Terrorism, Law, and Our Constitutional Order

Christopher L. Blakesley

*University of Nevada, Las Vegas – William S. Boyd School of Law*

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TERRORISM, LAW, AND OUR CONSTITUTIONAL ORDER*

CHRISTOPHER L. BLAKESLEY**

We have all suffered moments of vicarious terror over the past few years as we watched news accounts of terrorist incidents, such as the downing of Pan Am Flight 103 over Lockerbie, Scotland. There, some institution, government, or group used innocent children, women, and men as fodder for their "war." Some have claimed that the pusillanimous carnage was in retaliation for the slaughter of equivalent innocents aboard the Iranian Air Bus, similarly destroyed by American forces during the summer of 1988.¹ Others suggested that it was committed by those interested in thwarting prospects of peace in the Middle East.²

Combatting terrorism seems to be a significant preoccupation of governments today. The domestic and international legal communities, however, have failed to respond adequately to the terrorist threat. Terrorism has not been defined properly or objectively. Governments often overreact to the threat of terrorism and abuse the public's fear of terrorism to accomplish selfish foreign policy or domestic goals. There is even a tendency of governments and groups to exploit these fears in an attempt to justify their own acts of criminal terrorism. Governments become terroristic to fight terrorism and oppressors to overcome oppression. This article discusses these dangers, as well as the related dangers of allowing the fear of terrorism to be used to

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¹ Was United States Captain Will Rogers of the warship U.S.S. Vincennes, which shot down the Airbus, or his superiors informed, or were they grossly negligent not to have been so informed, that "bellicose rhetoric is not a good indication of actual intent in the Middle East?" Rubin, Payment Precedents in the Gulf Affair, CHRISTIAN SCI. MONITOR, July 21, 1988, at 13. Did they know that Iran had very good military reasons for not attacking a United States war vessel by air, and that Iran, indeed, had carefully avoided doing so? Were they aware that it was actually Iraq that had attacked United States ships in this manner; that it was in Iraq's interest, not Iran's, to provoke the United States? Professor Alfred Rubin notes some of these deficiencies in the United States explanation of the slaughter of those 290 souls, and suggests a tort rationale and settlement, ex gratia to satisfy the United States and "the world's gut feeling that America must be wrong." Id. I would submit that, although the tort model is appropriate and that compensation ought to be forthcoming, criminal action should not be ruled out. If the evidence is such that the killing of those innocent people was done intentionally or in a grossly reckless (wanton) fashion, mass murder has been committed. If both sides were grossly reckless, perhaps both are responsible.

² Id.
erode domestic constitutional protections in the name of fighting terrorism. Most of the points made in this article about the United States's constitutional government apply as well to other nations, and even to groups seeking self determination (e.g., the Palestine Liberation Organization).

The purpose of this article is to fashion a useful legal response to terrorism so that we can come to grips with the parameters of criminal terrorism. To do this terrorism must be defined in a neutral way. The rule of law must be the supreme value. Substantive criminal law is, quite naturally, the appropriate model to apply to matters of international criminal law, including terrorism. Substantive criminal law will be applied to decide what conduct amounts to criminal terrorism, what mental elements are required for one to be guilty of committing a terrorist act, and whether there are any defenses of justification or excuse. When the actus reus and the mens rea combine to cause the prohibited result, and when no justification or excuse is presented, criminal terrorism is established. The adoption of a neutral definition of criminal terrorism applicable to every group or nation, regardless of ideology, is necessary to maintain a consistent global policy towards terrorism.

I wish also to prompt continued discussion about what type of conduct fits within that category of conduct commonly called terrorism. I suggest that there is a certain common core of values that condemns certain forms of readily recognizable violence. This article presents a broad definition or description of the type of violence that fits this common core concept and suggests how it is condemned universally. Another purpose of the article is to suggest that one of the best protections against terrorism is a consistent policy that condemns this common core of violence and that clearly refuses to participate in or promote it. The rule of law, including international law, condemns criminal terror-violence and provides a means of thwarting it. Law provides the means of prosecuting and punishing terrorists of all types. Indeed, it may provide, by its very articulation and long-term consistent application, an influence upon governments and groups.

I. DEFINING CRIMINAL TERRORISM

One of the means to establish consistent policy and to protect humanity against criminal terror-violence is to penalize the conduct. Many argue that this must be done, but they are unable or unwilling to offer a satisfactory definition of terrorism.3 If the criminal sanction is

3. See Baxter, A Skeptical Look at the Concept of Terrorism, 7 Akron L.J. 380 (1974). But see M.C. Bassiouni's writings, such as: Bassiouni, Methodological Options of International Control of Ter-
to be used, it is necessary to provide a legal definition of the crime or crimes that we condemn as terrorism. To do this, we must distinguish "justifiable," or excusable, violence—perpetrated against an enemy in war or insurgency—from acts of terrorism. This distinction is necessary because the law permits violence in some situations; for example, the use of violence to escape oppression or to defend oneself is a legitimate criminal defense. It may be that, because the law condones violence in certain circumstances, the key to identifying and prohibiting terrorism objectively will be combining the law of war with basic substantive criminal law common to nearly all nations. To do so, we must first determine who is an "enemy combatant" or its equivalent and under what circumstances those among "the enemy" may be subjected to legal violence. Given the rhetoric of the day this is not an easy task.

To be condemnable in criminal law terms, however, conduct must include the basic elements of crime, actus reus and mens rea, which combine to cause a proscribed social harm. It is necessary to establish the parameters of these basic elements to require extradition or prosecution. The conduct condemned as terrorism in this article fits all of the elements of criminal law, and is condemned as criminal, under customary international law as well as the laws of virtually every nation-state, and even under the equivalent rules of groups not considered states. The general definition of terrorism I propose in this article is: the application of terror-violence against innocent individuals for the purpose of obtaining thereby some military, political, or religious end from a third party.

Under this definition, terrorism is political violence aimed at or wantonly impacting innocent civilians. It is political violence without restraint of international law or morality. It is without justification or

rorism, 7 AKRON L.J. 188 (1974); Bassiouni, Terrorism, Law Enforcement, and the Mass Media: Perspectives, Problems, Proposals, 72 J. CRIM. L. & CRIMINOLOGY 1 (1981); M.C. BASSIOUNI, A POLICY-ORIENTED INQUIRY INTO DIFFERENT FORMS AND MANIFESTATIONS OF 'INTERNATIONAL TERRORISM': UNITED STATES PROCEDURAL ASPECTS 15, 16 (1988) [hereinafter POLICY-ORIENTED INQUIRY] (noting the impossibility of a pure definition, but promoting the notion that a "working definition" is greatly needed and possible).

Applying Professor Bassiouni's working definition, terrorism is:
an ideologically-motivated strategy of internationally proscribed violence designed to inspire terror within a particular segment of a given society in order to achieve a power-outcome or to propagate a claim or grievance irrespective of whether its perpetrators are acting for and on behalf of themselves or on behalf of a state.

Id. at xxiii.


5. For more detailed, positivistic evidence of its criminality, see Blakesley, Jurisdiction As Legal Protection Against Terrorism, 19 CONN. L. REV. 895 (1987).
excuse. It is no mystery. Such conduct is condemned and prosecuted as criminal violence by every nation of the world, so a general principle condemning it already exists.

Professors Thomas Franck and Scott Senecal began a recent article with the following hypothetical event and related questions:

Suppose that, in 1938, the Prague government of President Edvard Benes, foreseeing the inevitable dismemberment of Czechoslovakia after the Munich Pact, had infiltrated a trained death squad of German Jewish exiles across the German border, in civilian clothing, to assassinate Adolf Hitler. Suppose they had succeeded and then had fled to Holland.

How should international law govern this hypothetical event? Should it require Holland either to try the assassins for murder or to return them to Germany for trial? Or should it exculpate, even commend, the assassins for a job well done? Or should the law remain silent? Would the answer be the same if the assassins had also killed some German civilian bystanders?6

Although this hypothetical killing of Hitler meets the elements of murder—intentional killing of a human being7—and although it violates the international rules against killing a head of state, in those horrific circumstances of 1938, self-defense would have justified the killing.8 If the killers had knowledge of the imminent atrocities about to be perpetrated against them and other innocents, or of the imminent demise of their nation, all at Hitler’s behest, self-defense-type justification would obtain. Hitler was the leader of a great and dreadful conspiracy poised imminently to attack and destroy the nation and peoples represented by the hypothetical killers. Hence, Hitler was an attacker in the traditional posture whose attack triggered self-defense. Thus, by applying the concepts of self-defense, the hypothetical Hitler

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8. Since 1856, when the famous clausule belge or clause d’attentat came into being, most extradition treaties have not allowed the killing of a head of state to be exempted from extradition by way of the political offense exception. See, Blakesley, Extradition Between France and the United States: An Exercise in International and Comparative Law, 13 VAND. J. TRANSNAT’L L. 653, 705 (1980). Nevertheless, it is submitted that killing Hitler would have been justified. Such a killing would clearly fit the classic mode of self-defense. However, it has been suggested that it might be better to consider that international law has preempted the use of self-defense in relation to heads of state, rendering that conduct criminal terrorism. It would be necessary to rely on national conduct similar to jury nullification to work to disapprove extradition of prosecution when the killer of a Hitlersque head of state has taken refuge. Notion suggested by John Murphy in conversation in New Orleans on January 8, 1989. This suggestion, however expedient, seems to be an avoidance of the problem that ought to be faced, at least by commentators and theoreticians.
killers would be justified. Their conduct would not be murder, nor would it be criminal terrorism.

Terroristic outrage can be distinguished from the above hypothetical killing. Chemical warfare recently has been reinstituted against combatants and noncombatants alike. Libya is said to have completed construction of a chemical weapons manufacturing facility. Evidence indicates that on or about March 23, 1988, and at other times, the Iraqi air force bombed villages in Kurdistan, spreading mustard gas, and possibly nerve gas, over villagers, dropping them in their panicked tracks, while many held their babies to their breasts. Iraq accused Iran of using similar weapons. The Salvadoran Army has reconstituted, after a hiatus, its program of mass execution of civilians to intimidate its “enemies.” In September 1982 innocent men, women, and children were slaughtered in the refugee camps at Sabra and Shatila, Lebanon, by Lebanese-Christian forces dependent on Israel. On October 7, 1985, the Italian cruise-liner, Achille Lauro, was hijacked and American Leon Klinghofer was murdered and thrown overboard. On July 2, 1986, Rodrigo Rojas was mortally wounded when he was doused with gasoline and set afire while walking with

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11. Smolowe, Return of the Silent Killer, Time, Aug. 22, 1988, at 40; Chemical Warfare, supra note 10; see also Smolowe, Where is the Outrage?, Time, Sept. 26, 1988, at 36.

12. Salvador: Dix Payans Tues Pres de la Capitale: l'Armee Reprend ses Executions Collectives, Le Monde, Sep. 22-28, 1988, at 2, cols. 2-5 (Edition Internationale). The articles described the execution of seven men and three women, aged twenty to sixty years, dressed like poor farmers ready to work in the fields. The soldiers gathered some forty poor farmers to a school, claiming they wanted to advise them of the situation in the region. When at the school, the soldiers accused them of collaborating with the guerrillas. They blindfolded and took ten of them from the schoolhouse less than a kilometer from the school and executed them.


14. See N.Y Times, Oct. 11, 1985, at A1, col. 6. When United States fighter planes intercepted an Egyptian jetliner carrying the men later convicted by the Italian judicial system of hijacking the Achille Lauro, id., they either committed kidnapping or hijacking of their own, or they have a claim of justification. The only justification could be that the Egyptian government or jetliner pilot consented to the taking, or that the Egyptian government or jetliner pilot was participating in the escape of the alleged hijackers; See McGinley, The Achille Lauro Affair—Implications for International Law, 52 Tenn. L. Rev. 691 (1985). See also Letelier v. Chile, 488 F. Supp. 665, 673 (D.D.C. 1980), which states that:

[T]here is no discretion to commit, or to have one's officers or agents commit, an illegal act... Whatever policy options may exist for a foreign country, it has no 'discretion' to perpetrate conduct designed to result in the assassination of an individual or individuals,
protestors in Santiago, Chile.\textsuperscript{15} The Soviets are alleged to have used booby-trapped dolls to kill Afghan Moujahadeen children.\textsuperscript{16} The United States government has supported, both directly and indirectly, the Nicaraguan “Contras” who allegedly have killed innocent Nicaraguans in conjunction with their guerrilla warfare.\textsuperscript{17} It is also alleged that the Sandinistas have killed innocents in maintaining their power.\textsuperscript{18} The depredations in Kampuchea are renown.\textsuperscript{19} The South African government terrorizes and oppresses the nonwhite population within its territory.\textsuperscript{20} These tragic episodes continue the ugly saga of terrorism. This modern \textit{mal du siecle} is the nauseating, modern equivalent of the ancient blood-feud.

The conduct presented immediately above is criminal terrorism. That conduct, like the Hitler hypothetical, indicates intentional killing of human beings. Certainly, there was a political or military motive or purpose behind the killings, as there was in the Hitler hypothetical. Unlike the Hitler hypothetical, however, such a motive or purpose provides no justification or excuse. With no justification or excuse, the conduct constitutes murder, criminal terrorism, or a war crime, depending on the circumstances.

What is it about these events that distinguishes them from the Hitler hypothetical? This question will be explored in detail below. Generally, Hitler, as opposed to those in the other circumstances representing terrorism, was in a mode of attack against the killers. The victims portrayed above were used as tools to gain an edge over a third party; to make a propagandistic, public relations, philosophical or ideological point; to intimidate; or to achieve a military, political, or religious end. They were pawns, not enemy combatants or attackers.

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action that is clearly contrary to the precepts of humanity as recognized in both national and international law.


17. \textit{See}, e.g., Neier, \textit{There’s a Contra-diction}, Sacramento Bee, Apr. 5, 1987, at 1, col. 6 (Forum).

18. Id.


With regard to the innocent bystanders who might have been killed along with Hitler, again, standard substantive criminal law principles obtain. If the killings were committed in a depraved or reckless manner, indicating disdain for innocent life, or in a way that presented a high and unnecessary risk to the lives of these bystanders, it would be equivalent to old common law depraved-heart murder. If the plan was to kill them along with Hitler, even though it was reasonably possible to avoid killing them without a significant risk of failure in the important objective, the justification for killing Hitler would still obtain, but that for killing the innocent bystanders would not.

A. Terrorism Distinguished From War

Criminal terrorism is different from war or wartime violence. It is also different from simple domestic murder. Even during war, one may not intentionally or wantonly kill noncombatants or even captive former combatants. Noncombatants were never "attackers," and captured combatants no longer are "attackers," so they may not be summarily killed. If this is true during war, it is true, a fortiori, during relative peacetime. What really counts for terrorism is what was done (was it violence designed to achieve a political, military, or philosophical end?) and against whom it was done (was it done to noncombatants, i.e., innocents?).

The definition of terrorism presented in this article allows a useful legal response to terrorism. It condemns criminal terrorism wherever it occurs—even if perpetrated by the United States or the Soviet Union. It could be applied immediately to allow extradition and prosecution of terrorists of every ilk. Certainly criminal terrorism is different from war, yet citizens often are deluded by governmental or group propagandistic rhetoric. The simple platitude "one person's terrorist


22. See G. FLETCHER, RETHinking CRIMINAL LAW 256-62 (1978), wherein he considers the permutations of the notion of "intention" in homicide and homicide by excessive risk-taking. "Highly reckless homicide borders contagiously on the field of intentional homicide. If, despite his fervent wishes, a defendant kills by throwing a bomb or shooting into a crowded room, he could be liable for a malicious killing either under the tracks of intentional or highly reckless homicide." Id. at 259.

is another's freedom fighter," while bandied about and sometimes taken seriously, misses the point. The issue is whether certain conduct, whether perpetrated by governmental officials, soldiers, police, freedom fighters, insurgents in a civil war, or dissidents, is criminal. There are nonterrorist freedom fighters and terrorist freedom fighters. Whether they are terrorist depends on what they do and to whom they do it. Wars of national liberation—wars of any kind—are, by definition, violent—murderously so. They are akin to murder and probably turn many of the participants on both sides of the combat into victims or executioners, or both. Sartre was correct, but incomplete, in aphorizing that, "[o]nce begun, [a war of national liberation] is a war that gives no quarter." Today, no war does. Killing in war is deemed by nations and other groups to be justifiable or acceptable. War is quintessential terror, yet, sadly, it is not criminal.

Some conduct even within war, and, a fortiori, during times of relative peace is not, however, justifiable or acceptable. A fight for survival or for gaining or retaining power may cause people to do unspeakable things, but we need not justify or accommodate such behavior. This has long been recognized. For example, in 634 A.D., Caliph Abu Bakr charged the Moslem Arab Army invading Christian Syria: "Do not commit treachery, nor depart from the right path. You must not mutilate, neither kill a child or aged man or woman..." Killing of babies in arms, for example, is not acceptable; it is a war crime, terrorism, or murder depending on the context. Perpetrators of such murder are prosecutable and have been prosecuted.

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24. This has been stated more kindly by Professor M. Cherif Bassiouni:

[C]onfusion stems, in part, from the indiscriminate and inconsistent use and application of the term 'terrorism' by the mass media and government pronouncements. This is due in part to the political or ideological content of the term reflecting differing values. It is best expressed in the maxim: 'what is terrorism to some is heroism to others.'


28. See generally United States v. Calley, C.M.A. 22, 534, 48 C.M.R. 19 (1973); T. TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY (1970). Unfortunately, like that of most nations, the United States military has participated in war crimes or terrorism in the past. Atrocities in Vietnam turned out not to be sporadic, but endemic to the atrocious military situation there. For example, Professor D'Amato notes:

By 1969, American aircraft had engaged in thirty-nine distinct bombing attacks on the
B. Terrorism Distinguished From Common Domestic Crime

Substantive criminal law and customary international law, evidenced by, among other things, the complex of international treaties on such conduct as hijacking, hostage taking, human rights, the laws of war in international and civil strife, and general principles that are derived from the domestic laws of virtually all nations, render certain conduct criminal. I call such conduct criminal terrorism, because, while the conduct also would constitute simple domestic common crime, it may be differentiated based on its international impact and context.29 I denominate it “criminal terrorism,” rather than simply “terrorism,” to avoid the claim or confused suggestion that some “terrorism” is justified; war is basic and quintessential terror, but it is not criminal.

To be sure, what I denominate criminal terrorism is simple crime in the domestic law of all nations. What makes this conduct different from common, domestic crime is that the conduct is perpetrated pursuant to some political, military, ideological, or religiose end. This conduct includes anarchy or nihilism as well as rebellion or oppression; it has an international impact and has been condemned by international customary or positive law. A political, military, religiose, or ideological motive is not needed for rendering the conduct criminal, but such a motive is an element of the crime of terrorism. The international im-

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29. Evidence of the existence of these crimes is presented in Blakesley, supra note 5, at 911-20; Blakesley, The Modern Blood Feud: Thoughts on the Philosophy of Terrorism (unpublished article); cf., Christenson, Jus Cogens: Guarding Interests Fundamental to International Society, 28 VA. J. INT’L L. 585, 616-17 (1988).
pact of this conduct that makes it an international crime triggering universal jurisdiction.\(^{30}\)

Thus, the elements of the offense of terrorism are established. They are: (1) the perpetration of violence by whatever means; (2) against "innocents"; (3) with intent to cause the consequences of the conduct or with wanton disregard for its consequences; (4) for the purpose of coercing or intimidating an enemy (government or group) or otherwise to obtain some political, military, or religious benefit; (5) without justification. The conduct presented herein as criminal terrorism is both a domestic offense in virtually all nations and an international crime.

It is the fourth element that distinguishes criminal terrorism from domestic crime. For example, if the accused approved of or promoted the murder of the child of a head of state or group leader to intimidate the leader or to obtain some other advantage, the crime not only would be murder under domestic criminal law, it would be criminal terrorism subject to universal jurisdiction.\(^{31}\) The same would be true of governmental conduct such as kidnapping, torture, and murder of people in its own general population so as to intimidate it and quell dissent. The same would be true for the utilization of chemical or biological weaponry to eliminate or intimidate a dissident group or cultural minority. It should not matter whether the conduct transcended international frontiers. It is always an international crime triggering universal jurisdiction.

Similarly, if a person kidnaps or murders the child of a head of state simply to reap a profit or because he has a personal dislike for the father, the killing is domestic kidnapping or murder. But if he kills the child in order to coerce her father to take some direct political, military, or religious action, such as withholding aid to some country or group, or forbearing other legitimate conduct, such as publishing an offensive book, the kidnapping or murder also would constitute criminal terrorism. As such, the perpetrator would be subject to universal jurisdiction, and any state that obtains custody over him has an obligation under international law to extradite him or to prosecute him for his crimes.\(^{32}\)

Another example of terrorism is a government or group starving a portion of its population, enforcing its impoverishment, or otherwise denying it basic human rights for the purposes of maintaining polit-

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\(^{30}\) See Blakesley, supra note 5.


\(^{32}\) Id.
tical, military, religious, or economic power. This oppression is terrorism.

We delude ourselves if we think that terrorism is committed only by our "enemies." Our "enemy" thinks the same way. Each government must understand that terrorism is defined in a neutral manner and not by what conduct or ends the government deems to be justified. We must choose whether we will support our own terrorism while condemning that of our "enemies." Doing so will only strengthen the already deadly grip of terrorism. All of us, whether we are Palestinians or Israelis, Americans, Nicaraguans, or Soviets, black or white Southern Africans, Iranians or Iraqis, must choose to eliminate the use of terrorism by our own government or leadership, so that terrorism may be overcome.

The problem is that denizens of nearly every nation or group continually are bombarded with pronouncements that "terrorism" is committed only by wild and loathsome enemies that an objective, neutral definition of terrorism sinks in only with difficulty. Moreover, people often are ideologically predisposed to dismiss any suggestion that terrorism is a phenomenon that all parties to a conflict, including themselves, could commit.

C. Propagandistic Abuse of the Term "Terrorism"

The late Professor Richard Baxter articulated the commonly felt sense of futility in trying to define terrorism: "We have cause to regret that a legal concept of 'terrorism' was ever inflicted upon us. The term is imprecise; it is ambiguous; and above all, it serves no operative legal purpose." With deference to the esteemed late Professor Baxter, this article has demonstrated that some sort of working definition is needed. No legal definition of anything makes any sense, except in terms of the purpose for which it is applied. If we can decide our purpose in preventing the violence most people fear and call terrorism, we will have the working definition we need. This article provides a limited definition of criminal terrorism, which provides the elements necessary to convict someone of the crime: the application of violence against innocent individuals, including taking them hostage, for the purpose of intimidating a third party in order to reap some military, political (including anarchy) or religious benefit. In this sense, a war


34. This is still a sort of "rough-and-ready" definition, see Baxter, supra note 33, at 381, that may
crime is a form of criminal terrorism; it is criminal terrorism when the state allows, or ignores, purposeful or criminally reckless killing of innocents—those *hors du combat.* It is terrorism when applied to the peacetime equivalent of those *hors du combat.* A crime against humanity, such as genocide, torture, or apartheid is a form of terrorism. What we call it does not really matter; it is all illegal and immoral terror-violence. Its *actus reus* is the application of violence against innocents. Its *mens rea* is the intent to harm innocents, the

or may not stand up under sustained critical scrutiny, but it is useful for the purpose of establishing jurisdiction and providing for extradition and prosecution. Note that the definition is broad enough to include conduct that would be a war crime during armed conflict or common criminal violence if perpetrated domestically. It is certainly appropriate to differentiate between these types of violence and to recognize that they may be fit into separate categories. Nevertheless, the core concept of my definition is the use of innocents (noncombatant, civilian population) as a means to achieve a political, military, or religious end. Whether its context is a war (war crime) or a time of relative peace; whether it is perpetrated by a state government against persons within its borders, or by persons within a state's borders against other persons within the state's borders; or whether it is perpetrated across national boundaries, it is criminal. For the purposes of this article, and for purposes of jurisdiction, extradition, and prosecution it is the same. *See generally L.C. Green, The Law of Armed Conflicts and the Enforcement of International Criminal Law, in Essays on the Modern Law of War 239 (1985) [hereinafter Law of Armed Conflict], L.C. Green, supra note 13.*

35. For the definition of war crime, see Doman, *Aftermath of Nuremberg: The Trial of Klaus Barbie,* 60 U. Colo. L. Rev. 449, 455 (1989). For a discussion of the relation between terrorism and war crimes, *see United States v. Calley, C.M.A. 22, U.S.M.C.A. 534, 48 C.M.R. 19 (1973); T. Taylor, supra note 28.* Note that even though the definition of terrorism is broad enough to include conduct that would be a war crime during armed conflict, it is appropriate to differentiate among various types of violence and to recognize that they may fit into different legal categories. *See generally Law of Armed Conflict, supra note 34, at 215-37.*

36. For the definition of crimes against humanity, *see Doman, supra note 35, at 455.*

knowledge that the conduct will harm innocents, or the wanton disregard of that high degree of risk.

I do agree with what I believe is the sense of Professor Baxter's statement of regret and frustration as to a legal definition of terrorism. It is not good to have a legal definition of terrorism if the use to which it is put is one of legalistic quibbling and obfuscation, or if it is used as a rhetorical device to achieve ulterior ends or even to justify one's own counter-conduct that may itself be criminal terrorism or otherwise violative of international or domestic law. For example, consider the so-called Shultz Doctrine of applying military force to preempt terrorism or to retaliate against terrorists or states supporting, harboring, or training terrorists.\(^{38}\) Former Secretary of Defense Casper Weinberger opposed such responsive military strikes because they "kill women and children."\(^{39}\) We have seen that the term terrorism and even the notion of law can be appropriated for ulterior, even illegal and terrorist, purposes. So Professor Baxter may be correct in this sense: The abuse of the term "terrorism" may be so serious that the term should be abandoned. Abandoning the term would be helpful as long as the conduct that constitutes it, as presented in this article, is universally condemned anyway.\(^{40}\)

This article presents for consideration and debate a definition of terrorism that can work in the arena in which international law and criminal law converge. Although a complete definition is difficult, this definition determines at least what sort of conduct clearly constitutes criminal terrorism.\(^{41}\)

Regardless of whether terror-violence occurs in a setting where it should be called a war crime, a crime against humanity, state, or group terrorism, it is condemnable terror-violence. Terrorism from this point of view is simply violent crime, and so it has traditionally been considered by Anglo-American, Continental, Islamic, and other

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systems of jurisprudence.\textsuperscript{42} International law condemns this conduct and provides for universal jurisdiction to be asserted over each of these types of terrorism on the basis of at least three legal theories.\textsuperscript{43} Under each of these theories prosecution is appropriate. Perhaps this presents a phenomenological vision of law, but I submit that most, if not all, peoples consider violence against their own noncombatants, whether done by powers within their nation or by outsiders, to be evil and illegal. Violence against innocents triggers the justification for revolution, but not for violence by proxy against the evil-doer's noncombatants. If a thing is illegal when committed against one's own, it is illegal when done against others, even against the original evil-doers. Such conduct should be, and is, a crime, whether committed by a government, by a soldier during a war or civil insurrection, or by a member of a political or guerilla group. A United States District Court noted in the 
\textit{Letelier v. Chile}\textsuperscript{44} murder case:

\begin{quote}
[T]here is no discretion to commit, or to have one's officers or agents commit an illegal act. . . . Whatever policy options may exist for a foreign country, it has no "discretion" to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law.\textsuperscript{45}
\end{quote}

Thus, even if killing innocents is deemed effective to promote an end considered by the actors to be good—even if it is an efficient means to intimidate a government or group, or to render a population insecure, even if the perpetrators are combatants in an internationally-recognized national liberation movement—it is not morally or legally justified. It is criminal terrorism. The claim of some that a child of the enemy oppressor is the enemy, and therefore can be killed because

\begin{footnotesize}
\begin{enumerate}
  \item M. Khadduri, supra note 27; Friedlander, \textit{Mere Rhetoric is Not Enough}, 7 HARV. INT'L REV., May/June 1985, at 4, 6 (noting that the acts that go into what is called terrorism are crimes and have been recognized and punished as such in Anglo-American and Continental jurisprudence); Friedlander, supra note 40 (such crimes are universally condemned as criminal). Chapter 204, of Title 18 of the United States Code provides for rewards for information concerning terrorist acts, and in 18 U.S.C. § 3077 (Supp. 1987), an 'act of terrorism' is defined as an activity that:
    \begin{enumerate}
      \item involves a violent act or an act dangerous to human life that is a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; and (B) appears to be intended —
      \begin{enumerate}
        \item to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by assassination or kidnapping.
      \end{enumerate}
  \end{enumerate}
  \item The universality theory, the protective principle, and the territorial theories all would suffice to provide jurisdiction to prosecute or extradite a person who committed the acts presented as terrorism in this article. For extensive analysis of these theories, see Blakesley, supra note 5.
  \item Id. at 673; see also Singer, supra note 14.
\end{enumerate}
\end{footnotesize}
she will inherit the benefits of the oppression, or because she will grow into an oppressor, is unacceptable. But it is no more acceptable to oppress or to acquiesce in one's own government's or group's oppression. That too is terrorism.

International law and domestic law equip us to extricate ourselves from the "infernal dialectic" of violence; they provide the means whereby we may avoid accepting or participating in the oppression or the slaughter of innocents, even by our own acquiescence. It is error of the highest order to accept the ideologue's argument that, because some nations or rebel groups participate in oppression or other terrorism, it is inevitable and therefore necessary to combat it with like conduct. Self-defense under the rule of law does not include the use of innocent civilians as tools. It is practical and necessary to alter this vision. We must reestablish the vision of a world made up of human beings controlled by the rule of law and morality, not by raw power.

D. Defining "Innocent": Justifiable and Unjustifiable Violence Distinguished

It has been suggested that the innocence or guilt of the victim is an inappropriate way to define the conduct of terrorism; that the term "innocent" is too "value-loaded." On the contrary, the use of the concept of "innocence," if not the term itself, is crucial. It is not only justified, it is necessary, if one is to consider the conduct criminal. To define culpable conduct on the basis of the status of the victim is not at all unreasonable or unwieldy. The concepts of culpability and innocence are essential to establishing criminal conduct. Justifiable violence traditionally has been distinguished from unjustifiable violence by the status of the victim. We should define the concept of innocence narrowly, however, to promote good policy regarding criminal law and in combatting terrorism, and so that the term can be helpful.

1. Culpability of a Terrorist Regarding an Innocent

The term "innocent" is essential to any useful, legal definition of terrorism. But the term must be specific and limited. In this article an "innocent" means a nonattacker—a noncombatant during hostilities or her relative peacetime equivalent. There is no justification for killing individuals hors du combat. One may analogize to the law of war and to the concept of self-defense in domestic criminal law. Oppression may be analogized to an attack, allowing for justified revolutions, based on a theory of self-defense. "Self-defense" attacks, however,

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must be against individuals holding the status of attackers. As in matters of self-defense in domestic law, the determination of whether the person killed is an attacker may be difficult in a given case, but line drawing and categorization is the job of the judiciary. In most cases it is not difficult.

Some have suggested that it is inappropriate to determine what international conduct is criminal by focusing on the object or the purpose of the conduct. They have noted that, generally, crime is defined by an act, not by its motive or object,\textsuperscript{47} and that one should delineate a crime by what was done, not why it was done or to whom.\textsuperscript{48} Although this argument is generally true, it is misleading. Proof of crime requires \textit{a mens rea} as well as an \textit{actus reus}. Culpability is based on the defendant's mental state (intent to kill or wanton disregard for human life), which concurs with the actus reus (shooting) to cause the prohibited result (death of an innocent human being). Motive may or may not be relevant to proving the culpable mental state, but motive is not the culpable mental state. The perpetrator's intent, knowledge, or other culpable mental state regarding the object and the act done to the object are precisely what must be proved to establish guilt.

For example, if one kills, knowing she is killing a person rather than a deer, she has a mental state that may establish criminal homicide when she acts to fulfill that end. Moreover, if one kills a deer, sincerely believing it is a person, one may not be convicted of a criminal homicide. Similarly, a war crime is committed when violence is perpetrated, intentionally or wantonly, against noncombatants (innocents), although the same conduct is not criminal if committed against combatants. A homicide will be justified if committed against a person attacking the killer with deadly force, but the killing will be murder if one intentionally or knowingly kills an innocent. Killing an innocent will be criminal homicide, even if the killing is committed to save one's own life. Thus, it is criminal homicide to shoot an innocent, even if to fail to do so would cause oneself or a relative to be killed by a third person. It is substantively necessary, therefore, to consider the object of an allegedly criminal act, and the object's status or conduct vis à vis the criminal. Culpability is based on the object's action or status, in conjunction with the perpetrator's mental state vis à vis that object and its action or status. If the defendant kills intentionally, based on a reasonable belief that she is being attacked with deadly force, the killing would not be criminal homicide. Thus, it is perfectly

\textsuperscript{47} See discussion and writings cited in Franck & Senecal, supra note 6, at 197; see also Paust, \textit{supra} note 46, at 721.

\textsuperscript{48} See Franck & Senecal, \textit{supra} note 6, at 197.
appropriate, even necessary, to define criminal terrorism by taking the object and the mental state about that object into account.

Accordingly, even if killing innocents is deemed effective to promote an end considered by the actors to be good—even if it actually is an efficient means to intimidate a government or dissident group, or to render a population insecure—it does not need to be accepted as morally justified or legal. Paramilitary or other combatant forces have no justification to hole themselves up and to use innocent civilians as shields. This is a form of oppression or terrorism. Similarly, it is criminal terrorism to bomb, gas, or starve villages, because one wishes to undermine confidence in the nation’s leader to prompt a coup-d’etat, or because one believes that some enemy or “terrorist” forces may be hiding or interspersed therein. Unfortunately, governments and revolutionaries alike, as well as most international law jurists and commentators, have forgotten essential and fundamental criminal law.

2. Violence in War Distinguished From War Crime

While war is quintessential terror, it is not criminal terrorism. Nevertheless, some conduct in war is illegal and may be punished. Torture, causing unnecessary suffering, using poison or other prohibited weapons, and the summary execution of prisoners all violate the laws of war and are therefore criminal. One may call it war crime or criminal terrorism during combat; it is impermissible violence. Moreover, wantonly reckless or intentional killing of noncombatants in war is a war crime. Noncombatants are innocents because they are not prepared imminently to attack those who kill them. Thus, even within the context of war, violence upon individuals who possess a certain status (i.e., innocents) is criminal.

Wanton killing of innocents is conceptually the same as domestic, depraved-heart murder. When it is perpetrated for a terror purpose upon innocents, it is criminal terrorism. When there is no “war,” wanton or intentional killing of these peace-time analogues to noncombatants is also a crime.

Thus, conduct applied legally to combatants may be criminal when applied to noncombatants or their analogues (“innocents”). The impermissibility of this conduct, its criminality, if you will, is based on the innocent status of the victims. Combatants who kill combatants are similar to those who claim self-defense in domestic criminal law. It is the status of the innocent victim that determines the guilt of the

49. Thus, war crimes and terrorism occur when a combatant or relative peacetime equivalent, utilizes weaponry that is prohibited. In a sense, all persons may be conceived as being too innocent to be subjected to such weaponry.
accused. The noncombatant is innocent in the sense that she is a person not subject to being killed justifiably in self-defense; she is not in a mode of attack upon the killer. All nations prosecute such conduct. The fact that this may be an international crime as well as a domestic crime should not cause confusion. It simply means that the conduct is proscribed by international law and that customary and conventional international law provide for universal jurisdiction over it. Thus, conduct is internationally or universally prosecutable when perpetrated pursuant to the above-noted aims or when otherwise in violation of international law, including that which protects human rights. Any nation that obtains the person of the perpetrator of such a crime must prosecute or extradite him.\footnote{E.

E. Defenses: Justifiable Uses of Force

1. Self-Defense

Self-defense, like self-determination, often is asserted improperly as a justification for killing. It is not difficult to determine the validity of a self-defense claim. It is not self-defense to attack an innocent—a person who is not attacking the person raising the defense—even if killing the innocent will preserve the life of the defendant. Self-preservation is not self-defense.\footnote{Self-defense does not apply unless the victim/attacker forced a choice on the killer—to kill the victim/attacker or be killed. This defense, along with its limitations, applies to individuals or to groups.}

\footnote{50. Blakesley, \textit{supra} note 5, at 943.}

\footnote{51. United States v. Holmes, 26 F. Cas. 360 (C.C.E.D. Pa. 1842); Regina v. Dudley & Stephens, 14 Q.B.D. 273 (1884); B. Cardozo, \textit{Law and Literature} 110-14 (1931) ("there is no right on the part of one to save the lives of some by the killing of another. There is no rule of human jettison."); F. Hicks, \textit{Human Jettison} (1927); Comment, \textit{In Warm Blood: Some Historical and Procedural Aspects of Regina v. Dudley and Stephens}, 34 U. Chi. L. Rev. 387 (1967).

German law may excuse the killing of a person under circumstances such as that in \textit{Dudley and Stephens}. In the German Penal Code § 35, a person acts without culpability (das schuldig), if he or she does an act to avert an imminent, otherwise unavoidable risk to his life. The killing, however, would be rechtswidrig (wrongful; unlawful, violative of the overall social order, though not culpable). The killing clearly does not fit the German notion of self-defense. The young man about to be cannibalized would be justified, as a matter of self-defense, to kill the approaching, would-be cannibals. Fletcher, \textit{Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory}, in \textit{Studies in Comparative Criminal Law} 123, 130-31 (E. Wise & G. Mueller eds. 1975) [hereinafter Fletcher, \textit{Proportionality}]; see also G. Fletcher, \textit{Rethinking Criminal Law} 85-64 (1978). David Wasserman argues convincingly that the peculiar force of self-defense as a justification is the "fact that the aggressor is forcing a choice between lives at the moment he is killed." Wasserman, \textit{Justifying Self-Defense}, 16 Phil. & Pub. Aff. 356, 357 (1987) (emphasis added).

\footnote{52. Wasserman, \textit{supra} note 51, at 357.}
2. Political Self-Determination

As with any crime, affirmative defenses may apply, but the motive behind the conduct is not one of them. It is never justifiable intentionally or wantonly to kill noncombatants, so it is never justifiable to use noncombatants or other innocents as targets or pawns in a battle for liberation from tyranny or to promote the status quo in a democracy. Both are crimes, no matter how lofty the goal.

F. A Modern Blood Feud

Sadly, today apologists in every camp, including those on “our side,” are wont to justify conduct that, if it were perpetrated against us, would be considered criminal. We all seem to be caught up, as Albert Camus said,

[in some] infernal dialectic that whatever kills one side kills the other too, each blaming the other and justifying his violence by the opponent’s violence. The eternal question as to who was first responsible loses all meaning then . . . [W]e can at least . . . refrain from what makes it unforgivable—the murder of the innocent. 53

I trust that Albert Camus was right that humanity generally does not want to be either victim or executioner. 54 When we participate in or accept oppression or the slaughter of innocents, however, we become oppressors or slaughterers of innocents. Notwithstanding all of our attempts to justify this oppression and slaughter—with obfuscation, secrecy, and rhetoric—a common core of values condemns it.

We must escape this cycle. It violates domestic and international


54. A. Camus, Neither Victims nor Executioners, 27 (D. MacDonald trans. 1972), quoted in Friedlander, Terrorism and National Liberation Movements: Can Rights Derive From Wrongs?, 13 Case W. Res. J. Int'l L. 281, 282 n.3 (1981). But in this, we must still try to overcome, by rectifying wrongs done in the past or currently being perpetrated, the tendency to allow inertia to make executioners or victims of us all.


Man’s [sic] drive to destroy, to kill, or simply to dominate and to oppress comes from the metaphysical void he experiences when he finds himself a stranger in his own universe. He seeks to make that universe familiar to himself by using it for his own ends, but his own ends are capricious and ambivalent. They may be life-affirming, they may be expressions of comprehension and of love, or they may be life-denying, armored in legalism and false theology, or perhaps even speaking the naked language of brute power. In any case, the message of Camus is that man cannot successfully seek the explanation of his existence in abstractions: instead of trying to justify his life in terms of abstract formulas, man must create meaning in his existence by living in a meaningful way.

Id. at 181-82.
law. The best way to combat terrorism is to eliminate the oppression and depredation at its root, and to make sure that we do not condone or sustain terroristic activity by our own governments, even when it is said to be in the name of antiterrorism. Domestic law and international law provide a means to combat both aspects of terrorism; they provide a means to keep pressure on perpetrators of oppression and to prosecute and punish all violence against innocents whether it is aimed at intimidation of a population or group, at triggering anarchy, or at promoting other military, political, ideological, or religiose ends.

II. THE ROLE OF THE RULE OF LAW

Contrary to the vision that some perceive as coming from the late Professor Baxter, this article has demonstrated how at least the definition of terrorism proposed herein is both necessary and useful. A mere definition is useless, however, if the rule of law in which the definition is implemented does not actually affect conduct. The definition expressed herein is designed to help implement a consistent policy and means to protect humanity from the conduct we all consider terrorism. To be meaningful, however, the rule of law must be respected both at home and on the international scene. Recently this has not been the case.

A. Recent Subversions of the Rule of Law

Attempts to circumvent the rule of law only lend impetus to the cycle of illegal violence and terror. There have been recent attempts to circumvent the rule of law both in the United States and abroad. When these attempts are combined with efforts to avoid congressional participation in policy-making or oversight, or with attempts to eliminate the judiciary from reviewing executive conduct that might be in violation of law or constitutional provisions, as has happened recently in the United States, they pose a serious threat to our constitutional republic, no matter what justification is claimed.

If self-defense or national defense is removed from the realm of law and appropriated by the propagandists to camouflage conduct that actually violates the rule of law, illegality is served. When self-justification is the standard for measuring whether conduct is "legally" justified, there is no legality. If the concept of self-defense is denigrated by self-justification, there can be no legal rule of self-defense. Ultimately, this approach actually will threaten our defense. But self-justification of conduct in the sphere of international relations has been, unfortunately, the approach recently taken by the United States gov-
ernment and individuals articulating what they believe ought to be American policy.

If our government, by its policy and action, promotes or condones terroristic conduct by its own operatives or agents, whether it is in the name of democracy, anticommunism, or antiterrorism, it is rejecting the rule of law. The rhetorical justification is flimsy and dangerous, but it is believed by many. It allows the government to condone oppression and terrorism by our “friends” against their (and our) perceived enemies, masking criminal violence against innocents.

Alexander Haig recently exemplified this dangerous attitude when he noted that, “[t]he . . . flaw is that we have tended thus far to believe that a counteraction that endangers innocent lives dirties our hands. That places the terrorist on the same moral plane as the victim.” General Haig is wrong! This does not place the terrorist on the same moral plane as the victim. It is the innocent lives that are all on the same moral plane. This “flaw” recognizes that innocent victims of every side are on an equal footing, no matter what ideology or motive is used to rationalize their slaughter. It recognizes that we do not want to become terrorists and that we are willing to prosecute those among us who do become terrorists—those who are willing to kill innocents to get back at terrorists. Killers of innocents place themselves on an equal footing. The one hundred-plus innocents killed in Tripoli, including Qaddafi’s infant daughter, are on an equal footing with Leon Klinghofer. All of their deaths are reprehensible.

B. The Raskolnikov Factor: Self-Justifying Self-Defense

The Reagan Administration took the position that it is “justifiable self-defense to apply military force to preempt anticipated terroristic activity or to retaliate against terrorists or against states which support terrorism by harboring, financing, or training terrorists. In addition, abduction of ‘terrorists’ from abroad is argued also to be ‘justifiable self-defense.’” Thus, the bombing of Tripoli, including the targeting of Qaddafi and his family, was argued to be in “self-defense.”

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over, they argue that the only judge of the justification in such a situation is the administration itself; a decision to take such measures of "self-justified self-defense" is *per se* legal, in that no other nation or institution may question it. 58

One danger of this attitude of self-justification, of course, is that other nations or groups may utilize it as well. Could the Soviet Union "justify" a preemptive strike against the United States? Can groups that consider themselves violated by the United States "justify" similar conduct? Could Raskolnikov, the impoverished student be "justified" in killing Aliona Ivanova, the malevolent pawnbroker? Some plays based on Dostoevsky's great novel during Stalin's era portrayed Raskolnikov's ax-killing as a revolutionary blow against capitalism and a symbolic call to destroy hated Czarist rule. 59 Reviewed in this way, it was self-justified conduct, even self-justified self-defense. 60 If self-justification is elevated to the level of legality, there is no rule of law in any crucial context. 61 Unfortunately, this is the reality among the governments of the world today, as well as among rebels and revolutionary leadership. Thus, a significant danger of this concept of self-justifying self-defense is that it allows all nations and groups to claim legality for any act they wish to commit in "self-defense." If one has the power to succeed, one is justified. 62 This current view of international law held by most of the leaders in the world, including our own, is dangerous indeed. One of its dangers is what it might prompt others to do to us. Another danger is what such a self-defining vision of self-defense might cause us to do or to become.

The Nazi rationalization of its conduct during World War II, based on notions of *lebensraum* and "necessary defense" (*Notwehr*), 63 were natural arguments arising from basic concepts of self-defense in German legal philosophy. Interestingly, the Soviet vision is nearly identical and has produced similar legalistic rationalization in the international arena. The ancient German notion of *das Recht*, combined with that of "necessary defense" and the Soviet vision of the same


59. Franck & Senecal, *supra* note 6, at 197.

60. See *infra* notes 63-66 and accompanying text.


62. *Id.*

63. See **StGB**, § 53 (1986).
notions (neobxodimaya obrona), are very similar to the Reagan Administration's view of self-defense. These notions in Germany and the Soviet Union hold that every right or defensible interest, from life to personal honor, receives the same degree of protection and privilege. The only question is whether a right or interest is threatened; if one is threatened, the threat injures good social order and necessary defense is triggered. Whatever force necessary to prevent the invasion of the right or interest is justified. In both the German and the Soviet conceptualizations of "necessary defense," the notions of "Legal Order" (die Rechtordnung) and social dangerousness (protivopraynost) identify "necessary defense" with the protection of the Legal Order itself and in its entirety. Thus, justification for attacks on the Sudetenland, Poland, and the rest of Eastern Europe at the beginning of World War II—as well as the elimination of many perceived "threats" to the Legal Order—were justified in the name of self-justified "necessary defense." The similarity of this vision of justification and the Reagan Administration's self-definitional legality is striking. One hopes that the Bush Administration will abandon this philosophy.

The policy of self-justified self-defense and the cliche, "one person's terrorist is another's freedom fighter," are analogous to the increasingly popularized view of many private individuals that, because many criminals are not caught or punished, there is no effective criminal law, so resort to "vigilante justice" is justified. This is erroneous and dangerous because, when that mind-set takes hold, power alone becomes the keystone of relations. Substantive and procedural constitutional protections are cast aside.

C. How American Domestic Law Has Failed to Curb Terrorism

The executive branch of the United States has fostered the notion that it has absolute power in the realm of foreign affairs. In fact, constitutional checks and balances operate even in this area. The Constitution requires Congress to participate with the executive branch in making foreign policy. And, as the Oliver North trial illustrates, the judiciary is required to hear cases brought before it calling into question the conduct of the executive branch in the realm of foreign affairs. The Iran-Contra scandal is not the only example of the executive's abuse of power. All too often, the executive branch violates or

65. Fletcher, Proportionality, supra note 51, at 123-27.
66. Id. at 140.
manipulates the rules of law to combat terrorism. This manipulation is more dangerous than the terrorism itself.

1. Executive Manipulations of Public Fear of Terrorism

Two problems related to obfuscation and failure to define terrorism properly and objectively are the tendency of overreaction to the threat of terrorism from opposing camps and the abuse of people's fears about the dangers of terrorism to accomplish foreign policy or domestic ends. Many, if not most, nations exploit these fears to justify their own acts of criminal terrorism; they become terrorists to fight terrorism. The people's anxiety about terrorism also is used to promote domestic political interests and to erode constitutional protections in the name of fighting terrorism.

Governments, including our own, have not been able to withstand the temptation to prey on the public fears and insecurity about crime to erode constitutional safeguards. Similarly, and perhaps with some of the same motives, governments prey on the public perception of anarchy in the international arena. They use the public perception of that anarchy and fear of terrorism to promote their own policies of international vigilante justice. The strategy, tactics, and methodology apparently adopted for promoting United States governmental policy in both domestic and foreign affairs use the rhetoric of combating terrorism and "keeping communism out of this hemisphere" as melodramatic devices to muster support for conduct that otherwise would be abhorred by the population. These tactics are more dangerous than the evils they seek to address.

2. Executive Abuses in Vietnam

It is true that we should not stand by and allow criminal terrorism to be committed by the Sandinistas against the people of Nicaragua. The Soviets also should be condemned for terrorism in Afghanistan. The list of such condemnable behavior is endless. The evil committed by others, however, does not justify that committed by ourselves. The sad, recent history of Cambodia and Vietnam have been raised as grounds for justifying our intervention around the world. But those situations should not indicate the way. Those who raise the issue of Cambodia or Vietnam never note—maybe they do not even understand—that Cambodia, under Sihanouk, was able to avoid slaughter and destruction by being neutral, by not supporting either side in the war. This worked quite well, until we forced expansion of the war into that sad country and into Laos. We saturated those territories with bombs and slaughter. We prepared the condi-
tions for Pol Pot to gain power. No doubt, Pol Pot is responsible for his own crimes, but we, by our naked terrorism and belief in "military necessity," set him up. It was not simply by losing the war that we contributed to that sickening reign of terror; we destroyed a relatively peaceful Cambodia while we were "pacifying" the countryside in Vietnam. The notorious Phoenix program allowed the United States to "save," by simple assassination, some 40,000 Vietnamese.67 Those who contributed directly to the slaughter by their support of our terror in Vietnam are now twistedly suggesting that the emergence of Pol Pot and the evil in that area of the world should provide the impetus, the need, to use more terror in other spots in the world.68 I am not, of course, suggesting that Pol Pot and his followers or the North Vietnamese or Viet Cong should be excused for their crimes. Certainly, they all executed civilians and committed other terrorist acts. They all were criminal.69

Terror begets terror begets terror. Yet, sadly, today the lesson that some are suggesting needs to be learned from the Vietnam experience is that we should "not fail again."70 Failure apparently is defined to be losing the war. It is argued that we must be sure not to avoid taking part in or promoting such deprivations, but to do whatever is necessary to win. This attitude misunderstands our failure. The failure in Vietnam was not in ending the carnage and leaving, but in participating in it to begin with. The failure was not in the soldiers who courageously fought for the right reasons. The failure, the tragedy, was our adoption of a policy of committing and accepting the commission of terrorist conduct. The application of this soul-destroying policy caused us to fail in whatever lofty goals we might have entertained. This attitude and approach are ultimately self-defeating. So proved that war.

D. Why Misunderstanding and Misuse of International Law Have Caused Our Failure to Curb Terrorism

"International law is part of our law," noted Justice Gray in


69. See N.Y. Times, Feb. 12, 1968, at A9; cited in id. at 28, 43 n.57.

but what part of our law it is, continues to be debated feverishly. The interrelationship of international law and domestic law is intricate. Many people argue that, when one gets down to the basics, there is no international law. Thus, unfortunately, some ideologues believe, or at least argue, that terrorism is inevitable and, consequently, the rule of law either does not apply or it must be pushed aside to combat “terrorism.” This gives rise to the excuse that one’s own violence against civilians, or that of one’s allies against one’s enemies, is justified, and hence, not illegal: “One person’s terrorist is another’s freedom fighter.”

Of course, when both sides take this position, terrorism increases. This is the rationale of those who believe or wish to promote the idea that there is no law when it comes to international relations—that power is the rule of international affairs. Thus, operations like “Phoenix” during the Vietnam war are adopted. This attitude impacts on our domestic system as well. It is the rationale of the executive branch when it attempts to eviscerate the Constitution when the Constitution stands in the way of executive policies in matters of foreign relations. A cynical use of “law” as a propaganda tool has the same effect as the claim that there is no international law. The Reagan Administration also employed this tactic when it espoused the belief that since the United States is always right, the rule of law, like God, is always, and automatically, on our side. That is, whatever we do is consistent with the rule of law (self-justifying self-defense) and whatever the enemy does violates it. Either way, the principle is the same. So is the result. Terrorism increases.

It is in this vein that some political scientists—positivists of the, “there is no international law” bent—have argued that, just as (they believe) there is no international law, there is no appropriate legal definition of terrorism, because “one person’s terrorist is another’s freedom fighter.” Similarly, they argue that what is called “international law” is ineffectual against, and therefore irrelevant to, combatting terrorism, so we “must fight fire with fire.” It is argued, for example, that, because states often refuse to extradite or prosecute perpetrators

71. The Paquete Habana, 175 U.S. 677, 700 (1900) (Gray, J.).
73. For a discussion of how the Reagan Administration, in the name of combatting terrorism, attempted to eliminate the judiciary from consideration of the political offense exception in extradition, see Blakesley, Evisceration, supra note 39; Blakesley, Separation of Powers, supra note 39.
of terror-violence when it is perpetrated for a cause they deem just, we
must "take the law into our own hands" and "kidnap" its perpetrators.74

When Abraham Sofaer stated that "the law applicable to terror-
ism is not merely flawed, it is perverse,"75 he was mistaken, if not
purposefully misleading. His aim actually seems to have been to "re-
form" the law to accommodate United States interventionism, while
condemning all violence committed by our "enemies" or the "enemies
of our friends."

The law clearly condemns willful or wanton violence against in-
ocent civilians—terrorism. It condemns it and those who commit it,
no matter whom or what piety they represent. The Sofaer position
ultimately is self-defeating, because it is essentially anti-rule-of-law. It
posits a world wherein the only "law" is raw power. Professor Falk is
absolutely right that, "[s]o long as political violence is ideologically
coded, there will be attempts to make the violence of the other a crim-
inal undertaking and to sanctify the violence of the self."76 It is hard
to tell whether Judge Sofaer believes that there is no international law
(it is perverse, therefore, nonexistent), or whether he believes that the

74. W alcott & Pasztor, supra note 56; see also Fessler, Extraterritorial
Apprehension as a Proactive Counterterrorism Measure, in BEYOND THE IRAN-CONTRA
CRISIS: THE SHAPE OF U. S. ANTI-TERRORISM POLICY IN THE POST-REAGAN ERA
225, 231 (N. Livingstone & T. Arnold eds. 1988); T. Nardin, LAW, MORALITY
AND THE RELATIONS OF STATES (1984) (general review of opposing positions on
what is international law); D'Amato, supra note 28; D'Amato, Is International Law
International Law, 33 UCLA L. REV. 665, 665-668 (1986); Engelberg & Gerah, U. S.
Is Said to Weigh Abducting Terrorists Abroad for Trials Here, N.Y. Times, Jan. 19, 1986,
at 10, col. 2; Findlay, supra note 56; Oliver, International Law, Morality, and the Na-
tional Interest: Comments for a New Journal, 1 AM. U. INT'L L. & POL'Y 67
(1986); Oliver, Reflections on Two Recent Developments Affecting the Function of Law

This attitude about the effectuality of law even permeated the Reagan Administration's approach
to problems of common crime. Note the self-help, extra-legal measures apparently taken to capture
alleged drug traffickers, as well as alleged terrorists. E.g., United States ex rel. Luhan v. Gengler, 510
F.2d 62 (2d Cir. 1975), cert. denied, 421 U.S. 1001 (1975); United States v. Tocacino, 500 F.2d 267 (2d
Cir.), reh'g denied, 504 F.2d 1380 (2d Cir. 1974), on remand, 398 F. Supp. 916 (E.D.N.Y. 1975);
Lardner & Lewis, FBI Dupes Terrorism Suspect, Brings Him to U.S. for Trial, Wash. Post, Sept. 18,
1987, at A1, col. 4 (the capture of an alleged Lebanese terrorist off the coast of Cyprus), cited in
Findlay, supra note 56, at 4.

Ignoring, or perhaps flaunting, international and domestic law is dangerous and short-sighted. The
Reagan Administration did not understand that if we can come up with reasons for wanting to abduct
people we consider criminal, rather than going through the usual legal methods of obtaining custody
over them, that other nations will feel free to do the same with our nationals. Many nations and groups
have an interest in doing so, in the name of their criminal law. Our government, having done the same
thing, will have no means of reparation, other than hypocritical protest or acts of war. The abduction
even of alleged drug traffickers has had damaging effects on our relations with some of our allies.

75. Sofaer, Terrorism and the Law, 64 FOREIGN AFF. 901, 902 (1986).
76. R. Falk, supra note 57, at 140.
only valid international law is that which supports the United States and what we and our friends do. The effect is the same.

This view is what Professor Falk correctly calls a "propagandistic appropriation of law." It holds to a perverse vision of the world and of law, and it seems to motivate the conduct of most groups and nations today. Law, ironically, is interpreted in such a cynical way that careful scrutiny of its application to events around the world by interested parties shows that those parties believe that law is merely a tool, and nothing more, to be used against the other side. It is a cudgel. Both sides to nearly every conflict want us to believe that their own acts are all "legal" and any act of violence against them or their allies is per se terrorist—that only their enemies commit terrorism. Although popular, this cynical abuse of law is not valid.

The fact that some states will not cooperate in prosecuting or extraditing their nationals, or other terrorists for whose politics they might have sympathy, does not affect the legal definition of terrorism. Violation of the law and failure to enforce it does not negate the law itself. If consistent enforcement is the essence of law or is necessary for law to exist, there is no law at all. International law has been and will continue to be one means, among others, that is effectual in combatting terrorism. It must be honored and applied in a neutral fashion. To disregard the rule of law or to appropriate it for one's own selfish purposes, even in order to combat terrorism more efficiently, is more dangerous than the terrorism itself.

To effectively eradicate terrorism, we should adopt a neutral, objective definition of terrorism like the one applied herein, and always extradite or prosecute all those who commit it. We would apply it to friend and foe alike. There would be extradition to Nicaragua as well as to England. All those who commit terrorism would be prosecuted, regardless of whether it is committed in the name of democracy, or in the name of communism. This is not what is being done, however. Only those who attack us or our allies are considered terrorists.

77. Id.


Neither the State Department nor the Justice Department has attempted vigorously to investigate, to prosecute, or to extradite those who are alleged to have committed terrorist acts on behalf of congenial causes. Perhaps, in reality, this is because they want the battle against terrorism to be selective. Judge Sofer and Secretary Shultz, by their conduct and rhetoric, seem to have tried to appropriate law to accommodate their vision of United States interests. Thus, for them the use of violence against innocent civilians is justified, apparently, when it is done for purposes deemed by them to be good; it is legal from their point of view, so long as it is applied to our enemies or used by our allies.81

We have seen that violence is justified in self-defense or when it occurs in revolution or in breaking the yoke of oppression. Ideologues suggest, either by word or by deed, that violence against innocent civilians is justified and legal when it is committed for a just cause. Both the substantive criminal law model and the law of war model, however, condemn any willful or wanton violence against innocents. While violence sometimes may be justified, violence against innocents is not. One is not justified to slit a weaker person’s throat and to drink his blood or to eat his flesh because one will starve otherwise.82 Nor is the killing of innocents justified because it will benefit or protect a nation or group. Self-defense comprehends neither the killing of innocents, nor the use of innocents as a means of self-preservation. A nation may not justifiably starve, or attack and destroy, or otherwise oppress, a group or nation, inside or outside its borders, to benefit the majority of its population or its power elite. Any group that commits terror-violence, or promotes or condones its use, whether in the name of God, communism, anticommunism, democracy, or whatever other piety, has no room to complain about others doing the same.


82. Regina v. Dudley & Stephens, 14 Q.B.D. 273 (1884). Some have suggested that the German substantive criminal law would justify this conduct. See Franck & Senecal, supra note 6, at 201-02. But it would not. It is true that the German vision of necessity as an excuse may excuse the conduct, recognizing it to be rechtswidrig (wrong; against the social order), but not culpable (schuld). This notion recognizes that given some extreme pressures of circumstances people may commit rechtswidrig acts, punishment for which will be forgone because society understands. This is not a justification in the least; nor is it self-defense. See discussion in Fletcher, Proportionality, supra note 51 and accompanying text.
III. TERRORISM AND THE CONSTITUTION

No doubt, it is appropriate to thwart terrorism against us and our allies. We should thwart it everywhere it is found. But we must ask first whether we have become part of the problem: whether in the name of antiterrorism we have become terrorists;83 whether in the name of anticommunism and antitotalitarianism we have allowed erosion of antitotalitarian protections in our Constitution and constitutional order. In other words, we must develop a model of a neutral, legal definition of terrorism and a reverence for the rule of law to have a framework for constructing a rational policy of response to terrorism perpetrated by other nations or groups, or even by ourselves.

A. The Constitutional Construct: Scrupulous Separation of Powers

The framers of the Constitution left no doubt about their intention to protect our liberty by scrupulous separation of powers and significant checks and balances: "[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers."84 Each branch of government has a responsibility to ensure that the other two branches do not behave illegally. No doubt the need for checks and balances is just as (if not more) important today as it was two hundred years ago.

Our executive and legislative branches have the responsibility to

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83. E.g., the United States interception of the Egyptian airliner carrying hijackers of the Achille Lauro. For factual background of the Achille Lauro affair, see Murphy, supra note 58, at 80-83 (arguing that the interception was legal); Schachter, supra note 78, at 140 (arguing that the interception was illegal); Terrorists Seize Cruise Ship in Mediterranean, 85 DEP'T ST. BULL. 74-81 (1985). See also Intoccia, American Bombing of Libya: An International Legal Analysis, 19 CASE W. RES. J. INT'L L. 177 (1987) (arguing that the bombing of Libya was legal); Murphy, supra at 86 (opining that the justification of self-defense is applicable to attacks against nations supporting terrorism, but noting that "self-defense is permissible only if all other options have been exhausted"); Schachter, supra note 61, at 122 (noting the danger of allowing self-justification in self-defense to be the rule of law); N.Y. Times, Apr. 18, 1986, at A11, col. 3. Note that in the United States bombing of Libya, Qaddafi's home, wherein his family also resides, was targeted. This being so, it can be said that Qaddafi's 18-month-old adopted daughter was purposefully killed, along with more than 100 other innocents. R. FALK, supra note 57 (noting the 100 civilian casualties); Hersch, supra note 57. Any student who has had basic criminal law knows that to target a home wherein it is virtually certain that innocent people are living—and dropping a bomb on it which kills one or more of them—provides sufficient mens rea for murder (even if the intent was to kill only one's enemy therein). The self-justifying self-defense approach would allow all natives to claim legality to any act they wish to commit in "self-defense." This, of course, suggests the Reagan Administration's view of international law and self-defense: If one has the power to do what one wishes, one is justified.

With regard to proposals for abducting "terrorists" from foreign soil, see Murphy, supra note 58, at 84 (suggesting that except in rare occasions of anarchy, abductions would be illegal); N.Y. Times, Jan. 19, 1986, at A1, col. 4; N.Y. Times, Jan. 28, 1986, at A24, col. 4 (wherein Abraham Sofaer, Legal Adviser to the Department of State, defends the legality of such abduction).

84. THE FEDERALIST NO. 78 at 100 (M. Dunne ed. 1901) (A. Hamilton).
ensure that no policies promoting violence against innocents are adopted. The legislative branch has oversight responsibilities to control the executive. The Justice Department must prosecute or extradite anyone who promotes or participates in terrorism, even when the perpetrator is a governmental agent. When the Justice Department fails to prosecute, or where there is significant conflict of interest, it is necessary to appoint a special prosecutor to do so, such as in the Oliver North case. The judiciary must judge the constitutionality of the conduct of the other two branches of government. Citizens of every nation and members of every group have a duty not to acquiesce in the perpetration of illegal conduct such as criminal terrorism. We have the responsibility to ensure that our executive, legislative, and judicial branches function responsibly. We must insist, for example, that terrorism not be built into foreign or domestic policy and that its perpetrators be prosecuted or extradited.

The Reagan Administration, like other administrations throughout our history, tried to arrogate power unto itself at the expense of the judiciary and the legislative branches, especially in the arena of foreign relations. Many of our insightful forbears have signalled the dangers of that tendency. Abraham Lincoln noted:

Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This our [delegates to the constitutional] convention understood to be the most oppressive of all kingly oppressions, and they resolved to so frame the Constitution that no one man should hold the power of bringing oppression upon us. 85

The executive branch traditionally has attempted to appropriate Congress's war powers, for example. 86 Many of the framers foresaw this tendency and its concomitant dangers. For example, James Madison wrote:

Every just view that can be taken of this subject admonishes the public of the necessity of a rigid adherence to the simple, the received, and the fundamental doctrine of the Constitution, that the power to declare war, including the power of judging of the causes of war, is fully and exclusively vested in the legislature; that the executive has no right, in any case, to decide the question, whether there is or is not a cause for declaring war; that the right of convening and informing Congress, whenever such a question seems to call for a decision, is all the right which the Constitution has

86. See generally F. Wormuth & E. Firmage, supra note 85.
deemed requisite or proper; and that for such, more than for any other contingency, this right was specially given to the executive.\textsuperscript{87} Henry Clay noted that this aspect of the United States Constitution was unique: "Everywhere else the power of declaring war resided with the executive. Here it was deposited with the Legislature."\textsuperscript{88} The executive branch has a tendency to suggest that since matters of foreign affairs, such as the war powers, are subject to the power of the executive in other nations, they should belong exclusively to the executive in the United States, as well. This approach appears to cause other nations' executives to be free of some of the consternation that ours has to suffer. Some may believe that we would have a more efficient foreign policy if we took the same approach. That position is debatable, as evidenced by the Iran-Contra debacle.

Article I, section 8 of the United States Constitution provides that "Congress shall have power . . . to declare war."\textsuperscript{89} Today declaration of war virtually never occurs.\textsuperscript{90} If it were to occur, congressional authority would be necessary.\textsuperscript{91} Only Congress has the authority to establish a state of war or to approve or to ratify an act of war.\textsuperscript{92} Indeed, our armed forces exist only by virtue of congressional acts, and presidential authority over the armed forces, so far as it exists, is conferred by Congress under its power "to make rules for the government and regulation of the land and naval forces."\textsuperscript{93} Apart from the "President's constitutional power to use the armed forces placed under his control by Congress to repel a sudden attack, the armed forces may be used only to pursue legislatively authorized goals and only when Congress has prescribed their use in the pursuit of those goals."\textsuperscript{94} Moreover, the use of private armies for undeclared war or reprisal also must receive the approval of Congress.\textsuperscript{95}

\begin{itemize}
  \item \textsuperscript{87} J. Madison, \textit{Letters and Other Writings} 642-43 (1884), quoted in F. Wormuth & E. Firma, supra note 85, at 30-31 (emphasis added).
  \item \textsuperscript{88} 32 \textit{Annals of Congress} 1500 (1818); see also J. Madison, supra note 87.
  \item \textsuperscript{89} U.S. Const. art. I, § 8.
  \item \textsuperscript{90} In over 200 years, Congress has declared war only eleven times unconditionally and only four times conditionally. F. Wormuth & E. Firma, supra note 85, at 53, 56.
  \item \textsuperscript{91} U.S. Const. art. I, § 8 ("The Congress shall have power . . . to declare War . . . ").
  \item \textsuperscript{92} J. Madison, supra note 87; William Patterson, delegate to the Constitutional Convention and later an Associate Justice of the Supreme Court, noted: "It is the exclusive province of Congress to change a state of peace into a state of war." United States v. Smith, 27 F.Cas. 1192, 1230 (C.C.N.Y. 1806) (No. 16, 342), quoted in F. Wormuth & E. Firma, supra note 85, at 28, 31, 53-74.
  \item \textsuperscript{93} F. Wormuth & E. Firma, supra note 85, at 88.
  \item \textsuperscript{94} Id.; see generally id. at 87-104 (discussing government of the armed forces).
B. Support of Covert Terrorism Endangers Our Constitutional Order

The Constitution is clear that policy development in foreign affairs is to be a joint effort. The executive and legislative branches make policy for the people, and the judiciary decides whether the policy, even though it relates to foreign affairs, is constitutional. Is there any doubt, for example, that the executive branch, even with the advice and consent of the Senate, cannot legally or constitutionally enter into a treaty with another nation that would promote slavery, apartheid, or other types of terrorism? Could we enter into a treaty that would eliminate due process for those charged with terrorism and found in the United States? Such a treaty should be found unconstitutional and nullified by the judiciary. The judiciary, therefore, also has a role to play when matters of foreign relations and the Constitution converge.

1. The Separation of Powers is Subverted

The executive branch has tended to want to rid itself of the inconvenience of having to deal with Congress and the judiciary in matters it perceives to be of grave importance in international relations. This tactic for conducting American policy crystallized early in the era of the cold war. A special Report of Covert Operations commissioned by President Eisenhower has been hallowed American policy: "[A]nother important requirement is an aggressive covert psychological, political and paramilitary organization more effective . . . and, if necessary, more ruthless than that employed by the enemy. . . . There are no rules in such a game. Hitherto acceptable norms of human conduct do not apply."96 Some argue that Congress has the power merely to "declare war."97 Others argue that the executive branch,

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97. See W. REVELEY, WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCH? 32, 140-41, 144, 171 (1981); ROSKOW, ONCE MORE INTO THE BREACH: THE WAR POWERS RESOLUTION REVISITED, 21 VAL. U.L. REV. 1, 2, 6 (1986); see also C. THACH, THE CREATION OF THE PRESIDENCY, 1775-1789: A STUDY IN CONSTITUTIONAL HISTORY (1969) (advocating a strong executive and pointing out Congress's inability to make vigorous decisions); but see Blakesley, Separation of Powers, supra note 39; Lobel, supra note 95 (arguing that the use of covert paramilitary operations as instruments of United States foreign policy falls under congressional prerogative and authority
with the advice and consent of the Senate, can promulgate treaties that
eliminate the judiciary from making decisions relating to law, fact, and
human liberty, when those issues are related to alleged terrorism. 98

There is a tendency for the executive of this or any nation to es-
chew even constitutionally mandated avenues of problem-solving that
are considered to be cumbersome, inefficient, or inimical to the exec-
utive's vision of national interests in foreign affairs. There also is a ten-
dency to consider the executive's own conduct and the conduct of its
allies to be justified when it is directed at goals deemed by the exec-
tive to be good. Moreover, constitutional provisions based on checks
and balances and separation of powers sometimes are deemed by the
executive to be cumbersome and inefficient for resolving pressing
problems: Sometimes Congress disagrees with executive policy; some-
times the judiciary must consider whether the conduct of foreign af-
fairs has passed legal or constitutional muster. For these reasons, and
because combatting terrorism is so important, our executive branch
has a tendency to avoid the Constitution and constitutional procedures
when they impede its policy objectives. This tendency is exacerbated
when accompanied by other pressing policies, such as keeping commu-
nism from gaining another foothold in our hemisphere. Thus, the ex-
cutive branch uses terrorism and fears relating to it as convenient
vehicles to promote other objectives.

2. The Iran-Contra Affair as a Paradigm

At the closing of the Iran-Contra hearing session with Lt. Colonel
Oliver North, Senator Inouye of Hawaii made a point about a soldier's
legal and moral obligation to disobey illegal superior orders. Senator
Inouye alluded to the Nuremberg trials, pointing out that the world,
through that Tribunal, made it abundantly clear that failure to disobey
illegal superior orders may be criminal and, if so, should incur punish-
ment. 99 Brandon Sullivan, Colonel North’s attorney, objected vocifer-

pursuant to art. 1, § 8, cl. 11, of the Constitution, granting Congress the power to issue “letters of
marque and reprisal,” which were the instruments permitting private individuals to use force against
foreign governments.)

98. E.g., Supplementary to the Extradition Treaty, June 25, 1985, United States-United King-
dom, 24 I.L.M. 1104 (1985) [hereinafter Supplementary Extradition Treaty or Supplementary Treaty];
but see Bassioni, The Political Offense Exception Revisited: Extradition Between the U.S. and the
Int'l L. & Pol'y 255 (1987); Blakesley, Evisceration, supra note 39.

99. On superior orders generally, see Y. Dinstein, The Defense of 'Obedience to Superior
Orders' in International Law (1965); L. Green, Superior Orders in National and Inter-
national Law (1976); Paust, My Lai and Vietnam: Norms, Myths and Leader Responsibility, 57 Mil.
L. Rev. 99 (1972). Lauterpacht noted that “it is necessary to approach the problem of superior orders
on the basis of general principles of criminal law, namely as an element in ascertaining the existence of
mens rea as a condition of accountability.” Lauterpacht, The Law of Nations and the Punishment of
ously to the allusion to the Nuremberg Trials because he found it personally and professionally distasteful. This objection succeeded in diverting Senator Inouye from his tack.

The Reagan Administration's sales of arms to Iran—ironically and significantly indicating the Reagan Administration's actual attitude about terrorism—funded the "Contras," who are alleged to have committed terrorist acts in Nicaragua. If these allegations are true, those supporting the Contras with that knowledge may be guilty of being aiders and abettors in those criminal acts. The arms sales provided weapons to Iran, which was said to have been in control of the groups that perpetrated many acts of terrorism throughout the world. The orders to sell arms to Iran apparently were given and obeyed in secrecy, allegedly to save lives. The irony is manifold: We sold weapons to alleged terrorists in order to obtain funds so that we could arm alleged terrorists who were involved in a "war" with other alleged terrorists—all in the name of "saving lives." The scenario becomes even more alarming and ominous if the allegations about interlocking agreements for shipment of arms in exchange for the freedom of the shippers to ship narcotics into the United States are true. Perhaps the era of the Contras and of Iranian-sponsored terrorism has ended, but the insight gained by considering that era is important to our understanding of international law in relation to our constitutional order. That insight may allow us to avoid similar dangers and difficulties in the future.

The Iran-Contra affair may be a symptom of a problem far more dangerous to our constitutional republic than either terrorism or the Sandinistas; it certainly indicates a weakness, and signals our own failure to recognize and to combat terrorism. Senator Inouye's questions to Oliver North regarding the soldier's duty to refuse to obey illegal orders, and Brandon Sullivan's response thereto provide a fascinating glimpse at our confusion, obfuscation, and ambivalence about law, the Constitution and terrorism. Although Brandon Sullivan found the question distasteful, it should have been answered. The Iran-Contra debacle was important, not so much because it involved Iran and Nicaraguan Contras, but because it raised the spectre of a secret shadow government that attempted to run a war that may have included the use of criminal terrorism. It signalled the need to be vigilant in protecting our constitutional republic from zealous ideologues hell bent on casting aside moral, legal, and constitutional impediments to save the world from what they viewed as evil. If illegal orders that aided

and abetted criminal terrorism were given and obeyed, and the Reagan-Bush Administration knowingly aided and abetted terror-violence against innocent civilians while selling arms to Iran (which the Administration may as well have applied to our own citizens), then a significant coup against terrorism may have been struck through North’s conviction.

Thus, Senator Inouye’s line of questioning and the conduct that gave rise to it are important beyond their immediate context. The questions posed significant questions relating to international and domestic criminal law. These questions, in turn, prompt serious questions of the interaction between constitutional law, international law, and foreign affairs. If our constitutional republic is going to continue to flourish, we must focus on the meaning of the constitutional separation of powers and checks and balances when constitutional obstacles obstruct a favored solution to important matters of foreign policy.

The Iran-Contra affair provides a vehicle for studying the role and relationship of Congress, the executive, and the judiciary in matters of war, terrorism, and foreign affairs at a point where constitutional, international, and criminal law converge.100

From the foreign policy point of view it appears that the decisions made in the Iran-Contra scandal were more impetuous than considered and were based on a confusion of rhetoric and impulsive ideology rather than planning and competence or any long-term policy or strategy.101 The administration devised a secret cabal—a group of officials within the executive branch—assigned by the President to make policy relating to terrorism and to stopping the encroachment of communism into this hemisphere. Furthermore, the Administration’s secret conduct apparently was designed to avoid participation with Congress in making foreign policy regarding war and terrorism. This defiance of Congress was combined with an attempt to avoid judicial process to correct alleged misdeeds and to decide issues impacting on liberty and

100. If the parties knowingly supported intentional, deadly violence against innocent civilians, it is criminal. Domestic and international law make this abundantly clear, as established by the authority cited throughout this article. 22 TRIALS OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 500 (1948) [hereinafter TRIALS OF MAJOR WAR CRIMINALS] ("criminality . . . should exclude persons who had no knowledge of the criminal purposes or acts.") Crimes against humanity have been defined as: “murder . . . and other inhumane acts committed against any civilian population, before or during the war.” Id. at 496. Cf. In re Yamashita, 327 U.S. 1 (1946) (in which General Yamashita’s conviction without proof of knowledge was upheld). See also, article 3(f), of the Arms Export Control Act, 22 U.S.C. §§ 2751-2796C (1982 & Supp. III 1985), which defines a terrorist state as: "any government which aids or abets, by granting sanctuary from prosecution to, any individual or group which has committed an act of international terrorism."

due process. That conduct presented a significant threat to our domestic constitutional order: When the executive branch is allowed to operate outside the bounds of law, it is able to wield absolute power.

C. The Guise of "Functional Necessity"

Executive arrogation of power in the United States today is occurring simultaneously with a judicial and legislative abdication of power. The excuses given by the South African government and its apologists ring frighteningly familiar, and should remind us of Milton's poignant warning:

So spake the Fiend, and with necessity,
The tyrant's plea, excused his devilish deeds.102

The Reagan Administration's aggressive attempts to avoid Congress and to allow, either intentionally or by some sort of willful blindness, secret organizations to finance and engage forces in war—and perhaps even to commit terror-violence, are ominous if they portend a trend. The proffered justification that the Soviet Union does the same is not very persuasive, in light of the Soviet mode of constitutional government. Nevertheless, Congress seems often to have acquiesced in executive arrogation of power in matters of foreign affairs, especially in the area of war powers.

Some have argued that Congress has power merely to declare war, not to make the policy decision whether to go to war.103 These scholars argue that the term, "to declare war," is unique to international law and that it must be understood pursuant to international law.104 Moreover, it has been asserted that:

[T]he international powers of the United States are conferred and defined by international law. Internationally, the government of the United States possesses all the powers possessed by any other state under international law, including the sovereign power to violate international law. The Constitution commits these powers to the political discretion of Congress and the President in accordance with the principle of functional necessity.105

Finally, it is argued that functional necessity requires that the Presi-


103. See W. REVELEY, supra note 97; Rostow, supra note 97; see also C. THACH, supra note 97 (advocating a strong executive and pointing out Congress's inability to make vigorous decisions).

104. Rostow, supra note 97, at 6.

dent alone sometimes has the power to make war, that is, to commit acts of war.\(^{106}\)

1. Judge Abraham Sofaer’s Recent Application of Functional Necessity

The Reagan Administration made its position on terrorism, security, and law quite clear. While that administration is no longer in power, it is important to understand its views, so that we can attempt to amplify the chances for peace and the rule of law, rather than might, in the world. In his essay on *Terrorism and the Law*,\(^ {107}\) the Legal Adviser to the Department of State, Abraham Sofaer, spent harsh criticism on recent attempts to criminalize killing and maiming of “innocents” during civil wars, piracy, and hostage takings, because such criminalization included recognition of possible prisoner-of-war status to those captured in battles against “colonial, racist or alien” domination. He objected to this criminalization, because of the “legitimacy” that he believed it afforded the struggles against such oppressive regimes. Somehow he seemed to believe that to penalize violence against innocents (as opposed to violence against their enemy combatants) would “legitimize” the insurgency.\(^ {108}\)

Judge Sofaer failed to note, however, that he was backing violence against enemy combatants (if not others) by the Contras in Nicaragua and by the Moujahadeen in Afghanistan, among others. He also failed to mention that the Hostages Convention,\(^ {109}\) article 12 of which was the focus of his criticism, also makes it clear that states are obligated to prosecute or extradite individuals who commit offenses against “innocents,” even in those struggles. Sofaer was critical of the Hostages Convention, despite its antiterrorism value, because it provided national liberation movements a “rhetorical and political victory.”\(^ {110}\) Apparently, official blindness to oppression and state terrorism, along with what the Reagan Administration considered a rhetorical and political victory for “liberation movements” was enough for the Ad-

\(^{106}\) Rostow, *supra* note 97, at 5.

\(^{107}\) Sofaer, *supra* note 75.

\(^{108}\) *Id.* at 916.


\(^{110}\) Sofaer, *supra* note 75, at 916.
ministration to criticize and oppose the Hostages Convention, which
condemns and criminalizes the slaughter of innocents by anyone.

Similarly, the Reagan Administration refused to ratify Protocol I
codification of customary international law which significantly
augments the protections afforded innocents during armed conflicts. It
condemns conduct that would include most terrorist acts.\footnote{Id. at art. 51(2), 72 Am. J. Int'l L. at 478; see also id. at art. 33, 72 Am. J. Int'l L. at 471-72.} Article
51(2) of the Protocol prohibits "[a]cts or threats of violence the pri-
mary purpose of which is to spread terror among the civilian
population."\footnote{Id. at art. 1(4), 72 Am. J. Int'l L. at 458 (international armed conflicts are expanded to
include "conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination"). See also id. at art. 51, 72 Am. J. Int'l L. at 478-79; The President's Message to the Senate Transmitting the Protocol, cited and
discussed in Franck & Senecal, supra note 6, at 204-08 nn. 21-32; and in Paust, An Introduction to and
Commentary on Terrorism and the Law, 19 Conn. L. Rev. 697, 707 (1987). Abraham Sonaer also oppos-
ses this. See Sonaer, supra note 75, at 912-13. See also Roberts, The New Rules for Waging War:
The Case Against Ratification of Additional Protocol I, 26 Va. J. Int'l L. 109 (1986); contra Aldrich,
Progressive Development of the Laws of War: A Reply to Criticism of the 1977 Geneva Protocol I (Commentary), 26 Va. J. Int'l L. 693 (1986). Professor Michael Reisman criticizes Protocol I, suggesting that it presents a shift away from the status quo in international affairs. He suggests that an existing state that has suffered low intensity incursions or aggression is not allowed by Protocol I to attack another state in which the original low-intensity attackers have found haven, which is a an innovation contrary to self-defense in customary international law. Reisman, Old Wine in New Bottles: The Rea-
United States government had negotiated and signed it previously be-
cause it would legitimize the conflict engaged in by liberation move-
ments opposing racist, colonial, or other oppressive regimes.\footnote{Id. at art. 51(2), 72 Am. J. Int'l L. at 478; see also id. at art. 33, 72 Am. J. Int'l L. at 471-72.} The Reagan Administration's opposition to these antiterrorism measures,
combined with the bombing of Tripoli, the "Iran-Contra Affair,"
other initiatives in Latin America, and its relationship with the South
African government, ought to give us pause. The Reagan Administra-
tion's position on the political offense exception also fit well with its dangerous position on terrorism. Note that the entire stance of the Reagan Administration on these issues had been sold as antiterrorist. Retrospective analysis of the positions taken by, and the conduct of, that administration is important as a new administration makes decisions relating to the development of an appropriate interrelationship between foreign policy, law, and the constitutional order. The Bush Administration should take a more forthright and coherent antiterrorism approach than its predecessor.

2. The Speciousness of “Functional Necessity”

Under the Constitution, the President may commit acts of war to repel sudden attacks, but even these actions must be ratified by Congress. It is very strange to view law as sanctioning the commonly held notion that a subject may violate it at will if the subject has the power to do so. No doubt, the power to do so sometimes exists, but does power really equal law? It seems more accurate to say that, although sometimes nations in the international arena, like individuals in the domestic sphere, have the power or luck to avoid sanction when they violate a law, this reality does not suggest that the law sanctions its own violation. Rather, it means simply that the nation “got away with” a violation of law, much like analogous occurrences in domestic law.

There is no doubt that when the nation is attacked, the President may call out the troops and may commit our forces in self-defense. Even this action, however, must be ratified by Congress. Not only must Congress ratify acts of war, it has the power to establish basic policy goals and strategies relating to war and foreign affairs. It has the power to provide for the common defense, to regulate commerce among nations, to declare war, to grant letters of marque and reprisal, and to raise and support the army and navy. Congress also has the power to make all laws necessary and proper to accomplish these constitutional objectives. All of these powers explicitly provided Congress by the Constitution demonstrate the speciousness of the “functional necessity” argument.

What happens if a state violates international law and is caught—or loses a war and has its officials prosecuted for violation of international law? What Germany did during World War II arguably was “legal” under Germany’s domestic positive law, but it was not legal.

117. Id. at art. II, § 2.
under international law. This would have been true whether Germany "got away with it" or not. Furthermore, just because some Allied nations and their officials were not prosecuted and punished for war crimes committed during World War II, does not mean that there was no international law in operation. Today, conduct like that committed by governmental officials in Germany before and during World War II, would be either a war crime or criminal terrorism, depending on the context—even if the nation's domestic laws justified the conduct. Do the "modern realists" or devotees of functional necessity actually believe that if Germany had "gotten away with" its atrocities, it would not have violated the law? Their arguments as to what may be done, as long as it is "necessary" and "feasible" suggest an answer. If that is what constitutes "law," is law worth having?

The essence of the notions of sovereignty and functional necessity is that there is no international law, except that which is based on consent. Moreover, this functional necessity view of international law—that international law is confined to what a nation has the power to accomplish—is also used by some of its proponents to overcome domestic constitutional mandates or, at least, to control the definition and application of constitutional principles and terminology when foreign affairs are concerned. According to this school of thought, we are to read our Constitution in accordance with notions of functional necessity and in the same fashion as other nations would read theirs. Our Constitution thus is controlled by the notion of absolute sovereignty; and since the sovereign power in the international sphere generally is controlled by the executive, it follows for functional necessity advocates that the President alone must have this power and constitutional authority.

This view really is nothing more than the reductionistic view that sovereign power includes unbridled freedom to act—provided that the power to succeed exists—even if the action would be in violation of international norms or the thrust of constitutional language and history. This view holds that the executive branch can function with impunity in the realms of war, fighting terrorism, and perhaps even generally in foreign relations. This view reduces the Constitution to a document that may be violated at the will of the executive.

Paradoxically, and tragically, the so-called "realist" devotees of the doctrine of functional necessity and the so-called "terrorists" have adopted consistent visions of law and morality. Depending on his or her perspective, each is trying either to gain, to expand, or to maintain his or her power with terror-violence. Professor Falk passionately and adroitly shows how this mindset flows from the teachings of
Machiavelli to both the revolutionary and the so-called modern political "realists." Just read Kissinger, Brezinski, Kennon, or McNamara, as they approve the use of violence without any normative limits (other than "reality" and "necessity"). Each accepts unquestioningly that the end justifies the means, recognizing, of course, that one must be sure that the end is achievable and that the means are necessary to the achievement of that end.  

3. Return to the Rule of Law

The system of checks and balances and the rule of law must prevail over the executive-minded philosophies of "political realism" and "functional necessity." The functional necessity argument denigrates the Constitution, placing it on the same plane as a dim view of international law, even though the constitutional division of powers is the superior norm in our republic.

The international law described by the notion of functional necessity is, moreover, not international law at all. Ironically, then, the "functional necessity" view posits a lawless international order as a basis for adopting a construction of the Constitution that eviscerates traditional limitations—all to the proclaimed end of furthering goals perceived to be required by a dangerous world. But the Constitution condemns certain conduct that the executive branch sometimes has been inclined to participate in or to promote. Indeed, the constitutional checks and balances provide the wherewithal to ensure that we do not violate international law or destroy our constitutional republic through precipitous executive action.

In its fight for freedom and democracy, and against terrorism, the executive branch often has attempted to thwart the constitutional separation of powers and checks and balances. The result has been not to deter or combat terrorism, but actually to promote it. I have shown that, in addition to promoting terrorism, such policies and conduct pose serious threats to our constitutional democracy. If one utilizes measures that are totalitarian in nature, the risks are obvious. If one fights terrorism with terroristic tactics and strategies, and tries to mask them by avoiding constitutional procedure, the risks are manifold and manifest.

118. R. FALK, supra note 57, at 87-94.
D. The United States-United Kingdom Supplementary Extradition Treaty: An Example of Executive and Legislative Subversion of Judicial Power in the Foreign Policy Arena

The Senate recently acquiesced in the elimination of the judiciary in a matter quintessentially and traditionally judicial. By treaty, the Senate eliminated the judiciary from deciding questions of law and fact affecting human liberty in the extradition arena—at least when one of our closest allies charges that a person has committed a terrorist act.

The executive branch negotiated a treaty with the United Kingdom, whereby requests for extradition based on specified terrorist conduct will allow only the executive branch to consider the legal and factual issues regarding whether the conduct of the alleged criminal constituted a "political offense" and, therefore, whether he would be subject to extradition. The Senate gave its advice and consent. Thus, the process due a person alleged to be a terrorist by Great Britain is to be provided by the Secretary of State, not the courts.

Extradition is the means by which one nation may seek the return of fugitives who have fled to another country. Extradition treaties provide for extradition on a showing of probable cause that the fugitive committed an extraditable offense. This means that a decision must be made as to whether an extradition treaty applies to the circumstances alleged to have occurred. Evidence must establish that there is probable cause to believe that the person accused actually committed the prohibited and extraditable conduct. Usually, a court is presented with questions of both law and fact. Because the decision to extradite deprives an individual of basic liberties (freedom), it is, as a matter of due process and separation of powers, a question for the courts to decide.

1. The Misguided Elimination of the Political Offense Exception

The political offense exception to extradition developed from

119. The Supplementary to the Extradition Treaty, supra note 98.
120. Id.
121. See generally M.C. BASSIOUNI, INTERNATIONAL EXTRADITION IN UNITED STATES LAW AND PRACTICE (1983); I. SHEARER, EXTRADITION IN INTERNATIONAL LAW (1971); Blakesley, supra note 8 (discussing extradition in light of the United States-France Extradition Treaty and Practice).
122. See United States v. Judge Lawrence, 3 U.S. (3 Dall.) 42 (1795); F. WORMUTH & E. FIRMAGE, supra note 85, at 229-46; Blakesley, Exiscreration, supra note 39; Rubin, Extradition and "Terrorist" Offenses, 10 TERRORISM 83, 84 (U.K. 1987).
principles of asylum and sovereignty. The principle allows a nation to refuse to extradite a fugitive, if the offense charged in the extradition request is of a "political nature." It is designed for those situations wherein the fugitive is a defeated partisan in an insurrection or civil war, or for those individuals charged with crimes after having been defeated in an attempted revolution or war of self-determination. The exception applies properly only to those situations in which a person or group commits violence against the opposition military or combatant political forces. It recognizes the right to revolt and to use violence to escape oppression. It allows nations to refuse to participate in a victor's justice by extraditing the losers of a civil war or insurrection upon the termination of hostilities. But the political offense exception does not condone war crimes or terrorism; it does not immunize from extradition and prosecution those who commit terror violence against innocents, and therefore does not afford a defense to terrorism. It is inapt to claim, as the Departments of State and Justice have done, that it is necessary to eliminate the political offense exception in order effectively to combat terrorism.

The political offense exception should not be eliminated from extradition treaties for purposes of combating terrorism, because it properly does not apply to terrorists. The treaty of extradition with Great Britain virtually eliminated the political offense exception because the Reagan Administration claimed that it promoted terrorism. It does not, if terrorism is defined as I define it herein.

The political offense exception recognizes that violence is justified in certain circumstances. For example, some violence is justified in rebellion and revolution to escape oppression. John Stuart Mill wrote: "[P]olitical liberties or rights [which it was to be regarded as a breach of duty of the ruler to infringe,] specific resistance or general rebellion was held to be justifiable." Thus, revolution and related violence are seen as conclusions of the Enlightenment philosophy and have been considered justified, even noble. Violence and terror applied against innocents, however, are never justified. History moved from revolution to the Reign of Terror, and the masters of revolutionary (justified) violence became murderers. Violence against innocents for whatever end, however glorified, is immoral and criminal. It was

124. See Blakesley, Evisceration, supra note 39, at 116-17, nn. 30, 33.
125. Supplementary Extradition Treaty, supra note 98.
126. J.S. MILL, ON LIBERTY 2 (1859).
127. This was depicted brilliantly in C. DICKENS, A TALE OF TWO CITIES (1986) and in A. FRANCE, LES DIEUX ONT SOIF (THE GODS ARE ATHIRST) (1978).
immoral and criminal when perpetrated by the "Ancien Regime," and it was immoral and criminal when perpetrated by the "directorat." It is immoral and criminal when perpetrated today by those claiming to defend democracy, by those claiming to fend off oppression or to promote "national liberation." As a matter of law, the political offense exception does not apply to criminal terror-violence—to criminal terrorism, if you will. Into which camp the particular alleged violence fits is a question of law for the judiciary, not for the executive.

2. The Necessity of Judicial Participation

The political offense exception should remain in the hands of the judiciary precisely because the judiciary is best equipped to decide whether given conduct is terrorism or justifiable violence against oppressors. The political offense exception has been part of our extradition law since the beginning of modern extradition practice in the mid-nineteenth century. It remains part of the extradition law of virtually all nations except those in the Soviet orbit.129

128. Madame Defarge certainly had good reason to wish to avenge herself and the French people. She knits and registers all who will be executed to avenge and "free" the French people. C. Dickens, supra note 127. Once the Revolution begins and takes hold, the wave of power and violence consume her as she embodies it. Anatole France's protagonist, Evariste Gamelin, also is consumed by the violence. A sensitive artist interested in rectifying injustice, he becomes a paranoid monster as he is consumed with the need and desire to execute all who might have been connected with the Ancien Regime. A. France, supra note 127. Righting wrongs explodes with ferocious and relentless intensity into violence against not only those who did evil and violence, but eventually against those who were felt to symbolize that evil. This violence thus consumes the good set out as its prompting. It consumes even its own. Gamelin, who is finally decapitated by his beloved Guillotine, enunciates the point:

Until recently it was necessary to seek out the guilty to try to uncover them in their retreats and to wrench confessions from them. Today it is no longer a hunt with packs of hounds, no longer the pursuit of a timid prey. From all sides the victims surrender themselves. Nobles, virgins, soldiers, prostitutes flock to the Tribunal to extract their delayed condemnations from the judges, claiming death as a right, which they are eager to savor.

A. France, supra note 127, at 198. I use Les Deuxeont Soif and A Tale of Two Cities in my Comparative Criminal Law Course to present the role of ideology and morality in the development of the criminal law. I use A. Camus, L’Etranger and his essay, Reflections on the Guillotine, supra note 53, to show their application. This particular quotation is well suited to indicate the impact that violence against relative innocents has on the actor. It was brought to my attention in a paper by Stephanie Brown, Revolutionary Justice (unpublished paper, University of the Pacific, McGeorge School of Law) (May 18, 1987).

129. Yugoslavia, not really within the "Soviet orbit," although sometimes considered to be, does have a political offense exception in its extradition treaties. The other Warsaw Pact Nations sometimes allow for such an exception, although it is not found in any of their extradition treaties. The exception is not allowed, however, when the conduct has been perpetrated against other socialist or "friendly" states. Gardocki, The Socialist System, in 2 International Criminal Law: Procedure, 133, 140-41 (M. Bassiouli ed. 1986). Perhaps this "double standard" for political offenses was seen as appealing by the Reagan Administration, as it is strikingly similar the approach taken in the Supplementary to the Extradition Treaty, supra note 98. See United States and United Kingdom Supplementary Extradition Treaty: Hearings on Treaty Doc. 99-8 Before the Senate Comm. on Foreign Relations, 99th Cong., 1st Sess. 2-6 (1985) (statement of Abraham D. Sosnaer, Legal Adviser, Department of State); Sosnaer,
The exception presents questions of fact (e.g., does evidence suggest that this defendant committed the alleged violation? Was there an insurrection? Was violence used against innocents?). Like the extradition itself, the exception presents mixed issues of law and fact (e.g., is the alleged conduct extraditable under the treaty? Was the conduct justifiable violence against attackers or criminal violence against innocents? Did the violence occur pursuant to an insurrection or in an attempt to escape oppression? Were the people attacked noncombatants?). These are questions that the judiciary is designed—and constitutionally mandated—to decide. Moreover, the decision to extradite impacts on human liberty: It effectively binds the fugitive over for trial by the foreign requesting state. Thus, the Constitution emphatically calls for the determination whether to extradite to be made by the judiciary.

Although one may infer from Article III, section 1, that the Constitution allows the Congress to determine the jurisdiction of the judiciary, it is fair to say that the legislature may not define that jurisdiction so as to eliminate the judiciary from deciding questions at the intersection of due process and human liberty. Article III, section 2, provides that “trial of all crimes . . . shall be by jury,” implying that some sort of court will consider such matters.

While courts have made some errors, most of the time they correctly decide political offense cases. Nevertheless, to obviate any future judicial errors, Congress should draft legislation that provides sufficiently clear guidelines and standards for the application of the political offense exception.

In fact, the State and Justice Departments had drafted some definitional legislation, presented it to Congress, and promoted its promulgation. Then the Reagan Administration found it more expedient to withdraw its promotion of this legislation and to oppose its promulgation altogether, because it found it preferable to remove the issue

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*supra* note 80 (indicating that the political offense exception should not apply to extradition requests by democratic allies, but should remain applicable to those made by “unstable” and “undemocratic” regimes). *Contra* Blakesley, *Evisceration*, *supra* note 39. This Convention allows the executive and legislative branches to use treaties to choose which alleged terrorists will be “protected” and which will not. While this may be a common occurrence in the practice of international affairs, it is unfortunate and unwise to allow our law to promote the notion that terrorism is a political, not a legal, issue.


from the realm of law and the courts altogether. It appears that the Administration saw the issue as purely political and administrative in nature, and therefore within the exclusive province of the executive branch to decide.\textsuperscript{133}

3. Unconstitutional Arrogation of Power

The Supplementary Extradition Treaty with the United Kingdom effectively eliminates the political offense exception, except for the offenses of sedition, treason, and espionage.\textsuperscript{134} This treaty, as well as other similar treaties with other foreign governments,\textsuperscript{135} effectively removes the judiciary from the process of deciding whether conduct falls within the political offense exception to extradition.\textsuperscript{136} Because terrorism, as defined in this article, would not fit within the political offense exception anyway, the only impact the Supplementary Extradition Treaty has is to prevent the judiciary from applying the exception in situations in which it ought to apply—such as where violence is committed against opponent combatants pursuant to a justifiable revolution or an escape from oppression.\textsuperscript{137}

These treaties provide another example of the executive branch’s unconstitutional attempt to arrogate power unto itself in the arena of foreign affairs, especially when terrorism or war is involved. In the instance of the United States-United Kingdom Supplementary Extradition Treaty, the Senate went along, giving its advice and consent. There has been a tendency for the Congress, and even the judiciary, to accept the erroneous proposition that the arena of foreign affairs ought to be exclusively within the executive prerogative.\textsuperscript{138} For example, the


\textsuperscript{134} Supplementary Extradition Treaty, supra note 98.

\textsuperscript{135} See \textit{e.g.}, Supplementary Extradition Treaty, Oct. 21, 1986, United States-West Germany, Sen. Treaty Doc. 100-6 (not ratified by Senate).

\textsuperscript{136} Id.

\textsuperscript{137} Blakeley, \textit{Evisceration}, supra note 39.

\textsuperscript{138} United States v. Barrigan, 238 F. Supp. 336 (D. Md. 1968), aff’d sub nom. United States v. Eberhardt, 417 F.2d 1009 (4th Cir. 1969), \textit{cert. denied}, 397 U.S. 909 (1970). The federal district court stated that “clearly defined areas have traditionally and necessarily been left to other departments of the government, free from interference by the judiciary. One such area is foreign relations.” \textit{Id.} at 338 (citing Baker v. Carr, 369 U.S. 186, 211 (1962)). See also Switek v. Laird, 316 F.Supp. 358, 365 (S.D.N.Y. 1970) (quoting Judge Wyzansky’s above-noted statement); United States v. Sisson, 294 F.Supp. 515, 517 (D. Mass. 1968) ("a domestic tribunal is entirely unfit to adjudicate the question whether there has been a violation of international law during a war by the very nation which created, manned, and compensated the tribunal seized of the case"). \textit{But see Reid v. Covert}, 354 U.S. 1 (1957) (constitutional questions related to foreign affairs will be heard by the Court); J. Burlamaqui, \textit{supra} note 95; F. Wormuth & E. Firmage, \textit{supra} note 85; Blakeley, \textit{Separation of Powers}, supra note 39; Lobel, \textit{supra} note 95; \textit{see also J. Moore}, \textit{supra} note 95; Firmage, \textit{supra} note 95; Lofgren, \textit{supra} note 95;
judiciary has utilized such prudential tools as the so-called political question doctrine to avoid overruling constitutional errors like these in the arena of foreign affairs. It is dangerous, however, for the court to eschew its responsibility to decide cases wherein constitutional values are at issue. Just because the issues also are related to foreign affairs—and have been the subjects of treaty provisions—it does not follow that the courts cannot hear them.

Although treaty agreement, when coupled with the advice and consent of the Senate, creates law of the land, it is not a mechanism for avoiding constitutional scrutiny. The judiciary at least must determine the constitutionality of treaties in the same way it determines the constitutionality of legislation. Would anyone question the notion that the executive and the Senate, through the treaty-making process, cannot eliminate due process for individuals who are prosecuted within our borders? The treaty process cannot be utilized to remove the judiciary from its constitutional mandate to decide questions of fact and law relating to human liberty. The United States-United Kingdom Supplementary Treaty on Extradition is an attempt to do just that.

4. A Principled Definition of Terrorism Permits the Preservation of the Political Offense Exception: A Response to Professor Lubet

There has been some well-reasoned academic support of the Supplementary Extradition Treaty’s elimination of the political offense exception. Among the best support is that of Professor Steve Lubet, who has challenged, forthrightly and adroitly, my position that the evisceration of the political offense exception tends also to eviscerate the separa-


140. U.S. Const. art. II, § 2(2).
ration of powers.\textsuperscript{141} Professor Lubet supports what he calls the "admittedly strict" limitation\textsuperscript{142} of the political offense exception as a necessary, important, and measured exercise in the making of positive law to combat terrorism, freeing extradition by "carefully separating violence from politics."\textsuperscript{143} He correctly criticizes judicial interpretation of the political offense exception as having "bound the process of extradition to unwieldy and unproductive consideration of the political motives of the offender."\textsuperscript{144} It is true that the notion that "relative political crimes should be nonextraditable has been exploited by accused assassins and bomber to delay and avoid their return to the offended state for trial,"\textsuperscript{145} and that courts erroneously have become subjects of that exploitation.\textsuperscript{146} I quite agree also that some of the current judicial attempts to define and apply the political offense exception have been quite abysmal. Certainly, the so-called "incidence test" has become a quagmire of nonsense that has worked to exempt from extradition some who should not have been exempted, and has not allowed exemption to others who perhaps should be covered by it.\textsuperscript{147} I have never argued that we ought to maintain the status quo vis à vis the political offense exception. Definition and legislative guidance are necessary.\textsuperscript{148} Congress must play its appropriate policy-making role in this area of foreign affairs and criminal law. My argument, rather, is that Congress abuses that role when it eschews the judicial role in determining whether a violent act was committed against an innocent person or an attacking enemy combatant. That is precisely what the United States-United Kingdom Supplementary Extradition Treaty does. And that is an improper violation of the separation of powers.

I have provided herein a definition and approach to terrorism\textsuperscript{149} that will allow the judiciary to continue its judicial function in this arena, while allowing Congress to play its policy-making role in pro-


\textsuperscript{143} \textit{Id.} at 61.

\textsuperscript{144} \textit{Id.} at 47 (citing the admittedly extreme example of Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986)).

\textsuperscript{145} \textit{Id.} at 47-48.

\textsuperscript{146} \textit{Id.} at 48.

\textsuperscript{147} \textit{Id.}

\textsuperscript{148} Blakesley, \textit{Evisceration}, supra note 39, at 123; Lubet, supra note 142, at 59.

\textsuperscript{149} For discussion on the philosophy and sociology of terrorism, see Blakesley, Modern Blood-Feud: Thoughts on the Philosophy of Terrorism (1989) (unpublished).
viding guidelines—indeed, very strict guidelines—to control the judicial response. In this way, I believe it is possible both to avoid the step onto the slippery slope, and to retain the judicial input as it should be, while ensuring that murderers and terrorists do not exploit our system to avoid the extradition and prosecution that are their due.

In my comments that follow I address some of Professor Lubet’s specific criticisms of my position on the evisceration of the political offense exception. I believe that he has at times misinterpreted my position due to my lack of clarity and that his critique often misses the point. I also believe that my definition of terrorism proposed above, coupled with a courageous legislature’s promulgation of the definition, and a courageous and careful judiciary, will accomplish the antiterrorist purposes that Professor Lubet believes are promoted by the evisceration of the political offense exception. My definition will, in fact, promote those purposes more efficiently, without eroding any of our constitutional principles.

Professor Lubet notes that my argument goes to the merits of the United States-United Kingdom Supplementary Extradition Treaty and its impact on our domestic constitutional order. He recognizes that I have identified a value—the separation of powers—that “obviously outweighs the need to take sterner law enforcement measures against terrorists.” He argues, however, that I have erred in my assessment of the operation of the treaty vis à vis the separation of powers and in my judgment concerning the primacy of the political offense exception.

Professor Lubet fails to see that my arguments regarding the evisceration of the political offense exception and its impact on our constitutional order are based on my belief that it is symptomatic of a larger constitutional disorder: the executive arrogation of power. It is this broad arrogation of power that threatens the separation of powers and, hence, our constitutional order. Removing the political offense exception from the judiciary is dangerous in itself, but it is all the more ominous when seen in light of the diminution or elimination of other important and constitutionally mandated legislative and judicial prerogatives. The danger lies in the general and continuing arrogation of executive power—especially in the arenas of war and foreign affairs—at the expense of the other branches of government. This power possibly even reached the point of forming a secret shadow government that promoted criminal terrorism.

Professor Lubet argues that the United States-United Kingdom

150. Lubet, supra note 141, at 966 n.13 and accompanying text.
151. Lubet, supra note 142, at 57.
Supplementary Extradition Treaty is a limited but needed advance against the ravages of terrorism. I disagree. The advance against terrorism is possible without risking the constitutional dangers signaled herein. A principled definition of terrorism and an even-handed application of the law against its perpetrators is possible—and will be a much more useful weapon against terrorism than destroying the political offense exception. My working definition of terrorism establishes the elements of the crime. It allows the judiciaries of the world to convict those who have committed the crime. At the same time, it allows the political offense exception to obtain only in situations in which it ought to do so. Killing an enemy combatant during a civil war or insurrection to escape oppression should not be an extraditable offense. On the other hand, killing a child or other noncombatant, even if done to promote democracy or self-determination or to escape from oppression, is terroristic murder, and should be punished as such. It should not be exempt from extradition or prosecution pursuant to the political offense exception.

Ironically, the United States-United Kingdom Supplementary Extradition Treaty virtually eliminates the political offense exception's application to the very political offenses for which the exception was designed: violent conduct, including killing, committed against enemy combatants, in a political or military struggle. While it would be nice to eliminate all violence and oppression, none of the proponents of the elimination of the political offense exception for violent conduct has suggested a pacifist stance. All that is suggested by the Supplementary Extradition Treaty is that violence can never be justified against Great Britain. This suggests that Britain does not now and will never violate the interests and well-being of its residents.

By forbidding the judiciary from deciding whether the alleged violence was used against the state in defense of violence perpetrated by the state, the Treaty removes from the judiciary an important, quintessentially judicial role. This erosion of judicial authority is dangerous. Moreover, the elimination of the political offense exception in the manner of the United States-United Kingdom Supplementary Extradition Treaty is terribly over inclusive. It includes situations that undermine our own sovereignty, in relation to our traditional refusal to participate in the domestic disputes of other nations by sending back their political enemies for prosecution. It allows a foreign sovereign to make the decision instead of our judiciary.

A few hypothetical situations might illustrate the overinclusiveness of the new, treaty-based solution. Suppose that a known Irish Republican Army (I.R.A.) member was known by the British military
to have information on the whereabouts of some I.R.A. fugitives and alleged terrorists. A group of British military, upset over the gruesome murder of British soldiers at an Irish Republican funeral procession, storm her house in the middle of the night. Fearful for her life, she shoots at the intruders as she exits the window, killing one soldier. She escapes to the United states. Should she be extradited back to Britain to be prosecuted for murder in these volatile times? The United States-United Kingdom Supplementary Extradition Treaty would require her extradition.

Another hypothetical also illustrates the point. Suppose someone at a cemetery in Northern Ireland attacks and kills an individual who was throwing grenades and firing weapons into the crowd. There are no cameras to record the depredations of the grenadier, who turns out to be an agent of the British military. The killer of the attacking grenadier escapes to the United States. Would the United States be obligated to extradite the fugitive to Britain to be prosecuted for murder? Again, the Supplementary Extradition Treaty would require his extradition.

In both hypotheticals the political offense exception ought to apply. In both cases, the fugitives were political enemies of Great Britain. Their victims were not innocents; they were enemy combatants. Normally, the American judiciary would determine whether to apply the exception and, hence, whether to extradite the two fugitives. The United States-United Kingdom Supplementary Extradition Treaty removes this role from the judiciary, however. Under the Treaty, the American judiciary would not be able to consider any of the facts relating to the killings, other than whether there was probable cause to believe that these persons intentionally killed the "victims." Note that no defenses may be raised at the extradition hearing. Thus, the United States, simply upon the allegations by the British, and the prima facie evidence of the killing, would be required to send the fugitives back to Britain to be tried by the British courts.

Some may argue that the Secretary of State or the President could refuse to send the person back. True, but that proves my point. Our constitutional system is such that we are not reduced to trust in the goodness of our leaders as our only protection against abuse. Specifically with regard to extradition and the political offense exception, the checks and balances exist so that we need not trust our executive to render justice in a situation in which pressures in foreign relations policy would make justice difficult. Moreover, under the recent United States-United Kingdom Supplementary Extradition Treaty, refusal to

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152. Reed, Terror in the Cemetery, Time, Mar. 28, 1988, at 34.
send the fugitive back would be a violation of the Treaty, even if the executive feels that justice required it. Are we to believe that the Secretary of State or the President would refuse to send an alleged "terrorist" killer back to a close and strategically important ally in violation of the Treaty? The reality is that the political offense exception was developed precisely for the purpose of avoiding that conflict of interest. Under our constitutional system the executive may say that she is doing her best for the ally, while the courts can render justice. Our constitutional system of checks and balances is designed to ensure that such decisions are rendered by neutral magistrates, upon proof of facts and their application to the law.

My definition of terrorism and its concomitant definition of the political offense exception would resolve all of these problems. Courts could decide, upon an appropriate legislative definition of the crime, including elements of actus reus and mens rea, whether the alleged crime was committed; the courts could determine whether the victim of the victim of the violence was an "innocent." Mistakes may be made, but they would be mistakes that are the price of liberty. Moreover, even the mistakes could be contained through efficient legislation.

Professor Lubet also suggests that I have not explained why I am not concerned with the requirement of extradition for the crimes of "aircraft hijacking, sabotage of aircraft, crimes against internationally protected persons, including diplomats, and hostage-taking," that I have not resolved what he sees as a contradiction between exempting these offenses from the political offense exception and not exempting murder. He suggests that I have articulated no constitutional principle that distinguishes between the two sets of offenses.

I believe there is a distinction. First, my substantive definition of terrorism resolves the problem. There is a difference in kind between hijacking and simple domestic kidnapping or murder. First, hijacking

153. It is true that article III of the Supplementary Extradition Treaty allows the judiciary to consider the fugitive's claim that the extradition request was motivated by a purpose to try and punish her because of race, religion, nationality or political opinion, or that she will be persecuted or prejudiced in her trial or punishment for these reasons. United States-United Kingdom Supplementary Extradition Treaty, supra note 98, at art. III. This is laudable, but included as an afterthought to make the Supplementary Extradition Treaty more palatable. Proof of illicit governmental motive and prejudice will be difficult, embarrassing if allowed, and a departure from the traditional rule that our courts will not look into or judge the judicial due process of other countries in extradition proceedings. M. C. Bassiouni, International Extradition in United States Law and Practice 1-17 (1983); Bassiouni, The Political Offense Exception Revisited: Extradition Between the United States and the United Kingdom—A Choice Between Friendly Cooperation Among Allies and Sound Law and Policy, 15 Denver J. Int'l. L. & Pol. 255 & n. 110 (1987).

154. Lubet, supra note 142, at 58.

155. Id. at 58-59.
has been recognized as an international offense in treaties and, probably, by customary international law.\textsuperscript{156} It has elements that can be proved beyond a reasonable doubt or sufficiently to convict in any national judicial system. Moreover, and this is the key, it impacts by definition on innocent civilians (noncombatants or their relative peacetime analogues, to apply the terms I have utilized herein). There can be no hijacking without violence against innocents, unless the hijacking is of a war plane of the attacker, in which case, the political offense exception probably should obtain.\textsuperscript{157} The crimes that I consider appropriately not within the political offense exception, such as hijacking, fit within my definition of terrorism, and therefore do not fit into my substantive definition of the political offense exception. Thus, the legislature, through its legislative process or its advice and consent to a treaty, would have defined a crime in a non-overinclusive manner. The judiciary could apply the law easily.

The crime of murder, on the other hand, may be alleged, and the \textit{prima facie} case established, by evidence of probable cause to believe that the accused intentionally (or with a depraved heart) killed a human being. Intentional killing of human beings, who happen to be enemy combatants, occurs and is justified during wartime and during insurrections and civil strife. Someone who kills a combatant while attempting to throw off the yoke of oppression, or simply while protecting himself or herself against criminal depredations by a regime having the monopoly on power and applying it criminally against them, ought to be, and is, justified in doing so. These killings, albeit horrible and probably conducive to continuing violence, are not criminally punishable. They should not be subject to extradition. We have traditionally recognized this justification, and continue to do so, through the political offense exception. This recognition has ended with regard to the United States-United Kingdom Supplementary Extradition Treaty. The executive branch has determined, illegitimately,

\textsuperscript{156} See Blakesley, supra note 5.

\textsuperscript{157} If a group commandeered or intercepted an enemy combatant's plane, as an act in furtherance of a war or civil strife, or perhaps to capture enemy criminal terrorists or combatants, it may not be considered hijacking in violation of international law. One could argue that it would not be extraditable conduct under the extradition treaty. Thus, I can accept these crimes being exempted from the political offense exception. If the commandeering or interception of an enemy combatant's plane to capture the enemy combatant (or the relative peacetime equivalent—a criminal terrorist) would be considered internationally criminal hijacking, it should not be exempted from the political offense exception. Hijackings of civilian aircraft with civilians aboard would be criminal hijacking and would not fit my definition of a political offense. On the other hand, commandeering of the enemy combatant or the equivalent would fit the political offense exception. To except it from the political offense exception would suffer from the same defect as murder.
to limit the exception to members of groups that promote United States interests.

Professor Lubet suggests that it is incumbent on critics of the United States-United Kingdom Supplementary Extradition Treaty who do not trust the executive branch to do justice under the pressure of international politics and relations to come up with some examples of executive branch failure in this regard.\textsuperscript{158} The Constitution is designed to prevent potential abuse by all of the branches of government. Is it necessary to come up with examples of specific abuse when the Constitution is designed to eliminate the potential for abuse? We have (more theoretically than actually in the recent past) judicial supervision of police conduct relating to searches and seizures via the warrant clause of the fourth amendment.\textsuperscript{159} If an arm of the executive branch has been so good at abiding by the strictures of the fourth amendment so that there were virtually no cases of abuse to be found, would it suggest that there should be no judicial supervision? I happen to believe that the thinning of judicial supervision is a dangerous domestic trend—perhaps not unrelated to the other dangerous trend relating to the political offense exception—the executive arrogation of power.

The suggestion that critics must present specific examples of abuse in actual cases misses the point. The problem lies in the arrogation of executive power and the dangerous potential that portends. In addition, the abuses of executive power relating to the political offense exception will arise in the future. The problem is that we always have had the political offense exception. Thus, the courts have been able to decide the hard questions. The executive branch, indeed, has had the luxury of blaming the judiciary in circumstances that might otherwise have been politically embarrassing.

Professor Lubet also argues that it is legitimate to remove the political offense exception from the judiciary, because extradition is more like an arrest than a judicial proceeding anyway.\textsuperscript{160} This argument also misses the point. True enough, an extradition proceeding begins with a provisional arrest, which occurs before a trial. The process is designed to send the fugitive to the country seeking to prosecute. Thus, it is less than a trial.\textsuperscript{161} On the other hand, the extradition hearing is the only occasion in which a fugitive in the United States is bound over for trial. In nonextradition cases, the decision to go for-

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\textsuperscript{158} Lubet, supra note 142, at 55.
\textsuperscript{159} U.S. CONST. amend. IV.
\textsuperscript{160} Lubet, supra note 142, at 57.
\textsuperscript{161} See generally, Blakesley supra note 8.
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ward with trial is a judicial decision. Therefore, in the sense that the extradition hearing affects human liberty and due process, it is in fact more like a judicial proceeding than a simple arrest. To allow, as the United States-United Kingdom Supplementary Extradition Treaty does, a foreign sovereign to cause due process to be bypassed simply by alleging that the fugitive is a terrorist, is to undermine both our sovereignty and the integrity of our constitutional system. To take Professor Lubet's argument to its logical conclusion, all extradition proceedings, not just those dealing with the defunct political offense exception, should be handled administratively rather than judicially. Thus, the decision to bind any accused person over for trial would be made by the executive branch. Is Professor Lubet prepared to accept this conclusion? What would he do when a request for extradition comes from a country in which civil strife is occurring and national or ethnic tempers are short? To allow the judicial decision of whether to go to trial to be made by a foreign sovereign in this circumstance is especially suspect. Under those conditions, we risk returning defeated partisans to a victor's justice. The due process implications for the accused are more ominous than in the usual arrest in the United States, and they certainly call for more than administrative expediency. Indeed, it was for that very reason that the political offense exception was created. Thus, to surrender our judiciary's power to a foreign sovereign to ensure due process within our own system is extremely dangerous.

Professor Lubet is correct, however, in noting that not everything relating to law, fact, and human liberty belongs in the judicial sphere.162 Who can disagree with him that legislatures generally make law and that courts generally interpret and apply it? On the other hand, what concerns me is the question whether the legislature can so define criminal conduct or, as in this case, conduct that fits within the extradition treaty, so as to eliminate the judiciary from deciding the issue presented. But if the Senate and the President have eliminated murder from the political offense exception, and if killing an enemy combatant is not murder (which it is not), the executive and the legislative branches have combined to eliminate the judiciary from the role that the Constitution has given to it, namely, assuring that due process is provided to accused criminals in American courts. It is hard for me to believe that our three- branched constitutional republic allows any two of the coordinate branches to eliminate the third. This is, however, exactly what has happened incrementally in the case of the United States-United Kingdom Supplementary Extradition Treaty.

162. Lubet, supra note 142, at 57.
F. The "Security State" Response to Terrorism

Using terrorism as a justification for the arrogation of executive power is not unique to the United States. Indeed, that is the typical response to the terrorism problem by governments around the world.

1. The Example of Great Britain

It appears that the Reagan Administration took its lead from Great Britain, which, while having a great tradition in the development of civil liberties, has been backsliding, at least with regard to security problems with Northern Ireland. In Northern Ireland, even the judiciary has become very "executive-minded." It has seemed keen, for example, to admit unconfirmed verbal confessions allegedly made to police during intense interrogation by alleged Irish Republican Army members or sympathizers. There also is a disturbing trend to absolve security forces from responsibility for lethal uses of force. This judicial "executive mindedness" was illustrated well by Lord Pearson in McEldowney v. Forde, where he declared that the Minister of Home Affairs is the only individual who should make regulations for the preservation of the peace and maintenance of order. The Northern Ireland Parliament must have intended that somebody should decide whether or not the making of some proposed regulation would be conducive to the 'preservation of the peace and the maintenance of order.' Obviously it must have been intended that the Minister of Home Affairs should decide that question. Who else could? . . . The courts cannot have been intended to decide such a question, because they do not have the necessary information and the decision is in the sphere of politics, which is not their sphere.

The backsliding with regard to civil liberties in Great Britain has accelerated with the ban on reporting statements of individuals with certain "terroristic" backgrounds and the abrogation of the three-hundred-year-old right not to incriminate oneself by being compelled to speak. One cannot yet be forced to speak, but one's silence may be used against her.

Lord Pearson's statement sounds much like the arguments and the rhetoric of the Legal Adviser to the United States Department of


164. 3 All E.R. 1039 (H.L.) (1969), cited and discussed in Dugard, supra note 2, at 482.

165. McEldowney, at 1066, quoted in Dugard, supra note 20, at 482.
State regarding the United States-United Kingdom Supplementary Extradition Treaty. Judge Sofaer's thoughts reflect the trend in programs and policy of the Reagan Administration, which also was toward eliminating civil liberties, if that elimination could be sold as a means to combat crime or terrorism. If this trend continues in the Bush Administration, it will lead to additional serious infringements. One must hope that it can be thwarted before it goes as far as it has in the United Kingdom.

2. The Example of South Africa

Another ominous similarity is found in South Africa, where the parliament and the judiciary have become so obsessed with security and anticommunism, that even those who are opposed to apartheid have been co-opted. Although South Africa begins from a base of legal and moral depravity, its white citizens at one time had significant civil liberties. The evil of apartheid has been maintained through laws promulgated ostensibly to protect security. For example, in addition to the Group Areas Act, the South African legislature has "legalized" lengthy (at least ninety days; more likely, indeterminate) detention without trial for the purpose of interrogation.

In addition, the South African judiciary has acquiesced to—indeed has expanded upon—the executive's authority to protect against terrorism, in a manner that has eviscerated civil rights and liberties. For example, reading and writing materials have been denied detainees, because they relieve "tedium" and would "negative the inducement to speak." Denial of these materials is hoped to lead to detainees providing more information to the government about other "terrorists." For example, an antiapartheid South African law professor was convicted, and the conviction upheld on appeal, for contempt of court because he called for the courts to adopt a more activist approach to the interpretation of the security laws in order to curb police torture.

Needless to say, a climate of violence and repression has grown in South Africa as security forces have been given a free hand. Popular

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166. Sofaer, The Political Offense Exception and Terrorism, 15 DEN. J. INT'L L. & POL'Y 125 (1986); contra Blakesley, Evisceration, supra note 39; Bassiouni, supra note 153.
168. Act 37 of 1963 § 17 (90-day detention), cited in Dugard, supra note 20, at 490 n.76. In 1967, this was extended to 180-day detention and today indefinite detention is prescribed. Internal Security Act, Act 74 of 1982 § 29, cited and discussed in Dugard, supra at 490.
169. Id. at 490 (citing Schermbrucker v. Kindt N.O., 1965(4) S.A. 606(A), 619).
anxiety about terrorism and communism, as well as racism, have been
used by the government effectively to prevent what had been an in-
dependent judiciary from playing its role as protector of civil liberties.
The South African judiciary has, of course, been acquiescent—if not
complicitous—in this occurrence, as has the executive-minded legisla-
ture, which is fixated on the need for security. The South African
judiciary even stopped exercising its long-honored powers over the ad-
mission of confessions obtained by abusive means.\textsuperscript{171}

3. The Example of Israel

Professor Pnina Lahav's eloquent account of the tragic Shin Bet
affair in Israel also presents a classic denouement.\textsuperscript{172} First, the
people's constant suffering of murderous terrorism; second, "the resort
to murder as a counter terrorist method; [third,] the use of censorship to
shield the method from the public eye; [fourth,] once censorship [has]
failed, the cover-up of the affair to shield illegality from the institu-
tions of law enforcement; [fifth,] the President's pardon, which ex-
tended to agents of the secret police for both the murder and the
cover-up, and which was challenged before and sustained by the High
Court of Justice."\textsuperscript{173} Finally, the acquiescence or connivance of the
judiciary with the security-minded tactics or strategy at the expense of
the due process system. The secret police gain ascendance and eventu-
ally society "relaxes its demand that the police account for its
actions."\textsuperscript{174}

CONCLUSION

Thomas Merton, condemning humanity's tendency to go to war,
used the Trojan War to illustrate the horrible silliness of war. His
condemnation applies just as well to criminal terrorism:

The only one, Greek or Trojan, who had any interest in Helen was
Paris. No one, Greek or Trojan, was fighting for Helen, but for the
'real issue' which Helen symbolized. Unfortunately, there was no
real issue at all for her to symbolize. Both armies, in this war,
which is the type of all wars, were fighting in a moral void, moti-

\textsuperscript{171} Dugard, supra note 20, at 484-498.
\textsuperscript{172} Lahav, A Barrel Without Hoops: The Impact of Counterterrorism on Israel's Legal Culture,
10 Cardozo L. Rev. 529 (1988). The Shin Bet Affair refers to an incident in which the Israeli army
stormed a bus which had been hijacked by terrorists. The army killed two of the hijackers outright.
The remaining two hijackers were handed over to Shin Bet, the Israeli military intelligence organi-
ization, for interrogation. During the interrogation the hijackers were severely beaten and, eventually,
"executed pursuant to an order by the head of Shin Bet." Id. at 531-32 (citing the report submitted by
the Shin Bet to the Israeli Attorney General).
\textsuperscript{173} Id. at 530.
\textsuperscript{174} Id. at 529.
vated by symbols without content, which in the case of the Homeric heroes took the form of gods and myths. 175

This was not so bad for the Greeks, because their myths limited them. For us, our myths are absolute and bring us to total war and terrorism. "[Our myths] penetrate the whole realm of political, social, and ethical thought." 176 We go to war or we condone or promote our own government's or group's criminal terrorism, "because of 'secret plots' and sinister combinations, because of political slogans elevated to the dignity of metaphysical absolutes." 177 These have no content. "We seek to impart content to them by destroying other men who believe in enemy-words, also in capital letters [and equally without content]." 178

Simone Weil and Thomas Merton were not far off in their belief that the monster, "the great beast," "the grimmest of all the social realities of our time," is the urge to collective power. 179 This lust for power is masked by the symbols of "nationalism, of capitalism, communism, fascism, racism," 180 and, I would add, fundamentalism, antiterrorism, self-determination, democracy, 181 and even national security, which is "a chimerical state of things in which one would keep for oneself alone the power to make war while all other countries would be unable to do so." 182

The greatest danger posed by terrorism to our democracy and to our constitutional republic may be our executive branch's overreaction to terrorism and its use of terrorism to erode the constitutionally mandated checks and balances and sharing of powers in foreign affairs, war powers, and combatting international crime. The Constitution provides for congressional oversight and sharing of policy development in these arenas. The Constitution also mandates judicial determination when due process and human liberty are at stake. Furthermore, the judiciary must decide when either of the two other branches of government has overstepped its bounds. This article signals the dangers to our domestic constitutional order posed by the executive tendency to arrogate power to itself, especially in times of danger or perceived danger. To avoid manifest hypocrisy, the destruction of the rule of law, and the erosion of our primary democratic and

176. Id. at 137.
177. Lahav, supra note 172, at 529.
178. T. MERTON, supra note 175, at 138.
179. Id.
180. Id.
181. See Ecclesiastes 1-9 (King James) (noting that anything is vanity (and evil) if abused).
182. T. MERTON, supra note 175, at 139 (quoting Simone Weil).
constitutional values, we must be vigilant to avoid participating directly, or as aiders and abettors, in the conduct described herein as criminal terrorism. We must not allow hysteria to cause us to accept denigration of the Constitution and arrogation of power by the executive branch at the expense of the other two branches. Although the congressional process is sometimes cumbersome, and although the judiciary may make mistakes, they are set in the Constitution as checks and balances for our domestic protection against autocracy. Whether combatting terrorism is accomplished by means of extradition, by prosecution of alleged perpetrators, or by a decision to initiate an act of war, we must maintain our integrity and preserve our constitutional order.

Governmental reaction to terrorism, here and elsewhere, has been to develop an executive-controlled security state through the evisceration of civil liberties in the name of combatting terrorism. In the United States this has manifested itself in abuse of the separation of powers, via executive usurpation of legislative and judicial authority. This has occurred in conjunction with the denigration of the rule of law and exportation of terrorism to fight terrorism. In this article, I have presented a neutral, useful, legal response to terrorism that will allow us to combat terrorism wherever it arises and that will not risk damage to our constitutional republic. I have presented a definition of terrorism that, combined with renewed respect for the rule of law and the primacy of the Constitution, will allow us to identify and to eliminate terrorism—whether practiced by foreign groups, foreign governments, or ourselves.