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## YALE LAW & POLICY REVIEW

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### Punishing Crimes of Terror in Article III Courts

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## INTRODUCTION

“The United States is at war against al Qaeda, an international terrorist organization.”<sup>1</sup> Over the past decade, the United States has invested substantial resources fighting the “War on Terror.”<sup>2</sup> Terrorism prosecutions in Article III courts have factored prominently in America’s unconventional war with al Qaeda and its affiliated extremist networks.<sup>3</sup> In this rather unprecedented way, the executive branch has enlisted the third branch—the judiciary—to pursue its war aims.

Yet several aspects of this novel interbranch war strategy remain underdeveloped, including the system for punishing these terrorist defendants in Article III courts. Indeed, amid the now-robust debates surrounding pretrial detention, the procedural rights afforded at trial, and access to post-conviction remedies, there has been relatively little conversation about the civilian courts’ approach to sentencing defendants convicted of crimes connected to the War on Terror. Nor has there been much discussion as to how the executive’s war objectives should factor into the civilian sentencing analysis. Rather, the United States Sentencing Guidelines (USSG) have been routinely applied as adequate to guide the courts’ sentencing practices.

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1. *Hamdan v. United States*, 696 F.3d 1238, 1240 (D.C. Cir. 2012).
  2. The use of the term “War on Terror” is not without some controversy and aversion in the Obama Administration. The balance of this Article uses the term loosely and sometimes interchangeably with “the armed conflict with al Qaeda.” Although the “War on Terror” can be said to encompass a broader range of extremist groups and movements, the al Qaeda organization was the progenitor of that larger conglomerate of “Islamic extremist groups and actors who share anti-Western motivations and employ terrorism as their primary means.” Kevin E. Lunday & Harvey Rishikof, *Due Process Is a Strategic Choice: Legitimacy and the Establishment of an Article III National Security Court*, 39 CAL. W. INT’L L.J. 87, 88-89, n.4 (2008). The al Qaeda organization’s “declared goal is the establishment of a pan-Islamic caliphate throughout the Muslim world.” *Al-Qa’ida*, NAT’L COUNTERTERRORISM CENTER, [http://www.nctc.gov/site/groups/al\\_qaida.html](http://www.nctc.gov/site/groups/al_qaida.html) (last visited Apr. 12, 2013).
  3. “[D]uring the first two years of Barack Obama’s presidency, the annual number of prosecutions for jihadist-related terrorism doubled.” CTR. ON LAW & SEC., N.Y.U. SCH. OF LAW, TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001-SEPTEMBER 11, 2011, at 2 (2011) [hereinafter TERRORIST TRIAL REPORT CARD].

This Article challenges that complacency. It argues that the USSG sentencing regime is not properly suited to address crimes of coordinated, international terrorism, which implicate national security, foreign policy, and geopolitics, and which are connected to the broader conflict with al Qaeda. To advance that argument within the larger debate on terrorism prosecutions in civilian courts, this Article aims to spark a principled dialogue about sentencing and punishment in cases of international terrorism.<sup>4</sup>

To that end, Part I places the problem in context by reviewing the United States' history of trying and punishing similar crimes in analogous circumstances. This review highlights the ways in which the current conflict, and the interbranch strategy used to advance it, is unique to the United States' experience with the law of war and punishment. Against the historical backdrop, Part II argues that the Sentencing Guidelines that currently apply to War on Terror cases have developed without the proper perspective, as they do not consider relevant law-of-war (and other military justice) principles and sentencing purposes. As a result, the current guidelines sentencing system does not address the policy exigencies of this conflict.

Part II urges U.S. policymakers to develop a new body of criminal sentencing law that would apply in the armed-conflict context. That sentencing law would require, as a starting point, a reoriented normative foundation, which incorporates the core law-of-war principles of proportionality and necessity, and military justice principles of aggravation and mitigation, as well as the sentencing goals of deterrence and incapacitation. Borrowing in this way from the military law enforcement model and international laws of war is defensible on the understanding that criminal sentencing in an ongoing conflict serves conflict-related aims. After discussing those purposes and principles, Part II draws out examples from the case law to illustrate the main problem with the current guidelines system: its inability to distinguish among terrorist offenders.

Part III elaborates on the need for distinction among offenders. It discusses how the executive branch strategy of preventative prosecution has led to the prosecution of a broad range of terrorist offense conduct, which, in turn, demands the new sentencing framework proposed. To suit that strategy, Part III proposes

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4. As several authors point out, "although the growing body of literature on terrorism investigates patterns of global terrorism, terrorist networks, media coverage, and societal responses to terrorism, relatively less attention has centered on correlates of punishment of convicted terrorists." Mindy S. Bradley-Engen et al., *Punishing Terrorists: A Re-Examination of U.S. Federal Sentencing in the Postguidelines Era*, 19 INT'L CRIM. JUST. REV. 433, 433-34 (2009). Though James McLoughlin undertakes a thorough analysis of the sentencing aspects of terrorism prosecutions, and argues that the sentencing guidelines, as applied, are flawed, his argument stops short of a proposed alternative. This Article uses his work as a useful launchpad to suggest a solution to some of the problems that McLoughlin identifies. See James P. McLoughlin, Jr., *Deconstructing United States Sentencing Guidelines Section 3A1.4: Sentencing Failure in Cases of Financial Support for Foreign Terrorist Organizations*, 28 LAW & INEQ. 51 (2010).

revisions to the Sentencing Guidelines, which include a more fact-intensive analysis that considers the defendant's substantial steps, degree of participation, role in the offense, and ideology. Part III explains that such a revision to the guidelines regime not only better justifies the government's use of force to punish in this conflict, but also advances national security policy by reducing the risk of terrorists' recidivism and bolstering support for the War on Terror domestically and abroad.

#### I. THE UNITED STATES' HISTORY AND EXPERIENCE WITH PUNISHING "TERRORISTS"

The United States has a rich history of developing the laws of war and punishing violations as war crimes.<sup>5</sup> It is committed to these laws and customs, and they form an important part of American society's collective conscience of the national experience with war.<sup>6</sup> Yet despite its importance, this history does not provide a perfect blueprint for punishing violations of the laws of war in the current conflict with al Qaeda.<sup>7</sup> For one, the legal standards for *punishing* violations of the laws of war have not developed in conjunction with the laws themselves. And moreover, this conflict has taken the nation into uncharted territory, challenging policymakers and courts to understand how even to apply well-established laws and customs of war to the present context.

Nevertheless, America's history with punishment in war prior to 9/11 remains important.<sup>8</sup> It "put[s] us face-to-face with past generations' efforts to manage many of the same kinds of dilemmas" and "offers a sense of what we can reasonably expect."<sup>9</sup> In short, America's history with the laws of war and punishment provides the necessary moral, social, and legal anchor to any effort to reform the law and policy of sentencing in the War on Terror.

With that in mind, Section I.A considers the key moments in U.S. and world history that have contributed to the development of the United States' practice

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5. See JOHN FABIAN WITT, *LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* (2012) (providing an extensive historical review of the development of the American law of war and explaining how the United States' standards and code of warfare served to inform the development of the international law of war more broadly).

6. *Id.* at 8 ("Grappling with the American history of the laws of war is therefore indispensable if we are to make sense of the law and morality of military force in the twenty-first century.").

7. See *id.* at 373 ("Sharp breaks between past and present limit history's usefulness as a guide. . . . [I]t won't tell us whom we should prosecute in military commissions, or for what crimes.").

8. See *id.* at 8-9 (noting that this history is key to reconciling two "competing ideals for armed conflict"—"humanitarianism" and "justice").

9. *Id.* at 373.

of wartime punishment. That Section extracts certain bedrock principles for punishing in war, but it also highlights what questions of sentencing are left unanswered by historical experience. Section II.B turns to the current conflict and considers the trial and punishment procedures used so far in the War on Terror. It argues that, in view of the history discussed, the current approach, which principally embraces the civilian system and an interbranch war strategy, has swung too far, forgetting important lessons from American military history and the nation's traditional commitment to the laws and customs of war and punishment.

A. *The Pre-9/11 History and Experience*

Though the term “terrorism” took on new meaning after 9/11, criminal acts of terrorism are not new. Rather, conduct that society today labels as “terrorism” has historically been known as sabotage, treason, or war crimes (that is, acts of unlawful combat in war or armed conflict).<sup>10</sup> Generally speaking, unlawful acts perpetrated during wartime and in pursuit of war aims were considered violations of the laws of war, and were tried and punished by the executive branch in military (or multilateral) tribunals.<sup>11</sup> And, because those crimes were inextricable from the conflicts in which they were committed, the fora for trying them were usually constituted specifically for that purpose; in other words, they were ad hoc. Consequently, the punishments imposed by those tribunals were also specific to the conflict<sup>12</sup> and consistent with contemporaneous military objectives.<sup>13</sup> This

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10. Terrorism has been defined as “any organized set of acts of violence designed to create an atmosphere of despair or fear, to shake the faith of ordinary citizens in their government and its representatives, [or] to destroy the structure of authority which normally stands for security . . . .” Burton M. Leiser, *Terrorism, Guerrilla Warfare, and International Morality*, 12 STAN. J. INT’L STUD. 39, 39 (1977). “[Terrorism] is a policy of seemingly senseless, irrational, and arbitrary murder, assassination, sabotage, subversion, robbery, and other forms of violence . . . .” *Id.*
  11. See Nora V. Demleitner, *How Many Terrorists Are There? The Escalation in So-Called Terrorism Prosecutions*, 16 FED. SENT’G REP. 38, 38 (2003) (“Terrorism prosecutions are not novel in the U.S. criminal justice system. For many decades, however, they were not labeled terrorism cases but instead were classified as treason and sabotage, as murders and bombings.”); see also Kristen E. Eichensehr, *Treason in the Age of Terrorism: An Explanation and Evaluation of Treason’s Return in Democratic States*, 42 VAND. J. INT’L L. 1443 (2009) (discussing the history of treason laws in the Anglo-Saxon tradition and reviewing treason prosecutions in the United States in the post-World War II era).
  12. See Brief for the Government at 21, *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012) (No. 11-1257), 2012 WL 136259, at \*21 [hereinafter *Hamdan*, Br. for the Gov’t] (“Military commissions have been part of our legal architecture since the Revolutionary War, and they are tailored to the realities of armed conflict.”).
  13. For a comprehensive history of the U.S. use of military tribunals and commissions, see Michal R. Belknap, *A Putrid Pedigree: The Bush Administration’s Military Tribunals in Historical Perspective*, 38 CAL. W. L. REV. 433 (2002).

Section traces the development of these tribunals and the legal principles that evolved around them.

1. The Development of American Values and Procedures for Punishing Unlawful Acts in Wartime

From its inception, the United States has demonstrated a commitment to and interest in developing the principles of lawful, civilized war. As one legal historian notes, “No nation in the history of the world has made the law governing the conduct of armies in war more crucial to its founding self-image than the United States.”<sup>14</sup> Indeed, violations of the “rules of civilized warfare” were central to America’s Revolutionary claims; charges of King George III’s “Plunder[ing] our Seas,” “ravag[ing] our Coasts, burn[ing] our Towns, and destroy[ing] the Lives of our People” were levied in Congress’s brief for independence.<sup>15</sup> The Founders’ hope for an “Enlightened” and “humane” “way of war” influenced the methods and purposes of military trial by commission in the years following the Revolution.<sup>16</sup>

After independence, the U.S. military began trying and punishing foreign nationals (including civilians) for war-related crimes as early as the Mexican-American War. The Mexican use of guerilla tactics in 1847 resulted in what the United States believed to be inhumane violations of the laws and customs of war. General Winfield Scott sought to redress these violations by ordering martial law, which provided that certain crimes against American soldiers committed by Mexican civilians could be punished by military commissions.<sup>17</sup> Civilian criminal courts were replaced by military commissions in occupied and hostile territory.<sup>18</sup> General Scott’s martial law also authorized another form of military tribunal—called “councils of war”—to punish violations of the “laws of war” committed by Mexican guerilla fighters.<sup>19</sup> The councils of war were to “punish any flagrant violation of the laws of war by death or lashes, so long as there was satisfactory proof that such prisoner, at the time of capture, actually belonged to any part of a gang of known robbers or murderers.”<sup>20</sup> These commissions proved formative

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14. WITT, *supra* note 5, at 15.

15. *Id.*

16. *Id.* at 19, 23.

17. Belknap, *supra* note 13, at 448. By Scott’s General Order No. 20, military commissions were empowered to try “atrocities,” including “assassination and murder, malicious stabbing or maiming and rape, malicious assault, battery, robbery, theft, the wanton desecration of churches, and the destruction of public or private property.” WITT, *supra* note 5, at 123–24. The order provided for jurisdiction over any Mexican “inhabitant,” a term of art which was understood to include civilians. *Id.*

18. Belknap, *supra* note 13, at 448.

19. *Id.*

20. WITT, *supra* note 5, at 126.

to the burgeoning “national mythology of chivalry” in war, as they represented an American stand against inhumane conduct in war (by Americans and Mexicans alike) and sought to bring order to conflict.<sup>21</sup> And, with the tribunal’s novel seizure of jurisdiction over these offenses and defendants, they marked the first time in history that the law blended “the idiom of war” and the “language of crime.”<sup>22</sup>

Military commissions were used extensively for similar purposes during the Civil War.<sup>23</sup> These tribunals were considered the best option for dealing with unconventional combatants, such as “bands of guerillas, not regularly enlisted in the Confederate army,” who committed ordinary crimes for political reasons, such as “attack[ing] Union military forces, bases of supply, railroads, and civilian targets of opportunity.”<sup>24</sup> Those irregular fighters, like al Qaeda terrorists today, were “not perceived as legitimate combatants entitled to the privileges of belligerents but, instead, as outlaws, marauders, and spies.”<sup>25</sup> These were the “most common defendants” tried before the Civil War military commissions, constituting nearly eighty-five percent of people charged with violating the law of war before the tribunals.<sup>26</sup> The expansion of the laws regulating warfare and, with them, the ability to punish by military commission violators of those laws (soldier and civilian), was an important part of the North’s “strategy for winning the war.”<sup>27</sup> Reliance on trial and punishment thus served “not only as a restraint,” but also as an instrument of “power of a nation at war.”<sup>28</sup> In this way, punishment in wartime became both a source for maintaining principled order in a conflict and a means of advancing an effective war strategy.

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21. *Id.* at 123-24, 127.

22. *Id.* at 125, 127-28.

23. *See id.* at 267 (“Nearly 1,000 individuals were charged with violating the laws of war during the course of the [Civil War].”).

24. *Hamdan*, Br. for the Gov’t, *supra* note 12, at 30; *see also* Belknap, *supra* note 13, at 449 (noting that the Civil War military commissions tried mainly guerilla activities such as horse stealing and bridge burning).

25. *Hamdan*, Br. for the Gov’t, *supra* note 12, at 54.

26. WITT, *supra* note 5, at 268.

27. *Id.* at 274.

28. *Id.* In the wake of the Civil War, military commissions also tried violations of the “common law of war” or the “laws and customs of war.” *Id.* at 294, 298. Notable among these trials were the Lincoln conspiracy trials, in which the eight civilians accused of conspiring with John Wilkes Booth to assassinate President Lincoln on April 14, 1865 were found guilty and sentenced to death, and the trial of Captain Henry Wirz, who committed atrocities at the prisoner-of-war camp in Andersonville, Georgia. *See id.* at 294-99; Belknap, *supra* note 13, at 449, 462, 467 & n.253, 469.

The next major phase in the development of the laws of war and punishment came during and in the wake of the Second World War.<sup>29</sup> By this point, the international perspective had been primed by the American experience. The laws of war codified by Francis Lieber and approved by President Lincoln during the Civil War served as the foundation for European thinking on the conduct of war around the time of the first Geneva Convention in 1864.<sup>30</sup> Lieber's new term "war crime" captured for the first time an "idea that had been implicit in the American experience from the Mexican War forward."<sup>31</sup> And so, following the American example, a formalized, international consensus on what constitutes a "war crime" developed shortly after the world wars, with the drafting and ratification of the Geneva Conventions and the constitution of the Nuremburg tribunals.<sup>32</sup>

The Geneva Conventions codified the law of armed conflict (LOAC) as a conventional body of international law to govern in cases of armed conflict.<sup>33</sup>

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29. Military commissions were used during the Indian Wars in the American West in the post-Civil War period but, considering that these trials "threw American views of the laws of armed conflict into a vast confusion," their use is more anomalous than indicative of America's path in developing the principles of lawful warfare and punishment. WITT, *supra* note 5, at 330. President Wilson did not use military commissions to try war crimes committed in the United States during World War I. JENNIFER ELSEA, *TERRORISM AND THE LAW OF WAR: TRYING TERRORISTS AS WAR CRIMINALS* 22 (2001).
30. WITT, *supra* note 5, at 342-43.
31. *Id.* at 343.
32. See KEVIN JON HELLER, *THE NUREMBURG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW* 3 (2011) (providing a comprehensive review of the Nuremburg Military Tribunal proceedings).
33. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva II]; Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609. The United States has not ratified Additional Protocol I or II. OPERATIONAL LAW HANDBOOK 16-17 (Andrew Gillman & William Johnson eds., 2012) (publication of the Judge Advocate General's Legal Center & School, U.S. Army); Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the "War on Terror,"* 27 FLETCHER F. WORLD AFF. 55, 60 (2003).



Common Article 3<sup>34</sup> became the basis for international humanitarian law and is now understood to apply in most cases where the LOAC applies.<sup>35</sup> But it was the legal proceedings at Nuremburg that truly “gave birth . . . to crimes against peace, crimes against humanity, and the crime of criminal membership.”<sup>36</sup> The first installment of Nuremburg trials was held by what was known as the International Military Tribunal (IMT).<sup>37</sup> After the IMT concluded, the United States conducted subsequent proceedings in the Nuremburg Military Tribunals (NMT), in which the United States tried 177 members of the Third Reich.<sup>38</sup> Unlike the IMT, the NMT was not an international tribunal, but rather was authorized by executive order.<sup>39</sup>

It seems to have been implicit at Nuremburg that terrorism-like offenses were considered, at that time, to violate the LOAC as war crimes. At the conclusion of World War I, the Allies condemned Germany for “violat[ing] the laws and customs of war,” including “the execution of a system of terrorism” that involved “[m]urders and massacres [of non-combatants] . . . [and] the arbitrary destruction of public and private property.”<sup>40</sup> More definitively, after the Second World War, the Judge Advocate General of the U.S. Army included “[s]ystematic terrorism” and “[w]anton destruction of property” in a published list of war crimes subject to trial by military commission under the “laws and customs of war.”<sup>41</sup> Ultimately, the NMT trials resulted in 142 convictions. Twenty-four of

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34. It is common to each of the four Geneva Conventions. See John T. Rascliffe, *Changes to the Department of Defense Law of War Program*, ARMY L., Aug. 2006, at 23, 25.

35. As Rona explains, “[t]he terms ‘international humanitarian law,’ ‘humanitarian law,’ ‘law of armed conflict,’ ‘*jus in bello*’ and ‘laws of war’ are interchangeable.” Rona, *supra* note 33, at 55 n.1; see also Robert J. Delahunty & John C. Yoo, *What Is the Role of International Human Rights Law in the War on Terror?*, 50 DEPAUL L. REV. 803, 803 (2010) (explaining the relevance of human rights law, which was “designed to operate primarily in normal peacetime conditions,” to the LOAC).

36. HELLER, *supra* note 32, at 3.

37. *Id.* at 1-2.

38. *Id.*

39. *Id.* at 112-13; see United States Executive Directive, JCS 1023/10 (July 8, 1945). Professor Heller characterizes these tribunals as “inter-allied special tribunals created pursuant to Law No. 10, a multilateral agreement enacted by the Allied Control Council as the supreme legislative authority in Germany.” HELLER, *supra* note 32, at 113.

40. *Hamdan*, Br. for the Gov’t, *supra* note 12, at 51 (quoting COMM’N OF RESPONSIBILITIES, CONFERENCE OF PARIS 1919, VIOLATION OF THE LAWS AND CUSTOMS OF WAR 16-17 (1919)).

41. *Id.* (quoting FOREIGN RELATIONS OF THE UNITED STATES, DIPLOMATIC PAPERS 1944, H.R. DOC. NO. 79-303, pt. 1, vol. 1, at 1267, 1272-73 (1945)).

those convicted were sentenced to death, twenty to life imprisonment, and ninety-seven to imprisonment for a term of years.<sup>42</sup>

Perhaps because these tribunals were conceived out of an urgency to punish violations of the laws of war, their focus was on the trials of those violations themselves, rather than on the legal standards—if any—that governed the parameters of the punishments imposed. Indeed, the World War II tribunals “left few sentencing guidelines” for future war crimes tribunals and commissions to follow.<sup>43</sup> At most, “[t]he tribunals occasionally appended a perfunctory final paragraph to their judgments reviewing ‘mitigating factors’ in the rare cases where these were deemed to be present.”<sup>44</sup> The Nuremberg tribunal in particular “never explained how [it] determined the sentences [it] imposed—even when the sentence was death,” nor did it “comment on the general sentencing principles [it] applied.”<sup>45</sup>

The domestic counterparts to the NMT did not fill this gap in guidance. Among the notable trials, the United States famously tried several Nazi saboteurs in 1942 for, among other offenses, “relieving or attempting to relieve . . . the enemy” in violation of the applicable laws of war, and conspiracy to commit those offenses.<sup>46</sup> In those cases, the saboteurs had come from Germany to complete their respective sabotage missions, landing in two groups, one in Florida and one in Long Island. Upon arrival, the saboteurs discarded their military uniforms and embarked on their mission. Due to a series of snafus, their plots were ultimately thwarted by the FBI. Attorney General Francis Biddle advised President Roosevelt to try the saboteurs by military commission, on the view that, “[u]nder the internationally accepted ‘law of war,’ apart from our Constitution, enemy aliens

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42. HELLER, *supra* note 32, at 313. For those sentenced to a term of years, the sentences ranged from two-and-a-half to ten years. *Id.* at 329.

43. William A. Schabas, *Sentencing by International Tribunals: A Human Rights Approach*, 7 DUKE J. COMP. & INT’L L. 461, 461 (1997).

44. *Id.*

45. HELLER, *supra* note 32, at 313-14. Of course, in addition to the Nuremberg trials, it was not uncommon for the U.S. military to try and punish soldiers in the Axis army for crimes committed during hostilities. As detailed in the Supreme Court’s decision in *In re Yamashita*, 327 U.S. 1 (1946), Japanese General Yamashita was convicted by a military commission convened by the commanding general of the U.S. armed forces in the Western Pacific for crimes committed by his troops in the final stages of World War II. Similarly, in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), German soldiers were convicted by a military commission for continuing to engage in hostilities against U.S. forces in China after Germany had surrendered to the Allies. Notably, the Supreme Court held that “[t]he jurisdiction of military authorities, during or following hostilities, to punish those guilty of offenses against the laws of war is long-established.” *Id.* at 786. The Court also confirmed that it was well established that the military has jurisdiction over “enemy belligerents, prisoners of war, or others charged with violating the laws of war.” *Id.*; Belknap, *supra* note 13, at 443-44.

46. *Ex parte Quirin*, 317 U.S. 1, 23 (1942).

of domestic citizens who came through the lines out of uniform for the purpose of engaging in hostile acts . . . are subject to trial by military tribunals.”<sup>47</sup>

The President ultimately agreed.<sup>48</sup> Apparently, the decision to use a military rather than a civilian court was in part motivated by a sentencing consideration: a trial by military commission rendered the defendants eligible for the death penalty, whereas the maximum penalty in civilian court for attempted sabotage would have been thirty years in prison.<sup>49</sup> The defendants were found guilty and sentenced to death.<sup>50</sup> The penal outcome desired—death—drove the choice of forum. For this, *Ex Parte Quirin* did not leave much of a sentencing-analysis legacy.

By the late twentieth century, it had become well established that war crimes included certain acts of “terrorism” and that those crimes could be punished militarily. Equally well established were the legal standards governing the use of force in conflict. Yet few standards had developed at the intersection: no rules of law were defined to govern the punishments imposed on war criminals or those who perpetrated criminal acts of terror. There was no occasion for the United States to develop such rules after the post-World War II era, as there were no major instances of trial by military commission in the context of war after that period. Although the United States engaged in other armed conflicts—in Korea, Vietnam, and the Gulf, for instance—those conflicts did not create a significant need to try and punish civilians or foreign nationals for crimes of war, sabotage, treason and the like, committed by civilians during wartime.<sup>51</sup>

## 2. The International and Comparative Approach in the Post-World War II Era

In the postwar period, the international community assumed the mantle of prosecuting war crimes. After Nuremberg, with the creation of the United Nations, the international community continued to pursue, prosecute, and punish war crimes and violations of international humanitarian law, in cases where the

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47. Memorandum from Oscar Cox to Francis Biddle, Att’y Gen. (June 29, 1942), Box 61, Oscar Cox Papers, Roosevelt Library.

48. Belknap, *supra* note 13, at 472; David J. Danelski, *The Saboteurs’ Case*, 1 J. SUP. CT. HIST. SOC’Y 61, 63-64 (1996).

49. Belknap, *supra* note 13, at 471; see Michael R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 MIL. L. REV. 59, 63 (1980).

50. *Quirin*, 317 U.S. at 44-45.

51. Violations of the laws of war by U.S. servicemen were tried by the ordinary courts-martial process. During the Vietnam War, for example, 201 army personnel and 77 marines were tried by general and special courts-martial for crimes against Vietnamese civilians. ROBERT DOYLE, *THE ENEMY IN OUR HANDS: AMERICA’S TREATMENT OF PRISONERS OF WAR FROM THE REVOLUTION TO THE WAR ON TERROR* 287 (2010).

relevant nation-state was unable to do so. Pursuant to Article 29 of its charter, the UN has the power to constitute special tribunals that function as “subsidiary organs” for this purpose.<sup>52</sup> It has done so on several occasions.

The first of these special tribunals after Nuremberg was the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>53</sup> The ICTY was established in 1993 to try and punish the war crimes committed in the conflicts in the Balkans during the 1990s.<sup>54</sup> Similarly, in 1994, the Security Council created the International Criminal Tribunal for Rwanda (ICTR) to prosecute violations of international humanitarian law committed in Rwanda in 1994.<sup>55</sup> Unlike the directive governing the NMT (or, for that matter, the treaty provisions under which the IMT was constituted), the statutes creating the ICTY and ICTR have “brief provisions dealing with sentencing, proposing that sentences be limited to imprisonment.”<sup>56</sup> The statutes also direct the tribunals to consider “the ‘general practice’ . . . of the criminal courts in the former Yugoslavia or Rwanda,”<sup>57</sup> as well as international human rights law (IHRL).<sup>58</sup> These tribunals’ sentencing practices at a minimum introduced the laws of war (or at least human rights law) to war-related sentencing and punishment analyses.<sup>59</sup>

From a comparative standpoint, England also provided an interesting example as a more general precedent for adapting national court systems to the context of terrorism. England’s “Diplock” court system, as it is known,<sup>60</sup> emerged from

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52. Schabas, *supra* note 43, at 465; see U.N. Charter art. 29.

53. *About the ICTY*, UN ICTY, <http://www.icty.org/sections/AbouttheICTY> (last visited July 14, 2012).

54. The ad hoc tribunal is projected to be completed by 2016, inclusive of any appeal proceedings. *Id.*

55. *About the ICTR*, UN ICTR, <http://www.unictr.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx> (last visited July 14, 2012).

56. Schabas, *supra* note 43, at 461-62.

57. *Id.* at 468.

58. This includes provisions of the Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), and the International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171. *Id.* at 467.

59. See Delahunty & Yoo, *supra* note 35 (explaining the relevance of human rights law to the laws of war).

60. The system was born of recommendations of a commission led by Lord Diplock, hence the “Diplock courts.” REPORT OF THE COMMISSION TO CONSIDER LEGAL PROCEDURES TO DEAL WITH TERRORIST ACTIVITIES IN NORTHERN IRELAND (1972), <http://cain.ulst.ac.uk/hmso/diplock.htm>; see *The Justice and Security (Northern Ireland) Act 2007 (Commencement No.1 and Transitional Provisions) Order 2007*, <http://www.legislation.gov.uk/ukSI/2007/2045/contents/made> (last visited Apr. 8, 2013). For further discussion of the Diplock system, see JOHN JACKSON & SEAN DORAN, JUDGE WITHOUT JURY: DIPLOCK TRIALS IN THE ADVERSARY SYSTEM (1995).

its conflict with the Irish Republican Army and the Troubles in Northern Ireland. It was designed to punish “ordinary” crimes—bombings, murders, and kidnappings—committed by civilians and against civilians, which are politically motivated and connected to a broader, protracted conflict.<sup>61</sup> The system began in the mid-1970s,<sup>62</sup> with the 1973 Northern Ireland (Emergency Provisions) Act, and modified the typical civilian tribunal to allow for nonjury trials for “offenses connected with political agitation.”<sup>63</sup> That decision was apparently motivated by national security concerns.<sup>64</sup> While initially intended as a temporary measure,<sup>65</sup> the Diplock courts continue to exist today and have been used in post-9/11 terrorism cases.<sup>66</sup> The Diplock courts are useful to bear in mind, as they tend to suggest that, where civilian courts are employed to advance conflict-related objectives, procedural modifications to that legal system are likely to be necessary.<sup>67</sup>

The next Section considers how the United States has, so far, adapted its own civilian legal systems to punish crimes of terrorism, after some initial experimentation with the use of a military framework.

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61. See generally LAURA K. DONOHUE, COUNTER-TERRORIST LAW AND EMERGENCY POWERS IN THE UNITED KINGDOM, 1922-2000 (2001) (reviewing related counter-terrorism legislation).
  62. Laura K. Donohue, *Terrorism and Trial by Jury: The Vices and Virtues of British and American Criminal Law*, 59 STAN. L. REV. 1321, 1326 (2007).
  63. Niamh Howlin, “*The Terror of Their Lives*”: *Irish Jurors’ Experiences*, 29 LAW & HIST. REV. 703, 761 (2011).
  64. Matthew S. Podell, *Removing Blinders from the Judiciary*, 23 B.C. INT’L & COMP. L. REV. 263, 267-68 (2000) (noting the jury system was thought to be “unworkable in the context of political violence in Northern Ireland, where there existed a real threat of witness and juror intimidation by terrorist groups”). In these courts, one judge presides and provides the defendant with a written verdict. DONOHUE, *supra* note 61, at 1334; see *Diplock Courts*, BBC NEWS (July 3, 2007), [http://news.bbc.co.uk/2/hi/programmes/law\\_in\\_action/6265734.stm](http://news.bbc.co.uk/2/hi/programmes/law_in_action/6265734.stm).
  65. Donohue, *supra* note 62, at 1326.
  66. See, e.g., *Al-Qaeda Terror Suspect Is Jailed*, BBC NEWS (Dec. 20, 2005), [http://news.bbc.co.uk/2/hi/uk\\_news/northern\\_ireland/4545692.stm](http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/4545692.stm); see also FERGAL FRANCIS DAVIS, THE HISTORY AND DEVELOPMENT OF THE SPECIAL CRIMINAL COURT, 1922-2005 (2007) (discussing the legal history of Ireland’s special criminal court system with a focus on the legitimacy effects of a nonjury system).
  67. In terms of sentencing specifically, the English model does not add much. Indeed, the commentary on the Diplock courts does not suggest that those courts have developed a creative, or particularly nuanced, approach to punishing terrorists. Moreover, although the literature on the Diplock system is extensive, there is very little discussion of its sentencing practices or principles. At most, there is some suggestion that defendants convicted by these courts are sentenced as “ordinary criminals” who have committed analogous offenses outside the political/wartime context. See JOHN E. FINN, CONSTITUTIONS IN CRISIS: POLITICAL VIOLENCE AND THE RULE OF LAW 122 (1990) (considering, but rejecting, the likelihood of sectarian bias in sentencing offenses committed by Republicans and Loyalists).

B. *The Post-9/11 Approach to Punishing in the War on Terror*

By 9/11, the United States had some partial historical examples to consider in devising a system for apprehending, detaining, and trying these new enemies of the state. And it had a well-developed and internationally accepted legal code governing the conduct of war to consult. What the United States lacked, however, was a solid precedent for punishing war criminals in the novel type of armed conflict that it faced.

With little guidance to draw upon, the task of designing a legal system for treating crimes of terror was not easy. From the start, the War on Terror has created a complicated legal landscape in which the courts and policymakers have struggled to maneuver. There are several ways in which that landscape is confusing. For one, for purposes of navigating the LOAC, the nature of the conflict defies traditional definition—as it arguably is neither an interstate (i.e., international) conflict nor an intrastate (i.e., civil) war.<sup>68</sup> The “enemy” is also difficult to define: though “al Qaeda” is loosely used as a synonym for the “enemy” in the War on Terror (and throughout this Article), they are not always one and the same. Although al Qaeda was the basis for the modern, anti-Western radical Islamic movement in general, and the group with whom many other terrorist organizations affiliate and identify today, many other extremist groups operate independently and with varying, regional aims.<sup>69</sup> While distinct from al Qaeda, those groups are still considered “enemies” in the War on Terror.<sup>70</sup>

Moreover, the duration of the conflict is unprecedented. Unlike conflicts or wars where the military objectives on both sides are concrete and therefore amenable to success or failure, the current conflict with terror has the potential to last

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68. See Rona, *supra* note 33, at 56–63 (discussing reasons why neither characterization is an “elegant” fit to the War on Terror).

69. Lunday & Rishikof, *supra* note 2, at 134.

70. See *id.* (noting that these groups’ “association with Al Qaeda has transformed it from a terrorist group into a broader, loose network or conglomeration of Islamic extremist groups and actors who share anti-Western motivations and employ terrorism as their primary means”). There is some suggestion that the al Qaeda organization has been seriously weakened by U.S. counterterrorism efforts since 9/11 and that it is “at the point of collapse.” Daniel L. Byman, *The History of Al Qaeda*, BROOKINGS (Sept. 1, 2011), <http://www.brookings.edu/research/opinions/2011/09/01-al-qaeda-history-byman>. Regardless of whether that is true, the threat of terrorism from al Qaeda’s affiliate terrorist networks and groups remains as strong as ever: “In Iraq, Yemen, Somalia, and the Maghreb, strong affiliate organizations are in rebellion against their governments. In Afghanistan and Pakistan, like-minded groups are also up in arms. . . . [T]hese organizations vary in how much control the al Qaeda core in Pakistan exerts over them, and how much their focus is global rather than local. But they share at least some of al Qaeda’s ideology and goals.” *Id.*

indefinitely.<sup>71</sup> Finally, both domestic and international legal and ethical standards have evolved considerably in the last several decades, suggesting that, as a society, the United States no longer accepts the same standards that have governed the government's conduct in past wars.<sup>72</sup> As legal historian John Fabian Witt points out, it would be "silly to deny the vast differences that separate the present day from the age that witnessed the rise of the modern laws of war."<sup>73</sup> Not only has the nature of armed conflict changed over time, but so too has society's awareness of conflict and the government's conduct in it, thanks in large part to the twenty-four-hour news cycle and video technology.<sup>74</sup> In this new social and legal landscape, both the executive and the judiciary have been challenged to (re)define the crime of international terrorism in the context of the War on Terror, and also to determine the most effective, moral, and fair way to punish it.

The unique nature of the conflict, unknown to this country's history with war, thus understandably called for a new system of trial and punishment. The next Subsection considers the evolution of the War on Terror legal systems since 9/11. First, it reviews the military track on which the War on Terror began. Second, it explains the civilian, or law enforcement, track that has now become dominant in the executive's war strategy. That system is still developing, with the legal precepts for punishment, in particular, perhaps the slowest to evolve.

#### 1. The Military Track: The Law-of-War Framework

Initially, the trial and punishment of the operatives in the War on Terror seemed to fall squarely within the jurisdiction of the military branches. Military jurisdiction arises from, among other sources, "that which is derived from international law, including the law of war."<sup>75</sup> From the outset, the acts of terrorism perpetrated by al Qaeda networks resembled those that historically violated the international law of war. As the State Department has noted,

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71. The State Department has said that the al Qaeda "threat will be sustained over a protracted period (decades not years) and will require a global response executed regionally, nationally, and locally." *The Terrorist Enemy*, U.S. DEP'T OF STATE, <http://2001-2009.state.gov/s/ct/enemy/index.htm> (last visited Apr. 8, 2013).

72. See Schabas, *supra* note 43, at 464 ("[A]fter initial suggestions that it fell within the reserved domain of sovereign states[,] . . . criminal law has become imbued with legal principles derived from international human rights law that barely existed in 1945.").

73. WITT, *supra* note 5, at 372. He continues: "The sheer density of the relevant treaties, for example, is an utter novelty of the past sixty years." *Id.*

74. *Id.*

75. DEPARTMENT OF THE ARMY, FM 27-10, THE LAW OF LAND WARFARE, ch. 1, § 1 (1956). In the Civil War era, the judge advocates understood the authority of military commissions to derive from the common law of war. WITT, *supra* note 5, at 270.

The al-Qaida network has many of the characteristics of a “globalized insurgency” and employs subversion, sabotage, open warfare and, of course, terrorism. It seeks weapons of mass destruction or other means to inflict massive damage on the United States, our allies and interests, and the broader international system. [Al-Qaida] aims to overthrow the existing world order and replace it with a reactionary, authoritarian, transnational entity.<sup>76</sup>

Consistent with that description, in the years immediately following 9/11, the government deemed these operatives to be enemy combatants, subject to detention for the duration of hostilities pursuant to the LOAC, and tried them by military commission<sup>77</sup>—“panel[s] of military officers convened by military authority to try enemy belligerents on charges of a violation of the law of war.”<sup>78</sup>

That system was born with President Bush’s November 2001 order announcing that military tribunals could be used to try noncitizens suspected of involvement in the 9/11 attacks.<sup>79</sup> As the operational complement to that order, Congress passed the Authorization for Use of Military Force (AUMF), authorizing the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . *in order to prevent* any future acts of international terrorism against the United States.”<sup>80</sup> After the Supreme Court held that the initial military commission system contravened the Uniform Code of Military Justice (UCMJ),<sup>81</sup> Congress responded by enacting the 2006 Military Commissions Act (MCA),<sup>82</sup> concluding that terrorism as a method of armed conflict was a “modern-day war crime[]” and, as such, a “practice[] contrary to the law of nations.”<sup>83</sup> Congress passed a revised MCA in 2009.<sup>84</sup>

Significantly, both the 2006 and 2009 MCAs addressed the crime of supporting terrorism, which the previous statutory treatment of international war crimes

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76. *The Terrorist Enemy*, *supra* note 71.

77. Robert M. Chesney, *Terrorism, Criminal Prosecution, and the Preventive Detention Debate*, 50 S. TEX. L. REV. 669, 671 (2009).

78. ELSEA, *supra* note 29, at 17. Military commissions are distinct from a military court martial, which tries service members for violations of military law. *Id.*

79. Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

80. Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 (2012)) (emphasis added).

81. *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006).

82. Pub. L. No. 109-366, 120 Stat. 2600 (2006).

83. H.R. REP. NO. 109-664, pt. 1, at 25 (2006).

84. Pub. L. No. 111-84, tit. XVIII, 123 Stat. 2190, 2574 (2009) (codified at 10 U.S.C. § 47A (2012)).



did not include.<sup>85</sup> In particular, section 950v(b)(25) of the 2006 MCA made punishable the offense of providing material support or resources to those “who . . . ha[ve] engaged in hostilities . . . or who ha[ve] purposefully and materially supported hostilities against the United States or its coalition partners.”<sup>86</sup> It applies to those who have provided “material support or resources to an international terrorist organization engaged in hostilities against the United States.”<sup>87</sup> The 2006 MCA thus “clarified the scope of the Executive’s authority to try war crimes,”<sup>88</sup> adding crimes that include conspiracy and material support for terrorism to the “generic” international law of war.<sup>89</sup>

As such, the *jurisdiction* of the military commissions is not in serious doubt. Military commissions have long been authorized to try war crimes committed by the enemy, which, after 2006, include materially supporting terrorism.<sup>90</sup> And the government has made clear that it views the conflict with al Qaeda and its syndicates as an “armed conflict” that triggers some, though not all, provisions of the LOAC.<sup>91</sup> As two preeminent national security scholars have noted,

85. The preexisting statute that authorized war crimes military commissions referred to violations of the “law of war” and cross referenced the international law of war in particular. 10 U.S.C. § 821 (2012). The “generic” law of war, incorporated in section 821, included spying and aiding and abetting the enemy. *Id.* §§ 821, 904, 906.

86. *Id.* § 948a(7).

87. *Id.* § 950t(25).

88. *Hamdan v. United States*, 696 F.3d 1238, 1246 (D.C. Cir. 2012).

89. *Id.*; see Military Commissions Act of 2006, Pub. L. No. 109-366, § 3, 120 Stat. 2600, 2630 (2006) (codified at 10 U.S.C. § 950t) (2012).

90. *Hamdan*, 696 F.3d at 1245.

91. As Corn and Jensen argue, there is some ambiguity over the extent to which the LOAC applies to the conflict with al Qaeda, as it defies strict classification as international within the meaning of Common Article 2 of the Geneva Conventions, or noninternational within the traditional meaning of Common Article 3 of the Geneva Conventions. “Because transnational armed conflicts are not, like their international counterparts, governed by the full corpus of the [LOAC,]” the extent to which those rules apply in the conflict with al Qaeda remains something of an open question. Geoffrey Corn & Eric Talbot Jensen, *Transnational Armed Conflict: A “Principled” Approach to the Regulation of Counter-Terror Combat Operations*, 42 *ISR. L. REV.* 46, 58 (2009). Some urge that ordinary law enforcement rules (i.e., criminal law) apply rather than the laws of war. See, e.g., Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 *YALE J. INT’L L.* 325 (2003); Rona, *supra* note 33; Kenneth Roth, *The Law of War in the War on Terror*, in *THE U.S. VS. AL QAEDA* 133 (Gideon Rose & Jonathan Tepperman eds., 2011).

The applicability and scope of the corpus of the LOAC to the War on Terror is complex, and well beyond the scope of this Article. It is clear, however, that the government has operated, and continues to operate, on the view that the War on Terror is an armed conflict, and that the al Qaeda terrorist fighters are not lawful combatants and therefore not entitled to the protections of the Third or Fourth Geneva Conventions, which extend certain rights to prisoners of war and civilians

The assumption that the “war on terror,” so understood, is such a conflict—and is not, or not only, a matter of domestic law enforcement—has been recognized by Congress, the U.S. Supreme Court, the UN Security Council, and the North Atlantic Treaty Organization (NATO). Other courts reviewing the legality of military actions in situations of terror that are similar to the United States’ conflict with al Qaeda have also concluded that the LOAC—as distinct from domestic criminal law—provides the appropriate rules of decision.<sup>92</sup>

This view is not unique to conservative scholars and the Bush Administration.<sup>93</sup> As one author notes, “It did not take long for the Obama administration to demonstrate that it was not about to abandon an armed conflict-based approach to dealing with the al Qaeda threat.”<sup>94</sup> In particular, the United States continues to use combat power against al Qaeda operatives, including the use of deadly force as a measure of first resort through targeted or drone killings, which is “an unavoidable indicator that the United States continues to rely on an armed conflict-based legal framework.”<sup>95</sup>

However, there have only been a handful of trials by military commission for a material support offense under the UCMJ. The case of *Hamdan v. Rumsfeld* is

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during conflict. See Rona, *supra* note 33, at 66; Tung Yin, *Ending the War on Terrorism One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARV. J.L. & PUB. POL’Y 149, 154 (2005); John Bellinger, *Armed Conflict with al Qaida?*, OPINIO JURIS (Jan. 15, 2007), <http://opiniojuris.org/2007/01/15/armed-conflict-with-al-qaida>.

92. Delahunty & Yoo, *supra* note 35, at 803-04.

93. “Military commissions trying enemy belligerents for war crimes apply directly the international law of war, without recourse to domestic criminal statutes *unless such statutes are declaratory of international law.*” ELSEA, *supra* note 29, at 30 (emphasis added); see U.S. ARMY JAG, LAW OF WAR HANDBOOK 20 (Keith E. Pulse ed., 2005) (“The sources of military jurisdiction include the Constitution and international law. International law includes the law of war.”).

In 2012, the D.C. Circuit was confronted with the question of whether material support for terrorism was a preexisting international law war crime under 10 U.S.C. § 821. It held that it was not. Although the 2006 MCA explicitly defined material support for terrorism as a war crime (after Hamdan’s offense), it held that “the Military Commissions Act [does] not . . . retroactively punish new crimes” and therefore “Hamdan’s conviction for material support for terrorism cannot stand.” *Hamdan*, 696 F.3d at 1241.

94. Geoffrey S. Corn, *Self-Defense Targeting: Blurring the Line Between the Jus ad Bellum and the Jus in Bello* 57, 63 (SSRN Elec. Library, Working Paper No. 1,947,838, 2011), <http://ssrn.com/abstract=1947838>.

95. *Id.*; see U.S. DEP’T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA’IDA OR AN ASSOCIATED FORCE, [http://msnbcmedia.msn.com/i/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf).

perhaps the best known.<sup>96</sup> Hamdan was, famously, Osama bin Laden's bodyguard and chauffeur. In November 2001, he was captured in Afghanistan while driving a vehicle containing anti-aircraft missiles and other military equipment, as well as al Qaeda documentation allowing him to have these weapons in Afghanistan.<sup>97</sup> He was turned over to U.S. military forces and transferred to the detention facility at Guantánamo Bay.<sup>98</sup> Hamdan was convicted on five specifications in his charge,<sup>99</sup> and sentenced to sixty-six months, which was reduced to five-and-a-half months for time served.<sup>100</sup> His conviction was vacated in 2012.<sup>101</sup>

That relative inactivity is indicative of the military commissions' difficult history. Their detractors have been vocal. Less—if ever—discussed, however, are the aspects of these tribunals that recommended them. Most notable among the commissions' positive features is their sentencing system. The War on Terror commissions follow the UCMJ rules for sentencing, which provide for jury deliberation and determination of the punishment.<sup>102</sup> In cases like *Hamdan*, juries sentence terrorist operatives by taking into account aggravating and mitigating circumstances when proposing and then voting on the sentence. As compared to federal court cases, that sentencing system has led to comparatively lenient sentences.<sup>103</sup> Also, unlike past tribunals, which were always ad hoc, these military commissions could have become institutionalized as part of a standing tribunal. A standing tribunal could, in theory, incorporate the relevant laws of war in the context of sentencing and develop a principled body of sentencing law in the context of armed conflict. These features of the commissions created some potential for the U.S. military to develop a law of punishment and sentencing specific to armed conflict, and to do so fairly and consistent with modern sensibilities of war.

That potential was largely lost amid the general public disapproval of the commissions and the knee-jerk movement to the civilian track. Probably because of the public outcry, there was little effort to import any aspects of the military model to the civilian one—including those that were, at face value, quite desirable and fair. The civilian system now used, while coherent within the four corners of Article III and the criminal code, is almost entirely divorced from the military model and the history behind it.

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96. 548 U.S. 557 (2006).

97. See *Hamdan*, Br. for the Gov't, *supra* note 12, at 33-34 (citing to the record and various government exhibits).

98. *Id.* at 13.

99. *Id.* at 14.

100. *Id.*

101. See *Hamdan*, 696 F.3d 1238.

102. See UNIFORM CODE OF MILITARY JUSTICE R. 1001(b)(4), 1001(c), 1006.

103. Daphne Eviatar, *Military Commissions Are a Terrorist's Best Bet*, HUFFINGTON POST (Feb. 11, 2010), [http://www.huffingtonpost.com/human-rights-first/military-commissions-are\\_b\\_458315.html](http://www.huffingtonpost.com/human-rights-first/military-commissions-are_b_458315.html).

## 2. Civilian Criminal Trials: The Law Enforcement Framework

At least initially, the civilian system was seen as an important complement to—rather than a replacement for—the military system:

Criminal punishment and military detention serve some similar—but not identical purposes, and one or the other might be called for depending on the circumstances of the particular subject. Some persons could be appropriately dealt with under either system. There may well be persons who cannot be proven guilty beyond a reasonable doubt, yet who the government can justify detaining as enemy combatants because they fall within the terms of the Authorization to Use Military Force and they have taken up arms against the United States.<sup>104</sup>

However, as the conflict has worn on, the government has increasingly turned to the nonmilitary—that is, law enforcement—track for pursuing its war aims by prosecuting terrorist operatives in civilian courts.<sup>105</sup> Indeed, the civilian system has, essentially, wholly replaced the military system in the government’s preventative prosecution strategy.

Several reasons account for this shift. For one, as compared to their civilian counterpart, “military commissions have been far less fruitful tribunals.”<sup>106</sup> The commissions have convicted in only six cases since 9/11.<sup>107</sup> The remaining cases have been “stalled” or removed to the civilian courts.<sup>108</sup> Perhaps most damning, “major questions surrounding the military commissions are still unresolved, and they will likely need to be addressed by the Supreme Court in order for the commissions to become a reliable and authoritative source of decision making altogether.”<sup>109</sup> As one scholar notes, “despite all of the attention that has been paid toward military commissions, the real adjudicative action vis-à-vis foreign terrorists” is in the Article III courts.<sup>110</sup>

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104. Tung Yin, *Coercion and Terrorism Prosecutions in the Shadow of Military Detention*, 2006 B.Y.U. L. REV. 1255, 1326; see also *Johnson v. Eisentrager*, 339 U.S. 763, 793 (1950) (Black, J., dissenting) (stating the basic principle of immunity from murder charges resulting from legitimate warfare).

105. Some scholars go so far as to argue that the criminal law framework is, in fact, the *only* appropriate legal framework applicable to cases of terrorism. See sources cited *supra* note 91.

106. Sara A. Solow, *Prosecuting Terrorists as Criminals and the Limits of Extraterritorial Jurisdiction*, 85 ST. JOHN’S L. REV. 1483, 1492 (2011).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 1491 & n.24 (noting that, according to the Center on Law and Security at New York University, from September 11, 2001 through September 11, 2010, the United

Modern antiterrorism legislation<sup>111</sup> dates to the early 1960s, with the enactment of a statute implementing an international convention against air piracy.<sup>112</sup> In the following decades, various international antiterrorism treaties, and their domestic implementing legislation, responded to particular, isolated “political events.”<sup>113</sup> However, the government quickly realized it needed a different prosecutorial tool to advance the War on Terror that was geared toward prevention, not reaction. As Attorney General Ashcroft explained to Congress immediately after 9/11, “at the command of the President of the United States, I began to mobilize the resources of the Department of Justice toward one single, overarching and overriding objective: to save innocent lives from further acts of terrorism.”<sup>114</sup> In line with that goal, the Department of Justice henceforth aimed to “prevent first, prosecute second.”<sup>115</sup>

To effectuate a preventative prosecutorial strategy, the government had to resort to a particular statutory arsenal—the material support statutes, codified at 18 U.S.C. §§ 2339A and 2339B. The purposes of these two statutes are to “prevent persons within the United States, or subject to the jurisdiction of the United

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States government brought 998 criminal indictments against persons for terrorism-associated crimes).

111. The U.S. Code defines a federal crime of terrorism as any action “to intimidate or coerce a civilian population or to influence the conduct or policy of a government through the use of coercion or mass destruction and other serious offenses.” 8 U.S.C. § 2332b(g)(5) (2012). Title 18 has a chapter called terrorism, which includes homicide and use of biological or nuclear weapons. 18 U.S.C. ch. 113B (2012). However, with respect to several of the statutes in this chapter, which are used to prosecute terrorism offenses, nothing in the statutory language ties the offense to terrorism per se. “In some cases it may, therefore, not be the elements of an offense but rather the placement or heading of the statute that defines whether a crime is deemed an act of terrorism.” Demleitner, *supra* note 11, at 38. Also, it bears noting that some executive agencies have promulgated their own definitions of “terrorism” as well. The FBI, for instance, defines terrorism as “the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.” *Id.*
112. Demleitner, *supra* note 11, at 38-39; see TERRORIST TRIAL REPORT CARD, *supra* note 3, app. A (listing the statutes used to prosecute terrorism offenses, including those not directly related to terrorism or national security).
113. Demleitner, *supra* note 11, at 39.
114. *Dep’t of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 310 (2001) (statement of John Ashcroft, Att’y Gen. of the United States); see also Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 26-34 (2005) (discussing the Department of Justice’s emphasis on prevention post-9/11).
115. *Homeland Defense: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 9 (2001) (statement of John Ashcroft, Att’y Gen. of the United States).

States, from providing material support or resources to foreign organizations [or individuals] that engage in terrorist activities.”<sup>116</sup> Material support includes any tangible or intangible property or service, including training or expert advice or assistance.<sup>117</sup>

The two statutes are similar, but serve distinct purposes. Section 2339A does not require that material “support be given to a designated foreign terrorist organization because Congress intended it to cover the provision of . . . support to even non-designated terrorist organizations, so long as such support was provided in furtherance of the specified crimes.”<sup>118</sup> In this sense, section 2339A functions like a terrorism-aiding-and-abetting statute.<sup>119</sup> “Prior to 9/11, § 2339A was rarely used; but in the years since the 9/11 attacks, over twenty defendants have been charged with at least fifty offenses under § 2339A.”<sup>120</sup>

Even so, section 2339A has been used less frequently than section 2339B, which prohibits material support to organizations formally designated as “foreign terrorist organizations”<sup>121</sup> (FTOs) by the Secretary of State.<sup>122</sup> Like section

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116. H.R. REP. NO. 104-383, at 58 (1995).

117. The U.S. Code defines the term “material support or resources” to include “any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.” 18 U.S.C. § 2339A(b) (2012). On December 17, 2004, Congress passed the Intelligence Reform and Terrorism Prevention Act (IRTPA), which amended the Antiterrorism and Effective Death Penalty Act (AEDPA). In enacting IRTPA, Congress amended the definition of “material support or resources” to include an additional ban on providing “service.” Pub. L. No. 108-458, § 6603, 118 Stat. 3762, 3762 (2004) (codified at 18 U.S.C. § 2339A(b)). Congress also defined for the first time the terms “training” and “expert advice or assistance,” § 6603, 118 Stat. at 3762 (codified at 18 U.S.C. § 2339A(b)(2)-(3)), and clarified the prohibition against providing “personnel” to designated organizations, § 6603, 118 Stat. at 3762 (codified at 18 U.S.C. § 2339B(h) (2012)).

118. ZABEL & BENJAMIN, *infra* note 122, at 32.

119. Chesney, *supra* note 114, at 12-13.

120. ZABEL & BENJAMIN, *infra* note 122, at 32.

121. See CHARLES DOYLE, CONG. RESEARCH SERV., TERRORIST MATERIAL SUPPORT: A SKETCH OF 18 U.S.C. 2339A AND 2339B, at 26 (2010). A “Foreign Terrorist Organization” is an organization designated as such pursuant to section 219 of the Immigration and Nationality Act. *Id.* To qualify, the organization must either engage in “terrorist activity,” as defined in 8 U.S.C. § 1182(a)(3)(B) (2012), engage in “terrorism,” as defined in 22 U.S.C. § 2656f(d)(2) (2012), or “retain the capability and intent to engage in terrorist activity or terrorism.” 8 U.S.C. § 1189(a)(1)(B) (2012).

122. RICHARD B. ZABEL & JAMES J. BENJAMIN, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS 32 (2008).

2339A, section 2339B was rarely used before 9/11.<sup>123</sup> Since then, however, the government has used it extensively to “prosecute an organization’s foot soldiers and sympathizers.”<sup>124</sup>

In many ways, section 2339B is more powerful than section 2339A, and intentionally so. It was enacted to close perceived loopholes in section 2339A that permitted those who claimed they were merely donating to charity to escape a material support charge.<sup>125</sup> That loophole was closed by the adoption of a particular mens rea requirement, which was crafted to capture a broad spectrum of conduct, along a rather generous time horizon relative to the commission of the putative offense. Specifically, to be convicted of section 2339B, the government need only prove that the defendant knew that the organization at issue was an FTO or, more simply, knew that the organization is or was somehow involved with terrorism or terrorist acts.<sup>126</sup> To reiterate: to violate section 2339B, an individual merely has to know that the recipient of the support or resources is engaged with terrorism—it is irrelevant whether a defendant knows how or to what end the support or resources will be used. By extension, even if the individual intends for support or resources to be used lawfully (or is ambivalent and ignorant as to their end-use), he is still guilty of section 2339B if he has knowledge of the organization’s illicit *raison d’être*.<sup>127</sup>

Finally, the preventative power of both sections 2339A and 2339B is bolstered by their extraterritorial reach—they extend to anyone in the United States, to offenses that occur at least in part in the United States, and to offenses that affect interstate commerce.<sup>128</sup> That statutory language thus captures conduct committed abroad, by defendants acting entirely abroad.

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123. *Id.* at 35.

124. *Id.* (quoting Tom Stacey, *The “Material Support” Offense: The Use of Strict Liability in the War Against Terror*, 14 KAN. J.L. & PUB. POL’Y 461, 463 (2005)).

125. McLoughlin, *supra* note 4, at 65.

126. As amended, AEDPA now provides in part: “Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.” 18 U.S.C. § 2339B(a)(1) (2012) (emphasis added).

127. See David H. Pendle, *Charity of the Heart and Sword: The Material Support Offense and Personnel Guilt*, 30 SEATTLE UNIV. L. REV. 777, 777-78 (2007). Challenges to the statute based on that knowledge standard have been uniformly rejected. See, e.g., *United States v. Assi*, 414 F. Supp. 2d 707, 718 (E.D. Mich. 2006); *United States v. Marzook*, No. 03-CR-0978, 2005 WL 3095543 (N.D. Ill. Nov. 17, 2005); *United States v. Paracha*, No. 03-cr-1197, 2004 WL 1900336 (S.D.N.Y. Aug. 24, 2004).

128. See 18 U.S.C. § 2339B(d).

Precisely because they are so amenable to prosecuting inchoate terrorist offenses, the material support statutes have been one of the most widely used prosecutorial tools in al Qaeda-related cases.<sup>129</sup> One study reviewing 107 post-9/11 prosecutions of international Islamist terrorism filed between September 11, 2007 and December 31, 2011 found that material support charges were by far the most common and yielded a conviction rate of over ninety percent.<sup>130</sup> In a more recent study, conducted in 2011, the NYU Center on Law and Security reviewed 1,054 “terror-related” cases,<sup>131</sup> with a focus on 578 cases that involved “violent and non-violent crimes, all inspired by jihadist ideas.”<sup>132</sup> This empirical research also found that the material support statutes were among the most common charges to have been brought against terrorist operatives, particularly since 2009.<sup>133</sup> The NYU report found an eighty-seven percent conviction rate with an average sentence of fourteen years.<sup>134</sup> These data confirm that material support charges are a critical component of the executive’s strategy of preventative prosecutions.

Given the government’s embrace of the criminal law strategy, the continued use of the military system for trial and punishment is unlikely.<sup>135</sup> Yet rejection of that forum has its drawbacks. Most notably, pushing aside the military context wholesale has also pushed into obscurity its sources of law and reference point: the military and international laws and customs of war. As a result, that perspective has been largely absent from the civilian courts’ approach to punishment. The next Part argues that this loss of perspective makes for poor sentencing policy with an adverse impact on national security.

## II. CIVILIAN COURTS’ PUNISHMENTS IN THE WAR ON TERROR

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129. As others have noted, however, the DOJ’s preventive strategy sometimes requires prosecutions for offenses that are not, on their face, linked to terrorism, particularly where material support prosecutions might “reveal publicly that [the government] believes that the defendant is connected to terrorism.” ZABEL & BENJAMIN, *supra* note 122, at 51. “This strategy has proved effective because individuals who enter the United States to commit terrorist acts are likely to violate other laws, including statutes regarding immigration, financial, or credit-card fraud, or the laws related to procuring false documents or making false statements to federal officials.” *Id.*

130. *Id.* at 23, 28, 58.

131. Terror-related cases are defined as “all federal criminal prosecutions since September 11, 2001 that the Justice Department claims are terror-related.” TERRORIST TRIAL REPORT CARD, *supra* note 3, at 7.

132. *Id.*

133. In particular, the report found that “[s]ince 2007, material support has gone from being charged in 11.6% of cases to 69.4% in 2010.” *Id.* at 19. As of September 2011, 87.5 percent of cases involved a material support charge. *Id.*

134. *Id.* at 7.

135. See Chad Bray & Ashby Jones, *Arrest Raises Issues of Where To Try Terror Suspects*, WALL ST. J., Mar. 7, 2013, <http://online.wsj.com/article/SB10001424127887324582804578346632329504930.html>.



Part I discussed the United States' historical experience with the laws and customs of war, and its efforts to adapt those laws to the War on Terror. Part II explores these efforts further, particularly where punishment is concerned, through the United States Sentencing Guidelines for international terrorism.<sup>136</sup> It argues that the Sentencing Guidelines, which were designed with domestic criminal law concerns in mind, are not for use in war or armed conflict.<sup>137</sup> The terrorism guidelines do not interface with the laws and customs of war or consider the executive's broader military strategy for fighting the global War on Terror.

Part II argues for a revision and perspective shift. It first explains how the Sentencing Guidelines currently operate in War on Terror cases and demonstrates how their application is inappropriate to this conflict's context, from both legal and policy perspectives. It then urges development of a new law of sentencing, still within the Sentencing Guidelines framework, but more appropriately designed to address the exigencies of the War on Terror. Even though the Sentencing Guidelines operate within the criminal law framework, as applied to punish terrorists, they are inextricable from the United States' objectives in the conflict with al Qaeda. Bearing that in mind, there is a proper place for law-of-war and military-justice principles in any sentencing paradigm that punishes these crimes of terror.

Part II then identifies which of these principles and sentencing purposes should inform a revision of the Sentencing Guidelines. It also addresses several examples from the case law to illustrate why the current guidelines system fails to serve the objectives of this conflict, which include the desire to punish criminals and the aim of stopping terrorism.

A. *The Sentencing Guidelines and International Terrorism Cases*

1. The Sentencing Guidelines Framework: The "Terrorism Enhancement"

After the Supreme Court's 2005 decision in *United States v. Booker*<sup>138</sup> and the related cases that followed in its wake, federal courts are required to consider the

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136. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified in scattered sections of 18 & 28 U.S.C.).

137. See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 230-51 (1993).

138. 543 U.S. 220 (2005).

Sentencing Guidelines in fashioning an initial sentencing range. That range derives from the calculation and cross-referencing of a “base offense level” and a “criminal history” category, and serves as the sentencing court’s starting point, from which the court has discretion to “depart” or “vary” upward or downward to arrive at the final sentence it will impose.<sup>139</sup> In civilian court prosecutions of War on Terror cases, the Sentencing Guidelines are used to sentence terrorists as well.

In 1994, Congress directed the Sentencing Commission to create an “Enhancement” in the Sentencing Guidelines for sentences resulting from crimes involving international terrorism.<sup>140</sup> The Terrorism Enhancement was expanded to its current form in 1996 when Congress passed the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and again in 2001 by the PATRIOT Act.<sup>141</sup>

The result, included as section 3A1.4 in the Sentencing Guidelines, is commonly known as the “Terrorism Enhancement.” Though the PATRIOT Act revised the Terrorism Enhancement after 9/11 to expand the range of qualifying conduct,<sup>142</sup> for the most part, it has basically remained the same since its inception. It provides: “[if] the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than 32, increase to level 32.”<sup>143</sup> The enhancement therefore applies in two scenarios: one, where the sentencing court finds that the defendant’s offense “involved” or was “intended to promote” a federal crime of terror-

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139. See, e.g., *Gall v. United States*, 552 U.S. 38 (2007); *Rita v. United States*, 551 U.S. 338 (2007).

140. McLoughlin, *supra* note 4, at 51. The enhancement went into effect in November 1995, pursuant to the Violent Crime Control and Law Enforcement Act of 1994, which directed the Sentencing Commission to “provide an appropriate enhancement for felonies involving international terrorism.” *Id.* at 59 (internal quotation marks omitted).

141. *Id.* at 51, 60. The USA PATRIOT Act, effective November 1, 2002, made the enhancement apply to offenses which include the harboring or concealing of a terrorist who has committed a crime of terrorism and obstructing the investigation of a crime of terrorism. The PATRIOT Act also expanded the enhancement to apply where the offensive conduct “involved” terrorism, but the actual offense of conviction was not one enumerated in the definition of a federal crime of terrorism. Additionally, the PATRIOT Act amended Application Note 1 (one of a number of supporting, explanatory notes in the Guidelines) to indicate that the enhancement can apply to any criminal act where the goal is to influence the conduct of government by intimidation or coercion, or to intimidate or coerce a civilian population. Application Note 4 was amended to allow for an upward departure, even if the enhancement does not otherwise apply, provided that the final sentence does not exceed the top of the Guidelines’ range had it been adjusted under section 3A1.4 of the Guidelines. McLoughlin, *supra* note 4, at 60-61.

142. See *supra* note 141.

143. U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (2002).

ism; or two, where the court finds the offense was “*calculated* to influence or affect the conduct of government by intimidation or coercion,” even if there was no “federal crime of terrorism.”<sup>144</sup> Notably, the Terrorism Enhancement defines a “federal crime of terrorism” by that same standard, with reference to 18 U.S.C. § 2332b(g)(5), as one that: “is calculated to influence or affect the conduct of government by intimidation or coercion” (and is also a violation of a range of enumerated offenses).<sup>145</sup>

In addition to the Terrorism Enhancement, the current guidelines, as amended by the PATRIOT Act, now set a specific base-offense level for crimes of international terrorism. Now, for example, providing material support to a foreign terrorist organization (i.e., a conviction under sections 2339A or 2339B) carries a base-offense level of 26, which amounts to a term of imprisonment of 63-78 months for a defendant who falls in Criminal History Category I, and 120-150 months imprisonment for a defendant in Criminal History Category VI.<sup>146</sup>

When the Terrorism Enhancement is applied after the initial guidelines calculation (again, which accounts for the base-offense level and criminal history category), the base-offense level increases by 12 points—but by no less than 32 points—and the Criminal History Category increases to VI.<sup>147</sup> Given that ratchet, there is no question that the operation of the Terrorism Enhancement yields longer periods of incarceration in the cases where it applies. Imposing longer sentences on terrorist operatives is certainly not undesirable *per se*, and, as the next Part argues, is necessary in certain cases. But there are other legal and policy problems with the Terrorism Enhancement and the guidelines framework in which it sits, which leave their legitimacy open to criticism.

## 2. The Problems with the Terrorism Enhancement

The guidelines framework, and the Terrorism Enhancement in particular, raises several concerns.<sup>148</sup> Chief among them is the Sentencing Guidelines’ failure to consider sources of international and military law even though, at bottom, these guidelines purport to constrain the scope of the United States’ authority to

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144. 18 U.S.C. § 2332b(g)(5) (2012) (emphasis added).

145. *Id.*

146. U.S. SENTENCING GUIDELINES MANUAL, § 2M5.2 & Sentencing Tbl. (2012). There is a base-offense level of 28 for offenses involving nuclear material, weapons, or facilities; biological agents, toxins, or delivery systems; chemical weapons; other weapons of mass destruction; attempt; or conspiracy. *Id.* § 2M6.1. The base level is 42 if the offense was committed with intent to injure the United States or aid a foreign nation or foreign terrorist organization. *Id.* Criminal History Category is determined by a defendant’s number of criminal history “points,” which is usually a function of his number of prior offenses. *Id.* § 4A1.1.

147. *Id.* § 3A1.4 & Sentencing Tbl. (2002); see Doyle, *supra* note 121, at 11.

148. McLoughlin, *supra* note 4, at 57 (“U.S.S.G. section 3A1.4 represents bad anti-terrorism policy for several reasons.”).

punish international terrorists. In addition, to the extent the Sentencing Guidelines purport to apply U.S. law to punish terrorism, the tension between them and other statutory and constitutional law is equally problematic.

a. The Terrorism Enhancement Ignores Military and International Law

The Sentencing Guidelines do not acknowledge that terrorism in the War on Terror is different from other crimes—or, even, from isolated incidents of terrorism unrelated to the War on Terror. In these cases, the judiciary operates as part of an interbranch war strategy of preventatively prosecuting cases of terrorism, which inevitably involves the courts in carrying out the political and military objectives at stake in the War on Terror.

Were these cases tried by military commissions, law-of-war principles would be relevant in several respects.<sup>149</sup> For one, the question of whether a law of war has been breached determines if an offense is triable by military commission in the first instance.<sup>150</sup> Moreover, both the Bush and Obama Administrations and the Supreme Court believe that the laws of war apply to at least some aspects of this conflict, such as where the authority to detain and the conditions of that detention are concerned.<sup>151</sup> It stands to reason, then, that where civilian courts have

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149. The sources of the law are understood to include “customary principles and rules of international law, international agreements, judicial decisions by both national and international tribunals, national manuals of military law, scholarly treatises, and resolutions of various international bodies.” ELSEA, *supra* note 29, at 6. “The law of war is also sometimes known as the ‘law of armed conflict’ or ‘international humanitarian law.’” *Id.* at 7; see Rona, *supra* note 33, at 55 n.1.

150. The case of *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012), questioned whether the material support statutes could properly be considered war crimes subject to the jurisdiction of a military tribunal. It held that the international law of war does not recognize material support to terrorism as a war crime, but that the U.S. Congress does. *Id.* at 1240.

151. See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004); see Geoffrey Corn & Eric Talbot Jensen, *Transnational Armed Conflict: A “Principled” Approach to the Regulation of Counter-Terror Combat Operations*, 42 ISR. L. REV. 46, 68 (2009) (“When . . . submission [of the opponent] results in the opponent falling under the control of his enemy, detention and treatment during detention become critical regulatory concerns.”); see also Miles P. Fischer, *Applicability of the Geneva Conventions to “Armed Conflict” in the War on Terror*, 30 FORDHAM J. INT’L L. 509 (2006). Notably, the Obama Administration does not consider the geographic scope of the conflict, for purposes of LOAC, to be limited to “hot” battlefields. See John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks on Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011), <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>.

stepped into the adjudicative shoes of the military branch, they too have some obligation to consider the laws and customs of war.<sup>152</sup>

Even more specifically, the laws of war could be seen as relevant to criminal sentencing insofar as sentencing is a particular use of force in conflict. As a general matter, the LOAC is understood to govern the use of force in armed conflict.<sup>153</sup> And punishment and force are hard to divorce in the War on Terror. Imprisonment in this conflict is, after all, an exercise of force that furthers the operational objectives of detention and incapacitation, even if it is also used to punish these criminal acts. The civilian courts' imprisonment serves other arguable military objectives too, such as signaling to the terrorist defendant's cohorts that terrorists will be targeted for punishment when caught fighting unlawfully against the United States. On this view, it is difficult to dispute that the laws of war are relevant to the civilian courts' sentencing practices.

Yet there is no indication that the Sentencing Commission considered the UCMJ, which incorporates the LOAC and international law of war in general,<sup>154</sup> or how those bodies of law operate in the context of the conflict with al Qaeda, when drafting the Terrorism Enhancement and related Sentencing Guidelines provisions. Nor do the guidelines reflect military-justice principles of sentencing. In fact, the operation of the Terrorism Enhancement is directly at odds with the sentencing procedures used by the War on Terror military commissions, which require that the jury deliberate and decide the sentence to be imposed.<sup>155</sup> Under that system, juries consider, among other things, "evidence in aggravation,"

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152. To be clear, this Article does not conflate the military- and criminal-law systems, but rather urges some role for law-of-war, and related military-justice, principles to influence the application of the criminal-sentencing law in situations of armed conflict. The law of war is a *lex specialis*, triggered by an armed conflict, and therefore arguably applicable to the War on Terror. The view of the International Committee of the Red Cross is that, even where applicable, the LOAC does not *displace* conflicting *lex generalis*, like domestic criminal law, "which is also capable of covering war crimes." Rona, *supra* note 33, at 56 n.3. In short, there is room to include the law of war's core principles in the domestic sentencing analysis, particularly in situations where this *lex specialis* could be said to apply.

153. See, e.g., Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 391 (1993).

154. See UNIF. CODE OF MILITARY JUSTICE R. 201(a)(b) (providing for courts-martial jurisdiction over persons who violate the laws of war).

155. See Uniform Code of Military Justice art. 21, which requires that, "unless impracticable, the rules for military commissions be the same as the rules for courts-martial used to try members of the U.S. armed forces." See UNIFORM CODE OF MILITARY JUSTICE R. 1000(b)-(d) (establishing the procedure for jury sentencing and delineating what factors that the just may consider); see also *supra* notes 96-100 and accompanying text (explaining that juries have been used to sentence in the military commissions used in the War on Terror).

“matter in extenuation,” and “evidence of rehabilitative potential.”<sup>156</sup> By its procedural nature, military jury sentencing affords for a more factored and gradated sentencing analysis than does the current guidelines approach.

b. The Terrorism Enhancement Diverges from Domestic Law

As applied to War on Terror cases, the Sentencing Guidelines also seem in tension with U.S. statutory law. In particular, the operation of the Terrorism Enhancement is inconsistent with the statutes that criminalize terroristic acts.<sup>157</sup> One source of that inconsistency is the irrelevancy to the Terrorism Enhancement of a defendant’s motivation for committing the offense, while the statutes themselves often distinguish between violent and financial crimes.<sup>158</sup> Consider, for instance, the varying penalties in 18 U.S.C. §§ 2332a, 2332b, and 2332d. Section 2332a, which addresses the use of weapons of mass destruction, provides for a prison sentence of “any term of years or for life”; and, if death results, the offender may be sentenced to death.<sup>159</sup> Section 2332b deals with acts of terrorism “transcending national boundaries”<sup>160</sup> and criminalizes killing, kidnapping, or maiming any person in the United States, as well as any assault on a person in the United States that results in serious bodily harm or is conducted with a deadly weapon.<sup>161</sup> The maximum penalty for those crimes ranges from ten years (for threats to commit those offenses), thirty years (for a related assault resulting in serious bodily injury), thirty-five years (for maiming), life imprisonment (for kidnapping), to the death penalty (if a death results).<sup>162</sup> Section 2332d addresses the financial crimes of any individual in the United States who “knows or has reasonable cause to know that . . . a country [is] supporting international terrorism” and enters into a financial transaction with that country’s government.<sup>163</sup> The maximum penalty for that crime is ten years in prison.<sup>164</sup>

156. UNIF. CODE OF MILITARY JUSTICE R. 1000(b)(4)(5), 1000(c).

157. See generally McLoughlin, *supra* note 4 (making this argument).

158. ZABEL & BENJAMIN, *supra* note 122, at 41.

159. 18 U.S.C. § 2332a (2012).

160. Legislative history shows that Congress had in mind terrorist acts that “are in some fashion or degree instigated, commanded, or facilitated from outside the United States.” 141 CONG. REC. 11,958 (1995) (statement of Thomas Daschle); see also H.R. REP. NO. 104-383, at 83 (1995) (“[O]nly those terrorist crimes that are truly transnational in scope will be prosecuted under this section.”).

161. 18 U.S.C. § 2332b(C)(1) (2012).

162. *Id.* For examples of cases prosecuted under this statute, see, for example, *United States v. Bin Laden*, 93 F. Supp. 2d 484 (S.D.N.Y. 2000); and *United States v. Reid*, 206 F. Supp. 2d 132 (D. Mass. 2002).

163. 18 U.S.C. § 2332d(a) (2012).

164. *Id.*

The material support statutes, which play a central role in these terrorism prosecutions, similarly distinguish between violent and financial conduct. Section 2339A initially set the maximum penalty at ten years, and was amended by the PATRIOT Act to allow a maximum of fifteen years, or life imprisonment if a death results.<sup>165</sup> Section 2339B allows for a maximum sentence of fifteen years, or life imprisonment if a death results.<sup>166</sup> Section 2339C, which was enacted as part of the Anti-Terrorism Convention of 2002,<sup>167</sup> punishes the provision of funds when one knows or intends that they will be used for terrorism.<sup>168</sup> Section 2339C distinguishes between defendants who *know* or intend that the funds will be so used, and those who do not act knowingly.<sup>169</sup> If the government proves that the defendant acted with the intent that the funds be used—or with knowledge that funds will be used—to fund a specific act of terrorism, the maximum penalty is twenty years.<sup>170</sup>

Based on the penalties delimited by the statutes themselves, it seems clear that “Congress did not intend to punish a financial supporter of a[n] FTO or organization that commits a terrorist act as severely as an individual who commits the act itself.”<sup>171</sup> As others have observed, by “[c]harting these and other anti-terrorism statutes, it appears that the penalties are meant to be proportional to the culpability of the conduct, to the injury that can be directly attributed to a defendant’s actions, and to the nature of the organization’s actions.”<sup>172</sup> In view of the statutory scheme that seems to treat separately financial and ideological terrorism, it is troubling that the Terrorism Enhancement provides no explicit gradation where motives are concerned.

The Sentencing Guidelines applied to al Qaeda terrorism also suffer constitutional infirmities. The right to trial by jury is one constitutional sticking point

165. *Id.* § 2339A(a); see Doyle, *supra* note 121, at 2.

166. 18 U.S.C. 2339B(a)(1) (2012).

167. Suppression of the Financing of Terrorism Convention Implementation Act of 2002, Pub. L. No. 107-197, §§ 202-203, 116 Stat. 724, 724-28.

168. 18 U.S.C. § 2339C(a)(1)-(2) (2012).

169. *Id.* § 2339C(a)(1) (imposing knowledge requirement for conviction).

170. *Id.* § 2339C(d).

171. McLoughlin, *supra* note 4, at 68.

172. *Id.* at 68-69 & tbl. 1. As pointed out in the *National Journal*, “Critics of the terrorism enhancement have seized on this issue of congressional intent to argue that the courts have veered into forbidden territory.” Shane Harris, *The Terrorism Enhancement: An Obscure Law Stretches the Definition of Terrorism, and Metes Out Severe Punishments*, NAT’L J., July 13, 2007, <http://shaneharris.com/magazinestories/terrorism-enhancement-obs-cure-law-stretches-the-definition-of-terrorism-and-metes-out-severe-punishments>. In any event, “[b]y all accounts, Congress hasn’t examined use of the terrorism enhancement since it created it more than a decade ago.” *Id.*

for the Terrorism Enhancement in particular. Where material support, for instance, is charged,<sup>173</sup> the government only needs to prove beyond a reasonable doubt that a defendant knowingly provided support or resources to an FTO. But there is no requirement that the jury also find the defendant knew the funds would be used to support terrorism. Meanwhile, it is a judge, applying the preponderance-of-the-evidence standard, that decides whether the enhancement applies. If the judge finds, without the jury, that the defendant “calculated” his actions to “influence or affect the conduct of government” (or to retaliate against government conduct), the enhancement may apply to skyrocket the sentence for which the defendant is eligible.<sup>174</sup>

That basic sentencing scenario, which involves a court’s power to increase a criminal sentence by reference to facts not found by the jury, was held unconstitutional in *Apprendi v. New Jersey*.<sup>175</sup> There, the Supreme Court judged such practice unconstitutional<sup>176</sup> as a “departure from the jury tradition that is an indispensable part of our criminal justice system.”<sup>177</sup> The Court’s analysis was steeped in historical reflection: it noted that, at common law, “[j]ust as the circumstances of the crime and the intent of the defendant at the time of commission were often essential elements to be alleged in the indictment, so too were the circumstances mandating a particular punishment.”<sup>178</sup> Similar concerns lurk in the background of the sentencing regime considered here,<sup>179</sup> where the application of the Terrorism Enhancement turns on facts not found by a jury, but rather by the court on

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173. This is true at least with respect to prosecutions under section 2339B.

174. Doyle, *supra* note 121, at 12 (discussing the operation and application of the Terrorism Enhancement).

175. 530 U.S. 466 (2000).

176. Since *Apprendi*, the Supreme Court has stated clearly that, “[w]hether the judge’s authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts . . . or *any* aggravating fact (as here), it remains the case that the jury’s verdict alone does not authorize the sentence.” *Blakely v. Washington*, 542 U.S. 296, 305 (2004).

177. *Apprendi*, 530 U.S. at 497.

178. *Id.* at 480.

179. As McLoughlin argues,

No one should doubt that the framers would be troubled by a judge ruling that a sentence that would be no more than fifty-seven months under the Sentencing Guidelines based upon the findings of the jury rises to 180 months based upon a district court judge’s findings, under a preponderance of the evidence standard, that the defendant intended to “influence or affect the conduct of government by intimidation or coercion.”

McLoughlin, *supra* note 4, at 86–87 (citing *United States v. Hammoud*, 381 F.3d 316, 356 (4th Cir. 2004) (Motz., J., dissenting)).



a preponderance of the evidence, and drastically increases the defendant's sentence when it applies.<sup>180</sup>

There are due process concerns with the Sentencing Guidelines as well, where they apply to punish terrorist conduct with a remote connection to the United States. In general, whether a criminal statute applies to conduct outside the United States requires a "nexus" to the United States, which "ensures that a United States court will assert jurisdiction only over a defendant who should reasonably anticipate being haled into court in this country."<sup>181</sup>

The nexus test gets hazy in many War on Terror cases. Compared to acts of terrorism committed within the United States (or those obviously directed at the United States), in some cases the alleged material support was provided exclusively abroad, and the defendants' connection to any U.S.-directed terrorist plot is quite attenuated. Some defendants in these cases have challenged their indictments on these grounds, arguing a lack of U.S. nexus.<sup>182</sup> Academics have also begun to probe this jurisdictional question in some depth.<sup>183</sup> Most courts have, however, shied away from these thorny questions and avoided resolving difficult due process questions.<sup>184</sup>

Yet so long as these constitutional questions remain, the legitimacy of the civilian courts' sentences hangs in some doubt, which, in turn, detracts from the strength of U.S. counterterrorism policy. The following Section explores a way to fix these legal and policy weaknesses in the current Sentencing Guidelines frame-

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180. See U.S. SENTENCING GUIDELINES MANUAL § 5G1.2 & cmt. n.1 (2012) (providing that, in multi-count convictions, a court may impose the sentences to run concurrently to equal the total punishment required by the Guidelines calculation, to the extent allowed by the statute maximum for each count of conviction). Doyle, *supra* note 121, at 11 (noting that the Guidelines call for application of the statutory maximum where a single count of conviction is concerned).

181. United States v. Klimavicius-Viloria, 144 F.3d 1249, 1257 (9th Cir. 1998).

182. See, e.g., United States v. Yousef, 327 F.3d 56, 111 (2d Cir. 2003) ("In order to apply extraterritorially a federal criminal statute to a defendant consistent with due process, there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair." (citation omitted)). There have also been facial challenges to the statute on this ground, with arguments that Congress exceeded its power under the Foreign Commerce Clause to enact the material support and narcoterrorism statutes (both preventative in nature). See, e.g., Memoranda in Support of Motion To Dismiss the Indictment, United States v. Issa, No. 09-cr-1244 (S.D.N.Y. filed Dec. 17, 2010), Dkt. Nos. 31, 35.

183. See, e.g., Solow, *supra* note 110; Dan E. Stigall, *International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in U.S. Domestic Law*, 35 HASTINGS INT'L & COMP. L. REV. 323 (2012) (providing a comprehensive review of jurisdictional approaches to questions of extraterritoriality).

184. See generally Solow, *supra* note 110 (discussing the case law that exists and pointing out that either the defendants have pled guilty prior to the court's resolution of a motion to dismiss or the courts' analyses on these issues has been perfunctory).

work. It proposes developing a new sentencing framework, born of certain sentencing purposes applicable to war, and with reference to bedrock law-of-war and military-justice principles. Such a normative framework could, in turn, animate a new set of sentencing guidelines for punishing criminal offenses perpetrated in the War on Terror.

*B. Punishing Terrorism: Purposes and Principles*

Any theoretical foundation for a new set of sentencing guidelines for terrorism requires a grasp on why the United States has chosen to punish terrorists in civilian courts.<sup>185</sup> This Section thus begins with the traditional criminal law purposes of deterrence and incapacitation, as those purposes are central to the War on Terror strategy. Building from these purposes, this Section considers how certain bedrock principles of war—proportionality and necessity—as well as related military justice principles—mitigating and aggravating circumstances—can be applied to the criminal-law setting and used to develop a new sentencing policy for punishing criminal acts of terrorism.

1. The Purposes of Punishment in the War on Terror

The first reason for punishment in the War on Terror is plainly to prevent and deter terrorism. In general, deterrence—whether of the general public or the specific offender—aims to prevent crime by instilling fear of punishment.<sup>186</sup> Deterrence has a role in wartime punishment as well, and was historically one of the principal reasons for punishing war criminals.<sup>187</sup> Deterrence was, for instance, of

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185. General sentencing theory identifies several basic purposes of sentencing, including deterrence, incapacitation, and rehabilitation. Retribution is also one basis for punishment, though in the context of war,

[t]he satisfaction of instincts of revenge and retribution for the sake of retribution are obviously the least sound basis of punishment. If punishment is to lead to progress, it must be carried out in a manner which world opinion will regard as progressive and as consistent with the fundamental morality of the [American] case.

M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 14 (1992) (quoting Nuremberg Prosecutor Robert H. Jackson).

186. GAIL A. CAPUTO, *INTERMEDIATE SANCTIONS IN CORRECTIONS* 15 (2004).

187. As Professor Mark Weisburd summarizes,

Punishment is inflicted on the basis of individual guilt and justified as deterrence; as removing from society, at least temporarily, a person whose choice to commit a criminal act despite the various costs of doing so suggests that the person may choose to commit other such acts; and, as far as some people are concerned, as justly punishing bad behavior.

Mark Weisburd, *Al-Qaeda and the Law of War*, 11 *LEWIS & CLARK L. REV.* 1063, 1071.

paramount importance at Nuremburg. As Prosecutor Robert H. Jackson underscored,

Punishment of war criminals should be motivated primarily by its deterrent effect, by the impetus which it gives to improved standards of international conduct and, if the theory of punishment is broad enough, by the implicit condemnation of ruthlessness and unlawful force as instruments of attaining national ends.<sup>188</sup>

The UN war crimes tribunals also recognized deterrence as an important reason to punish.<sup>189</sup>

Deterrence is an extremely important objective in the current conflict, in which the punishment imposed should address the defendants as both criminals and unlawful combatants. Ordinarily, deterrence has little relevance to combatants, particularly where the detention of prisoners of war is concerned, as lawful combatants are not considered criminals.<sup>190</sup> Terrorism, however, is a different sort of fight, one that is very much driven in certain cases by ideological fervor. There is also much more at stake behind the deterrence objective here. Compared to ordinary crime, the inability to deter comes at a greater societal price in the War on Terror. Ordinary criminal violence is “perpetrated by relatively small groups of individuals for private ends.”<sup>191</sup> International terrorism, in contrast, is perpetrated by an extensive, interconnected network, as a means to a specific, ideologically driven end.<sup>192</sup> Unlike ordinary crime, where “the material effects on society at large are generally limited,”<sup>193</sup> the material effects of terrorism on American and global societies at large are much more pervasive.<sup>194</sup>

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188. BASSIOUNI, *supra* note 185, at 14 (quoting Nuremburg Prosecutor Robert H. Jackson).

189. See Schabas, *supra* note 43, at 498 (“[R]eferring implicitly to the notion of deterrence, the Security Council affirmed its conviction that the work of the two tribunals will contribute to ensuring that such violations are halted.” (internal quotation marks omitted)); *id.* at 504 (“For the three members of the Trial Chamber, deterrence and retribution are decisive in determining a fit sentence.”).

190. See Yin, *supra* note 91, at 168.

191. Weisburd, *supra* note 187, at 1069.

192. See *id.* (“[I]ndividuals take part in war, not as free agents, but as part of a [terrorist] organization . . .”).

193. *Id.*

194. As Weisburd aptly frames it,

[W]ar either threatens the state with losses many orders of magnitude greater than those caused by crime or offers the state opportunities to make gains so great as to exceed the expected costs of war, as large as those costs necessarily are. It is therefore important for the state to take positive action either to defend itself or to attack . . . in order either to avoid the threatened future harm or ensure the possible future gain. War . . . must

And, importantly, terrorism can be deterred. “With the exception of a relatively small group of decision-makers,” terrorist operatives “participate as agents, not as initiators.”<sup>195</sup> These “[i]ndividual participants understand . . . that war is not intended to and almost surely will not advance their *individual* interests except to the extent that they identify with the interests of the entities they serve.”<sup>196</sup> Deterring international terrorism thus depends on the United States’ ability to sever offenders’ ideological ties to a larger terrorist network. Without those ties of ideology and allegiance, the interest in perpetrating these crimes diminishes.

If deterrence speaks to a strategy of prevention, incapacitation speaks to a strategy of submission.<sup>197</sup> The detention—or incapacitation—of an enemy soldier has always been a critical component of a war effort while hostilities are ongoing. The conflict with al Qaeda continues—and so as much as the civilian system is used to prevent and deter these crimes, it must also be used to incapacitate its perpetrators.

Incapacitation is perhaps even more important in the War on Terror than in the conventional wars in which the United States has engaged given the degree to which ideology motivates its fighters. In conventional wars, lawful combatants are generally not personally dangerous, and there is no reason to think they would “continue efforts to injure the state holding them captive once the authorities they served have agreed to stop fighting.”<sup>198</sup> With al Qaeda fighters, however, the “picture . . . is mixed.”<sup>199</sup> The group’s goals are “purely political.”<sup>200</sup> And, “[t]hough almost surely unachievable, these goals include absolute opposition to the United States and a determination to kill as many Americans as possible.”<sup>201</sup> This suggests that, other things equal, terrorist defendants’ motivation to return to the “battlefield,” if ideologically committed, will be stronger than those engaged in more conventional hostilities with a foreign power.

Lastly, as an aid to the objective of deterrence, rehabilitation also has a role in sentencing terrorist offenders. Admittedly, the idea of rehabilitating criminals in any context is subject to considerable debate. Critics have pointed out its “con-

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have an *ex ante* focus: it must be an effort to actively shape the future rather than merely respond to events in the past.

*Id.* at 1071; see Ruth Wedgwood, *Combatants or Criminals*, in *THE U.S. VS. AL QAEDA* 142, 144 (Gideon Rose & Jonathan Tepperman eds., 2011).

195. Weisburd, *supra* note 187, at 1069.

196. *Id.* (emphasis added).

197. Incapacitation is premised on the ability to exercise control over the criminal in order to prevent his ability to harm society. Selective incapacitation is a decision to target “high risk” or “career criminals.” CAPUTO, *supra* note 186, at 15-16.

198. Weisburd, *supra* note 187, at 1071.

199. *Id.* at 1082.

200. *Id.* at 1081.

201. *Id.*

ceptual weakness,” that “[v]agueness and ambiguity shroud its most basic suppositions.”<sup>202</sup> Chief among its conceptual problems—particularly where terrorism is concerned—is an ignorance of “how to prevent criminal recidivism by changing the characters and behaviour of offenders.”<sup>203</sup>

Yet despite its conceptual thorniness, both the military and international communities bear rehabilitation in mind in their sentencing practices. For instance, the rules governing the operation of the UN war crimes tribunals provide explicitly for the consideration of rehabilitative purposes. Those tribunals’ governing statutes incorporate reference to the International Covenant on Civil and Political Rights, which requires that “[t]he penitentiary system[s] shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.”<sup>204</sup> The U.S. military also considers rehabilitative options in sentencing. The UCMJ instructs the jury in sentencing to consider “[e]vidence of rehabilitative potential,” which “refers to the accused’s potential to be restored, through vocational, correctional, or therapeutic training or other corrective place in society.”<sup>205</sup>

In some limited fashion, the theory could thus prove to be instructive to the normative rationale used for punishing in the War on Terror. At the least, inclusion of some rehabilitative considerations would focus the sentencing courts on the long-term objectives of this war, which include diminishing the root causes of terrorism. And an effort to develop a sentencing framework that also addresses the underlying reasons for terroristic involvement would provide for a more impactful and lasting deterrent effect.

## 2. The Principled Bases for Punishment in the War on Terror

To build up from that theoretical foundation, a new sentencing framework requires principles of law to guide and to justify it. Here, those principles should be reasonableness (proportionality and necessity), and mitigating (and aggravating) circumstances.

Proportionality and necessity are core principles in the law of war,<sup>206</sup> and govern the legality of the use of force in armed conflict. Pursuant to them, force

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202. FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSES* 51 (1981).

203. *Id.* at 34.

204. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171.

205. UNIF. CODE OF MILITARY JUSTICE R. 1001(b)(5).

206. Those concepts have distinctive meaning in the contexts of *jus ad bellum* and *jus in bello*. Corn, *supra* note 94, at 6-7; see *NEW WARS, NEW LAWS? APPLYING THE LAWS OF WAR IN 21ST CENTURY CONFLICTS* (David Wippman & Matthew Evangelista

used to achieve a military objective<sup>207</sup> is deemed lawful where it is “not forbidden by international law” and “indispensable for securing the complete submission of the enemy as soon as possible.”<sup>208</sup>

In war, therefore, much is justified by the principle of necessity. Under Lieber’s Code, military necessity justified “[v]irtually any use of force.”<sup>209</sup> Today, the *jus ad bellum* is understood to “restrict[] resort to force by states to situations of absolute necessity,” at which point a state “may use only that amount of force absolutely necessary to meet the threat and restore the status quo ante of security.”<sup>210</sup> But under the *jus in bello*, a state has “the authority to employ *all* measures not otherwise prohibited by international law to bring about prompt submission of the enemy,” including deadly force as a matter of first resort.<sup>211</sup>

Proportionality tempers necessity. In the *jus in bello*, proportionality weighs the collective effects of force against the state’s operational goals. As such, it “must be framed by the broader concept of how it contributes to the legitimate operational objective of compelling enemy submission.”<sup>212</sup> Proportionality has even broader relevance to civilian sentencing courts.<sup>213</sup> It is embedded in the Fourth Amendment to the Constitution,<sup>214</sup> where the “reasonableness” clause

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eds., 2005); Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT’L L.J. 1 (2002); John Yoo, *Using Force*, 71 U. CHI. L. REV. 729 (2004); John B. Bellinger, Legal Adviser to the U.S. Dep’t of State, Speech at Oxford University: Prisoners in War: Contemporary Challenges to the Geneva Conventions (Dec. 10, 2007), <http://www.state.gov/s/l/rls/96687.htm>.

207. It should be noted that military objectives have dual meaning both in legal and policy parlance and this Article. As a legal term of art, a “military objective” is that which qualifies as a proper target under the law of war, and is defined as “objects which by their nature, location, purpose or use, make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.” Protocol I, *supra* note 33, art. 52, para. 2. In the more general sense of the term, and as it is used mostly throughout this Article, “military objective” has operational meaning; that is, it “refer[s] to a goal of a military operation.” TALLIN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE 126 (Michael N. Schmitt ed., 2013).

208. OPERATIONAL LAW HANDBOOK, *supra* note 33, at 11.

209. WITT, *supra* note 5, at 234.

210. Corn, *supra* note 94, at 67.

211. *Id.* at 68.

212. *Id.* at 72.

213. Delahunty & Yoo, *supra* note 35, at 822-23.

214. *Tennessee v. Garner*, 471 U.S. 1, 12 (1985).

governs the legality of executive uses of force in executing laws domestically.<sup>215</sup> And as confirmation that proportionality constrains the legality of the government's conduct in this war, it bears repeating that the AUMF gave the President authority to use "all *necessary and appropriate* force against those responsible" for the 9/11 attacks.<sup>216</sup>

Consideration of mitigating and aggravating circumstances supports the reasonableness of any punishment imposed. At international law, these principles are long recognized. Even the Nuremberg tribunals, whose punishments were largely unexplained or unreasoned, were known to consider aggravating and mitigating circumstances in fashioning a sentence. Although no aggravating factors were specifically mentioned, research suggests that several were "implicitly" accounted for: membership in the SS<sup>217</sup>; "vicious character"<sup>218</sup>; high education and culture levels<sup>219</sup>; and "consistent evasiveness during trial."<sup>220</sup> As for mitigating factors, the tribunals recognized several "justifications" and "excuses," including "independence from the Nazis; . . . active resistance to the Nazi regime;"<sup>221</sup> superior orders; military considerations; legal clarity; and personal characteristics.<sup>222</sup> The UN tribunals followed this approach,<sup>223</sup> with explicit buy-in from the United States.<sup>224</sup>

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215. The Sentencing Guidelines already recognize the general need for proportionality and necessity in sentencing. That requirement, known as the "parsimony requirement," instructs sentencing courts to impose a sentence that is "sufficient, but not greater than necessary." 18 U.S.C. § 3553(a) (2012); see *A Win for the 'Parsimony Clause' of 18 U.S.C. § 3553(a)*, SECOND CIR. SENT'G BLOG, [http://federal-sentencing.typepad.com/developments\\_in\\_federal\\_s/2006/12/a\\_win\\_for\\_the\\_p.html](http://federal-sentencing.typepad.com/developments_in_federal_s/2006/12/a_win_for_the_p.html) (last visited Apr. 11, 2013).
  216. 50 U.S.C. §1541 (Supp. I) (2012) (emphasis added).
  217. "No defendant who was not a member of the SS was ever sentenced to death . . ." HELLER, *supra* note 32, at 322.
  218. *Id.* at 322 ("even by Nazi standards").
  219. *Id.* at 323 ("the idea being that they should have known better than to collaborate with the Nazis").
  220. *Id.*
  221. *Id.*
  222. *Id.* at 325.
  223. See Schabas, *supra* note 43, at 463, 483, 486.
  224. During the drafting of the tribunal statutes, the United States proposed that, "[i]n reaching a sentence, the Trial Chamber shall take into account such factors as the gravity of the offense, the individual circumstances of the convicted person, and the evidence submitted during presentencing, such mitigating circumstances as meaningful and substantial cooperation provided to the Prosecutor by the accused, and the extent to which any penalty imposed by a national court on the same person for the same act has already been served." Suggestions Made by the Gov. of the United States, Rules of Procedure and Evidence for the International Tribunals for

Perhaps most relevant to the terrorism context is the notion of command responsibility, a well-known mitigating factor where military and war crimes are concerned. That consideration “involves an assessment of where the defendant stood within the military or civilian hierarchy.”<sup>225</sup> The Sentencing Guidelines also account for criminal hierarchy, and allow for sentence adjustments based on whether the defendant played an aggravating or mitigating role in the offense.<sup>226</sup>

Related to a defendant’s role, the strength of his commitment to the criminal enterprise of terrorism could also present an aggravating or mitigating circumstance. In that regard, the Trial Chambers of the ICTY consider “substantial cooperation” with the prosecutor and “take into account that the accused surrendered voluntarily to the International Tribunal, confessed, pleaded guilty, showed sincere and genuine remorse or contrition, and stated . . . willingness to supply evidence with probative value against other individuals for crimes falling within the jurisdiction of the International Tribunal.”<sup>227</sup> Similarly, under the Sentencing Guidelines, a defendant is eligible for a two-level reduction in his base-offense level for pleading guilty.<sup>228</sup> And if a defendant substantially cooperates with the government, a court may depart from the Sentencing Guidelines under section 5K, on recommendation from the government.<sup>229</sup> In the terrorism setting, a lack of ongoing ideological commitment—a possible mitigating circumstance—might appropriately be inferred from a defendant’s acceptance of responsibility (by pleading guilty), his testimony at trial, or some other indicia of cooperation with the government.

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In many ways, the Sentencing Guidelines are part of a newly emerging law or custom of war that applies to the War on Terror. However, as applied thus far, to address the legal challenges involved in punishing these war criminals in civilian courts, the guidelines have proven problematic—in some cases too weak, in others too severe, but in most instances a poor guide to the courts as to what punishment is necessary and reasonable.

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the Prosecution of Persons Responsible for Serious Violations of Int’l Humanitarian Law Committed in the Former Yugoslavia, U.N. Doc IT/14, para 26.3; see HELLER, *supra* note 32, at 322-23.

225. Schabas, *supra* note 43, at 489.

226. Section 3B1.1 provides for a two- to four-point increase in the base-offense level for an “aggravating role in the offense” and section 3B1.2 provides for a two- to four-level decrease to the base-offense level for a mitigating role (i.e. if the defendant was a minimal or minor participant). See *Aggravating and Mitigating Role Adjustments Primer §§ 3B1.1 & 3B1.2*, U.S. SENT’G COMMISSION (2012), [http://www.ussc.gov/Legal/Primers/Primer\\_Role\\_Adjustment.pdf](http://www.ussc.gov/Legal/Primers/Primer_Role_Adjustment.pdf).

227. Schabas, *supra* note 43, at 496 (citation omitted).

228. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2012).

229. *Id.* § 5K1.1.



C. *The Cases*

This Section considers the sentencing case law in the War on Terror. It describes the broad spectrum of offenses prosecuted in this conflict, demonstrating why the Sentencing Guidelines do not provide the tools required to punish conduct that spans that spectrum. This Section argues that a revised sentencing framework should provide courts with legal tools to distinguish between gradations of terrorist conduct, consistent with the principles and purposes discussed in Section II.B. In particular, as the case law reveals, courts require tools to distinguish at sentencing among a subgroup of terrorist offenders, which includes what this Article calls terrorist “service providers,” “low-level financiers,” and “sting participants.”

1. The “Hard Core” of Terrorist Conduct

Some terrorist defendants, many of whom are well-known, demand sentences that incapacitate indefinitely. The necessity of containing the threat such defendants pose is, in these cases, proportional to their terroristic acts or attempts, and there are no mitigating circumstances to consider.<sup>230</sup> These defendants will almost surely recidivate—that is, attempt to harm the United States again. In their cases, detention commensurate with the duration of hostilities is justifiable under the LOAC.

The case of Zaccharias Moussaoui, known as the “twentieth hijacker,” is a good example. Moussaoui was the only defendant directly related to the 9/11 attacks to be prosecuted in civilian court. He pled guilty to section 2332b(c)(2) and to conduct “including attending an al Qaeda-led training camp in Afghanistan in 1998, contacting U.S. flight schools by email from Malaysia, enrolling in a flight school in Oklahoma, inquiring about beginning a crop-dusting business, possessing flight manuals for commercial aircraft, placing multiple calls from public telephones to Germany (the location of an alleged al Qaeda terrorist cell), receiving a wire transfer of approximately \$14,000 from Germany, and buying and possessing knives and fighting paraphernalia including shin guards and fighting gloves.”<sup>231</sup> Moussaoui was sentenced to life in prison.<sup>232</sup>

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230. At least one court has used the “hardcore” label. *United States v. Warsame*, 537 F. Supp. 2d 1005, 1019 (D. Minn. 2008).

231. ZABEL & BENJAMIN, *supra* note 122, at 41 (citing Superseding Indictment, *United States v. Moussaoui*, No. 01-CR-455 (E.D. Va. June 19, 2002), Dkt. No. 199).

232. *Id.* at 41-42 (citing Minute Entry, Plea, *Moussaoui*, No. 01-CR-455 (E.D. Va. Apr. 22, 2005); Judgment, *Moussaoui*, No. 01-CR-455 (E.D. Va. May 4, 2006), Dkt. No. 1854. “He was also sentenced to four other life terms, to be served concurrently, under the remaining counts.” See Docket Description of Judgment, *Moussaoui*, No. 01-CR-455 (E.D. Va. May 4, 2006), Dkt. No. 1854).

The conduct in *United States v. Cromitie* is also in the hardcore camp.<sup>233</sup> There, the defendant was convicted of, among other things, multiple counts of conspiracy and attempt to use weapons of mass destruction.<sup>234</sup> At sentencing, the judge found that Cromitie and his codefendants had

engaged in a plot to fire missiles at U.S. military airplanes, which involved, among other things, (1) surveillance at [an] Airport, (2) acquisition of what defendants erroneously believed to be real Stinger missiles, and (3) selection of a precise location from which to fire those weapons. Moreover, during the course of the plot, Cromitie . . . made statements that plainly confirmed [his] intent to destroy the military planes and otherwise injure the United States.<sup>235</sup>

Cromitie was sentenced to twenty-five years' imprisonment.<sup>236</sup>

As a last example, in *United States v. Siraj*, the defendant was charged with four counts of conspiracy related to a plot to bomb the New York City subway station at Thirty-Fourth Street.<sup>237</sup> He was convicted by a jury and sentenced to thirty years in prison.<sup>238</sup>

The sentences in these cases are generally consistent insofar as they are all long—twenty-five years to life in prison. Those sentences, all of which included an application of the Terrorism Enhancement, properly reflect Congress's decision to set terrorism-related sentences at a very high level, in recognition of the serious danger that terrorism poses and the war that the United States is currently fighting against the al Qaeda network.<sup>239</sup> The sentences imposed appropriately and adequately serve the goals of incapacitation and specific deterrence of these high-risk offenders. Life (or long) sentences in prison are proportional to the threat they pose and, for the same reason, are necessary to ensure national security. In short, to the extent that the Sentencing Guidelines currently advise such lengthy and restrictive sentences on this category of offenders, the system functions lawfully and effectively. Yet even where these offenders are concerned, the guidelines system is not above policy reproach. The guidelines do not explain precisely which cases require these lengthy sentences or elaborate the justification for imposing them, making the sentences subject to criticism even if they are lawful and effective.

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233. No. 09-cr-558 2011 WL 2693293 (S.D.N.Y. June 29, 2011).

234. See 18 U.S.C. §§ 2332a, 2332g (2012).

235. *Cromitie*, 2011 WL 2693292, at \*3.

236. Benjamin Weiser, *3 Men Draw 25-Year Term in Synagogue Bomb Plot*, N.Y. TIMES, June 29, 2011, <http://www.nytimes.com/2011/06/30/nyregion/3-men-get-25-years-in-plot-to-bomb-bronx-synagogues.html>.

237. 468 F. Supp. 2d 408, 413-14 (E.D.N.Y. 2007).

238. Judgment, *United States v. Siraj*, No. 05-cr-00104 (E.D.N.Y. Jan. 18, 2007), Dkt. No. 182.

239. See *United States v. Meskini*, 319 F.3d 88, 92 (2d Cir. 2003).

2. A “Soft Core” of Terrorist Conduct

Aside from the hardcore cases, juries try and convict a second group of terrorist defendants whose conduct has less directly threatened U.S. interests, but the prosecution of whom remains an important—and ongoing—part of the executive’s war strategy of aggressive, preventative prosecution. These offenders include service providers, financiers, and sting participants. Overall, their cases illustrate how broad the range of terrorism offense conduct is.

a. Terrorist “Service Providers”

Section 2339A has particularly broad reach over the “service providers” to terrorists. The statute explicitly states that a defendant can be prosecuted for providing himself as personnel,<sup>240</sup> or for providing services, training, or expert advice to a terrorist or a terrorist organization.<sup>241</sup> “[F]ollow[ing] the lead of the statutory definition,” courts have broadly construed the definition of providing these services.<sup>242</sup>

*Holder v. Humanitarian Law Project* is the seminal case on terrorist service provision.<sup>243</sup> In that case, the plaintiffs wanted to support the lawful activities of two FTOs, the Kurdish Workers’ Party (PKK) (which sought self-determination for Turkish Kurds), and the Liberation Tigers of Tamil Eelam (LTTE) (which sought self-determination for the Tamil residents in Sri Lanka). Specifically, the plaintiffs wanted to work with the PKK to “provide training in the use of humanitarian and international law for the peaceful resolution of disputes, engage in political advocacy on behalf of the Kurds living in Turkey, and teach the PKK how to petition for relief before representative bodies like the United Nations.”<sup>244</sup> For the LTTE, plaintiffs wanted to “provide training in the presentation of claims to mediators and international bodies for tsunami-related aid, offer legal expertise in negotiating peace agreements between LTTE and the Sri Lankan government, and engage in political advocacy on behalf of Tamils living in Sri Lanka.”<sup>245</sup>

Fearing criminal prosecution for these activities, plaintiffs sought an injunction against enforcement of sections 2339A and 2339B. The district court granted a partial injunction in 1998.<sup>246</sup> After a sequence of appeal, remand, and congressional amendment, the case was consolidated and decided in the Central District

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240. See, e.g., *United States v. Abdi*, 498 F. Supp. 2d 1048, 1054, 1058 (S.D. Ohio 2007).

241. 18 U.S.C. § 2339A(b)(1)-(3) (2012).

242. ZABEL & BENJAMIN, *supra* note 122, at 32.

243. 130 S. Ct. 2705 (2010).

244. *Humanitarian Law Project v. Gonzales*, 380 F. Supp. 2d 1134, 1136-37 (C.D. Cal. 2005), *aff’d in part, rev’d in part*, *Humanitarian Law Project*, 130 S. Ct. 2705.

245. *Id.*

246. *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1176 (C.D. Cal. 1998).

of California in 2005, and then affirmed by the Ninth Circuit in 2009.<sup>247</sup> The Supreme Court granted certiorari on, among other issues, the question of whether the terms “training,” “expert advice or assistance,” “service,” and “personnel” were void for vagueness under the Due Process Clause of the Fifth Amendment, as applied to plaintiffs’ activities.<sup>248</sup> The Court held that

[m]ost of the activities in which plaintiffs seek to engage readily fall within the scope of the terms “training” and “expert advice or assistance.” . . . A person of ordinary intelligence would understand that instruction on resolving disputes through international law falls within the statute’s definition of “training” because it imparts a “specific skill,” not “general knowledge.” § 2339A(b)(2). Plaintiffs’ activities also fall comfortably within the scope of “expert advice or assistance”: A reasonable person would recognize that teaching the PKK how to petition for humanitarian relief before the United Nations involves advice derived from, as the statute puts it, “specialized knowledge.” § 2339A(b)(3).<sup>249</sup>

With respect to the term “service,” the Court held that it covered “advocacy performed in coordination with, or at the direction of, a foreign terrorist organization.”<sup>250</sup> It did not elaborate further on “how much direction or coordination is necessary for an activity to constitute a ‘service,’”<sup>251</sup> leaving the lower courts free to continue to develop their own standards.

As developed, those standards have been expansive. They have, for instance, captured most medical-related services.<sup>252</sup> Although section 2339A excepts medicine and religious materials, that exception does not extend to medical supplies or medical personnel.<sup>253</sup> In *United States v. Shah*, for example, the defendant doctor was prosecuted under sections 2339A and 2339B for providing medicine to wounded jihadists.<sup>254</sup> As the prosecution alleged, the doctor had basically “volunteered as a medic for the al Qaeda military.”<sup>255</sup> In the court’s view, “[m]uch as a military force needs weapons, ammunition, trucks, food, and shelter, it needs

247. *Humanitarian Law Project v. Mukasey*, 552 F.3d 916, 933 (9th Cir. 2009).

248. *Humanitarian Law Project*, 130 S. Ct. at 2716.

249. *Id.* at 2720.

250. *Id.* at 2722.

251. *Id.*

252. The law defining the boundaries of acceptable service provision in the War on Terror is in need of clarification. Under the Geneva Conventions, for example, a doctor who was not fighting cannot be captured on the battlefield. Geneva I, *supra* note 33, art. 24. One D.C. Circuit case, meanwhile, held that the AUMF is not limited by international law and that a Taliban cook could thus be lawfully detained. *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010).

253. H.R. REP. NO. 104-518, tit. 3, at 114 (1996) (Conf. Rep.).

254. 474 F. Supp. 2d 492 (S.D.N.Y. 2007).

255. *Id.* at 498-99.

medical personnel to tend to its wounded.”<sup>256</sup> The doctor, “who never actually succeeded in providing medical services to al Qaeda,” was convicted of the material support charges.<sup>257</sup> He was sentenced to twenty-five years imprisonment.<sup>258</sup>

Similarly, in *United States v. Warsame*, the defendant was prosecuted under section 2339B for providing English lessons in an al Qaeda clinic in Afghanistan in order to aid nurses’ reading of English medicine labels.<sup>259</sup> The prosecution alleged that these nurses treated al Qaeda members in nearby terrorist camps. Therefore, the court reasoned, the English-language training had “direct application to an FTO’s terrorist activities, as it would likely speed the healing and eventual return of terrorist militants to Al Qaeda training camps.”<sup>260</sup> Moreover, because the training was “in close proximity to terrorist training camps,” the “alleged conduct [was] closely tied to terrorist activity, such that Warsame would likely understand his conduct to be criminalized as ‘training’ under 2339B.”<sup>261</sup>

After applying the Sentencing Guidelines and the Terrorism Enhancement, the court arrived at a sentencing range of 292 to 365 months. Interestingly, however, because the court also found “nothing that adequately demonstrates that Warsame was part of a specific plot against the United States, and very little that suggests he was especially useful to al Qaeda,” it exercised its discretion to vary downward, based on the factors enumerated in 18 U.S.C. § 3553(a), and imposed a sentence of ninety-two months imprisonment.<sup>262</sup>

These cases, though only a small sample, illustrate the breadth of the court’s power to characterize the provision of service, define its relationship to terrorism, and then impose a sentence based on its assessment of the national security threat that service presents. Yet that reasoning is not always made explicit, making it hard to know what informed the court’s analysis in these respects. These decisions should be principled, and driven by a reasoned assessment of why the sentence is both necessary and proportional, and sufficient to prevent the defendant, and others like him, from performing such services in the future.

b. Low-Level Financiers

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256. *Id.* at 499.

257. ZABEL & BENJAMIN, *supra* note 122; *see also* Gov’t Memorandum in Opposition to Rafiq Sabir’s First Motion To Set Aside Verdict, at 21-23, *United States v. Shah*, No. 05-cr-673 (S.D.N.Y. Sept. 11, 2007), Dkt. No 163 (discussing factual circumstances of Sabir’s involvement in the conspiracy and his attempt to provide material support).

258. Judgment, *United States v. Shah*, No. 05-cr-00673 (S.D.N.Y. Nov. 30, 2007), Dkt. No. 176.

259. 537 F. Supp. 2d 1005 (D. Minn. 2008).

260. *Id.* at 1019.

261. *Id.*

262. *United States v. Warsame*, 651 F. Supp. 2d 978, 981 (D. Minn. 2009).

Congress has appropriately recognized that funding terrorism is as serious a threat to national security as the perpetration of terrorist acts. Congress thus drafted the material support statutes to criminalize funding terrorist activity. In fact, Congress was so concerned with the problem of funding that it enacted section 2339B in part to close the loopholes through which a would-be terrorist supporter could fund terrorism under the guise of a humanitarian or a charitable donation.<sup>263</sup> Given that congressional concern, courts are right to view terrorism financing seriously—even among the softcore offenses.

Even so, not every financial supporter of terrorism should be punished as a hardcore offender, particularly where the financing is minimal, attenuated to terrorism, or plainly not motivated by any anti-American ideology. The need to distinguish some of these financing cases is apparent in the case law. The case of *United States v. Issa* is just one example.<sup>264</sup> There, the three defendants, Oumar Issa, Harouna Toure, and Idriss Abdelrahman, were apprehended in Ghana and charged with a conspiracy to transport drugs across Africa and into Spain, using the assistance of al Qaeda handlers along the route.<sup>265</sup> According to the indictment, the proceeds of the drug sales were earmarked for the Fuerzas Armadas Revolucionarias de Colombia (FARC), a group classified as an FTO since 1997.<sup>266</sup> Though the quantity of drugs that the defendants were planning to ship was substantial—500-1,000 kilograms<sup>267</sup>—the defendants' actual involvement was not. Issa "admitted in part that he had agreed with others to assist in the transfer of drugs on behalf of FARC,"<sup>268</sup> whom the government argued he knew to be members of FARC.<sup>269</sup> He was alleged to have collaborated with Toure, who was charged with agreeing to help FARC members transport the drugs by procuring a truck and making some other basic preparations for leaving the country with the drugs.<sup>270</sup> Toure, in turn, was charged with coordinating with Abdelrahman

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263. See *supra* notes 123-127 and accompanying text.

264. No. 09-cr-1244 (S.D.N.Y. 2009).

265. Indictment ¶ 11, *Issa*, No. 09-cr-1244 (S.D.N.Y. Dec. 30, 2009), Dkt. No. 12.

266. *Id.*

267. *Id.* ¶ 11e.

268. Gov't Memorandum in Support of Sentencing at 6, *Issa*, No. 09-cr-1244 (S.D.N.Y. March 6, 2012), Dkt. No. 102.

269. *Id.* at 10. This case was part of a sting operation by the Drug Enforcement Agency. The "FARC members" were actually U.S. government confidential sources.

270. Indictment ¶ 11c-e, *Issa*, No. 09-cr-1244 (S.D.N.Y. Dec. 30, 2009), Dkt. No. 12.

and Abdelrahman's militia contacts to ensure the drugs' passage through the desert.<sup>271</sup> The three defendants were charged with material support under section 2339B and the crime of narcoterrorism.<sup>272</sup> All three pled guilty to the material support count.<sup>273</sup>

That conduct is certainly reprehensible as an attempt and conspiracy to provide material support to an FTO, and should be punishable by the U.S. courts. But from a blameworthiness perspective, it pales in comparison to hardcore terrorist financiers, like the defendant in *United States v. Bagcho*. Bagcho "was one of the largest heroin traffickers in the world[, who] . . . sent heroin to more than 20 countries, including the United States, [and whose drug] [p]roceeds . . . were . . . used to support high-level members of the Taliban to further their insurgency in Afghanistan."<sup>274</sup> It is difficult to dispute that the *Issa* defendants' conduct posed a lesser threat to the United States' security than did Bagcho's. Moreover, the fact that the *Issa* defendants were financially, rather than ideologically motivated further suggests that they deserved different treatment at sentencing.<sup>275</sup> In recognition of these differences in offense and offender characteristics, a revised War on Terror sentencing guidelines framework should provide courts with instructions and criteria for distinguishing among defendants like *Issa* and *Bagcho*.

c. Sting Operations and Government Informants

Sting operations capture terrorist defendants who also sometimes merit distinction. In recent years, the government has increasingly used sting operations to preventively prosecute terrorism.<sup>276</sup> By the nature of a sting operation, it tends to target conduct that is more removed from a putative terrorist act—both tem-

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271. *Id.* ¶ 11e.

272. 21 U.S.C. § 960a (2012).

273. Order Accepting Plea, *Issa*, No. 09-cr-1244 (S.D.N.Y. Jan. 19, 2012), Dkt. No. 90; Minute Entry Accepting Pleas of Defendant Toure and Defendant Abdelrahman, *Issa*, No. 09-cr-1244 (S.D.N.Y. April 26, 2012).

274. Press Release, Dep't of Justice (Mar. 13, 2012), <http://www.justice.gov/opa/pr/2012/March/12-crm-320.html>; see Lily Kuo, *Heroin Trafficker with Ties to Taliban Gets Life in U.S. Prison*, NBC NEWS, June 12, 2012, [http://www.msnbc.msn.com/id/47790590/ns/world\\_news-south\\_and\\_central\\_asia/t/heroin-trafficker-ties-taliban-gets-life-us-prison/#.T-3Y5FLsZzo](http://www.msnbc.msn.com/id/47790590/ns/world_news-south_and_central_asia/t/heroin-trafficker-ties-taliban-gets-life-us-prison/#.T-3Y5FLsZzo).

275. See Benjamin Weiser, *Citing Terror Defendants' Motivation, Judge Shows Sentencing Leniency*, N.Y. TIMES, Nov. 22, 2012, <http://www.nytimes.com/2012/11/23/nyregion/judges-ruling-in-qaeda-terror-case-openideologydebate.html>.

276. See TERRORIST TRIAL REPORT CARD, *supra* note 3, at 4 ("The rise in indictments [since 2009] is significantly affected by FBI informant operations. Since 2009, nearly 50% of terrorism cases have involved informants. . . . At least 15% of those informant cases can be considered sting operations.").

porally and substantively, and therefore sweeps in a wide range of offense conduct. The prevalence of sting operations again confirms the need for a revised, more nuanced sentencing framework for War on Terror cases.

Importantly, sting operations capture individuals who are susceptible to terrorist recruitment, but who have yet to commit an actual terrorist offense. Like the financiers, the sting cases also show a divide between the politically motivated defendant and, more innocuously, the very weak-willed one. The case of *United States v. Mandhai* is illustrative.<sup>277</sup> There, the defendant met an undercover FBI operative, Howard Gilbert, who was posing as a disgruntled Marine who had converted to Islam and wanted to wage jihad against the United States. Gilbert suggested to Mandhai that they should harm the United States by bombing electrical substations. The defendant was then introduced to another FBI operative, who was posing as someone with ties to bin Laden. Mandhai was charged with conspiring to damage and destroy electrical power stations and a National Guard armory by means of fire and explosives, in violation of 18 U.S.C. § 844(i)(n), and with inducing another individual, Shueyb Mossa Jokhan, to damage the property of an energy facility, in violation of 18 U.S.C. § 1366. He pled guilty to the first count.<sup>278</sup>

At sentencing, the court applied the Terrorism Enhancement as well as a “Role Enhancement” under section 3B1.1(c) of the Sentencing Guidelines.<sup>279</sup> Interestingly, the court also gave Mandhai a three-level downward departure on the ground that his crime was inchoate and that, but for Terrorism Enhancement, he would have benefited from a reduction under the guidelines for that reason.<sup>280</sup> The court then imposed 140 months imprisonment, which was at the low end of the adjusted guidelines’ range.<sup>281</sup>

The Eleventh Circuit reversed the sentence. It noted that Congress intended to punish inchoate crimes of terrorism, and therefore the district court’s basis for departure was impermissible. The court of appeals agreed, however, that the twelve-level increase required by the Terrorism Enhancement seemed, in Mandhai’s case, to “prevent[] the penalty from fitting the crime,” especially in view of the fact that the “main engine driving the conspiracy was [an FBI cooperator]—who was not charged” and that “every time Mandhai, the only teenager involved, had second thoughts” the two FBI informants “kept the conspiracy on track.”<sup>282</sup>

Undoubtedly, defendants prosecuted for attempted acts of terrorism, even if conscripted by a government agent, should be punished consistent with the war

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277. 375 F.3d 1243 (11th Cir. 2004).

278. *Id.* at 1246-47.

279. For a discussion of role enhancements under the Sentencing Guidelines, see *Aggravating and Mitigating Role Adjustments Primer* §§ 3B1.1 & 3B1.2, *supra* note 226.

280. See U.S. SENTENCING GUIDELINES MANUAL § 2X1.1(b)(2) (2007).

281. *Mandhai*, 375 F.3d at 1247.

282. *Id.* at 1249-50.



aim of aggressive prevention. But in fashioning a sentence that is proportionate to the threat, it seems hard to dispute that the defendant's knowledge, as well as his intent and capability of committing the crime, is relevant to the punishment he deserves.

Overall, these cases involving service providers, financiers, and sting participants suggest the courts' inability to distinguish among terrorism offenders at the punishment phase of the case. This failure, it seems, is largely attributable to the inflexible and underinclusive sentencing framework that guides them. As this Part has argued, applying a law-of-war lens to sentencing is the first step toward developing a more sophisticated and effective body of law to govern the civilian courts' punishments in the War on Terror. Part III takes that step, and recommends a way to revise the Sentencing Guidelines for specific application to the context of conflict.

### III. A NEW FRAMEWORK FOR PUNISHMENT IN THE WAR ON TERROR

Part III moves from theory to application. It suggests a way to use the normative framework constructed in Part II as a basis for revising the Sentencing Guidelines that apply to War on Terror cases. To that end, this Part suggests an overhaul of the current standard for applying the Terrorism Enhancement, which questions whether a defendant has "calculated" his conduct toward terroristic ends, for a more refined (and yet simplified) analysis that considers a defendant's "substantial steps" toward the terrorism offense and the motives for his conduct. The ultimate goal of the revision is for civilian courts to gain the sentencing tools they need to distinguish between the hardcore and softcore offenders, and among the softcore offenders. Part III concludes with an argument as to why the revised guidelines proposed are not only more legitimate, but also serve to further national security and America's long-term interests.

#### A. A Two-Part "Mens Rea" Inquiry Adapted to the War on Terror

This Section proposes a guidelines system that replaces the Terrorism Enhancement with a multifactor (fact-bound) intent analysis. With this change, courts would no longer be challenged to determine whether a terrorist defendant's actions were "calculated" to influence government, and instead would have at their disposal more concrete tools to punish defendants relative to their culpability and threat to the national security.

##### 1. Problems with the "Calculated" Standard

The elements required for conviction of a federal crime of terrorism are, technically, different from those required for application of the Terrorism Enhancement. But in practice, the distinction has proven elusive. Questions surrounding the varying requirements have arisen with some regularity, particularly with respect to the mens rea requirement for application of the Terrorism En-

hancement. That confusion is certainly a cause for concern. In the context of terrorism, the defendant's mens rea is critical, as it indicates his propensity to recidivate, and suggests the level of security risk that he poses. Without a clear way to determine mens rea, it seems impossible for courts to impose a sentence that is reasonable, necessary, and effective.

The source of the confusion, it seems, is the "calculated" standard, that is, whether "the offense was calculated to influence or affect the conduct of government" sufficient to trigger the Terrorism Enhancement.<sup>283</sup> Its application is, indeed, perplexing. Consider, for instance, the sentencing of a defendant convicted of material support under section 2339B. Pursuant to that statute, the government need only prove the defendant's "guilty knowledge, but not [his] guilty intent" to secure a conviction.<sup>284</sup> With respect to section 2339A, the statute requires that the defendant knew *or* intended his support to be used in preparation for or carrying out terrorist activity.<sup>285</sup> And so while it would seem that calculation is something more than mere knowledge, what calculated conduct amounts to as a factual matter remains unclear.

A few courts of appeals, including the Second and the Fourth Circuits (where a significant number of terrorism cases are prosecuted), have tried to provide some clarification on that question,<sup>286</sup> but without much success. The Second Circuit grappled with it relatively recently in the War on Terror in *United States v. Stewart*.<sup>287</sup> *Stewart* involved the conduct of a lawyer, Lynn Stewart, her student-translator, Mohammed Yousry, and her terrorist-client, Abdel Rahman, who was a spiritual leader for the terrorist group al-Gama. The defendants were charged with violating the prison's Special Administrative Measures (SAMs), which had restricted Rahman's ability to communicate with individuals outside the prison. It was the government's theory that Stewart provided material support to al-Gama by providing "communications equipment" and "personnel" by publicly relaying Rahman's messages regarding a ceasefire.<sup>288</sup> A jury convicted Stewart and Yousry on the section 2339A count.<sup>289</sup>

Without elaborating, the Second Circuit concluded that the Terrorism Enhancement requires a finding of specific intent.<sup>290</sup> It thus affirmed the district

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283. See 18 U.S.C. § 2332b(g)(5) (2012). U.S. SENTENCING GUIDELINES MANUAL § 3A1.4(a) & app. n.4 (2012).

284. Pendle, *supra* note 127, at 803; see also *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2717 (2010) (confirming that specific intent of furthering a special plot or the FTO's goals is not required for conviction).

285. ZABEL & BENJAMIN, *supra* note 122, at 33.

286. See *United States v. Assi*, 428 Fed. App'x 570 (6th Cir. 2011).

287. 590 F.3d 93 (2d Cir. 2009).

288. *Id.* at 114-16.

289. *Id.* at 108.

290. *Id.* at 138.

court's decision not to apply the Terrorism Enhancement to Yousry because it agreed that the "involved" prong of the enhancement had not been triggered as there was no evidence that Yousry himself had sought to influence or affect the conduct of the government.<sup>291</sup> Later cases in the Second Circuit have developed the standard some, but not much. At best, the Second Circuit instructs the district courts to interpret "calculated" as "intentional."<sup>292</sup>

The Fourth Circuit has also attempted to provide "guidance on what sort of intent justifies th[e] [terrorism] enhancement for a material support crime."<sup>293</sup> In *United States v. Hammoud*, the Fourth Circuit provided some examples where an enhanced sentence *would* be appropriate, including "where [a] defendant had close connections with Hizballah officials and his own testimony indicated that he was well aware of Hizballah's terrorist activities and goals and that he personally supported this aspect of Hizballah."<sup>294</sup> As another example from a later case, that court agreed that an enhanced sentence would be warranted where a "defendant attended a jihadist training camp abroad, was acquainted with a network of people involved in violent jihad and terrorism, and lied about both."<sup>295</sup>

But these examples are only partially helpful. Although they illustrate the type of conduct that would arguably qualify as hardcore, these cases do not address how the calculated standard might apply to distinguish among cases of softcore offenders, which are undoubtedly encountered by the courts in that jurisdiction as well. And so it is not surprising that questions at the district court level remain, and that Terrorism Enhancements are bootstrapped to most terrorism convictions.<sup>296</sup> To avoid the morass, it seems, courts have simply defaulted to application of the Terrorism Enhancement, and occasionally varied from the sentence the enhancement produces.<sup>297</sup> The source of the confusion—the "cal-

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291. *Id.* at 137.

292. *United States v. Awan*, 607 F.3d 306, 317 (2d Cir. 2010).

293. *United States v. Hammoud*, 381 F.3d 316, 356 (4th Cir. 2004).

294. *Id.*

295. *United States v. Benkahla*, 530 F.3d 300, 313 (4th Cir. 2008).

296. See Harris, *supra* note 172 (noting that his review "shows that judges uphold the government's request for an enhancement far more often than they deny it," and that prosecutors "obtained the enhancement in 27 of the 35 cases" reviewed).

297. Admittedly, that state of affairs is no different from the method by which courts ordinarily sentence in the typical criminal context. But, as this Article has endeavored to make clear, the War on Terror context is unique and, in this special setting, the standard sentencing method is troubling insofar as it produces sentences that do not make sense in view of the actual offense conduct and do not advance the government's overarching war aims. And so, in this context, there should be some concrete parameters—beyond those expressed in section 3553(a)—to guide the courts' exercise of discretion, to ensure that the appropriate purposes and legal principles are respected so that punishments in this war more clearly fit the crimes committed and further the United States' counterterrorism aims consistently

culated” language—as written directly in the Sentencing Guidelines and incorporated by reference to section 2332b(g)(5), should be replaced with more manageable doctrinal tools.

## 2. The “Substantial Step” Doctrine

The substantial step doctrine is a classic blackletter test of a criminal attempt, which has developed in the common law and in the Model Penal Code. In its simplest formulation, a substantial step is “[t]he minimum conduct . . . towards the commission of the crime . . . [which] must have been strongly corroborative of the actor’s purpose.”<sup>298</sup> Although the substantial step doctrine is usually considered in connection with the actus reus rather than intent, here it functions well as a replacement for the calculated standard, which, most precisely understood, speaks to a terrorist defendant’s actions as well as his intent.

Incorporating a substantial step-like doctrine into the Sentencing Guidelines for terrorism is sensible for several reasons. For one, the defendant’s proximity to an actual terrorist plot indicates the seriousness of the threat he poses, and thereby informs the necessity of deterring and/or incapacitating him with imprisonment. Moreover, his proximity to a crime of terrorism speaks to the proportionality of his sentence, as it places the defendant along a spectrum of culpability relative to other defendants sentenced in the War on Terror cases.<sup>299</sup> The substantial step doctrine is also capacious enough to consider other factors relevant to punishment, such as the degree of support provided and the defendant’s role in the terrorist offense.<sup>300</sup> Both of those factors—degree and role—are important in devising a more proportionate and reasonable sentencing system, but neither are necessarily considered in connection with the Terrorism Enhancement. Lastly, it bears emphasizing that the substantial step doctrine would be a particularly effective way to differentiate defendants’ relative culpability in this context, where offenses span a broad timeline.

Some cases will be clear-cut. In *United States v. Harun*, for example, the defendant was indicted for conspiring to assist al Qaeda in connection with a plot

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across all federal jurisdictions. Courts’ skittishness in the area of national security threats probably compounds their propensity to default to the enhancement. See Burt Neuborne, *Spheres of Justice: Who Decides?*, 74 GEO. WASH. L. REV. 1090, 1116 (2006) (“According to my research, Article III courts have never invalidated a national security initiative that was explicitly endorsed by both the President and Congress.”).

298. Andrew Ashworth, *Criminal Attempts and the Role of Resulting Harm Under the Code, and in the Common Law*, 19 RUTGERS L.J. 725, 729 (1988).

299. Outside the national security context, Judge Posner of the Seventh Circuit has discussed the substantial step doctrine in relation to the “psychology of intent”: “[a] person who demonstrates by his conduct that he has the intention and capability of committing a crime is punishable even if his plan was thwarted.” *United States v. Gladish*, 536 F.3d 646, 648 (7th Cir. 2008).

300. See McLoughlin, *supra* note 4, at 100.

to “deliver, place, discharge and detonate . . . explosives” in U.S. diplomatic and consular facilities in Nigeria.<sup>301</sup> He was charged with, among other crimes of terrorism, violating sections 2339A and 2339B. Even on the sparse information available in the indictment, it seems relatively obvious that, if proven, substantial steps were taken to execute this serious terrorist plot. A district court should be able to reach that determination without wading into the greyness of the calculated standard, which, even in a relatively clear case of hardcore conduct like this, could invite a range of potentially confounding questions. As the case law develops the substantial step standard in cases like *Harun*, it will become easier for other district courts to meaningfully distinguish dissimilarly situated defendants, who are indicted for crimes of terror but did not come nearly as close to providing support or assistance in connection with an identifiable terrorist plot to harm American lives or economic interests. In short, assessing the substance of the steps taken toward a terrorist plot or in furtherance of a terrorist network’s concrete goals is a workable way for a court to assess a defendant’s culpability and threat.

### 3. Ideological Motivation

Ideology is a second metric for gauging a terrorist defendant’s culpability and threat. Yet oddly, although a defendant’s reasons for becoming involved in terrorism seem obviously related to his ability to be deterred and the degree to which he poses a threat to national security, motive is often considered irrelevant in the Terrorism Enhancement analysis.

The oddity is well illustrated in the cases. In *United States v. Awan*, for instance, the defendant was convicted of, among other things, providing material support under section 2339A in connection with his help transferring money to the Khalistan Commando Force, a group responsible for terrorism in India.<sup>302</sup> The district court did not apply the Terrorism Enhancement because it found that there was “no proof that the defendant was motivated by a desire to influence Indian government or retaliate against the Indian government[,]” but rather, had “private purposes in mind.”<sup>303</sup> However, the Second Circuit vacated the sentence for procedural error: namely, that the Terrorism Enhancement does not require proof that a defendant was motivated to influence or affect the conduct of a government, only that he “calculated” his actions to that end.<sup>304</sup> In other words, the government only needs to prove the defendant “engaged in conduct in order to bring about a result,” not that he was motivated by any particular reason to bring

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301. Indictment ¶¶ 2-5, *United States v. Harun*, No. 12-cr-134 (E.D.N.Y. Feb. 21, 2012), Dkt. No. 1.

302. 607 F.3d 306 (2d Cir. 2010).

303. *Id.* at 316.

304. *Id.* at 317.

about that result.<sup>305</sup> This distinction is confusing. But it seems to mean that, for sentencing purposes, it does not matter why a defendant became involved with terrorism, only that the defendant intended to take the actions that he did.<sup>306</sup>

Ignoring motive in these cases leads to bizarre results, as noted by at least one court. In this regard, the *Al-Arian* court posed an interesting hypothetical:

A and B are members of a[n] FTO. The FTO exists to oppose and remove (by violent and non-violent means) a foreign government. A opposes the FTO's use of violent means to accomplish its goals. B has no problem with the group's use of violence and wants to raise funds for weapons to further that interest. B travels to where A lives to raise money. A does not know that B is coming to fundraise on behalf of the FTO. A picks B up at the airport. A allows B to stay in his home, use his telephone, and use his house to entertain other FTO members while A is at work. B fundraises while A is gone.<sup>307</sup>

A can likely be convicted for his involvement with a crime of terror (because he knowingly sheltered B, whom he knew to be a member of an FTO), but given his opposition to violence and lack of any discernable commitment to the terrorist group, to punish A equally with B is neither proportional to his crime nor necessary to contain the threat he poses.<sup>308</sup>

Aside from the normative and policy reasons for distinguishing these offenders discussed in Part II, there are other compelling reasons to account for a defendant's motive at the punishment phase. One such reason is grounded in history, and the tradition of calibrating the punishment of political criminals to their political motivation. Treason law—a precursor to modern terrorism law—is a prime example.<sup>309</sup> Much like the terrorism laws, treason laws are directed at subjective feelings of disloyalty and betrayal. As Professor George Fletcher has written, “the crime is addressed to the bond of loyalty between a particular sovereign and subordinate subjects” and has at its “core” “internal attitudes,” namely the “mental actions of compassing or lusting in one's heart.”<sup>310</sup> The first trials for war

305. Transcript of Sentencing as to Defendant Toure at 12-13, *United States v. Issa*, No. 09-cr-1244 (S.D.N.Y. Nov. 15, 2012), Dkt. No. 137 (offering the government's explanation of “calculated” behavior).

306. As the Assistant U.S. Attorney in the *Issa* case argued, “There is no requirement that a defendant who is providing material support to a terrorist organization be driven by ideology . . . . The point is that he provided support knowing that it was a terrorist organization, knowing that it had an anti-U.S. agenda.” Weiser, *supra* note 275.

307. *United States v. Al-Arian*, 329 F. Supp. 2d 1294, 1300 (M.D. Fla. 2004) (emphasis added).

308. See *supra* Section II.B.

309. See ZABEL & BENJAMIN, *supra* note 122, at 45 (“Treason is the oldest crime available for terrorism prosecutions.”).

310. George P. Fletcher, *Law, Loyalty, and Treason: How Can the Law Regulate Loyalty Without Imperiling It?: Ambivalence About Treason*, 82 N.C. L. REV. 1611, 1621

crimes were to the same effect: at Nuremberg, for example, “[a] number of tribunals rewarded defendants for maintaining professional and ideological independence from the Nazis.”<sup>311</sup>

There are also symbolic reasons to make distinctions at sentencing based on the defendant’s motives. And symbolism has played a prominent role in the government’s efforts to wage the War on Terror.<sup>312</sup> The Bush Administration, for instance, repeatedly characterized the conflict as one against “‘evil’ forces.”<sup>313</sup> As Eichensehr points out, “[I]n the wake of 9/11 the Bush Administration framed the ‘War on Terrorism’ as an existential struggle. A struggle that is perceived as existential—the forces of good battling to survive against the forces of evil—is laden with symbolism.”<sup>314</sup>

Related, there is good public policy reason to punish ideologically motivated terrorism more severely than the same conduct that lacks ideological motives. As an expressive matter, that distinction would send signals to the enemy regarding the legitimacy of terrorist conduct in general—namely, a more forceful message that the jihadist mission will be singled out for particular punishment in the American criminal justice system.<sup>315</sup> A symbolic message against ideology is also important to winning the “hearts and minds” and sustaining domestic support for this protracted conflict with terrorism: for better or worse, “[i]f the country

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(2004). The treason analogy is relevant to the crimes of international terrorists, as “[t]he current U.S. understanding of treason” includes not only U.S. citizens but also those present in the United States. Eichensehr, *supra* note 11, at 1466. Eichensehr argues, however, that the American instantiation of treason laws, as developed by the Framers and interpreted by the Supreme Court, limits the crime to external acts. *Id.* at 1468-70.

311. HELLER, *supra* note 32, at 324.

312. See Eichensehr, *supra* note 11, at 1482 (noting that U.S. government leaders “have framed the conflict with Al Qaeda” in “symbolic terms”).

313. *Id.* (referring to, among other sources, Peter Baker, *President Who Sees in Absolutes Awaits Voters’ Definitive Answer*, WASH. POST, Nov. 7, 2006, at A01 (noting that President Bush’s world “is a world of absolutes” and quoting him as saying, in reference to the War on Terror, “I view this as a struggle of good versus evil”); and George W. Bush, State of the Union Address (Jan. 29, 2002), <http://transcripts.cnn.com/2002/ALLPOLITICS/01/29/bush.speech.txt>).

314. Eichensehr, *supra* note 11, at 1482-83.

315. The relationship between punishment, motivation, and legitimacy was recognized by the Special Court for Sierra Leone in the *Prosecutor v. Fofana & Kondewa* case. Sentencing Judgment, Case No. SCSL-04-14-T (Oct. 9, 2007). There, the Appeals Chamber reversed a sentence of the Trial Chamber that had mitigated the sentence based on the defendant’s political motives, on the ground that doing so would confer legitimacy to conduct that unequivocally violated the law. See Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus Ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT’L L. 46, 48-49 (2009).

perceives itself to be fighting an existential conflict either for its survival or against an 'evil' enemy, then symbolism becomes very important."<sup>316</sup>

For all of these reasons, a revised terrorism sentencing guidelines should instruct the courts at sentencing to more deeply probe the defendant's ideological motivations, just as it should instruct courts to consider the defendant's substantial steps, degree of involvement, and role in the offense.

### B. *Translating These Criteria into Guidelines for Punishment*

This Section gathers these doctrinal suggestions into a model Sentencing Guideline to replace the Terrorism Enhancement.<sup>317</sup> It proposes disposing of the Terrorism Enhancement in favor of new War on Terror sentencing guidelines, which include amended base-offense levels that correspond to the hardcore and softcore groups of offenders, and which also distinguish among the defendants in the softcore group. The guidelines proposed recommend one track for punishment of hardcore offenders and a second for punishment of softcore offenders.

#### 1. Track One for Hardcore Offenders

Subsection II.C.1 discussed the cases of hardcore terrorism. Those defendants, and others like them, have the specific intent to perpetrate a specific terrorist act or organizational goal (or have already done so); are ideologically motivated (by anti-American animus); and were involved in a plot or organization in a substantial way. For this category of offenders, specific deterrence is unlikely and the overriding goal is incapacitation—that is, preventing them from recidivating to the battlefield of terrorism.

It is axiomatic under the law of war that a government may detain its enemy combatants for the duration of hostilities.<sup>318</sup> Consistent with that principle, regardless whether these defendants are criminally tried in civilian courts, the executive has authority to detain them for the duration of the War on Terror.<sup>319</sup> As the civilian courts act as partners with the executive in advancing the global War on Terror, these courts should be cognizant of that detaining prerogative and

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316. Eichensehr, *supra* note 11, at 1485.

317. While the courts' relatively unfettered discretion is fine in the ordinary criminal context, where the courts have ample experience and precedent, in the context of sentencing fighter-criminals who partake in a global war, it is worth questioning whether additional guidance is required.

318. See Chesney, *supra* note 77, at 3.

319. See *Hamdan v. United States*, 696 F. 3d 1238, 1241 (D.C. Cir. 2012) (noting that "the United States may have continued to detain Hamdan until the end of hostilities pursuant to its wartime detention authority").



power, and be guided to impose analogous restrictions on liberty where the hardcore defendants are concerned.

But such guidance is not explicit in the current law. Neither the Sentencing Guidelines nor the terrorism statutes employ military-necessity reasoning in setting out the maximum or minimum penalties proscribed for crimes of international terrorism. Some of the federal terrorism statutes provide for maximum terms of life in prison, but again, only in limited circumstances, such as where a death results. Otherwise, the maximum terms of imprisonments are less—the material support statutes, for instance, carry only fifteen-year maximums.<sup>320</sup> As far as thresholds are concerned, with the exception of the narcoterrorism statute, most of the terrorism statutes do not provide for mandatory minimum sentences, and even narcoterrorism carries only a ten-year mandatory minimum.<sup>321</sup> The terrorism statutes thus give the courts considerable latitude to sentence hardcore offenders to sentences less than the duration of hostilities, for sure. Given the importance of incapacitation here, that flexibility is unwise.

The surest solution lies with Congress, which should consider amending the material support statutes to provide for sentences that correspond to the duration of the conflict, rather than a definite term of years. Given that the conflict is indefinite, the maximums could arguably be increased to life. Such amendments would be well justified by reference to military practice and the laws and customs of war, which confirm the necessity of detaining an enemy for the duration of a conflict.<sup>322</sup> With that amendment to the statutory maximum sentences, the base-offense levels for hardcore offenders could likewise increase to 43 (life). Courts would then be able to impose sentences that match the statutory life maximum, with the possibility of an early release pending some form of conduct-review, should the conflict with terrorism end.<sup>323</sup>

## 2. Track Two for Softcore Offenders

Under a new set of guidelines, a completely different set of rules would govern the sentencing of softcore defendants. The mechanics of those guidelines would be simple. First, at the preliminary sentencing hearing, the court determines whether the defendant is on track one or track two based on findings of fact pertaining to the substantial step and ideology questions. If placed on track two, a second, more intricate and fact-intensive hearing will be required to determine the precise punishment to be imposed.

In the second hearing, the court begins, as usual, by calculating a base-offense level. But arriving at the proper base-offense level would require a more

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320. See *supra* notes 159-171 and accompanying text.

321. 18 U.S.C. § 960a (2012).

322. See *supra* notes 318-319 and accompanying text.

323. See *infra* notes 361-363 (discussing use of parole review boards in national security cases).

factually rigorous proceeding than before. It would depend on the proof of substantial steps (with the government adducing facts suggesting how close a defendant came to the crime, how involved, and in what capacity) and the nature of the defendant's motivation. The base-offense levels would be gradated according to the presence or absence of these facts. For instance, where a substantial step and ideological motivation are found lacking, a proper base-offense level might be 23, which yields a sentence of 46-57 months imprisonment.<sup>324</sup> If, on the other end of the spectrum, a defendant was ideologically motivated and had participated in a substantial fashion, his base-offense level would be 27, yielding a term of imprisonment of 70-87 months.<sup>325</sup> Some levels between 23 and 27 should also be included to address defendants that fall between those two factual ends.<sup>326</sup>

### 3. Sentencing Under a Revised Guidelines System

Three examples drawn from the case law again help to illustrate how these new guidelines might operate in practice. The first is the case of *United States v. Issa*, which involved three defendants, Oumar Issa, Harouna Toure, and Idriss Abdelrahman, who were charged with narcoterrorism conspiracy under 21 U.S.C. § 960a and conspiracy to provide material support to the FARC.<sup>327</sup> Issa, who lived in Mali, was approached by a government undercover agent and a cooperating source regarding the possibility of transporting drugs from Ghana to Spain for the FARC.<sup>328</sup> The defendants, including Issa, were offered large sums of money to help provide secure passage of the cocaine to Spain.<sup>329</sup> With respect to Issa's *mens rea*, defense counsel argued at sentencing that there were no facts suggesting that he knew that any of the drug proceeds would go to an anti-American cause.<sup>330</sup> Rather, the defense stated that Issa had never heard of the FARC before meeting the government agents, and that all of his knowledge about the organization came from what those agents had told him.<sup>331</sup> As to his motivation, the defense argued in its sentencing memorandum that Issa's crime was financially

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324. U.S. SENTENCING GUIDELINES MANUAL, Sent'g Tbl. (2012).

325. *Id.*

326. This granular base-offense level schema would not apply to the hardcore defendants, who are routed into track one during the initial sentencing hearing.

327. Indictment, *United States v. Issa*, No. 09-cr-1244 (S.D.N.Y. Dec. 30, 2009), Dkt. No. 12.

328. *Id.* ¶ 11.

329. Memorandum in Opposition to Motion To Dismiss at 3-4, *Issa*, No. 09-cr-1244 (S.D.N.Y. filed Feb. 17, 2012), Dkt. No. 98.

330. Transcript of Sentencing at 23, *Issa*, No. 09-cr-1244 (S.D.N.Y. Mar. 12, 2012).

331. *Id.* at 18-19.

motivated; it highlighted the poverty in which he and his family had lived in Mali.<sup>332</sup>

Despite these factors, there were enough facts in the record for the court to conclude by a preponderance of the evidence that Issa's conduct was calculated to influence the American government.<sup>333</sup> Based on certain tape-recorded conversations, the facts demonstrated that Issa knew he was working with FARC, who had a "common enemy, the Americans," and that FARC is involved in kidnappings, and a "militia with warriors."<sup>334</sup> After applying the Terrorism Enhancement, the court exercised its discretion to vary below the Sentencing Guidelines, pursuant to its authority under section 3553(a), from the 180-month sentence that the Sentencing Guidelines recommended. The court reasoned that Issa "had no actual involvement in any activities of FARC"; that his "knowledge of FARC [was] based on what informants told him"; that he was "not told of specific detailed terrorist acts or plots"; and that he seemed to be the "least culpable member of the conspiracy" insofar as "he introduced the informant and the source to his co-defendant, Toure, but did nothing else to further the objective of helping the transport of drugs or to help the objective of getting any weapons."<sup>335</sup> Additionally, the court found it "[p]retty clear that the defendant's motivation in this case was money and not to influence the government, for political reasons," and that "the defendant was not ideologically motivated."<sup>336</sup> For those reasons, the court found that Issa was a "defendant [who] can be deterred more easily than the ideologically motivated."<sup>337</sup> The court imposed a sentence of fifty-seven months imprisonment.<sup>338</sup>

Demonstrating its thoughtfulness, the court appropriately distinguished the sentence imposed on Issa's co-defendant, Toure. When sentencing Toure, the court determined that, in contrast to Issa, Toure understood that "the [terrorist] groups that he was going to work with to transport drugs [had] anti-American goals . . . and that it should have been obvious that [] transporting the drugs . . . would only further their cause in fighting against America and the Americans."<sup>339</sup>

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332. Sentencing Mem. in Support of Defendant Issa at 6-7, *Issa*, No. 09-cr-1244 (S.D.N.Y. Feb. 27, 2012) (on file with court); Transcript of Sentencing at 35, *Issa*, No. 09-cr-1244 (S.D.N.Y. Mar. 12, 2012).

333. Though the court did not use the "calculated" language in its decision on the record, it did so implicitly in applying the enhancement. *See* Transcript of Sentencing at 26, *Issa*, No. 09-cr-1244 (S.D.N.Y. Mar. 12, 2012).

334. *Id.* at 24-27.

335. *Id.* at 49-52.

336. *Id.*

337. *Id.* at 51-52.

338. *Id.* at 55.

339. Transcript of Sentencing as to Defendant Toure at 20, *Issa*, No. 09-cr-1244 (S.D.N.Y. Nov. 15, 2012), Dkt. No. 137.

Largely for that reason, Toure received a sentence of sixty-three months imprisonment, notably longer than that imposed on his co-defendant Issa.<sup>340</sup>

These sentences are unique in the case law. The court in the *Issa* cases considered the relative culpability of the codefendants as well as their culpability relative to other offenders in other War on Terror cases.<sup>341</sup> As such, *Issa* is a model example of how a revised guideline that incorporates the substantial-step and ideology criteria could be used to order defendants in the softcore category, according to the seriousness of their conduct and threat to national security. In short, a revised set of War on Terror guidelines would make explicit the type of discretionary reasoning employed by the *Issa* court.

The case *United States v. al Kassar*<sup>342</sup> is a counterpoint to *Issa*, and its *lack* of discretionary reasoning confirms why revised guidelines are much needed. In that case, three foreign nationals were charged with, among other things, material support under section 2339B.<sup>343</sup> Monzer al Kassar was a large-scale weapons dealer; the other defendants were Tareq Mousa al-Ghazi, a middleman, and Moreno Godoy, al Kassar's friend and assistant. According to the indictment, some of the organizations to which al Kassar provided weapons were terrorist groups, such as the Palestinian Liberation Front (part of whose mission was to harm U.S. interests).<sup>344</sup> After conviction, al Kassar and Godoy were both given identical sentences, which included 180 months imprisonment on the material support charge (to serve concurrently with the sentences imposed on the other counts of conviction).<sup>345</sup>

Is that a reasonable, proportionate, and necessary result? The facts in the record suggested that, unlike al Kassar, Godoy

came very late to th[e] conspiracy and played . . . a lesser role. He shuttled the informants to and from airports, train stations and hotels; helped facilitate the transfer of funds . . . ; and served as an intermediary for messages between the informants and his friend and employer, Monzer Al Kassar.<sup>346</sup>

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340. *Id.* at 51. In Toure's case, the court applied the Terrorism Enhancement, but, finding that Toure was not ideologically motivated and had taken steps to learn English in prison (among other factors), the court departed downward to impose a prison term of sixty-three months. *Id.* at 48-51.

341. See Weiser, *supra* note 275.

342. 582 F. Supp. 2d 488 (S.D.N.Y. 2008).

343. Indictment ¶ 9, *Al Kassar*, 582 F. Supp. 2d 488 (No. 07-cr-354).

344. *Id.* ¶ 1.

345. Judgment, *Al Kassar*, 582 F. Supp. 2d 488 (No. 07-cr-354), Dkt. No. 119; Judgment, *Al Kassar*, 582 F. Supp. 2d 488 (No. 07-cr-354) (Judgment as to Godoy, Dkt. No. 120).

346. Sentencing Memorandum in Support of Defendant Godoy at 7, *Al Kassar*, 582 F. Supp. 2d 488 (No. 07-cr-354), Dkt. No. 110.

Despite that fact, the presentence report rejected a downward adjustment for Godoy's minimal participation.<sup>347</sup>

Also ignored was the fact that Godoy seemed to have been motivated by money rather than animosity, unlike his co-defendant Kassar.<sup>348</sup> For Godoy, who was merely al Kassar's "friend and employee"—rather than his "business partner"—"[h]is motivation [was] even further removed from 'terrorism.'"<sup>349</sup> Godoy had told the probation office

[t]o tell the truth I hate terrorists but the jury convicted me of terrorism. I am a person of the right, I am very conservative. My family cannot understand how come they accuse me of being a terrorist if I have my ideology of the right and have been accused of helping a leftist terrorist group.<sup>350</sup>

In contrast, for al Kassar, there was evidence of tape-recorded meetings at which he mentioned liking the undercover agents' touted "cause against the United States."<sup>351</sup> Al Kassar also allegedly discussed FARC's need for missiles to shoot down American helicopters in Colombia.<sup>352</sup>

In view of these facts, a proportionate sentence would have subjected Kassar to a much more severe penalty than Godoy—not the *same* one—to reflect the greater need to prevent al Kassar from supplying enemy groups in an ongoing battle, as well as the aggravating circumstances of al Kassar's offense and in recognition of the mitigating circumstances of Godoy's. Furthermore, sentencing al Kassar to a term of life in prison while sentencing Godoy to a relatively shorter prison term would have made a strong symbolic statement: that the United States has zero tolerance for those committed to terrorism and who effectively further it, but will treat fairly those who are incidental to these extremist groups and, if properly incentivized, would choose a different path.

The defendant in *United States v. Kahn*, who has not yet been sentenced, is a "candidate" for the application of a new sentencing guideline for international terrorism.<sup>353</sup> There, the defendant pled guilty to an attempt to provide material

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347. *Id.*

348. *Id.* at 4.

349. *Id.*

350. *Id.* (quoting the presentence report at 21, para. 84).

351. See Sentencing Memorandum in Support of Defendant al-Ghazi at 6, *Al Kassar*, 582 F. Supp. 2d 488 (No. 07-cr-354), Dkt. No. 134.

352. See *id.* at 7-8.

353. See Robert Chesney, *NationalSecurityLaw United States v. Khan (N.D. Ill. June 8, 2012) (7.5 Year Sentence for Attempted Material Support to AQ in the Form of Money Given to Ilyas Kahsmiri)*, J. OF NAT'L SEC'Y L. & POL'Y (June 8, 2012, 7:41 pm), <http://jnslp.wordpress.com/2012/06/08/nationalsecuritylaw- united-states-v-khan-n-d-ill-june-8-2012-7-5-year-sentence-for-attempted-material-support-to-aq-in-the-form-of-money-given-to-ilyas-kahsmiri> (reporting the Department of Justice press release on this case).

support to an FTO. As generally described in the Department of Justice press release, Kahn had met with a leader of the Kashmir independence movement, whom Kahn knew or had reasons to know was working with al Qaeda in leading attacks against the Indian government in the Kashmir region.<sup>354</sup> Kahn gave this terrorist leader, Ilyas Kashmiri, about \$200 to \$250, which he supposedly intended Kashmiri to use for attacks in India.<sup>355</sup> He later sent \$930 to an individual in Pakistan, with directions to give \$300 of that sum to Kashmiri.<sup>356</sup> Kahn then met with an undercover law enforcement agent who was posing as someone interested in sending money to Kashmiri for weapons and ammunition, and individuals to Pakistan for military-style training in connection with future attacks against the United States.<sup>357</sup> The agent expressed that he was interested in supporting Kashmiri on the condition that he was working with al Qaeda.<sup>358</sup> The undercover agent provided Khan with \$1,000, which Khan agreed to provide to Kashmiri.<sup>359</sup> Based on these factual snippets, it seems likely that the facts found at a sentencing proceeding regarding Kahn's substantial steps would place him in the second category of offenders, but at the highest range of base offender levels. Although the DOJ did not believe "Khan . . . posed any imminent domestic danger"<sup>360</sup> given his involvement in a sting, his financial contributions were not insubstantial and his ideological commitment well demonstrated.

Most likely, institutional adjustments would have to be made to accommodate this new sentencing system. Rigorous prerelease review, for instance, would be an important part of this revised guidelines system that yields a wider range of sentences for terrorist offenders in the softcore group. It would also be important to assess the continued threat to security, if any, posed by hardcore offenders should the War on Terror officially cease and the justification for their life sentences be undermined. The aim of a back-end prerelease review would be to ensure that defendants will not return to their previous terrorist affiliations or escalate their terrorist involvement upon their release and removal.

One possibility is a comprehensive parole-style review hearing before a national security review board, composed of a panel of national security experts, much like the review boards that have been proposed by national security experts

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354. Robert Chesney, *NationalSecurityLaw United States v. Khan* (N.D. Ill. Feb. 6, 2012) (*Guilty Plea in AQ Material Support Case*), J. OF NAT'L SEC'Y L. & POL'Y (Feb. 6, 2012, 10:46 pm), <http://jnsplp.wordpress.com/2012/02/06/nationalsecuritylaw-united-states-v-khan-n-d-ill-feb-6-2012-guilty-plea-in-aq-material-support-case> (reporting the Department of Justice press release on this case).

355. *Id.*

356. *Id.*

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.*

as an alternative forum for trial.<sup>361</sup> In some sense, the military commission system already uses a version of review boards, the Annual Review Boards (ARBs), which essentially provide parole hearings for each detainee. If the ARB determines that the detainee is no longer a threat, that detainee may be released.<sup>362</sup> In 2008, the government spent over fifteen million dollars to hold ARBs for every detainee and reviewed over 300,000 documents during those hearings.<sup>363</sup> Resources and precedent for such a procedural addition to the existing Article III system therefore already exist.

*C. National Security Demands a Revised System for Punishment*

Part II argued the current Sentencing Guidelines are inadequate to the War on Terror cases for their failure to address directly how the principles of proportionality, necessity, aggravation, and mitigation apply in this conflict context. This Part suggested that a revised set of sentencing guidelines could better account for them, while serving deterrence and incapacitation objectives, by incorporating certain factual criteria for consideration—defendants’ substantial steps toward a terrorism offense as well as their degree of participation and role in the terrorist scheme. This Section argues why such revisions to the Sentencing Guidelines are as much an improvement in national security as sentencing policy.

For one, the revised sentencing guidelines address a serious national security weakness in the current sentencing system, the risk that it is “hardening” terrorist defendants against America, and contributing to the development or entrenchment of terrorist networks. The risk that terrorists will harden in the U.S. prison system, or, in ordinary criminal language “recidivate,” is at least in part a function of their experience in prison, inclusive of their perceptions of the process behind the punishment.

The correlation between prison and extremism is well documented, in both theory and history. Several sociological explanations for criminal behavior relate to prison, norm development, and group cohesion.<sup>364</sup> According to these explanations, prisons provide environments in which criminal subcultures develop,<sup>365</sup>

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361. See Jack L. Goldsmith & Neal Katyal, Op. Ed., *The Terrorists’ Court*, N.Y. TIMES, July 11, 2007, <http://www.nytimes.com/2007/07/11/opinion/11katyal.html>.

362. Kyndra Rotunda, *Applying Geneva Convention Principles to Guantánamo Bay*, 43 U. RICH. L. REV. 1067, 1078-79 (2009).

363. *Id.* at 1079.

364. See, e.g., HOWARD ABADINSKY, ORGANIZED CRIME (2010).

365. See *id.* at 19-20 (noting that subcultures “are patterns of values, norms, and behavior which have become traditional among certain groups . . . [or] occupants of ‘closed institutions’” such as prisons).

that is, groups that are oriented around “norms” and ideology.<sup>366</sup> By that theory, terrorist defendants’ experience in prison shapes the norms or “frames of reference”<sup>367</sup> that influence their “[i]deas about [American] society.”<sup>368</sup> Of course negative norms and ideologies will inevitably feed the growth of extremist networks, both in prison and after a defendant’s release.

There is other data to suggest that conditions of confinement can push toward extremism those terrorist defendants that might have previously lacked very radical beliefs.<sup>369</sup> Intelligence experts, for one, have discussed the relationship between feelings of isolation and compelled betrayal that incarceration stimulates and the hardening of radical ideals.<sup>370</sup> Prison makes the possibility acute: “[i]t is not particularly uncommon for terrorist groups to recruit some of their members among criminal elements, particularly among individual who may have special skills or common criminals who can contribute to its goals in instruments, training, and other matters.”<sup>371</sup>

The origins of al Qaeda are a case in point. Although an extreme example, prison played a role in hardening Ayman al-Zawahiri, bin Laden’s second-in-command and now, after bin Laden’s death in June 2011, the putative al Qaeda leader, against the West.<sup>372</sup> Experts who have studied Zawahiri’s case explain that the time spent in Egyptian prisons “redoubled Zawahiri’s [ideological] fervor.”<sup>373</sup> The combination of the mistreatment he experienced in prison and his engagement with other radical militant thinkers,<sup>374</sup> “transformed him from a relative

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366. *See id.* at 20 (noting that “[s]ubculture theory explains criminal behavior as learned; the subcultural delinquent has learned values that are deviant. Ideas about society lead to criminal behavior”).

367. *Id.*

368. *Id.* At one point, Department of Defense data suggested that five to ten percent of detainees “rejoined the battle.” Rotunda, *supra* note 362, at 1080.

369. *See* William Glaberson, *Pentagon Study Sees Threat in Guantánamo Detainees*, N.Y. TIMES, July 26, 2007, at A16 (suggesting that experience at Guantánamo has made certain detainees who were not otherwise that dangerous want to join forces with al Qaeda).

370. Rotunda, *supra* note 362, at 1082-83; *see* ABADINSKY, *supra* note 365, at 5 (“[T]errorists imitate the organized criminal behavior they see around them, borrowing techniques. This can lead to more intimate connections, particularly in places of poor governance . . . such as in . . . prisons.”).

371. ABADINSKY, *supra* note 365, at 5.

372. *See, e.g.*, Jayshree Bajoria & Lee Hudson Teslik, *Profile: Ayman al-Zawahiri*, COUNCIL ON FOREIGN REL. (July 14, 2011), <http://www.cfr.org/terrorist-leaders/profile-ayman-al-zawahiri/p9750#p2>.

373. *Id.*

374. Lawrence Wright, *The Man Behind Bin Laden*, NEW YORKER, Sept. 16, 2002, at 71.



moderate in the Islamist underground into a violent extremist.”<sup>375</sup> By those historical accounts, Zawahiri was released from the Cairo prison in 1984 “a hardened radical.”<sup>376</sup> While Zawahiri’s story may be extreme, the lessons it teaches are important, and not overstated. Most significantly, it illustrates how subjective feelings of mistreatment, when combined with an opportunity for extremist “group-think,” can have a potent hardening effect.<sup>377</sup>

The current sentencing practice of imposing lengthy sentences, across the board to all softcore terrorist defendants, exacerbates that risk. Related are the restrictive conditions of imprisonment that accompany terrorism convictions. For many convicted terrorists, the conditions of their imprisonment are extremely restrictive.<sup>378</sup> These defendants are often assigned to maximum-security prison facilities and some are subject to a regime of Special Administrative Measures (SAMs).<sup>379</sup> As with the length of the sentence, when necessary, SAMs might be reasonable. But indiscriminate imposition of SAMs, like an unreasonably long sentence, stand to increase the hardening risk. To the extent that the guideline revisions proposed here imposes more reasonable sentences and less restrictive conditions where appropriate, and engenders a process for punishment that is perceived as more fair, the law will do more to mitigate these hardening risks than the current system, which exacerbates them.

The United States also has a long-term security interest in winning the hearts and minds in this conflict. Revising the Sentencing Guidelines as suggested would

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375. *Id.* at 69.

376. *Id.* at 71.

377. As one Canadian intelligence analyst testified, members of al Qaeda or other related militant Islamic groups “maintain their ties, and their relationships to those networks, for very long periods of time” and that “[t]hese ties are forged in environments [such as prisons] where relationships mean a great deal, and it is our belief that the dedication to the ideology, if you will, is very strong, and is virtually impossible to break.” Rotunda, *supra* note 368, at 1082.

378. ZABEL & BENJAMIN, *supra* note 122, at 124 (explaining SAMs); *see also* Alia Malek, *Gitmo in the Heartland*, THE NATION, Mar. 10, 2011, <http://www.thenation.com/article/159161/gitmo-heartland> (explaining the Bureau of Prisons’ operation of special communications restricted units for terrorist inmates).

379. SAMs are designed to “ensure security for highly dangerous defendants,” and “intended to prevent violence within the prison system” and “inmates from sending communications to others outside of prison.” ZABEL & BENJAMIN, *supra* note 122, at 124; *see* 28 C.F.R. § 501.3(a) (2012). At the direction of the Attorney General, the Bureau of Prisons has developed this regime of SAMs. *See id.*

go far in that regard. The proposed revisions are transparent and understandable.<sup>380</sup> As experts have repeatedly stressed, transparency is key in gaining international support for U.S. efforts in the global War on Terror.<sup>381</sup> Also, the normative framework and model guidelines that lean on it carefully incorporate legal principles from both domestic and international law, and consult the historical experiences of the United States as well as the international community. As such, not only is this sentencing policy transparent, but it also reflects the United States' appreciation of the global nature of this war and its sense of comity.

This revision of the Sentencing Guidelines would also speak to hearts and minds at home by bringing U.S. punishment practices closer in line with constitutional standards. Without the Terrorism Enhancement to contend with, the question of whether its application by a judge under a preponderance of the evidence is unconstitutional disappears.<sup>382</sup> The sentencing analysis required by the revised guidelines affords ample opportunity to include the jury in finding the necessary sentencing facts (i.e., the substantial step, the motivation, and the role and degree of the defendant's participation). With the imposition of a more fact-intensive sentencing schema, courts will likely begin to require the government to argue and prove these facts to the jury at trial. Alternatively, if not found during the trial by incorporation into the jury charge, it is likely that the parties will begin to request *Fatico* hearings before sentencing, at which proceeding the court will specifically find those facts.<sup>383</sup> It is even possible that a new type of *Fatico*

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380. WITT, *supra* note 5, at 371 (“International standards such as those in the Geneva Conventions serve to coordinate American actions with those of our allies. Adherence to the laws of armed conflict . . . assist[s] American efforts to win over civilian hearts and minds. The laws of war . . . serve as a useful guide to the nation’s long-term interests.”).

381. See John B. Bellinger III, Op. Ed., *Will Drone Strikes Become Obama’s Guantanamo?*, WASH. POST, Oct. 2, 2011, [http://www.washingtonpost.com/opinions/will-drone-strikes-become-obamas-guantanamo/2011/09/30/gIQAoReIGL\\_story.html](http://www.washingtonpost.com/opinions/will-drone-strikes-become-obamas-guantanamo/2011/09/30/gIQAoReIGL_story.html) (noting the importance of providing information regarding counterterrorism policies and, with respect to the use of drone strikes in particular, commenting that “[e]ven if Obama administration officials are satisfied that drone strikes comply with domestic and international law, they would still be wise to try to build a broader international consensus”); see also DONOHUE, *supra* note 61, at 1334-35 (noting that the Diplock courts in England “hurt the United Kingdom’s international standing,” as the accompanying “changes in admissibility of confessions and rules of evidence raised questions about whether the system was designed to convict individuals—not to dispense justice”).

382. See *supra* note 179 and accompanying text.

383. A *Fatico* hearing “is designed to allow a judge to determine whether allegations in a Government sentencing memorandum that are disputed by the defense should be considered in deciding punishment.” Kurt Eichenwald, *Sentencing of Milken is Delayed by Judge*, N.Y. TIMES, Sept. 28, 1990, <http://www.nytimes.com/1990/09/28/business/sentencing-of-milken-is-delayed-by-judge.html>.

hearing might develop for international terrorism cases, in which the jury is included and a heightened standard of proof required.<sup>384</sup> Such a procedural addition would be consistent with the military approach, and a step in the right direction toward reorienting the civilian courts' thinking of these cases as part of an interbranch war strategy.

The proposed framework also alleviates the second constitutional concern implicated in terrorism prosecutions—the extraterritorial application of U.S. antiterrorism laws. To the extent that the revised sentencing guidelines incorporate established principles from the international law of war, as the framework intends, the resulting guidelines will be more “adjudicative” than “prescriptive.”<sup>385</sup> Applying them in War on Terror cases would likely not, on that understanding, imply an attempt to apply U.S. substantive law of sentencing to extraterritorial conduct. The prospect of a more constitutionally sound sentencing policy thus has a legitimizing effect, and provides yet another reason why the proposed framework, and the revised sentencing guideline derived from it, stand to further the national security interest.

#### CONCLUSION

This Article has argued for an overhaul of the punishment regime applied to terrorists convicted in Article III courts. It began by examining America's history and experience with the laws of war, with a special focus on how crime has been punished in the context of armed conflict. With historical experience in mind, the Article identified the legal and policy problems with the current system of sentencing, specifically pointing out the system's failure to appreciate the relevant principles of international and military law and its underestimation of the important sentencing goals at stake. The Article argued for a more appropriate and effective framework for sentencing, comprised of the principles of proportionality and necessity, with reference to aggravating and mitigating circumstances. That framework would be animated by the sentencing purposes of incapacitation and deterrence, and would afford courts an opportunity to consider the rehabilitative purposes of their sentences as well.

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384. Although largely beyond the scope of this Article, it bears mention that the inclusion of the jury at the sentencing stage of trial is consistent with the historic role of the jury and the Framers' understanding of the role and responsibilities of the jury. See, e.g., Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 316-17 (2003).

385. See Oona Hathaway, *Online Kiobel Symposium: The ATS Is in Good Company*, SCOTUSBLOG (July 17, 2012, 11:37 AM), <http://www.scotusblog.com/2012/07/online-kiobel-symposium-the-ats-is-in-good-company> (making this argument in connection with a defense of the Alien Tort Statute); Oona Hathaway, *Response: International Law Supplies the Conduct Rules and Domestic Law Governs Enforcement*, SCOTUSBLOG (July 20, 2012, 12:49 PM), <http://www.scotusblog.com/2012/07/response-international-law-supplies-the-conduct-rules-and-domestic-law-governs-enforcement> (same).

From those normative principles, the Article proposed a way to revise the Sentencing Guidelines and replace the Terrorism Enhancement. It explained why it is in the United States' interest to undertake such a project. For one, the United States has the opportunity to develop, for the first time, standards for punishing terrorists that are consistent with the laws and customs of war. Developing more robust sentencing guidelines for the War on Terror would, therefore, reflect America's traditional role at the forefront of advancing the laws and customs of war and serve as a testament to its continued global leadership in this regard. Ultimately, U.S. efforts to develop a new body of sentencing law, which considers the international law of war together with the domestic criminal law, would demonstrate the United States' commitment to waging an effective, yet transparent and legitimate, War on Terror.