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## The Death Penalty--An Obstacle to the "War on Terrorism"?

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# The Death Penalty—An Obstacle to the “War against Terrorism”?<sup>1</sup>

Thomas Michael McDonnell\*

## ABSTRACT

*September 11 seared our collective memory perhaps even more vividly than December 7, 1941, and has evoked a natural demand both for retribution and for measures to keep us safe. Given the existing statutory and judicial authority for capital punishment, the U.S. Government has to confront the issue whether to seek the death penalty against those who are linked to the suicide attacks or to the organization that sponsored them or both. Meting out the death penalty to international terrorists involves difficult moral, legal, and policy questions. The September 11 crimes were not only domestic crimes, but also international ones. The magnitude of these crimes, the killing of over 3,000 innocent people, cries out for redress.*

*Yet most countries in the world, including nearly all our closest allies, have abolished capital punishment. None of the*

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1. In my earlier drafts of this Article, I did not put quotation marks around “war on terrorism.” It has now become clear, however, that this phrase has not only become unthinkingly part of the lexicon but is dangerously overbroad. One commentator put it aptly:

Wars have typically been fought against proper nouns (Germany, say) for the good reason that proper nouns can surrender and promise not to do it again. Wars against common nouns (poverty, crime, drugs) have been less successful. Such opponents never give up. The war on terrorism, unfortunately, falls into the second category.

Grenville Byford, *The Wrong War*, FOREIGN AFF., July 2002, at 34, available at 2002 WL 2085047. Emergency measures put into effect because of the “war on terrorism” may likewise never end, and governmental officials may justify military actions that have little to do with our immediate security by invoking such a broad description of the threat.

\* Professor of Law, Pace University School of Law, B.A., J.D., Fordham University. I wish to thank Professors Donald L. Doernberg and John A. Humbach, both of Pace University School of Law, and Christopher G. Wren, Assistant Attorney General, Wisconsin Department of Justice, for their comments on an earlier draft of this Article. I also wish to thank law librarians Margaret Moreland and Cynthia Pittson; my administrative assistant Carol Grisanti; my research assistants Christina Kelly, Laura Krawczyk, and William Onofry; and my wife, Kathryn Judkins McDonnell, whose support helped make this Article possible. I dedicate this Article to my father, Joseph T. McDonnell, attorney-at-law, whose work and concern for justice and fairness have been a constant inspiration.

*four currently operating international criminal tribunals is authorized to give a death sentence. In addition, the advent of the suicide bomber turns the deterrence justification for the death penalty inside out. Might the death penalty help create martyrs rather than discourage similar attacks? Could our imposing the death penalty increase support in the Islamic world for al Qaeda and other extremist groups? Furthermore, to what extent as a matter of constitutional law and policy, should a secondary actor, one who did not kill, but who was a member of a terrorist conspiracy, be subject to the death penalty? This Article examines these questions in the context of the Zacarias Moussaoui case, the supposed twentieth hijacker, who, on September 11, 2001, had been held in custody for twenty-six days.*

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## I. INTRODUCTION

September 11 seared our collective memory perhaps even more vividly than December 7, 1941, not only because, like Pearl Harbor, the attack on the World Trade Center took us completely by surprise or because the burning twin towers collapsed so unexpectedly and spectacularly as we watched the horror unfold on our television sets, but because the September 11 attacks constitute a virtually unprecedented threat to our security and way of life. The attacks have thus evoked a natural demand both for retribution and for measures to keep us safe. To satisfy these demands, Congress created the Department of Homeland Security<sup>2</sup> and rushed to pass the

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2. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002). Congress passed a spate of measures in response to the September 11 attacks. *See*

Patriot Act.<sup>3</sup> The President has taken numerous steps, including, among many others, the invasion of Afghanistan, the indefinite incommunicado detention of alleged Taliban and al Qaeda leaders in Guantanamo Bay, the establishment of military tribunals to try those and other foreign terrorist suspects at some unspecified date,<sup>4</sup> the incommunicado detention of two U.S. citizens without trial,<sup>5</sup> the detention of hundreds of immigrants thought to be linked to

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Michael P. O'Connor & Celia M. Rumann, *Into the Fire: How to Avoid Getting Burned by the Same Mistakes Made Fighting Terrorism in Northern Ireland*, 24 CARDOZO L. REV. 1657, 1705 n.227 (2003) (citing List of Legislation Related to September 11 Attacks, available at <http://thomas.loc.gov/home/terrorleg.html> (last visited Jan. 22, 2004)).

3. USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001). Brought about in part by Attorney General John Ashcroft's demand for immediate action, the pace of passage was frenetic:

Passage of the bill, by a vote of 337 to 79, was the climax of a remarkable 18-hour period in which both the House and the Senate adopted complex, far-reaching antiterrorism legislation with little debate in an atmosphere of edgy alarm, as federal law enforcement officials warned that another attack could be imminent. Many lawmakers said it had been impossible to truly debate, or even read, the legislation that passed today.

Robin Toner & Neil L. Lewis, *A Nation Challenged, House Passes Terrorism Bill Much Like Senate's, but With 5-Year Limit*, N.Y. TIMES, Oct. 13, 2001, at B6.

4. President George W. Bush, Executive Order: Notice—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001), available at 2001 WL 1435652. Six of the Guantanamo Bay detainees, however, may be tried fairly soon, according to Administration Officials. See Neil A. Lewis, *Threats and Responses: The Tribunals; Six Detainees Soon May Face Military Trials*, N.Y. TIMES, July 4, 2003, at A1. To date, none of the Guantanamo detainees have been tried. The Pentagon, however, says it has released a total of 119 Guantanamo Bay detainees, leaving 610. *U.S. Releases 26 Guantanamo Bay Detainees*, WASH. POST, Mar. 16, 2004, at A2.

5. See *Hamdi v. Rumsfeld*, 316 F.3d 450, 460-61 (4th Cir. 2003); *Padilla v. Bush*, 233 F. Supp. 2d 564, 610 (S.D.N.Y. 2002), remanded, *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003) (answering certified questions and ruling, *inter alia*, that President, as Commander in Chief, lacked power to detain U.S. citizens on U.S. soil). The U.S. Supreme Court subsequently granted certiorari in *Hamdi v. Rumsfeld*, No. 03-6696, 2004 U.S. LEXIS 12 (Jan. 9, 2004). After the Supreme Court agreed to hear his case, the Pentagon permitted Jose Padilla to meet with his lawyer. Michael Powell, *Lawyer Visits 'Dirty Bomb' Suspect*, WASH. POST, Mar. 4, 2004, at A10. Padilla had been held *incommunicado* for nearly two years. *Id.* Two agents listened to the conversation conducted with a glass barrier between Padilla and his attorney. *Id.* The meeting was also videotaped. Given the government's monitoring, his lawyer stated that their conversation dealt only with his health and well-being, not legal matters. *Id.* At about the same time and under similar constraints the Pentagon has allowed Yaser Esam Hamdi to see an attorney after nearly two years of *incommunicado* detention. See Lyle Denniston, *Supreme Court to Hear Detainee Case to Decide if Suspect in 'Dirty Bomb' Can Be Held*, BOSTON GLOBE, Feb. 21, 2004, at A2.

terrorism,<sup>6</sup> the indictment of several suspected terrorists in federal court,<sup>7</sup> and the invasion and occupation of Iraq.

Unlike our European allies, the United States has relatively little experience fighting a private terror organization.<sup>8</sup> Given the magnitude of the attacks, we may tend to overreact, which may play into the terrorists' hands. Overreaction may also erode our own respect for the rule of law and our moral standing both at home and abroad. This Article deals with a fundamental question, namely, whether, as a matter of law and policy, the federal government should use the death penalty against those found to have been involved in the September 11 attacks, in particular, and, more broadly, against those who belong to or have allied themselves with al Qaeda.<sup>9</sup>

Meting out the death penalty to international terrorists involves difficult moral, legal, and policy questions. The September 11 crimes were not only domestic crimes, but also international ones. The magnitude of these crimes, the killing of over 3,000 innocent people, cries out for retribution. Yet most countries in the world, including nearly all of our closest allies, have abolished capital punishment.<sup>10</sup> None of the four currently operating international criminal tribunals

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6. See *Center for National Security Studies v. Department of Justice*, 331 F.3d 918, 921 (D.C. Cir. 2003) (noting that in course of post-September 11 investigation, government interviewed over 1,000 persons, detained 700 for violation of immigration laws, 134 on federal criminal charges, and undisclosed number as material witnesses); see also Lawyers Committee for Human Rights, *A Year of Loss, Ch. 3: Treatment of Immigrants, Refugees, and Minorities*, at [http://www.lchr.org/us\\_law/loss/loss\\_ch3a.htm](http://www.lchr.org/us_law/loss/loss_ch3a.htm) (last visited Jan. 22, 2004).

7. See *Indictment, United States v. Goba*, 220 F. Supp. 2d 182, 184 (W.D.N.Y. Oct. 21, 2002), available at <http://news.findlaw.com/hdocs/docs/terrorism/usgoba102102ind.html> (last visited Jan. 22, 2004) (charging six individuals with conspiring to aid terrorist organization, namely, al Qaeda); Matthew Purdy & Lowell Bergman, *An Unclear Danger: Inside the Lackawanna Terror Organization*, N.Y. TIMES, Oct. 12, 2003, at 1, 37 (noting that six of these "sleeper" cell defendants pleaded guilty to lesser charges but stating that apparently FBI agent in charge of case did not consider defendants terrorists, but perhaps potential terrorists); *The Nation in Brief*, WASH. POST, May 22, 2003, at A36 (noting seventh person was indicted for participation in "sleeper" al Qaeda cell in upstate New York); see also *Indictment, United States v. Battle*, No. CR 02 399HA (D. Or. Oct. 3, 2002) (charging four individuals with conspiring to levy war against United States and with conspiring to prove support and resources to al Qaeda), available at <http://news.findlaw.com/hdocs/docs/terrorism/usbattle100302ind.pdf> (last visited Jan. 22, 2004); *United States v. Abdullah*, No. 01 CR 3240-W (May 12, 2002); Philip Shenon, *Threats and Responses: The Law; 6 Persons Charged under Broadly Worded Act*, N.Y. TIMES, Sept. 17, 2002, at A17.

8. See Jonathan Stevenson, *How Europe and America Defend Themselves*, FOREIGN AFF., Mar-Apr. 2003, at 75.

9. This Article does not address the question of whether to use the death penalty in war crimes tribunals in Iraq. See Susan Dominus, *Their Day in Court*, N.Y. TIMES MAG., Mar. 30, 2003, at 30. See generally, Capt. R. Peter Masterson, *The Persian Gulf War Crimes Trials*, 1991 ARMY LAW 7 (1991).

10. See Carol S. Steiker, *The Law and Politics of the Death Penalty*, 81 OR. L. REV. 97, 97 (2002).

is authorized to impose a death sentence.<sup>11</sup> In addition, the advent of the suicide bomber turns the deterrence justification for the death penalty inside out. Might the death penalty help create martyrs rather than discourage similar attacks? Could our imposing the death penalty increase support in the Islamic world for al Qaeda and other extremist groups? Furthermore, to what extent as a matter of constitutional law and policy, should a secondary actor, one who did not kill, but who was a member of a terrorist conspiracy, be subject to the death penalty?

This Article examines these questions in the context of the Zacarias Moussaoui case, the supposed twentieth hijacker,<sup>12</sup> who, on September 11, 2001, had been held in custody for twenty-six days. This Article thus first deals with criminal liability imposed not on the actual perpetrators, but on accomplices and co-conspirators, secondary rather than primary actors. After the facts and allegations against Moussaoui are set forth, Part I of this Article analyzes the U.S. law of conspiracy applicable here. Part II examines the constitutional questions posed by imposing a death sentence on Moussaoui as a co-conspirator. Part III discusses the policy and international ramifications for the United States if we execute Moussaoui or al Qaeda and Taliban terrorists after trying them either in civilian courts or by military tribunals.

#### A. *Facts and Allegations against Zacarias Moussaoui*

Zacarias Moussaoui was indicted on December 11, 2001, by the Grand Jury in the U.S. District Court for the Eastern District of Virginia for conspiring to carry out the September 11 attacks.<sup>13</sup> Acting as his own attorney, he attempted to plead guilty on July 18 and July 25, 2002.<sup>14</sup> After the Court's questioning apparently made him realize he was unwilling to admit to the charges, he withdrew his

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11. See, e.g., Nora Demleitner, *The Death Penalty in the United States: Following the European Lead?* 81 OR. L. REV. 131, 143-44 (2002).

12. Some federal officials are now saying, however, that they no longer think that Moussaoui was in fact the twentieth hijacker. See Susan Schmidt & Dan Eggen, *Al Qaeda Effort to Enter U.S. in August 2001*, WASH. POST, Nov. 6, 2003, at A1, A23.

13. Indictment, *United States v. Zacarias Moussaoui*, No. 01-455-A (E.D. Va. Dec. 11, 2001), available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/DocketSheet.html>. The indictment charged him with the following offenses: (1) conspiracy to commit acts of terrorism transcending national boundaries; (2) conspiracy to commit aircraft piracy; (3) conspiracy to destroy aircraft; (4) conspiracy to use weapons of mass destruction; (5) conspiracy to murder U.S. employees; and (6) conspiracy to destroy property. *Id.*; see also David Johnston & Philip Shenon, *A Nation Challenged: The Government's Case: Man Held Since August Is Charged With Role in the September 11 Attacks*, N.Y. TIMES, Dec. 12, 2001, at A1.

14. Philip Shenon, *Terror Suspect Changes Mind on Guilty Plea*, N.Y. TIMES, July 26, 2002, at A1.

guilty plea.<sup>15</sup> The Justice Department is seeking the death penalty in his case.<sup>16</sup>

Zacarias Moussaoui was born in France of Moroccan parents on May 30, 1968.<sup>17</sup> He obtained a masters degree from Southbank University in Great Britain.<sup>18</sup> He was living in London before coming to the United States on February 23, 2001.<sup>19</sup> The indictment alleges that in April 1998, Moussaoui "was present at the al Qaeda-affiliated Khalden Camp in Afghanistan."<sup>20</sup>

Upon arriving in the United States, Moussaoui allegedly declared having at least \$35,000 in cash to U.S. Customs. Three days later, he opened a bank account in Norman, Oklahoma and deposited "approximately \$32,000 [in] cash."<sup>21</sup> For the next four months he attended the Airman Flight School in Norman.<sup>22</sup>

On June 20, 2001, Moussaoui allegedly purchased flight deck training videos for the Boeing 747 Model 400 and the Boeing 747 Model 200 from "the Ohio Pilot Store."<sup>23</sup> Two of the September 11 hijackers had allegedly purchased the same training videos from the same store, three months earlier.<sup>24</sup> On July 29 and 30, less than ten

15. *Id.*

16. Department of Justice, *Statement by Attorney General Ashcroft, Justice Department to Seek Death Penalty in Moussaoui Case* (Mar. 28, 2002), at [http://www.usdoj.gov/opa/pr/2002/March/02\\_ag\\_186.htm](http://www.usdoj.gov/opa/pr/2002/March/02_ag_186.htm) (last visited Jan. 22, 2004); see also Philip Shenon & Neil Lewis, *U.S. To Seek Death Penalty for Moussaoui in Terror Case*, N.Y. TIMES, Mar. 28, 2002, at A20.

17. Second Superseding Indictment, *United States v. Moussaoui*, No. 01-455-A, 282 F. Supp. 2d 480, ¶ 13 (E.D. Va. July 2002), available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/66826/0.pdf> (last visited Feb. 3, 2004).

18. *Id.*

19. *Id.* ¶¶ 41-42. After growing up in France, Moussaoui moved to London to pursue his masters degree and had been living there for seven years. MICHAEL GRIFFIN, *REAPING THE WHIRLWIND* 246-47 (rev. ed. 2003). He was asked to leave the Brixton Mosque for preaching holy war. *Id.* at 247. A French investigative judge suspected one "Zacarias" as being an Algerian al Qaeda paymaster, attempted to interview Moussaoui, and have his apartment searched, but the British refused. *Id.*

20. Second Superseding Indictment, *supra* note 17, ¶ 13. CBS reported that Moussaoui traveled to Chechnya in 1997. GRIFFIN, *supra* note 19, at 248. He is reported as twice visiting in September and October 2003 the Khallad operation center in Malaysia, the base for the attack on the *U.S.S. Cole*. *Id.* at 248. On the second trip he reportedly stayed with Yazid Sufaat, a former Malaysian army captain who supported the Taliban. *Id.* Sufaat gave him a letter of introduction, stating the Moussaoui was a marketing executive for Infocus Tech, a computer company, and had a salary of \$2,500 per month. *Id.*; see also JASON BURKE, *AL QAEDA, CASTING A SHADOW OF TERROR* 206 (2003). Moussaoui then traveled back to London, had a visit from bin al-Shibh, then traveled to Afghanistan by way of Pakistan and returned to London on February 7, 2001. GRIFFIN, *supra* note 19, at 278. After a couple of weeks in London, he took off for the United States, flying into Chicago and arriving in Norman, Oklahoma on February 26, 2001. GRIFFIN, *supra* note 19, at 248.

21. Second Superseding Indictment, *supra* note 17, ¶¶ 42-43.

22. *Id.* ¶ 44.

23. *Id.* ¶ 53.

24. *Id.* ¶¶ 45, 53.

days after purchasing the B-747 training videos, Moussaoui allegedly made several phone calls from public telephones to a number in Duesseldorf, Germany.<sup>25</sup> On August 1 and 3, Ramzi bin al-Shibh<sup>26</sup> allegedly wired “approximately \$14,000” to Moussaoui, first from Duesseldorf and then from Hamburg, Germany.<sup>27</sup> Less than two weeks earlier, Bin al-Shibh allegedly wired money from Germany to one of the September 11 hijackers in Florida.<sup>28</sup> Al-Shibh allegedly shared an apartment in Germany with Mohamed Atta, said to be the mastermind of the September 11 attacks.<sup>29</sup>

Ten days after receiving the second wire transfer, Moussaoui started training on Boeing 747 flight simulators at the Pan Am Flight Academy in Minneapolis, Minnesota.<sup>30</sup> He paid the Academy the balance due, \$6,800, in cash.<sup>31</sup> One of his flight instructors suspected Moussaoui of terrorism when Moussaoui “repeatedly proved himself incapable of understanding basic flying techniques but still insisted on learning how to fly a 747, the largest commercial jet.”<sup>32</sup> The flight instructor made repeated calls to the FBI until finally, three days later, on August 16, 2001, Moussaoui was arrested for immigration violations.<sup>33</sup> He allegedly told FBI agents that he was taking flying lessons for pleasure and never mentioned the September 11 plot.<sup>34</sup>

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25. *Id.* ¶ 63.

26. *Id.* ¶ 64.

27. *Id.* ¶ 65. Apparently, al-Shibh received the money from Mustafa Ahmed al-Hawsawi, also known as “Sheikh Sayeed,” a “known associate of bin Laden.” GRIFFIN, *supra* note 19, at 251. Ahmed was also apparently at least the conduit if not the source of the \$35,000 in cash Moussaoui brought with him to the United States. *Id.*

28. Second Superseding Indictment, *supra* note 17, ¶ 21.

29. *Id.* ¶ 14; see also Desmond Butler, *Threats and Responses: Intelligence; Germans Were Tracking Sept. 11 Conspirators as Early as 1998, Documents Disclose*, N.Y. TIMES, Jan. 18, 2003, at A10. Al-Shibh was arrested in Pakistan the following year. Desmond Butler, *Threats and Responses: Investigations; Germans in U.S. With Data On a Top Qaeda Suspect*, N.Y. TIMES, Sept. 27, 2002, at A20 (noting that al-Shibh was arrested earlier that month, September 2002).

30. Second Superseding Indictment, *supra* note 17, ¶ 70.

31. Jim Yardley, *Nation Challenged: The Conspiracy Charge; E-Mail Sent to Flight School Gave Terror Suspect's 'Goal'*, N.Y. TIMES, Feb. 8, 2002, at A1. Moussaoui had previously paid \$1,500.00 of the \$8,300.00 tuition by Visa card. *Id.*; see also Indictment, *supra* note 13, ¶ 72.

32. Philip Shenon, *A Nation Challenged: the Suspect, Flight School Warned F.B.I. of Suspicions*, N.Y. TIMES, Dec. 21, 2001, at B1; Yardley, *supra* note 31.

33. Christopher Drew, *After the Attacks: The Plot*, N.Y. TIMES, Sept. 17, 2001, at A4.

34. Government's Response in Opposition to Defendant's Motion to Strike Government's Notice to Seek the Penalty of Death at 21, *United States v. Moussaoui*, No. 01-455-A, 2002 U.S. Dist. LEXIS 13326 (E.D. Va. July 11, 2002), available at <http://news.findlaw.com/hdocs/docs/moussaoui/usmoussaoui051002gvrsp1.pdf> (last visited Feb. 3, 2004). On August 26, French informed the FBI of Moussaoui's links to al Qaeda. GRIFFIN, *supra* note 19, at 256.

Moussaoui has been in custody ever since. He had been incarcerated for twenty-six days when the September 11 attacks occurred.<sup>35</sup>

After September 11, an intensified FBI investigation revealed that he had the telephone number of al-Shibh in Germany.<sup>36</sup> In his various attempts at confession, Zacarias Moussaoui has admitted in open court to being a member of al Qaeda and being loyal to Osama bin Laden.<sup>37</sup> He might have applauded on seeing the collapse of the World Trade Center Towers on television while he was in custody.<sup>38</sup> He denies, however, being the so-called twentieth hijacker or being "directly involved" with the September 11 attacks.<sup>39</sup>

### B. Court Proceedings and Sanctions

Because of Moussaoui's somewhat erratic behaviour the district court conducted a hearing into his competency to stand trial.<sup>40</sup> U.S. District Court Judge Leonie M. Brinkema ultimately concluded that Moussaoui was competent to stand trial and to represent himself.<sup>41</sup> He did so,<sup>42</sup> and in the process made damaging admissions, affirming

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35. After Moussaoui's arrest, the 19 hijackers in the words of one commentator went into "high gear," possibly suggesting that they feared the operation would abort. *Id.* at 257.

36. Coleen Rowley, a Federal Bureau of Investigation agent in the Minneapolis office criticized FBI Headquarters for failing to approve a request to seek a search warrant of Moussaoui's computer before September 11 or to give credence to an Arizona FBI report that together might have warned officials of the September 11 attacks. Dan Eggen & Bill Miller, *FBI Flaws Alleged By Field Staff Moussaoui Probe Lapses Blamed on Headquarters*, WASH. POST, May 24, 2002, at A1.

37. Shenon, *supra* note 14.

38. Rick Linsk, *Terror Suspect at End of Road*, CENTREDAILY.COM, Sept. 10, 2002, available at <http://www.centredaily.com/mld/centredaily/4038932.htm> (last visited Feb. 5, 2004) (noting that *Los Angeles Times* initially reported jailer said Moussaoui cheered upon learning of September 11 attacks, but story has since been contradicted). See Bob Drogin & Josh Meyer, *After the Attack; The Investigation*, L.A. TIMES, Sept. 17, 2001, at A4.

39. Shenon, *supra* note 14. He also stated that while he might be a member of al Qaeda, "it doesn't mean I'm on the plane," an apparent reference to the September 11 hijacked airliners. *Id.*

40. There is evidence of some degree of mental illness in other members of Moussaoui's family. See Susan Dominus, *Everyone Has a Mother*, N.Y. TIMES MAGAZINE, Feb. 9, 2003, at 37.

41. Moussaoui told his lawyers that he would refuse to submit to a psychiatric examination. Transcript of Motion Hearing Before Hon. Leonie M. Brinkema, U.S. District Court Judge for the Eastern District of Virginia at 44, *United States v. Moussaoui*, No. 01-455-A, 2002 U.S. Dist. LEXIS 11087 (E.D. Va. Apr. 22, 2002), available at <http://cryptome.org/usa-v-zm-042202.htm> (last visited Jan. 26, 2004).

42. Judge Brinkema has subsequently revoked her order that permitted Moussaoui to represent himself. *Order, United States v. Moussaoui*, No. 01-455-A, slip op. (E.D. Va. Nov. 3, 2003), available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/69412/0.pdf> (last visited Jan. 26, 2004). Judge Brinkema stated that she took this step to bar Moussaoui from representing himself, because of his frivolous motions and contemptuous language. *Id.*

his loyalty to Osama bin Laden, possible knowledge of the September 11 attacks, and apparent close ties to other top al Qaeda leaders.<sup>43</sup> In addition, Judge Brinkema granted his motion to have access to al-Shibh, but the government appealed.<sup>44</sup> The government argued that Moussaoui does not have the right to a videotaped deposition of al-Shibh, asserting national security grounds.<sup>45</sup> The prosecutor stated, in oral argument before the Fourth Circuit, that al-Shibh “buries this defendant,” but whether that means that al-Shibh’s alleged statements to the government implicate Moussaoui in the September 11 attacks is unclear.<sup>46</sup>

The Fourth Circuit dismissed the Justice Department’s appeal, concluding that the district court’s requiring the government to permit a videotaped deposition of al-Shibh was not a “final order.”<sup>47</sup> By a vote of seven to five, the Fourth Circuit en banc refused the Justice Department’s request to consider the panel’s decision.<sup>48</sup> The government initially decided to defy the district court order to arrange a videotaped deposition of al-Shibh, an order later expanded to require the same of Khalid Shaikh Mohammed and Abu Zubaydah.<sup>49</sup> On September 25, 2003, the government took the unusual step of joining in the defense motion to dismiss the

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43. Moussaoui has admitted being loyal to Osama bin Laden. Philip Shenon, *Threats and Responses: The Courts; Justice Dept. Warns of Risk to Prosecution and Security*, N.Y. TIMES, June 4, 2003, at A21. In court papers, he wrote, “I will be delighted to come back one day to blow myself into your new W.T.C. if ever you rebuild it.” Philip Shenon, *A Nation At War: The Terrorist Suspect; Man Charged in Sept. 11 Attacks Demands That Qaeda Leaders Testify*, N.Y. TIMES, Mar. 22, 2003, at B12. He also referred to Mohammed Shaikh Khalid, whom U.S. and Pakistani forces captured in Pakistan as “Top Mujahid Brother Mohammed” and called another of the captured al Qaeda leaders, Abu Zubaydah, “[M]y commander Zubaydah.” *Id.* Mohammed Shaikh Khalid is reported to be the chairman of al Qaeda’s military committee and mastermind of the September 11 attacks. YOSRI FOUDA & NICK FIELDING, *MASTERMINDS OF TERROR* 12, 173 (2003). Moussaoui also stated, “I have certain knowledge about September 11, and I know exactly who done it. I know which group, who participated, when it was decided. I have many information.” Government’s Brief at 11, *United States v. Moussaoui*, No. 03-4792 (4th Cir. filed Oct. 31, 2003) (quoting record at 2JAU223), available at <http://news.findlaw.com/hdocs/docs/moussaoui/usmouss102403gbrf.pdf> (last visited Feb. 5, 2004).

44. See Jerry Markon, *Moussaoui Prosecutor Fights Ruling*, WASH. POST, June 13, 2003, at A9.

45. *Id.*

46. *Id.* Transcript of Oral Argument at 23, *United States v. Moussaoui*, 333 F.3d 509 (4th Cir. June 3, 2003) (Nos. 03-4262, 03-4261). See also *Government: Al Qaeda Witness ‘Buries’ 9/11 Defendant Moussaoui*, at <http://www.cnn.com/2003/LAW/06/13/moussaoui.trial> (last visited Feb. 4, 2004).

47. See *Moussaoui*, 333 F.3d at 514.

48. *United States v. Moussaoui*, 336 F.3d 279, 279 (4th Cir. 2003) (*en banc*).

49. Philip Shenon, *U.S. Will Defy Court’s Order in Terror Case*, N.Y. TIMES, July 15, 2003, at A1.

indictment.<sup>50</sup> A district court judgment dismissing the case would be a “final order,” clearing the way for a government appeal to the Fourth Circuit.<sup>51</sup>

Rebuking the government, however, Judge Brinkema denied the motion to dismiss, and sanctioned the government as follows: (1) the government may not seek the death penalty, and (2) the government may not at trial attempt to tie the defendant to the September 11 attacks.<sup>52</sup> The court reasoned, among other things, that the death penalty requires that a defendant have played a substantial role in bringing about the death of the victims of September 11 and that the government’s depriving the defendant of witnesses that might show he played little or no role in those attacks violated his rights under federal statutory and constitutional law.<sup>53</sup> The government is appealing the Fourth Circuit ruling.<sup>54</sup> If the government is ultimately unsuccessful, it may move the case into a military tribunal.<sup>55</sup>

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50. Philip Shenon, *In Maneuver, U.S. Will Let Terror Charges Drop*, N.Y. TIMES, Sept. 26, 2003, at A1. The government had hoped that that the district court would have dismissed and that the Fourth Circuit court would have rejected Judge Brinkema’s conclusion that Moussaoui has a right to a video-taped deposition of the key al Qaeda captives. If the Fourth Circuit affirms the dismissal, however, the Bush Administration has indicated that they will treat Moussaoui as an “enemy combatant” and try him in a military tribunal.

51. *Id.*

52. *United States v. Moussaoui*, No. 01-455-A, slip op. at 9-13 (E.D. Va. Oct. 2, 2003), available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/69264/0.pdf> (last visited Jan. 26, 2004); see also Order, *United States v. Moussaoui*, Crim. No. 01-455-A, 282 F. Supp. 2d 480 (E.D. Va. Oct. 2, 2003), available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/69267/0.pdf> (last visited Jan. 26, 2004); Philip Shenon, *Judge Rules Out a Death Penalty for 9/11 Suspect*, N.Y. TIMES, Oct. 3, 2003, at A1.

53. *Id.*

54. Philip Shenon, *U.S. to Appeal Ruling on 9/11 Terror Suspect*, N.Y. TIMES, Oct. 8, 2003, at A28. The government apparently considered but rejected moving Moussaoui’s case to a military tribunal at this time. *Id.*

55. *Id.* The Justice Department, however, is concerned that allies may be even more reluctant to extradite al Qaeda suspects if Moussaoui’s case is transferred to a military tribunal. See Philip Shenon, *A Nation at War, Terrorism Suspect: Man Charged in Sept. 11 Attacks Demands that Al Qaeda Leaders Testify*, *supra* note 43. See also Desmond Butler, *German Judge Orders a Retrial for a 9/11 Figure*, N.Y. TIMES ABSTRACTS, Mar. 5, 2004, 2004 WL72408997, at \*1 (German appellate court ordering new trial for Mounir el-Motassadeq, “the only person successfully prosecuted for involvement in Sept. 11 terrorist attacks,” because, *inter alia*, the United States refused to permit Bin al-Shibh to testify).

## II. UNDER FEDERAL LAW, IS MOUSSAOUI CRIMINALLY RESPONSIBLE FOR CONSPIRING<sup>56</sup> TO COMMIT THE SEPTEMBER 11 ATTACKS?

To conspire with another, an actor must agree that “they or one or more of them” will commit a criminal offense or that the actor “agrees to aid such other persons in the planning or commission of such crime.”<sup>57</sup> Generally, to be a conspirator, the actor must have the specific intent to commit the criminal offense.<sup>58</sup> Thus, the actor’s mere knowledge that members of a conspiracy may commit an offense is not enough; the actor must have a stake in the outcome and have the purpose that the offense be committed in order to be a member of the conspiracy.<sup>59</sup> On the other hand, once an actor becomes a member

56. I am indebted to the following case book authors for their insights and case selections concerning conspiracy law and doctrine: George E. Dix & M. Michael Sharlot [CRIMINAL LAW CASES AND MATERIALS (4th ed. 2002)]; Professors Sanford H. Kadish & Stephen J. Schulhofer [CRIMINAL LAW AND ITS PROCESSES, CASES AND MATERIALS (7th ed. 2001)]; Wayne R. LaFave [MODERN CRIMINAL LAW CASES AND MATERIALS (3d ed. 2001)].

57. MODEL PENAL CODE § 5.03(1) (1962).

58. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 434-35 (3d ed. 2001). In the 1993 World Trade Center bombing case, the Second Circuit Court of Appeals defined the offense of conspiracy as follows:

(1) that the defendant agreed with at least one other person to commit an offense; (2) the defendant knowingly participated in the conspiracy with the specific intent to commit the offenses that were the objects of the conspiracy; and (3) that during the existence of the conspiracy, at least one of the overt acts set forth in the indictment was committed by one or more of the members of the conspiracy in furtherance of the objectives of the conspiracy.

United States v. Saleme, 152 F.3d 88, 144 (2d Cir. 1998).

59. See Salinas v. United States, 522 U.S. 52, 65 (1997) (“A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor.”); see also Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 181 (1994) (citing *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938), and *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949)), *superseded in part*, 15 U.S.C. § 78t. Judge Posner noted that:

To infer membership from knowledge would erase the distinction between conspiring on the one hand, which means joining an agreement, and aiding and abetting on the other, which means materially assisting a known-to-be-illegal activity in the hope that it will flourish to the benefit, pecuniary or otherwise, of the aider.

*In re Brand Name Prescription Drugs Antitrust Litigation*, 288 F.3d 1028, 1035 (7th Cir. 2002) (Posner, J.) (citations omitted); see also *United States v. Irwin*, 149 F.3d 565, 569-70 (7th Cir. 1998) (noting that Learned Hand’s formulation for aider and abettor liability has been generally accepted) (citing *Nye & Nissen*, 336 U.S. 613 (quoting *Peoni*); *United States v. Giovannetti*, 919 F.2d 1223, 1227 (7th Cir. 1990); *United States v. Pino-Perez*, 870 F.2d 1230, 1235 (7th Cir. 1989); *United States v. Falcone*, 109

of the conspiracy, offenses that are reasonably foreseeable and committed in furtherance of the conspiracy can be imputed to the actor even if he or she did not necessarily intend to commit or even know about the offense in question.<sup>60</sup>

Justice Frankfurter summarized the classic rationales for the crime of conspiracy:

[C]ollective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish.<sup>61</sup>

It would have been impossible for a single individual to bring down the Twin Towers. In combating a criminal organization, be it the Mafia or al Qaeda, traditional conspiracy law and RICO conspiracy law<sup>62</sup> are major weapons in the prosecutor's arsenal. Given the "greater potential threat" to society posed by a

F.2d 579, 581 (2d Cir. 1940) (Hand, J.); *Peoni*, 100 F.2d at 402 (Hand, J.); *People v. Lauria*, 251 Cal. App. 2d 471, 475 (1967); MODEL PENAL CODE § 5.03(1) (1995). For a lucid discussion of *Falcone* and the seminal Supreme Court case pointing in the opposite direction, see *Direct Sales Co. v. United States*, 319 U.S. 703, 709 (1943) and *United States v. Blankenship*, 970 F.2d 283, 285-89 (7th Cir. 1992).

60. *Pinkerton v. United States*, 328 U.S. 640, 646-47 (1946). The *Pinkerton* doctrine is controversial, however. Although the federal courts have embraced it, the Model Penal Code and several states have rejected it. See ALA. CODE § 13A-2-23 & Commentary (1999); 720 ILL. COMP. STAT. § 5/5-2 (1999); N.D. CENT. CODE § 12.1-03-01(c) (1999); *State v. Stein*, 27 P.3d 184, 187-89 (Wis. 2001); *Woods v. Cohen*, 844 P.2d 1147, 1148 (Ariz. 1992); *State v. Small*, 272 S.E.2d 128, 135 (N.C. 1980); *Commonwealth v. Stasiun*, 206 N.E.2d 672, 680 (Mass. 1965); MODEL PENAL CODE, § 2.06 cmt. 6(a) (1985); Peter Buscemi, Note, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122, 1151 (1975); *infra* notes 86-89 and accompanying text.

61. *Callanan v. United States*, 364 U.S. 587, 593-94 (1961) (Frankfurter, J.) (justifying the double criminality aspect of conspiracy that permits punishing a defendant both for the completed target offense and for the conspiracy to commit the target offense). *But see* Paul Marcus, *Criminal Conspiracy Law*, 1 WM. & MARY BILL RTS. J. 1, \*3 n.12 (1992) (citing Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 414 (1959) (stating that none of Frankfurter's rationales have been empirically demonstrated)). The Model Penal Code and some states have rejected this double criminality aspect of conspiracy law. See MODEL PENAL CODE § 1.07(1)(b) (1962). *But see* Neal Kumar Kaytal, *Why it Makes Sense to Have Harsh Punishments for Conspiracy*, LEGAL AFF., Apr. 2003, at 44 (advocating *Pinkerton* as necessary weapon against dangers of group activity and as means to compel cooperation of minor actors). Although most often used against defendants who have completed the target offense, the crime of conspiracy is also employed to stop criminal activity at the early planning stages long before criminal liability for attempt or for the target offense attaches. Marcus, *supra*.

62. Racketeer Influenced and Corrupt Organizations Act of 1970, 18 U.S.C. §§ 1962-68 (1970).

sophisticated terrorist group like al Qaeda, federal prosecutors (and military tribunals) will almost certainly and routinely resort to conspiracy law when prosecuting such offenders.<sup>63</sup>

Conspiracy doctrine is vague and can be adapted to the needs of the prosecutor.<sup>64</sup> The conspiracy can be defined broadly or narrowly. For example, the conspiracy could be defined narrowly as the nineteen hijackers and others [hereinafter the “in-group conspirators”], who worked with them and who specifically intended<sup>65</sup> to hijack the four civilian airliners and to crash them into the Twin Towers, the Pentagon, and possibly Capitol Hill.<sup>66</sup> Or the conspiracy could be defined broadly to include those who joined al Qaeda and who follow Osama bin Laden’s *fatwah*,<sup>67</sup> authorizing the killing of

63. Conspiracy is certainly an appropriate tool when dealing with an organization like al Qaeda. See Marcus, *supra* note 61, at 42.

64. See *Krulewitch v. United States*, 336 U.S. 440, 446 (1949) (Jackson, J., concurring). The conspiratorial agreement need not be formally proven. *Iannelli v. United States*, 420 U.S. 770, 778 n.10 (1975) (Powell, J.) (“The agreement need not be shown to have been explicit. It can instead be inferred from the facts and circumstances of the case.”).

65. If the cell system deliberately kept conspirators in the dark about the details of the conspiracy, the “willful blindness” doctrine might be invoked to satisfy at least a “knowingly” *mens rea*. See *infra* notes 138-49 and accompanying text.

66. Apparently, the White House was rejected as a target for “navigational reasons”; the capitol building was much larger and easier to target. FOUDA & FIELDING, *supra* note 43, at 127-28.

67. The *fatwah* issued by Osama bin Laden and the leaders of Jihad groups in Egypt, Pakistan, and Bangladesh states as follows:

[T]o kill Americans and their allies, *both civil and military*, is an individual duty of every Muslim who is able, in any country where this is possible, until the Aqsa mosque [in Jerusalem] and the Haram mosque [in Mecca] are freed from their grip, and until their armies, shattered and broken-winged, depart from all the lands of Islam, incapable of threatening any Muslim.

BERNARD LEWIS, *THE CRISIS OF ISLAM* xxiv-xxvii (2003) (quoting the 1998 *fatwah* issued by Osama bin Laden and other fundamentalist leaders) (emphasis added); see also Abbas Amanat, *Empowered through Violence: The Re-inventing of Islamic Extremism*, in *THE AGE OF TERROR* 43 (Strobe Talbott & Nayan Chanda eds., 2001) (noting that in 1996 when Osama bin Laden arrived in Afghanistan he issued a *fatwah*, calling “upon all Muslims to kill Americans as a religious duty”). For a good summary on Osama bin Laden and al Qaeda, see Pierre Conesa, *Background to Washington’s War on Terror: Al Qaida, The Sect*, LE MONDE DIPLOMATIQUE, Jan. 2002, available at [http://mondediplo.com/2002/01/07sect?var\\_s+zacarias+moussaoui](http://mondediplo.com/2002/01/07sect?var_s+zacarias+moussaoui) (last visited Feb. 4, 2004). See also *Al-Qa’ida (the Base)*, available at [http://www.ict.org.il/inter\\_ter/orgdet.cfm?orgid=74](http://www.ict.org.il/inter_ter/orgdet.cfm?orgid=74) (last visited Feb. 4, 2004). A “fatwah” is defined as “a generic term for any legal decision made by a Mufti [an Islamic judge] or other Islamic religious authority, but, because of the particular context in which the West became familiar with the word, it is sometimes erroneously thought to mean ‘death sentence.’” Nadine Gordimer, *A Letter, with Love, to Salman Rushdie*, THE TORONTO STAR, Feb. 14, 1992, at A23, available at 1992 WL 6525312 (quoting THE OXFORD DICTIONARY OF NEW WORDS); see also FOUDA & FIELDING, *supra* note 43, at 9 (defining *fatwah* as “religious decree”).

Americans, civilians and military alike.<sup>68</sup> Even if this class of conspirators [hereinafter the “out-group conspirators”] knew nothing of the September 11 attacks beforehand, such attacks were arguably reasonably foreseeable and committed in furtherance of this conspiracy to kill Americans. Thus under the *Pinkerton* doctrine,<sup>69</sup> this broader class might likewise be criminally responsible for conspiring to carry out the attacks.

Moussaoui has admitted to being a member of al Qaeda. He also engaged in a series of activities that parallel those of the nineteen hijackers. Some reports indicate that al-Shibh, who provided logistical support and money to the hijackers, has asserted to government interrogators that Moussaoui was going to be used only as a backup.<sup>70</sup> If Moussaoui knew he was serving as a backup, a stand-in if something happened to one of the other hijackers, then Moussaoui could be criminally liable not only as a conspirator but as an accomplice in that he would have agreed to commit the target offenses and, assuming he agreed to be available if needed, he would have encouraged and thus aided and abetted the nineteen hijackers and others involved in the conspiracy.<sup>71</sup> If none of the nineteen hijackers were aware of Moussaoui’s alleged willingness to serve as a backup, then at common law, Moussaoui may not be deemed to be an aider and abettor.<sup>72</sup> Under this factual scenario, he would still, however, be part of the in-group conspiracy.

Moussaoui claims, however, that he had nothing to do with the September 11 attacks. Moussaoui’s standby attorneys filed a motion, asserting that al-Shibh would characterize Moussaoui as “a problematic and unstable hanger-on who could never be trusted to be

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68. The Justice Department apparently is adopting a broader theory of conspiracy, for the prosecutor argued before the Fourth Circuit as follows: “There is no suggestion in the indictment that everything was directed at September 11 . . . and once September 11 passed, the conspiracy dissolved and everybody went home and they satisfied their obligations. This was an ongoing conspiracy . . . for years that involved killing Americans.” See Transcript of Oral Argument at 23, *United States v. Moussaoui*, 333 F.3d 509 (4th Cir. June 3, 2003) (Nos. 03-4262, 03-4261); *Government: Al Qaeda Witness ‘Buries’ 9/11 Defendant Moussaoui*, *supra* note 46.

69. *Pinkerton v. United States*, 328 U.S. 640, 647 (1946); see *supra* notes 50-68 and *infra* notes 70-90 and accompanying text.

70. Jeffrey Markon, *Moussaoui Defense Claims He Was Supposed to Help in Later Action by al Qaeda*, *ASIAN WALL ST. J.*, May 15, 2003, at A8.

71. If Moussaoui were deliberately kept in the dark about his possible role, the doctrine of willful blindness might be employed to establish that he acted “knowingly.” See *infra* notes 138-49 and accompanying text.

72. See WAYNE R. LAFAVE, *PRINCIPLES OF CRIMINAL LAW* 516 (2003) (“An undisclosed intention to render aid if needed will not suffice, for it cannot encourage the principal in his commission of the crime.”). But see MODEL PENAL CODE § 2.06(3)(a)(ii) (1962) (including “attempts to aid” as sufficient to satisfy *actus reus* for complicity).

a participant in any significant undertaking by al Qaeda.”<sup>73</sup> Based on this motion, the district court concluded that Moussaoui “has made a significant showing that [text omitted by the court] . . . would be able to provide material, favorable testimony on the defendant’s behalf.”<sup>74</sup>

If Moussaoui was not a part of the September 11 in-group conspiracy, he could, however, be found guilty of conspiring as part of the larger out-group conspiracy. He has admitted to being a member of al Qaeda and now claims that he was training for a different mission.<sup>75</sup> He also admitted being loyal to Osama bin Laden.<sup>76</sup> He thus presumably shares Osama bin Laden’s objective that U.S. civilians as well as military personnel be killed.<sup>77</sup> Even if he did not know of the September 11 attacks beforehand, he could arguably be found guilty under a *Pinkerton* rationale, namely, that those attacks were reasonably foreseeable and carried out in furtherance of the al Qaeda conspiracy to kill Americans.<sup>78</sup>

Imposing criminal liability for the September 11 attacks under this latter theory is troubling, however. Traditionally under Anglo-Saxon jurisprudence an individual is criminally responsible only for crimes the individual has personally committed, has aided and abetted, or has conspired to commit.<sup>79</sup> Al Qaeda is estimated to have had from 4,000 to 10,000 members as of September 11, 2001.<sup>80</sup> Taking *Pinkerton* to its logical conclusion supports imposing liability on any then active members of al Qaeda for the crimes of September 11 even if these members never agreed to, participated in, or knew of

73. *Terrorist Attack Aftermath: U.S. Appeal in Moussaoui Case Dismissed*, FACTS ON FILE WORLD NEWS DIGEST, June 26, 2003, at 521B3, available in LEXIS, News Group File.

74. *United States v. Moussaoui*, No. CR. 01-455-A, 2003 WL 21263699, at \*4 (E.D. Va. Mar. 10, 2003). The redacted text presumably refers to Ramzi bin al-Shibh.

75. Markon, *supra* note 70, at A8.

76. *See supra* note 43.

77. *See* LEWIS, *supra* note 67 and accompanying text (setting forth the *fatwah* issued by Osama bin Laden).

78. Presumably, even as only a member of the out-group conspiracy, Moussaoui would be aware of the other previous, alleged al Qaeda attacks. *See infra* notes 145-46 and accompanying text.

79. “But it is repugnant to our system of jurisprudence, where *guilt is generally personal to the defendant* . . . to impose punishment, not for the socially harmful agreement to which the defendant is a party, but for substantive offenses in which he did not participate.” KADISH & SCHULHOFER, *supra* note 56, at 693 (quoting *People v. McGee*, 399 N.E.2d 177, 181-82 (N.Y. 1979)) (emphasis added).

80. *See Political Islam and the United States, a Winding Road to War*, Oct. 3, 2002, available at <http://www.Northadams.com/advocate/story7825.html> (last visited Feb. 4, 2004). The FBI estimates that 15,000 people received training at al Qaeda’s camps in Afghanistan, but not all of them joined al Qaeda. *See* Noam Scheiber, *The Way We Live Now: 2-16-03: Number in the News*, N.Y. TIMES MAG., Feb. 16, 2003, at 12. *But see* BURKE, *supra* note 20, at 13 (stating that as of September 11, al Qaeda had about 100 “hard core” members used to train and organize those who came to Afghan camps and who inspired others from other allied fundamentalist Islamic groups).

the attacks and did nothing, other than join al Qaeda, to further them. Although some lower federal courts have suggested that the *Pinkerton* rule should not be imposed on minor actors in a conspiracy,<sup>81</sup> the U.S. Supreme Court has never so held. Furthermore, those courts have not come up with any clear distinction between minor and major actors.

Some have defended *Pinkerton* on the ground that it increases the risk of joining any conspiracy.<sup>82</sup> Furthermore, *Pinkerton*, at least theoretically, encourages conspirators to keep an eye on each other: "Pinkerton forces conspirators to monitor each other, which in turn begets suspicion and thus even more monitoring."<sup>83</sup> Lastly, *Pinkerton* has been defended as an important weapon against complex criminal organizations:

[T]he ever-increasing sophistication of organized crime presents a compelling reason against abandonment of Pinkerton . . . Empirical evidence has repeatedly demonstrated that those who form and control

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81. See, e.g., *United States v. Alvarez*, 755 F.2d 830, 851 n.27 (11th Cir. 1985).

Although our decision today extends the *Pinkerton* doctrine to cases involving reasonably foreseeable but originally unintended substantive crimes, . . . [o]ur holding is limited to conspirators who played *more than a 'minor' role* in the conspiracy, or who had actual knowledge of at least some of the circumstances and events culminating in the reasonably foreseeable but originally unintended substantive crime.

*Id.* (emphasis added). The *Alvarez* court also identified two kinds of *Pinkerton* cases: first where the substantive crime is also

one of the primary goals of the alleged conspiracy. See, e.g., *United States v. Luis-Gonzalez*, 719 F.2d 1539, 1545 n.4 (11th Cir. 1983) (involving conspiracy to possess with intent to distribute marijuana; substantive crime of possession of marijuana); *United States v. Harris*, 713 F.2d 623, 626 (11th Cir. 1983) (involving conspiracy to distribute cocaine; substantive crimes of possession and distribution of cocaine); *United States v. Tilton*, 610 F.2d 302, 309 (5th Cir. 1980) (involving conspiracy to commit mail fraud; substantive crime of mail fraud).

*Alvarez*, 755 F.2d at 850 n.24. The second kind of *Pinkerton* case is where the substantive crime is

not a primary goal of the alleged conspiracy, but directly facilitates the achievement of one of the primary goals. See, e.g., *Shockley v. United States*, 166 F.2d 704, 715 (9th Cir. 1948) (involving conspiracy to escape by violent means from federal penitentiary; substantive crime of first degree murder of prison guard), *cert. denied*, 334 U.S. 850 (1948); *United States v. Brant*, 448 F. Supp. 781, 782 (W.D. Pa. 1978) (involving narcotics conspiracy; substantive crime of possession of firearm during commission of felony).

*Alvarez*, 755 F.2d at 850 n.24. The *Alvarez* court asserted that *Pinkerton* liability is appropriate in either category "because the substantive crime is squarely within the intended scope of the conspiracy." *Id.* Here, the September 11 attacks are presumably "one of the primary goals" of al Qaeda and thus within "the scope of the conspiracy."

82. See, e.g., *Kaytal*, *supra* note 61, at 44.

83. *Id.*

illegal enterprises are generally well insulated from prosecutions, with the exception of prosecutions predicated upon the theory of conspiracy. To preclude uniformly their exposure to additional sanctions, regardless of the circumstances, for the very crimes which sustain their illegal ventures, would have the most unfortunate and inequitable consequences.<sup>84</sup>

The “ever increasing sophistication” of terrorists threatens public safety far more than organized crime. Consequently, given the dangers that a large organization such as al Qaeda presents to civilians and civilian objects in our open society, there is arguably all the more reason to retain, if not expand, the *Pinkerton* doctrine.

As one prominent defense attorney stated, however:

[T]he *Pinkerton* doctrine permits the government to hold a defendant criminally responsible for all reasonably foreseeable acts of co-conspirators regardless of actual knowledge, intent or participation. Thus, if the government cannot prove a defendant's guilt [of] various substantive charges, it need only convince the jury of the defendant's guilt of conspiracy to secure convictions on the otherwise unsupportable substantive charges.<sup>85</sup>

The drafters of the Model Penal Code rejected *Pinkerton*, explaining that “there appears to be no better way to confine within reasonable limits the scope of liability to which conspiracy may theoretically give rise.”<sup>86</sup> *Pinkerton* has been applied broadly, but its application to conspiracies as large as al Qaeda appears unprecedented. As one noted commentator put it, “Such [*Pinkerton*] liability might be justified for those at the top directing and controlling the entire operation, but it is clearly inappropriate to visit the same results upon the lesser participants in the conspiracy.”<sup>87</sup>

The crimes of September 11 are the worst ever committed on U.S. soil. The principle of retribution and just desert cries out for severe punishment for those responsible. On the other hand, al Qaeda is apparently a loose network of extremist Islamic organizations.<sup>88</sup> To make every individual associated with that network criminally responsible for the heinous crimes of September 11 would go too far, straining the very principle set forth above.<sup>89</sup> Even without

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84. See KADISH & SCHULHOFER, *supra* note 56, at 692 (quoting Peter Buscemi, Note, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122, 1152-53 (1975) (quoting Deputy Assistant Attorney General Kenney)).

85. See Paul Marcus, *supra* note 61, at 7 (quoting Jeffrey Weiner, President of the National Association of Criminal Defense Lawyers).

86. MODEL PENAL CODE § 2.06 cmt. 6(a) (1962).

87. LAFAVE, *supra* note 72, at 527.

88. See *infra* notes 204-07 and accompanying text.

89. *But see* United States v. Salameh, 152 F.3d 88 (2d Cir. 1998). That case arose out of the trial of the 1993 World Trade Center bombings. Two of the defendants there argued that there was insufficient evidence to show that they had agreed to commit the bombing. They also asserted that *Pinkerton* was being used without

considering *Pinkerton* liability, such individuals would, however, be subject to significant terms of imprisonment.<sup>90</sup>

### III. CONSTITUTIONALITY OF IMPOSING THE DEATH PENALTY ON ACCOMPLICES AND CONSPIRATORS

If Moussaoui were found guilty of conspiring to hijack airplanes and to crash them into the Twin Towers and the Pentagon, would sentencing him to death violate the Constitution?<sup>91</sup> The U.S.

sufficient evidence that they were members of the underlying conspiracy. The Second Circuit rejected these arguments, noting first that the evidence supported that two defendants conspired to bomb buildings and vehicles in the United States. The government did not have to show that the defendants agreed to bomb the World Trade Center: "The government is not required to demonstrate that the defendant agreed to all of the conspiracy's objectives, as long as the defendant shared 'some knowledge of the [conspiracy's] unlawful aims and objectives.'" *Id.* at 147 (citations omitted). As members of the general conspiracy to bomb buildings and vehicles in the United States, there was sufficient evidence for the jury to find them guilty of the bombing under a *Pinkerton* rationale. *Id.* at 147-48. The government in the Moussaoui case could make the identical argument. Even if Moussaoui knew nothing about the September 11 attacks or did nothing to further them, his conduct here that so parallels that of the September 11 hijackers could be considered part of a general conspiracy to bomb buildings using airliners as missiles. A jury could then find him guilty of conspiring to carry out the attacks under a *Pinkerton* rationale.

90. *Cf.* Position of the Government With Respect to Sentencing Factors and Government's Sentencing Memorandum, *United States v. Lindh*, No. 02-37A, 227 F. Supp. 2d 565 (E.D. Va. Sept. 27, 2002), available at <http://news.findlaw.com/hdocs/docs/lindh/uslindh92602psentmem.pdf> (last visited June 30, 2003) (defendant pleaded guilty to aiding terrorist organization and other crimes and received 20-year sentence).

91. A preliminary issue that the parties have already litigated before trial is whether defendant Moussaoui, assuming he is found guilty of one or more capital offenses, is death eligible under the Federal Death Penalty Act of 1994. As a threshold matter, the Act requires that the government prove, beyond a reasonable doubt, that defendant:

- (A) intentionally killed the victim;
- (B) intentionally inflicted serious bodily injury that resulted in the death of the victim;
- (C) *intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act; or*
- (D) *intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act[.]*

Supreme Court has recognized that the Eighth Amendment is not locked into the mores of the eighteenth century when the Constitution and the Bill of Rights were written. The Court considers the “evolving standards of decency of a maturing society” to determine the Eighth Amendment’s reach.<sup>92</sup> Eschewing a subjective approach, the Court has adopted a majoritarian one to identify the current “evolving standards.” Examining so-called “objective factors to the maximum possible extent,” the Court first reviews the enactments of Congress and the state legislatures and then prosecutorial decisions and jury verdicts.<sup>93</sup> The Court also considers the extent to which the punishment comports with the principles of deterrence and retributive justice.<sup>94</sup>

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18 U.S.C.A. § 3591(a)(2) (1994) (emphasis added). Aside from these threshold requirements, the government must satisfy the jury that at least one aggravating factor exists and outweighs any mitigating factors. *See id.*; 18 U.S.C.A. § 3592 (1994).

Since defendant Moussaoui was in custody on September 11, he neither “intentionally killed” nor “intentionally inflicted serious bodily injury.” Thus neither (A) nor (B) apply. The government contends, however, that defendant Moussaoui is death eligible under provisions (C) and (D). This argument depends on reading “act” as including “conspiracy.” The government argues that the agreement is the *actus reus* of conspiracy and thus the offense of conspiracy should be considered tantamount to an “act” for purposes of the statute. The defense argues that act is not synonymous with offense and that an agreement to commit a crime alone fails to satisfy the act requirement. At least one Circuit Court of Appeals has concluded that Congress drafted these two subsections to codify the Supreme Court’s holdings in *Enmund v. Florida* and *Tison v. Arizona*, the major, relevant Eighth Amendment cases analyzed in detail below. *Enmund v. Florida*, 458 U.S. 792 (1982); *Tison v. Arizona*, 481 U.S. 137 (1987).

[S]ection 3591(a) does not set forth a list of aggravating factors, but, on the contrary, serves a gatekeeping function. Section 3591(a) codifies the command in *Enmund*, 458 U.S. at 797, and *Tison*, 481 U.S. at 157, to limit the imposition of the death penalty to those murderers who both undertake felony participation and demonstrate at least reckless indifference to human life.

*United States v. Webster*, 162 F.3d 308, 355 (5th Cir. 1998). A full discussion of the statutory issue is beyond the scope of this Article. Discussion is focused on the closely related question as to whether a death sentence under this statute passes constitutional muster.

92. *See Weems v. United States*, 217 U.S. 349, 373 (1910); *see also Trop v. Dulles*, 356 U.S. 86, 100-02 (1958).

93. *Atkins v. Virginia*, 536 U.S. 304, 312 (2002). In *Atkins*, the Court recognized the primacy of objective evidence, such as legislative enactments and jury verdicts, in determining “evolving standards of decency.” *Id.* The *Atkins* court, however, noted that ultimately the responsibility for interpreting the Eighth Amendment was the Court’s and it could bring to bear its subjective judgment. *Id.* at 313. The Court applies a somewhat different proportionality review to non-capital cases. *See, e.g., Ewing v. California*, 538 U.S. 11, 20 (2003) (upholding against constitutional attack life sentence under three strikes statute for defendant whose last strike was shoplifting three golf clubs).

94. *Atkins*, 536 U.S. at 318-19 (citing *Gregg v. Georgia*, 428 U.S. 153, 183(1976) and *Enmund v. Florida*, 458 U.S. 782, 798 (1982)).

Since constitutionally reviving the death penalty in *Gregg v. Georgia*<sup>95</sup> in 1976, the Supreme Court has narrowed the instances in which an accomplice or co-conspirator to a capital crime may be put to death. Ruling in two felony murder cases,<sup>96</sup> the Court has required that the Government show at least that the secondary actor was a “major particip[ant]” in the underlying felony and that he or she intended to kill or exhibited a reckless indifference to human life.<sup>97</sup> In the first case, *Enmund v. Florida*,<sup>98</sup> the defendant was a getaway driver, but there was some evidence that he planned the robbery. He and his two co-defendants stopped at a farmhouse so they could rob the occupants, an elderly couple. Upon hearing her eighty-six-year-old husband shout out, his seventy-four-year-old wife got their shotgun and shot one of the co-defendants in the arm. They, in turn, shot and killed both the husband and the wife. Enmund was a few hundred feet away, waiting by the car, but was charged with felony murder, convicted, and sentenced to death.

Reversing the death sentence, the Supreme Court held that the actor must have intended to kill and have played a major role in the killing.<sup>99</sup> In *Enmund*, the Court noted that only eight jurisdictions permitted death sentences for accomplices to felony murder, and all but three required such a defendant to be shown to have a culpable mental state.<sup>100</sup> The Court then held that the Eighth Amendment prohibited executing an actor “who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill or intend that a killing take place or that lethal force will be employed.”<sup>101</sup>

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95. *Gregg*, 428 U.S. at 176. In *Gregg*, the Court concluded that the guided jury discretion death penalty statute there passed constitutional muster, thus approving the reinstatement of the death penalty after, in effect, declaring all death penalty statutes unconstitutional in *Furman v. Georgia*, 408 U.S. 238 (1972). *Gregg*, 428 U.S. at 169.

96. *Enmund*, 458 U.S. 802 (5 to 4); *Tison*, 481 U.S. at 157 (5 to 4).

97. *Tison*, 481 U.S. at 157. The composition of the Court has changed since *Tison*, apparently moving in a more pro-death penalty direction. In *Tison*, Justice O'Connor delivered the opinion of the Court in which Chief Justice Rehnquist and Justices Scalia, White and Powell joined. Justice Brennan wrote a dissenting opinion, which was joined by Justices Marshall and Blackmun. Justice Stevens joined parts I to IV-A of Justice Brennan's dissent. Since *Tison*, Justices Ginsburg, Souter, Thomas, Breyer, and Kennedy have replaced retiring Justices Brennan, Marshall, Blackmun, White, and Powell. The first three of these retiring justices expressly found the death penalty to be unconstitutional in all cases. None of their replacements and no current member of the Supreme Court have reached that conclusion.

98. *See Enmund*, 458 U.S. at 782.

99. *Id.* at 797.

100. *Id.* at 789-91.

101. *Id.* at 797, 798. One commentator has noted that the decision could be interpreted to have set forth a still vaguer standard. *See* David McCord, *State Death Sentencing for Felony Murder Accomplices Under the Enmund and Tison Standards*, 32 ARIZ. ST. L.J. 843, 850-51 (2000) (criticizing Court for also stating that culpable mental

Writing for the four dissenters, Justice O'Connor<sup>102</sup> argued that the Court had miscounted the number of states that authorize imposing capital punishment on accomplices to felony murderers.<sup>103</sup> She also read the Florida Supreme Court decision, upholding the death penalty, as leaving undisturbed the trial court's finding that defendant did not play a minor role.<sup>104</sup> She argued that contemporary standards reflected in jury determinations and legislative enactments did not preclude the imposition of the death penalty for accomplice felony murder or that such a sentence would be disproportionate.<sup>105</sup>

Five years later in *Tison v. Arizona*,<sup>106</sup> the Court upheld the death penalty imposed on two sons whose father (and his cellmate) actually carried out the killings.<sup>107</sup> In that case, their father was serving a life sentence for murdering a prison guard in a previous escape attempt. Bringing to the prison an arsenal of guns hidden in an ice chest, the Tison sons helped their father escape once again (along with his cellmate, another convicted murderer). After the car in which they were fleeing broke down, one of the sons flagged down the car of a family. While both sons were some distance away, the father and his cellmate killed all four members of the family, including a two-year old. The sons' father later perished in the desert. The Tison sons were charged with felony murder, convicted, and sentenced to death.<sup>108</sup>

The two sons argued that under *Enmund* the state had to show that they intended to kill the family members. The Arizona Supreme Court claimed that the Tison sons had intended to do so, but its language indicated that that court had concluded that the sons only foresaw that the death of innocents was probable.<sup>109</sup> Now writing for the five-member majority, Justice O'Connor limited *Enmund*, reasoning that the sons' reckless indifference in helping their father,

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state of actor includes his "anticipat[ing] that lethal force would be used"). This phrase could be construed to mean a culpable mental state of "recklessly" rather than "intentionally." *Id.*

102. Chief Justice Burger, Justice Powell, and Justice Rehnquist joined Justice O'Connor's dissent.

103. Justice O'Connor wrote that "23 States permit a sentencer to impose the death penalty even though the felony murderer has neither killed nor intended to kill his victim." *Enmund*, 458 U.S. at 822 (O'Connor, J., dissenting). Justice White wrote the majority opinion, joined by Justices Brennan, Blackmun, Marshall, and Stevens.

104. *Id.* at 809 (O'Connor, J., dissenting).

105. *Id.* at 826-27. Given the conflicting findings of the trial court and the Florida Supreme Court, and the revised standards established by the U.S. Supreme Court, she would have, however, remanded for a new sentencing hearing to determine whether all the facts in that case warranted the death penalty. *Id.* at 827.

106. *Tison v. Arizona*, 481 U.S. 137, 137 (1987).

107. *Id.* at 158.

108. The cellmate was also sentenced to death. *Id.*

109. *Id.* at 142-43.

whom they knew to be capable of murder, satisfied the Eighth Amendment.<sup>110</sup> The two Tison sons, who were “major” participants in the underlying felony,<sup>111</sup> stood in contrast to *Enmund* whose “own participation in the felony murder was so attenuated and since there was no proof that Enmund had any culpable mental state, the death penalty was excessive retribution for his crimes.”<sup>112</sup> Affirming the Tisons’ death sentences, the Court then held that “major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement.”<sup>113</sup>

Writing for the dissenters, Justice Brennan<sup>114</sup> observed that the majority failed to follow *Enmund*.<sup>115</sup> As in *Enmund*, no evidence in *Tison* suggested that the Tison sons intended to cause the death of the victims. The dissent noted that the father’s killing the family was “spontaneous” while the sons were some distance away fetching water for the family members.<sup>116</sup> The majority stressed that the sons did nothing to stop the killing, but there was evidence suggesting that the sons could not do anything at that point.<sup>117</sup> The dissent also criticized the majority for offering examples of arguably unintentional killings such as “the person who tortures . . . the robber who shoots someone” not caring in either case whether the victim lives or dies.<sup>118</sup> The problem with these examples is that they focus on the primary party, the actor who kills or tortures. There, the Tison sons did not kill anyone; their father did.<sup>119</sup> Lastly, in counting the number of

110. *Id.* at 151-53.

111. *Id.*

112. *Tison v. Arizona*, 481 U.S. 481 U.S. 137, 149 (1987) (citations omitted).

113. *Tison*, 481 U.S. at 158. In *Tison*, however, the majority also noted that reckless indifference may rise to the moral equivalence of intentional wrongdoing:

[S]ome nonintentional murderers may be among the most dangerous and inhumane of all—the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim’s property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an “intent to kill.”

*Id.* at 157. On the other hand, if the defendant orders another to kill, the defendant has the intent to kill and satisfies *Enmund-Tison* regardless of the degree of actual participation in the killing. See *Stringer v. State*, 454 So. 2d 468, 478-79 (Miss. 1984).

114. Justices Marshall, Blackmun, and Stevens joined Justice Brennan’s dissenting opinion. *Tison*, 481 U.S. at 159.

115. *Id.* at 162-63 (Brennan, J., dissenting).

116. *Id.* at 165-66.

117. *Id.* at 166 n.6.

118. *Id.* at 169 (emphasis in original).

119. Furthermore, the examples that the majority gives are arguably examples of intentional killings that have been committed without premeditation or deliberation, the *mens rea* required in many states for first-degree murder. *Id.* at 169 n.9. On the other hand, the actor who intentionally commits serious bodily harm may do so without an

states that would permit executing felony murder accomplices who lack an intent to kill, the majority failed to take into account those states that have abolished the death penalty. When one does so, the dissent noted, approximately three-fifths of U.S. jurisdictions reject the majority's position.<sup>120</sup>

The dissent appears to have the stronger argument. If the Tisons acted with reckless indifference, however, it is hard to argue that *Enmund* did not act with reckless indifference also. Granted, carrying out a prison escape and a kidnapping probably presents a greater risk of harm to innocent people than does an armed robbery. However, *Enmund* knew his accomplices were armed with deadly weapons. Embarking on a robbery of an individual in his rural dwelling is pregnant with the possibility, if not probability, of violence. Furthermore, Justice O'Connor concluded in *Enmund*, that defendant there was not a minor actor, presumably meaning he was a major actor in the underlying robbery, at least for capital sentencing purposes.<sup>121</sup>

Enmund did, however, appear to play a lesser role in the robbery than the Tison sons did in the prison escape and in the kidnapping of the family. The Tison sons were present at the murder scene whereas Enmund, although close by, was not. The Tison sons heard their father considering what to do with the family. The sons could have attempted to dissuade him from killing and, later after the shots were fired, could have tried to render aid to the victims. (At least one of the victims apparently survived for some time after the shooting.)<sup>122</sup> The sons responded by doing nothing, except fleeing with the killers.

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intent to kill. Such an actor has traditionally been considered a second-degree murderer and thereby exempt from the death penalty. See KADISH & SCHULHOFER, *supra* note 56, at 396. Certain felony murderers even after Pennsylvania created degrees of murder in 1794 have been considered subject to the death penalty. See *id.* (quoting seminal Pennsylvania murder statute of 1794, which became model murder statute for U.S. states,

[A]ll murder, which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery or burglary shall be deemed murder in the first degree [and thereby punishable by death] . . . .") (emphasis added).

State v. Bohlen, 690 S.W.2d 174, 176 (Mo. Ct. App. 1985).

120. Tison v. Arizona, 481 U.S. 137, 175 (1987) (Brennan, J., dissenting).

121. See *supra* note 104.

122. Tison, 481 U.S. at 141.

The question is what these rulings<sup>123</sup> might foretell about the current Supreme Court's disposition to uphold a death penalty for Zacarias Moussaoui, should a jury find him guilty of conspiracy and sentence him to death.<sup>124</sup> The factual allegations in the indictment show that Moussaoui engaged in many of the same activities that the actual hijackers did, but which are not greatly incriminating in themselves. He arrived in this country with \$35,000 in cash. He signed up for flying schools; he purchased flight videos on the operation of the Boeing 747; he took a commercial flying course in which he operated Boeing 747 flight simulators. He purchased a knife (as Atta apparently did). Three pieces of evidence more directly link Moussaoui to al Qaeda and the hijackers: (1) He admitted in open court to being a member of al Qaeda and being loyal to Osama bin Laden; (2) Moussaoui allegedly received terrorist training in Afghanistan; and (3) Ramzi bin al-Shibh, the alleged coordinator of the September 11 attacks, wired Moussaoui money.<sup>125</sup>

If the government is able to prove all the allegations in the second superseding indictment, a jury could conclude that Moussaoui was a member of the "in-group" conspiracy. The parallel conduct that Moussaoui engaged in goes beyond the merely coincidental. That evidence plus his admissions and his allegedly receiving funds from

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123. See also *Cabana v. Bullock*, 474 U.S. 376, 386 (1986) (noting that *Enmund* rule that "a person who has not in fact killed, attempted to kill, or intended that a killing take place or that lethal force be used" is "substantive limitation on sentencing" and may be applied not only by jury, but also by appellate court reviewing case).

124. The Court could certainly refuse to grant certiorari. If the government ultimately transfers Moussaoui's prosecution to a military tribunal, the Court might not have jurisdiction to hear the case. *Cf. Hamdi v. Rumsfeld*, 316 F.3d 450, 459-60, 476-77 (4th Cir. 2003) (rejecting on separation of powers grounds habeas corpus petition of U.S. citizen, captured with Taliban in Afghanistan, but later brought to military base in Virginia where held as "enemy combatant" without charges, without trial, and without access to counsel), *cert. granted*, No. 03-6696, 2004 WL 42546 (U.S. Jan. 9, 2004); *Al Odah v. United States*, 321 F.3d 1134, 1141-42 (D.C. Cir. 2002) (rejecting habeas corpus claim of "next friends" of Taliban and al Qaeda Guantanamo Bay detainees principally on ground that they were beyond the territorial jurisdiction of the United States), *cert. granted*, 124 S. Ct. 534 (2003). Moussaoui, however, was arrested in the United States and is being tried in the United States, so his case might be distinguishable from *Odah* and *Hamdi* should the Supreme Court affirm those cases.

125. Second Superseding Indictment, *supra* note 17, ¶¶ 29, B1; Governments Response to Standby Counsel's Memorandum Regarding Rule 11 Considerations, Crim. No. 01-455-A (2002) at #13-14, available at <http://news.findlaw.com/hdocs/docs/moussaoui/usmouss72502grspr11.pdf>. Al-Shibh apparently roomed with Mohamed Atta and wired money to Marwan al-Shehhi, one of the hijackers of United Airlines Flight 175, which they crashed into the South Tower of the World Trade Center. Moussaoui also allegedly lied to FBI agents when being questioned upon his arrest. See *supra* note 34 and accompanying text.

Ramzi bin-al-Shibh probably meets the minimal sufficiency standard, if not more, to show he was a member of that conspiracy.<sup>126</sup>

On the other hand, Moussaoui might not have been a member of the “in-group” conspiracy (but he was unquestionably a member of the “out-group” conspiracy). His admissions show he was a member of al Qaeda, but the allegations (even if proved to be true) in the second superseding indictment do not overwhelmingly demonstrate that he was a member of the in-group conspiracy. The indictment does not allege that he was the twentieth hijacker. He might have been training for another operation.<sup>127</sup> So far, despite his admissions, Moussaoui claims he had nothing to do with the September 11 attacks: “I was not directly involved with these people,” Moussaoui told the district court.<sup>128</sup> He apparently does not want to die a martyr’s death by poison injection.<sup>129</sup>

Since *Gregg*, the Supreme Court has yet to deal with the question of imposing the death penalty on an actor indicted for conspiracy only, not for carrying out the underlying offense or for being present at the time of the killings or for ordering the killings or for playing a major role in them.<sup>130</sup> The two felony-murder

126. If admitted and found credible al-Shibh’s alleged statements that Moussaoui was to serve as a “back-up,” would, as indicated earlier, probably make him an accomplice and certainly a member of the in-group conspiracy. See *supra* notes 70-72 and accompanying text. The Government apparently is not going to use al-Shibh as a witness.

127. See David Johnston & Philip Shenon, *Evidence Against Suspect from 9/11 Is Called Weak*, N.Y. TIMES, July 20, 2002, at A8 (some investigators speculating that he may have been training for different operation, such as using crop dusters to spray chemical or biological weapons). Moussaoui himself now claims that he was training for another operation outside the United States. See Markon, *supra* note 70.

128. Shenon, *supra* note 14.

129. *Id.* Even if Moussaoui were involved with the “in-group conspiracy” say as a back-up, he might not have known about his designated role. Bin Laden claimed that al-Qaeda kept the September 11 conspirators in the dark about the operation until the last minute: “[Moussaoui’s and Hani Hanjour’s] isolation [from the ‘operational axis’] may have been designed to insulate them in the event that the Hollywood and San Diego cells were destroyed and they were needed to replace the protagonists on short notice.” GRIFFIN, *supra* note 19, at 253.

130. The instructions define conspiracy as follows:

What the Government must prove is that the defendant, Terry Lynn Nichols, and at least one other person, did knowingly and deliberately arrive at some type of an agreement that they, and perhaps others, would use a weapon of mass destruction against the Alfred P. Murrah Federal Building in Oklahoma City and the persons in it by means of some common plan or course of action as alleged in Count One of the indictment. Proof of such a common understanding and deliberate agreement among two or more persons, including the defendant now on trial, is the key element of the charge of criminal conspiracy.

Mere presence at the scene of . . . an alleged transaction or event, or mere similarity of conduct among various persons and the fact that they may have associated with each other and may have assembled together and discussed

accomplice cases that the Court has ruled on do suggest, however, how the Court might rule in Moussaoui's case, should it grant certiorari.

A. *The In-Group Conspirator Who Knew about the September 11 Attacks and Played a Major Role in the Conspiracy*

If the evidence shows that Moussaoui directly participated in the September 11 conspiracy, he would be death-eligible under current constitutional interpretation.<sup>131</sup> Assume hypothetically that A, an al Qaeda member, had purchased the airplane tickets for one or more of the hijackers and had known about the plan to hijack and crash the airliners. A would thus have intended to commit, among other crimes, mass murder.<sup>132</sup> Assume that, like Moussaoui, A was not present at the murder scene, an important distinction between the Tisons and Enmund.<sup>133</sup> Yet, those cases dealt with imposing the death penalty on

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common aims or interests, do not necessarily establish proof of the existence of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens—happens to act in a way which advances some object or purpose of the conspiracy does not thereby become a conspirator.

But a person may join in an agreement or understanding, as required for conviction, without knowing all the details of the agreement or understanding, and without knowing who all the members are. Further, it is not necessary that a person agree to play any particular part in carrying out the agreement or understanding. A person may become a member of a conspiracy even if that person agrees to play only a minor part in the conspiracy, as long as that person has an understanding of the unlawful nature of the plan and voluntarily and intentionally participates in it as something he wants to bring about.

Court TV Casefiles, *The Oklahoma City Bombing Trial Transcripts, Terry Nichols*, Dec. 16, 1997, <http://www.courttv.com/archive/casefiles/oklahoma/nichtranscripts/1216pm.html> (last visited June 24, 2003).

131. He would thus have intended that innocents be killed and would have actively participated in causing such a result, thereby satisfying *Enmund*, not to mention *Tison*. *But see* Defendant's Reply to Government's Response in Opposition to Defendant's Motion to Strike Government's Notice of Intent to Seek a Sentence of Death, *United States v. Moussaoui*, Crim. No. 01-455-A, at \*3 n.2, 282 F. Supp. 2d at 480 (E.D. Va. May 10, 2003) (arguing that more would be required for death penalty under *Enmund-Tison*), available at <http://news.findlaw.com/hdocs/docs/moussaoui/usmouss51502dthpopp.pdf>.

132. See Indictment, *supra* note 13, setting forth the crimes Moussaoui has been charged with. Presumably for federal jurisdictional reasons, he is not charged with conspiring to murder all the victims, only U.S. employees who were killed in the attacks. He is charged, however, with conspiracy to use a weapon of mass destruction. *Id.* The ticket hypothetical was suggested by the defense in papers submitted in reply to the government's motion in opposition to the defense motion to preclude the death penalty. *See* Defendant's Reply to Government's Response in Opposition to Defendant's Motion to Strike Government's Notice of Intent to Seek a Sentence of Death, *supra* note 131 at \*7.

133. *Cf. Fairchild v. Norris*, 21 F.3d 799, 803-04 (8th Cir. 1994), *cert. denied*, 513 U.S. 1146 (1995) (concluding that petitioner who, with accomplice, kidnapped and raped victim was death eligible under *Tison* even though he was *not* present when his accomplice who petitioner knew to be armed killed victim, because petitioner's behavior

accomplices to felony murder, an unintentional homicide. Here the indictment charges that defendant conspired with others to commit capital crimes that presuppose that the conspirators intended to kill innocents. The defendant's *mens rea* would be considerably greater than the Tisons' (he would have acted intentionally whereas they acted extremely recklessly), probably making up for the lack of personal presence at the scene of the crime. Furthermore, the Tisons acted extremely recklessly towards a few individuals, mainly prison guards and four members of the family. A, in this hypothetical, intended to kill at least a hundred, if not hundreds of innocent people. Purchasing the tickets would probably be enough to make him a "major participant," especially given the magnitude of the intended loss of life, satisfying both *Enmund* and *Tison*.<sup>134</sup>

On the other hand, there appear to be at least three other possibilities. Moussaoui might not have directly participated in the conspiracy, but he might have known about the planned attacks.<sup>135</sup> Or he might have participated in the in-group conspiracy, but have been deliberately kept in the dark about the nature and object of that conspiracy. Or he might not have known about the planned attacks, but was here on another operation and thus presumably shared the general aim of al Qaeda that any Americans, including civilians, should be killed.<sup>136</sup> Would imposing the death penalty under any of these circumstances be constitutional?

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constituted "reckless indifference" to human life). *But see* State v. Carlson, 48 P.3d 1180, 1183 (Ariz. 2002) (reducing sentence from death to life imprisonment without parole, because, among other reasons, defendant, convicted as co-conspirator, was not present at murder and would not necessarily know that killer would carry out murder in cruel and heinous manner, one of aggravating circumstances for death penalty).

134. For an excellent discussion of the meaning of "major participant," see McCord, *supra* note 101, at 875-88. A relevant question here is whether being a backup would render Moussaoui a "major participant." If the other 19 were told or it was implicitly known that Moussaoui or others would serve as a backup, it might encourage the 19 to go forward. They would realize that the organization was completely behind them, and perhaps that their personal honor would be questioned if, for some reason, they did not or would not complete their mission. If the backup were immediately available and this availability were also known to one or more of the 19, a backup might be seen as playing more than a minor role. On the other hand, if the backup was not aware of his or her playing any such role and was just engaged in training activities in the United States, it would be hard to characterize the backup's role as major. If the 19 hijackers were unaware of the presence of a backup, then his existence would not have encouraged them. Under that scenario, the backup would probably not satisfy the test for accomplice liability, at common law. *See supra* notes 61-63 and accompanying text.

135. *See* Government's Brief, *supra* note 43, at \*11.

136. *See* Amanat, *supra* note 67, at 43 (explaining that in 1996 when Osama bin Laden came to Afghanistan he issued a *fatwah*, "call[ing] upon all Muslims to kill Americans as a religious duty"); *Bin Laden Reportedly Leaves Afghanistan, Whereabouts Unknown*, Feb. 13, 1999, at <http://www.cnn.com/WORLD/meast/9902/13/afghan.binladen/index.html>. One of the problems with the law of conspiracy is that it

B. *The Out-Group Conspirator Who Did Not Know about  
September 11*

Let us deal with the last hypothetical first. Restated, the question is whether being a member of the “out-group” conspiracy, perhaps numbering in the hundreds if not thousands, is enough to permit the death penalty to be imposed absent evidence that the defendant aided or actively participated in the in-group conspiracy to carry out the September 11 attacks.<sup>137</sup> This first requires an examination of the *mens rea* and later *actus reus*.

Although research has not revealed another case in which the Supreme Court relied on the ostrich or willful blindness doctrine<sup>138</sup> to justify the death penalty, the Court might employ this doctrine to satisfy the culpability requirements for imposing the death penalty on accessories for murders carried out by others. Assume for a moment that Moussaoui was in a cell separate from the September 11 hijackers. In organizations like al Qaeda, cells are often set up so that members of one cell do not know members of other cells, and sometimes members of one cell do not know all the members of the same cell.<sup>139</sup> Presumably, cell members are aware of the

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does not clearly distinguish between major and minor participants and that the minnows may be caught in the same net as the sharks and are often subject to severe punishment. See *United States v. Alvarez*, 625 F.2d 1196, 1197 (5th Cir. 1980) (*en banc*) (reversing panel decision and reinstating marijuana sale conspiracy conviction of menial who had merely nodded to undercover agent). See also Marcus, *supra* note 61, at 32 (“Punishment for the completed conspiracy crime has always been stiff.”). *But see* Kaytal, *supra* note 61, at 44.

137. See Appendix, Tables 1 and 2.

138. Judge Richard Posner, of the United States Court of Appeals for the Seventh Circuit, explained the confusing doctrine of willful blindness:

[Notice] just what is it that real ostriches do (or at least are popularly supposed to do). They do not just fail to follow through on their suspicions of bad things. They are not merely *careless* birds. They bury their heads in the sand so that they will not see or hear bad things. They *deliberately* avoid acquiring unpleasant knowledge. The ostrich instruction is designed for cases in which there is evidence that the defendant, knowing or strongly suspecting that he is involved in shaky dealings, takes steps to make sure that he does not acquire full knowledge or exact knowledge of the nature and extent of those dealings.

See KADISH & SCHULHOFER, *supra* note 56, at 223-24 (quoting *United States v. Giovannetti*, 919 F.2d 1223, 128-29 (7th Cir. 1990)) (emphasis in original).

139. Cf. Nasra Hassan, *An Arsenal of Believers, Talking to the Human Bombs*, THE NEW YORKER, Nov. 19, 2001, at 36. In discussing Palestinian suicide bombers, Hassan writes as follows:

Generally, each cell consists of a leader and two or three young men. . . . Each cell is tightly compartmentalized and secret. Cell members do not discuss their affiliation with their friends or family, and even if two of them know each other in normal life, they are not aware of the other’s membership in the same cell. Only the leader is known to both. Each cell, which is dissolved after the

organizational policy to keep knowledge of other cell members to a minimum. The cell structure not only operates to protect the organization from penetration, but also arguably operates as a regime of willful blindness. By agreeing to be an active member of al Qaeda, the member agrees to blind himself or herself to the acts of other cell members. Willful blindness can substitute for knowledge.<sup>140</sup> So active al Qaeda members are arguably willfully blind to the crimes committed by members from other cells and thus have the necessary *mens rea* (they acted “knowingly”) to find the defendants not only guilty of the substantive offenses committed by other members of the conspiracy, but also death-eligible under *Enmund-Tison*.<sup>141</sup>

The Model Penal Code adopts the majority common law position that knowing the object of the conspiracy is not necessarily enough to satisfy the *mens rea* requirement for conspiracy.<sup>142</sup> The actor must act “purposely,” intending for the object of the conspiracy to be accomplished.<sup>143</sup> The willful blindness doctrine might not permit the government to show purpose. Nevertheless, there is authority for the proposition that knowledge alone is sufficient when the object of the conspiracy is a serious felony, like murder.<sup>144</sup> Furthermore,

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[suicide] operation has been completed, is given a name from the Koran or from Islamic history.

*Id.*; see also FOU DA & FIELDING, *supra* note 43, at 119 (quoting Ramzi bin al-Shibh, apparent coordinator of September 11 attacks) (describing how the attacks were organized: “[I]t is in short, a process of lining the cells to one another . . .”).

140. See *United States v. Jewell*, 532 F.2d 697, 700-01 (9th Cir. 1976); MODEL PENAL CODE § 2.02(7).

141. The government should argue the cell structure fits precisely within Judge Posner’s definition, namely, that when al Qaeda members assent to the cell structure, they “deliberately avoid acquiring unpleasant knowledge,” (i.e., “knowing or strongly suspecting that [they] are involved in shaky dealings, [they] take[ ] steps to make sure that [they] do not acquire[ ] full knowledge or exact knowledge of the nature and extent of those dealings,” which, in this instance, are terrorist operations carried out by other cells). The defense could also argue that “knowledge” alone is not enough to satisfy the *mens rea* of conspiracy. The prosecution must show that the defendant’s had the purpose, intended that the objects of the conspiracy be carried out. See *infra* notes 142-44 and accompanying text.

142. MODEL PENAL CODE § 5.03(1); see *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (Hand, J.); *infra* note 144 (collecting cases on *mens rea* for conspiracy).

143. *Peoni*, 100 F.2d at 402.

144. See, e.g., *United States v. Fountain*, 277 F.3d 714, 793 (7th Cir. 1985) (finding “knowingly” a sufficient culpable mental state for accomplice liability); *People v. Lauria*, 59 Cal. Rptr. 628, 634 (Cal. 1967) (suggesting in *dicta* that a supplier “who furnishe[d] equipment which he *knows* will be used to commit a serious crime may be deemed” to be a co-conspirator) (emphasis added); see also *United States v. Garcia-Torres*, 280 F.3d 1, 4 (1st Cir. 2002) (noting that “[a] drug conspirator need not know all of the details of the conspiracy, *United States v. Nueva*, 979 F.2d 880, 884 (1st Cir.1992), *cert. denied*, 507 U.S. 997 (1993), but it is hard to imagine how someone furnishing a peripheral service [supplying guns to a killer and kidnapper] to a drug conspiracy could be deemed to ‘join’ that conspiracy unless he knew both that the drug

membership in al Qaeda with its avowed purpose of killing Americans, including civilians, might be deemed sufficient to satisfy the “purposely” requirement.

Members of the out-group conspiracy were presumably aware of other crimes carried out by al Qaeda, for example, the bombing of the U.S.S. Cole and the two embassy bombings in East Africa.<sup>145</sup> The latter two incidents left hundreds, mostly innocent civilians, dead.<sup>146</sup> Therefore, members of the out-group conspiracy probably assumed that other similar actions were being contemplated by the al Qaeda leadership, by other cells, or by allied terror groups.

On the other hand, al Qaeda members in the out-group conspiracy would not necessarily have known or reasonably have foreseen the scale of the September 11 attacks. Imputing intent or even willful blindness<sup>147</sup> to al Qaeda members who knew nothing

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*conspiracy existed and that the peripheral service being furnished was designed to foster the conspiracy”* (emphasis added); *United States v. Gallishaw*, 428 F.2d 760, 763 (2d Cir. 1970) (noting that to convict defendant of bank robbery for loaning a machine gun to the primary perpetrators, the Government “would have to show *at a minimum that he knew* that a bank was to be robbed”) (emphasis added). The majority rule, however, apparently requires a culpable mental state of “purposely,” even for serious crimes. See KADISH & SCHULHOFER, *supra* note 56, at 709-10. However, the government may rely on the “slight evidence” rule to attempt to link Moussaoui to the September 11 conspirators. See, e.g., *United States v. James*, 528 F.2d 999, 1011-12 (5th Cir. 1976).

Once the existence of a common scheme of a conspiracy is shown, slight evidence is all that is required to connect a particular defendant with the conspiracy (citations omitted). The connection may be shown by circumstantial evidence (citations omitted). “A person may be held as a conspirator although he joins the criminal concert at a point in time far beyond the initial act of the conspirators. If he joins later, knowing of the criminal design, and acts in concert with the original conspirators, he may be held responsible, not only for everything which may be done thereafter, but also for everything which has been done prior to his adherence to the criminal design. . . .” *Lile v. United States*, 9 Cir., 264 F.2d 278, 281 (1958), quoted with approval in *Nelson v. United States*, 5 Cir., 415 F.2d 483 (1969); *Downing v. United States*, 5 Cir., 348 F.2d 594 (1965). The fact that a conspirator is not present at, or does not participate in, the commission of any of the overt acts does not, by itself, exonerate him. *United States v. Sutherland*, 463 F.2d 641, 647 (5th Cir. 1972).

*Id.*; see also LAFAYE, *supra* note 56, at 705 (citing Brent E. Newton, *The Antiquated Slight Evidence Rule, in Federal Conspiracy Cases*, 1 J. APP. PRACT. & PROCESS, 49, 51-54 (1999) (criticizing the rule and certain federal circuits for applying it *sub silentio* even after having expressly abolished it)).

145. See *The White House Determined*, . . . , WASH. POST, July 25, 2003, at A15, available at 2003 WL 56508330.

146. See Patricia Hurtado, *Bombing Case Gets New Judge*, NEWSDAY, Jan. 26, 2002, at A07, available at 2002 WL 2724799 (noting 224 people were killed in East African embassy bombings and thousands were injured).

147. The problem with the doctrine of willful blindness is that it might lower the culpable mental state from knowingly to recklessly and perhaps to negligently. See KADISH & SCHULHOFER, *supra* note 56, at 222 (citing *United States v. Barnhart*, 979 F.2d 647, 652 (8th Cir. 1992)) (attempting to avoid convicting a defendant on the basis of a “negligently” mental state by imposing the following two requirements on courts

about the September 11 attacks beforehand might not comport with their actual culpability. These other members may be willfully blind, but not necessarily to acts of the magnitude of September 11.<sup>148</sup>

Under the willful blindness doctrine, however, members of the out-group conspiracy may satisfy the *mens rea* element for the imposition of capital punishment on secondary actors. Willful blindness, as a practical matter, is often tantamount to a “recklessly indifferent” culpable mental state.<sup>149</sup> The latter mental state is precisely that which the Court in *Tison* identified as the *mens rea* for imposing the death penalty on accomplices. One hopes that the Court was in fact imposing the higher mental state of depraved indifference. But, even under that standard, one can persuasively argue that an actor who joins a known terrorist organization like al Qaeda is demonstrating depraved indifference to human life.<sup>150</sup>

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considering whether to instruct on “willful blindness”: (1) defendant must be subjectively aware of a high probability of illegal conduct; and (2) defendant must purposefully contrive not to learn of the illegal conduct). *But see* KADISH & SCHULHOFER, *supra* note 56, at 224 (citing David Luban, *Contrived Ignorance*, 87 GEO. L.J. 957, 962 (1999)), in which he demonstrates that the “high probability” requirement may be easily abused. This is not to suggest that Moussaoui or the average foot soldier in al Qaeda possesses a “negligent” culpable mental state.

148. It is possible that those who planned the September 11 attacks and those who carried them out had not realized how successful the attacks would be. They might not have known or expected that the attacks would bring down the towers. Elisabeth Bumiller, *A Nation Challenged: The Video; bin Laden, On Tape, Boasts of Trade Center Attacks; U.S. Says It Proves His Guilt*, N.Y. TIMES, Dec. 14, 2001, at A1; Judith Miller, *A Nation Challenged: The Mastermind; A Glimpse, Guard Down*, N.Y. TIMES, Dec. 14, 2001, at A1. In that event, they are still responsible for what they had done, given that they intended to commit murder and other crimes in the first place. *See* *Harvey v. State*, 681 A.2d 628, 637 (Md. Ct. App. 1996) (noting that single *mens rea* may apply to additional and unexpected results).

149. *See* Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 CRIM. L. & CRIMINOLOGY 191, 195 (1990). *But see* Jonathan Marcus, Note, *Model Penal Code Section 2.02(7) and Willful Blindness*, 102 YALE L.J. 2231, 2238-40 (1993) (distinguishing recklessness from willful blindness and determining that willful blindness essentially constitutes knowledge).

150. The Model Penal Code defines “depraved indifference murder” as a criminal homicide that “is committed recklessly under circumstances manifesting extreme indifference to the value of human life.” MODEL PENAL CODE § 210.2(1)(b). The MPC defines “recklessly” as “consciously disregard[ing] a substantial and unjustifiable risk that the material element [of the offense] exists or will result from [the actor’s] conduct. *Id.* § 2.02 The risk must be of such a nature and degree . . . and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct a law abiding person would observe in the actor’s situation.” *Id.* By joining a known violent terrorist organization like al Qaeda, an actor would be “consciously disregard[ing] a substantial and unjustifiable risk” that he or she would be, among other things, assisting individuals to kill innocent civilians. Such conduct is “a gross deviation” and arguably “manifests extreme indifference to the value of human life.” *Id.*

This assumes that terrorist violence is unjustified under law. A soldier who kills during war but who follows humanitarian law, is guilty neither of a war crime nor a domestic crime. *See* Jordan J. Paust, *War and Enemy Status after 9/11: Attacks on the*

Although the out-group conspirators appear to satisfy the *mens rea* requirements, they do not appear to satisfy the *actus reus* element. *Tison* requires not only that the secondary actors exhibit reckless indifference to life, but also that they be “major participant[s]” in the underlying felony. If the actors had nothing to do with September 11 conspiracy at all, aside from being out-group conspiracy members, then the *actus reus* element would not be met, and they would not be death eligible. It is “so attenuated”<sup>151</sup> to make out-group conspiracy members “major participant[s]” in the in-group conspiracy resulting in death and destruction when they played no role in that conspiracy. Thus, under *Enmund-Tison*, out-group conspiracy members should generally not be death-eligible.

C. *The Out-Group Conspirator Who Knew about the September 11 Attacks, but Did Nothing to Advance Them*

The same answer should apply to the conspirator who knows about the conspiracy, but has done nothing to bring the conspiracy about. *Mens rea* may be satisfied, but active participation is not. Thus if Moussaoui knew about September 11, but was here on another mission and did nothing to further the September 11 attacks, he should not be classified as a major participant. His allegedly lying to FBI officials as to his purpose in taking flying lessons when he was arrested and his presumably failing to disclose the September 11 plot would not appear to satisfy the major participation element.<sup>152</sup> This

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*Laws of War*, 28 YALE J. INT'L L. 325, 327-28 (2003). Given that the September 11 attacks constitute crimes against humanity if carried out by a private terror group and a war crime if carried out by the Taliban government (or if al Qaeda was the alter ego of the Taliban government), those responsible for the attacks may not escape the label of common criminal, international criminal, or war criminal. See *infra* notes 179-90 and accompanying text. But see FOU DA & FIELDING, *supra* note 43, at 118 (quoting “al-Qaeda Statement” justifying the attacks, for among other reasons, West’s and United States’ establishing Israel, for Israel’s killing Palestinians, for supporting allegedly corrupt Arab regimes, for supporting India in Kashmir, for the then blockade of Iraq, for using military force to keep the natural resource of many Arab states, oil, at a low price, and for violating Koran regarding tolerance of alcohol, interest, homosexuality, adultery, and prostitution).

151. See *supra* notes 110-13 and accompanying text in which the *Tison* Court distinguishes *Enmund*. *Tison v. Arizona*, 481 U.S. 137, 149, 157 (1987); see also *United States v. Castaneda*, 9 F.3d 761, 766 (9th Cir. 1993) (“[D]ue process constrains the application of *Pinkerton* where the relationship between the defendant and the substantive offense is slight.”), *vacated on other grounds*, 532 U.S. 1036 (1993); *United States v. Walls*, 225 F.3d 858, 865-66 (7th Cir. 2000) (relying on *Castaneda* to find unconstitutional application of *Pinkerton* doctrine).

152. See *supra* note 34 and accompanying text (discussing these allegations); see also McCord, *supra* note 101, at 875-78 (offering excellent discussion of meaning of “major participant”). The indictment does not allege that Moussaoui knew about the September 11 plot before his arrest.

certainly does not foreclose criminal liability,<sup>153</sup> but it should foreclose the death penalty.

*D. The In-Group Conspirator Who Knew Nothing about the Attacks  
but Who Played a Major Role in the Conspiracy*

A more difficult question is posed by the al Qaeda member who knew nothing about the September 11 attacks beforehand, but who played an important role in the conspiracy. For example, assume hypothetically that the actor, an al Qaeda member, knew nothing either about the planned attacks or about the idea of using civilian airliners as missiles, but purchased the plane tickets on orders of al Qaeda superiors. From the actor's point of view, he or she would be carrying out a fairly low-level task of purchasing tickets for what one presumably would believe were just routine flights. Yet, the purchase of the tickets, as noted above, played a key role in the conspiracy. Is such an actor death-eligible under *Enmund-Tison*?

This issue resembles that which arose in the context of depraved indifference murder under the Model Penal Code (MPC). Under the MPC, recklessness satisfies the *mens rea* for voluntary manslaughter.<sup>154</sup> Recklessness plus "extreme indifference to the value of human life" satisfies the *mens rea* for depraved indifference murder.<sup>155</sup> The issue was whether the "plus elements" are tested by a subjective standard or an objective one. Over a strong dissent, the New York Court of Appeals concluded that the additional elements were tested by an objective standard.<sup>156</sup> In that case the defendant was thus unable to use his voluntary intoxication to attempt to negate the plus elements of extreme indifference to reduce the offense from depraved heart murder to involuntary manslaughter (manslaughter in the second degree). Given the vagueness of the *Tison* holding, the U.S. Supreme Court could very well follow that lead or some similar approach and uphold the death sentence of an ostensibly out-group conspiracy member who objectively played a major role in the in-group conspiracy, but did not know she was doing so.

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153. Cf. *Government's Position on Sentencing and Government Sentencing Memorandum*, United States v. Lindh, Crim. No. 02-37A (E.D. Va. Sept. 27, 2002), available at <http://news.findlaw.com/hdocs/docs/lindh/uslindh92602psentmem.pdf> (last visited June 30, 2003) (defendant pleaded guilty to aiding terrorist organization and other crimes and received 20 year sentence).

154. MODEL PENAL CODE § 210.3(1)(a) (1980).

155. *Id.* § 210.2(1)(b).

156. *People v. Register*, 457 N.E.2d 704, 707 (N.Y. 1983), *cert. denied*, 466 U.S. 953 (1984).

Such a conclusion is disturbing in the death penalty context. With the exception of felony murder for some enumerated underlying felonies, depraved indifference (depraved heart murder at common law) traditionally has been second-degree murder and therefore a non-capital homicide.<sup>157</sup> Secondly, the Supreme Court has noted as follows:

Unless the imposition of the death penalty . . . “measurably contributes to one or both of these goals [deterrence and retribution], it ‘is nothing more than the purposeless and needless imposition of pain and suffering,’ and hence an unconstitutional punishment.” *Enmund v. Florida*, 458 U.S., at 798 (other citations omitted). With respect to retribution—the interest in seeing that the offender gets his “*just deserts*”—the severity of the appropriate punishment necessarily depends on the culpability of the offender.<sup>158</sup>

Admittedly, such an actor is both highly blameworthy and highly dangerous. Yet executing such actors for what they believe is the carrying out of a low-level function violates the principle of just desert.<sup>159</sup>

E. *The In-Group Conspirator Who Knew About the Attacks, but Who Played a Minor Role in the Conspiracy*

A variant on this hypothetical is the in-group conspiracy member who plays a minor role in the conspiracy. Suppose on September 10, 2001, for example, the actor put up for the night one of the September 11 hijackers. Suppose this actor is an al Qaeda member who knew of the September 11 plot when agreeing to put up the hijacker. Presumably such an actor would be only a minor participant in the conspiracy. Before September 11 the hijackers could easily have gotten a hotel room without incurring much risk.<sup>160</sup> The analysis is the converse of the individual who had no idea she in fact was playing a major role. Although *mens rea* is satisfied for the minor actor, the *actus reus* component, that of being a major participant, is not. So the in-group conspiracy member who plays a minor role should not be death-eligible.

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157. See KADISH & SCHULHOFER, *supra* note 56, at 396.

158. *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (emphasis added).

159. Of course, one could attack this position by arguing that the cell structure and its accompanying regime of willful blindness thus immunizes al Qaeda members from the death penalty. To the extent that the willful blindness amounts to reckless indifference as opposed to knowing conduct, it should not render one death eligible. Admittedly, *Tison* may very well support the imposition of the death penalty on such an actor, one who exhibits reckless indifference to human life but does not know the significance of her role.

160. Mohammed Atta, said to be the “field commander” of the September 11 terrorists, in fact stayed at a Comfort Inn outside of Portland, Maine on this date. See FOUDA & FIELDING, *supra* note 43, at 142.

None of the states or the federal government has dealt with crimes of this magnitude. The Timothy McVeigh-Oklahoma City bombing case never reached the U.S. Supreme Court. In that domestic terrorism case, there was never any question that McVeigh was the primary actor, so that case does not apply here in any event.<sup>161</sup> His accomplice, Terry Nichols, convicted as a co-conspirator, was given life in prison.<sup>162</sup> During World War II, the Supreme Court affirmed the death sentences of eight German spies by a hastily convened military tribunal.<sup>163</sup> The death penalty jurisprudence of the Court, however, has changed so significantly since World War II that that precedent is of questionable vitality today.<sup>164</sup> Nonetheless, Justice O'Connor stated in a speech, that given the events of September 11, we would have to expect new limitations on our civil liberties.<sup>165</sup> The Court's death penalty jurisprudence could evolve quickly into one of those limitations.<sup>166</sup>

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161. *Excerpt from Ashcroft Statement on Delaying Execution of Timothy McVeigh*, N.Y. TIMES, May 12, 2001, at A12.

162. See Jo Thomas, *Oklahoma City Verdict: The Overview; Death Penalty Ruled Out as Nichols Jury Deadlocks in Oklahoma Bombing Case*, N.Y. TIMES, Jan. 8, 1998, at A1. The State of Oklahoma, however, recently indicted Nichols and is seeking the death penalty in connection with the Oklahoma City bombing. See Dan Rather, *Oklahoma City Bombing Co-Conspirator to Stand Trial on State Murder Charges*, (CBS television broadcast, May 20, 2003), available in LEXIS, News Group File.

163. *Ex parte Quirin*, 317 U.S. 1, 2 (1942).

164. Jack Goldsmith & Cass R. Sunstein, Comment, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261 (Spring 2002). *But see* Hamdi v. Rumsfeld, 316 F.3d 450, 476 (4th Cir. 2003) (relying in part on *Ex parte Quirin* for the proposition that the courts should defer to the Executive in determining the status of "enemy combatants" captured "in the zone of active combat"), cert. granted, No. 03-6696, 2004 WL 42546 (U.S. Jan. 9, 2004). See also George Terwilliger et al., *The War on Terrorism: Law Enforcement or National Security?*, THE FEDERALIST SOC'Y NAT'L SECURITY WHITE PAPERS ON TERRORISM, available at <http://www.fed-soc.org/Publications/Terrorism/militarytribunals.htm>; cf. *Al Odah v. United States*, 321 F.3d 1134, 1142-44 (D.C. Cir.) (rejecting attempts of foreign nationals detained in Guantanamo Bay, Cuba to obtain legal review of their detention), cert. granted, 124 S.Ct. 534 (2003).

165. Tony Mauro, *Court Watch: Court Weighs in on Stops at the Border*, LEGAL TIMES, Dec. 3, 2001, at 8.

166. The Supreme Court did limit the death penalty in one important case last term and two important cases the previous term. See *Wiggins v. Smith*, 123 S. Ct. 2527, 2535-37 (2003) (O'Connor, J.) (reversing death sentence on grounds of ineffective assistance of counsel in failing to investigate petitioner's troubled childhood); *Ring v. Arizona*, 536 U.S. 584, 2434-43 (2002) (finding unconstitutional state death penalty statute that authorizes trial court alone, not jury, to determine whether aggravating circumstances exist to justify imposing penalty of death); *Atkins v. Virginia*, 536 U.S. 304, 321-25 (2002) (finding unconstitutional the imposition of the death penalty on mentally retarded offenders). Few commentators, however, believe that the Court has done an about-face in its death penalty jurisprudence. See, e.g., Erwin Chemerinsky, *Supreme Court Decided Crucial Issues*, CAL. BAR J., Aug. 2002, at 1, 20 ("There is no indication that these decisions portend the Supreme Court finding the death penalty unconstitutional."). Interestingly, however, in *Atkins*, the Court relied in part on the

#### IV. POLICY CONSIDERATIONS, INTERNATIONAL LAW, AND THE INTERNATIONAL REPERCUSSIONS OF EXECUTING AL QAEDA MEMBERS

Even if the U.S. Supreme Court were to conclude that executing an actor like Moussaoui is constitutional, sound policy considerations argue against such executions. This Article will first summarize the arguments in favor of imposing the death penalty on terrorists. After proposing a definition of terrorism, this Article will discuss arguments against imposing the death penalty on politically motivated terrorists in general and on the al Qaeda terrorists in particular. Included here are a constellation of policy questions, namely, how the death penalty interferes with an alternative strategy against terrorism; how the death penalty might create martyrs; how it might hinder cooperation with our allies in the war against terror; how the death penalty relates to the problem of the so-called "ticking bomb terrorist"; and how executing al Qaeda members might affect U.S. civilians and military in the field.

##### A. Summary of Arguments in Favor of the Death Penalty

Some of the arguments generally advanced in favor of the death penalty apply to international terrorists. Chief among these would be retribution, both the just desert strand<sup>167</sup> as well as the wild justice, revenge strand<sup>168</sup> of retribution theory. Killing over 3,000 innocent people, not to mention the other grave crimes that the hijackers committed, demands retribution.<sup>169</sup> Even under the just desert strand

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practice of other countries in determining that the death penalty for defendants who suffered from mental retardation violated the Constitution: "Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." *Atkins*, 536 U.S. at 316 n.21 (citing Brief for The European Union as Amicus Curiae in *McCarver v. North Carolina*); see also Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1129-30 (2002).

167. This strand attempts to arrive at "just outcomes; the emphasis is on what the offender fairly merits for his crime." Andrew Von Hirsch, *Penal Theories*, in THE HANDBOOK OF CRIME AND PUNISHMENT 659, 666 (Michael Tonry ed., 1998) (emphasis added). See also DRESSLER, *supra* note 58, at 17 (describing this notion of retributive justice as "punishment [being] . . . a means of securing a moral balance in the society").

168. See Robert Nozick, *Retributive Punishment*, in READINGS IN THE PHILOSOPHY OF LAW 196-98 (John Arthur & William Shaw eds., 1984) (distinguishing in detail retribution from revenge).

169. Furthermore, the Islamic countries themselves are strong advocates of the death penalty. See, e.g., William A. Schabas, *International Law and Abolition of the Death Penalty: Recent Developments*, 4 ILSA J. INT'L & COMP. L. 535, 545 (1998) (quoting Sudan delegate to Rome Conference to establish International Criminal Court, who "described capital punishment as 'a divine right according to some religions, in particular Islam'"); Jennifer Cunningham, *Frontier Justice is Put on the Dock*, THE GLASGOW HERALD, June 25, 1997, at 17 (noting Saudi Arabia's practice of

as opposed to the wild justice strand, the penalty of death is justified. Intentionally taking the life of so many innocents recalls the horrors of the Nazi regime.<sup>170</sup> The culpability level, at least of the active conspirators, is as high as can be imagined.<sup>171</sup> Even if suicide bombers may not be generally deterred,<sup>172</sup> those responsible for the September 11 attacks warrant the death penalty: “The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not.”<sup>173</sup>

Furthermore, the theories of incapacitation and specific deterrence would appear to be furthered by the death penalty.<sup>174</sup> Reformation of these offenders is unthinkable. Imposing the death penalty would also be justified under the denunciation theory, the theory espoused by the French sociologist, Emile Durkheim, that the

beheading convicted rapists, drug smugglers and murderers); Dominus, *supra* note 9, at 30 and *passim*.

170. After World War II, the Nuremberg International Military Tribunal sentenced to death twelve high-ranking members of the Nazi German Regime for war crimes and crimes against humanity. A number of doctors and SS leaders were likewise given the death penalty. See *War Crimes Trials*, 27 FUNK & WAGNALLS NEW ENCYCLOPEDIA 146-47 (1986).

171. Retribution looks only backward at what the actor has done: “Even if a civil society resolved to dissolve itself . . . the last murderer lying in the prison ought to be executed . . .” DRESSLER, *supra* note 58, at 18 (quoting IMMANUEL KANT, *THE PHILOSOPHY OF LAW* 197-98 (W. Hastie trans., 1887)). The utilitarians, on the other hand, look forward to determine whether the punishment will provide “an overall social benefit.” DRESSLER, *supra* note 58, at 16. The arguments that are set forth below draw greatly from utilitarian theory.

172. One could also argue that, although suicide bombers may not be deterred by the death penalty, their handlers might be. Cf. Norman L. Green et al., *Capital Punishment in the Age of Terrorism*, 41 CATH. LAW. 187, 225 (2002) (comments of Kenneth Roth) (noting that some of the leaders of al Qaeda, including Osama bin Laden, himself, seem less than keen on serving as suicide bombers).

173. See *Furman v. Georgia*, 408 U.S. 238, 453 (1972) (Powell, J., dissenting) (quoting Lord Justice Denning, Minutes of Evidence, *Royal Commission on Capital Punishment*, 207 (1949-1953)).

Because the only genuinely humane, immediate response to atrocities like the Washington sniper attacks and Mohamed Atta’s airline hijackings—and the necessary formal response of an organized civil society—is collective fury. Along with a controlled but ferocious determination to incapacitate and crush the perpetrators as quickly as possible. Deep-think analysis can and must wait.

David Tell, *Yes, The Sniper Was a Terrorist*, Editorial, 8 WKLY. STANDARD, Nov. 4, 2002 at 7, 8; cf. Note, *Responding to Terrorism, Crime, Punishment, and War*, 115 HARV. L. REV. 1217, 1233 (2002) (noting that “the resurgence of the death penalty in the thirty years since the Supreme Court’s ruling in *Furman v. Georgia* reflects the ascendancy of retributive theories of punishment”).

174. See *infra* note 253; see also Hirsch, *supra* note 167, at 660-61 (describing incapacitation as “penal consequentialism”). But given the apparently overwhelming number of individuals who are willing to engage in so-called “martyrdom operations,” incapacitating one offender may do little to stop others. See *supra* note 139.

death penalty serves to “express society’s condemnation and the relative seriousness of the crime,”<sup>175</sup> in this case, the September 11 attacks.<sup>176</sup>

### B. *Terrorism and Counter-Terrorism*

Despite the strength and appeal of many of the arguments for imposing the death penalty on those responsible for the outrage of September 11, there are others arguments that should be considered. Although the arguments that follow appear grounded in utilitarian theory,<sup>177</sup> I suspect they ultimately reflect Professor Charles Black’s observation that the death penalty is an evil, because, among other things, “it extinguishes, after untellable suffering, the most mysterious and wonderful thing we know, human life; this reason has many harmonics . . . .”<sup>178</sup>

#### 1. Defining Terrorism

The term “terrorism” has defied attempts at definition. Some define it as acts of violence by a private organization against the state or civilians.<sup>179</sup> Others say terrorism largely embraces attacks

175. DRESSLER, *supra* note 58, at 18; Denning, *supra* note 173, at 207 (“Punishment is the way in which society expresses its denunciation of wrong doing; and, in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them.”).

176. KADISH & SCHULHOFER, *supra* note 56, at 106 (reprinting an excerpt from EMILE DURKHEIM, *THE DIVISION OF LAW IN SOCIETY* 62-63 (W.D. Halls trans., 1984)).

177. See Jeremy Bentham, *Cases Unmeet for Punishment*, in *THE PORTABLE ENLIGHTENMENT READER* 541 (Issaack Kramnick ed., 1995) (reasoning that punishment should not be meted out “3. Where it is unprofitable, or too expensive: where the mischief it would produce would be greater than what is prevented. 4. Where it is needless: where the mischief may be prevented, or cease of itself without it . . . .”); see also *supra* note 167 and accompanying text.

178. Charles L. Black, Jr., *The Crisis in Capital Punishment*, 31 MD. L. REV. 289, 291 (1971); see also Anthony G. Amsterdam, *Capital Punishment*, in *THE DEATH PENALTY IN AMERICA* 346, 352-53 (Hugo Adam Bedau ed., 1982) (“The plain message of capital punishment . . . is that life ceases to be sacred whenever someone with the power to take it away decides that there is a sufficiently compelling pragmatic reason to do so.”). *But see* Walter Berns, *The Morality of Anger*, in *THE DEATH PENALTY IN AMERICA*, *supra*, at 333, 334 (“[Simon] Wiesenthal allows us to see that it is right, morally right, to be angry with criminals and to express that anger publicly, officially, and in an appropriate manner, which may require the worst of them to be executed.”); Ernest Van den Haag, *In Defense of the Death Penalty: A Practical and Moral Analysis*, in *THE DEATH PENALTY IN AMERICA*, *supra*, at 332 (“If it were shown that no punishment is more deterrent than a trivial fine, capital punishment for murder would remain just, even if not useful.”).

179. See JORDAN J. PAUST ET AL., *INTERNATIONAL CRIMINAL LAW CASES AND MATERIALS* 995, 997 (2000) (quoting U.S. Dept. of State, *Patterns of Global Terrorism*, Mar. 1989) (“[T]errorism’ is premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine state agents, usually intended

animated by racism or colonialism and excludes acts of “struggle” and “resistance” carried out by so-called “national liberation movements” even if those acts are aimed at innocent civilians.<sup>180</sup> For purposes of this Article, I consider crimes of terrorism to mean “war crimes” and “crimes against humanity” as defined by the Rome Statute of the International Criminal Court (ICC).<sup>181</sup> The Rome Statute defines a crime against humanity as “a widespread or systematic attack directed against any civilian population.”<sup>182</sup> Such attacks are defined as “a course of conduct involving the multiple commission of [such] acts . . . pursuant to or in furtherance of a State or organizational policy to commit such attack.”<sup>183</sup> As of this writing, the ICC has been signed by 139 countries and has been ratified by ninety-two countries.<sup>184</sup> Using the ICC definitions accomplishes a two-fold objective: it draws from a source of law now recognized by the vast majority of states as authoritative, and it addresses critics’ major

to influence an audience. ‘International terrorism’ is terrorism involving the citizens or territory of more than one country.”). For a good discussion of this issue, see BRUCE HOFFMAN, *INSIDE TERRORISM* 13-44 (1998).

180. See, e.g., NOAM CHOMSKY & EDWARD S. HERMAN, 1 *THE POLITICAL ECONOMY OF HUMAN RIGHTS: THE WASHINGTON CONNECTION AND THIRD WORLD FASCISM* 6 (1979) (criticizing the terms “terrorism” and “terrorist” as being applied to “the use of violence by individuals and marginal groups” while characterizing much more favorably “[o]fficial violence [by states] which is far more extensive in both scale and destructiveness,” that is, “wholesale as opposed to retail terror”); Charles Krauthammer, *The Ball’s Still in Arafat’s Court*, WASH. POST, Nov. 19, 1988, at A23 (criticizing U.N. Resolutions defining terrorism).

181. The Rome Statute of the International Criminal Court, art. 7.1, U.N. Doc. A/Conf. 183/9 (1998) [hereinafter ICC Statute], available at <http://www.un.org/law/icc/statute/rome fra.htm>.

182. *Id.* Article 7.1(a) provides as follows: “For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; . . . ” *Id.*; see also Jordan Paust, *Threats to Accountability after Nuremberg: Crimes against Humanity, Leader Responsibility and National Fora*, 12 N.Y.L SCH. J. HUM. RTS. 547, 553-54 (1995) (criticizing Article 5 of International Criminal Tribunal for former Yugoslavia statute on ground that its definition of crimes against humanity needlessly restricted its scope as compared to customary law definition of crimes against humanity).

183. ICC Statute, *supra* note 181, art. 7.2(a). The subsection in full states as follows: “Attack directed against any civilian population means a course of conduct involving the *multiple commission of acts* referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or *organizational policy* to commit such attack.” *Id.* (emphasis added). Compare the definition of terrorism provided by Caleb Carr, a definition that includes state terrorism as well as terrorism carried out by non-state actors: “Terrorism . . . is simply the contemporary name given to, and the modern permutation of, warfare deliberately waged against civilians with the purpose of destroying their will to support either leaders or policies that the agents of such violence find objectionable.” CALEB CARR, *THE LESSONS OF TERROR* 6 (2002).

184. ICC, *Ratification Status*, available at <http://www.un.org/law/icc/statute/rome fra.htm> (last visited Feb. 2, 2004).

objection to policies treating state terror and private terror, disparately.<sup>185</sup>

The attacks of September 11 easily satisfy the elements of crimes against humanity. By hijacking the four civilian airliners, deliberately crashing two of the hijacked airliners into huge civilian office buildings, thus murdering all the civilians on the aircrafts and murdering thousands of civilians within the buildings, the nineteen hijackers and their accomplices committed "multiple" acts "directed at any civilian population." The coordination of the attacks demonstrates that the attacks were committed "pursuant to or in furtherance of a State or organizational policy." The language "organizational policy"<sup>186</sup> was expressly intended to include non-state actors such as private terror groups.<sup>187</sup> If al Qaeda acted on its own in carrying out the September 11 attacks, those responsible in al Qaeda should be found guilty of crimes against humanity.

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185. See CHOMSKY, *supra* note 180, at 6; see also ALAN DERSHOWITZ, WHY TERRORISM WORKS 4-9 (2002). But see Byford, *supra* note 1, at 34-36 (arguing that a simple definition of "terrorism" is impossible to make, that both ends and means employed to those ends must be examined to determine whether individuals have engaged in "terrorism").

186. See Preparatory Comm'n on the Int'l Criminal Court, Elements of Crimes, U.N. Doc. PCNICC/2000/1/ADD.2 (2000), art. 7, available at [http://www1.umn.edu/humanrts/instrtree/iccelementsofcrimes.html#\\_ftn36](http://www1.umn.edu/humanrts/instrtree/iccelementsofcrimes.html#_ftn36) (last visited Mar. 13, 2003). The Final Draft Elements of Crimes of the ICC further supports this interpretation:

"Attack directed against a civilian population" in these context elements is understood to mean a course of conduct involving the multiple commission of acts referred to in Article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. It is understood that "policy to commit such an attack" requires that the State or organization actively promote or encourage such attack against a civilian population.

*Id.*, art. 7, Intro. (emphasis added); see also James D. Fry, *Terrorism as a Crime Against Humanity and Genocide: The Backdoor to Universal Jurisdiction*, 7 UCLA J. INT'L L. & FOREIGN AFF. 169, 191 (2002); Paust, *supra* note 150, at 327. But see William A. Schabas, *Punishment of Non-state Actors in Non-International Armed Conflict*, 26 FORDHAM INT'L L. J. 907, 924-25 (2003) (arguing that the September 11 attacks do not constitute "crimes against humanity" within the definition of either the ICC or custom).

187. Lucy Martinez, *Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems*, 32 RUTGERS L.J. 1, 36 (2002) (citing Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 31 (1999)); see also *In Re Doherty*, 599 F.Supp. 270, 274 (S.D.N.Y. 1984) (rejecting Great Britain's request to extradite PIRA member charged with attacking a convoy of British soldiers in Northern Ireland, but stating in *dicta* that the political offense exception would not protect individuals who placed bombs in public places, an act that violates international law or acts that would violate the Geneva conventions); cf. *In Re McMullen*, No-3-78-1899 M.G. (N.D. Cal. 1979) reprinted in Cong. Rec. 16,585 (1986) (denying Great Britain's request to extradite Provisional Irish Republican Army member and noting that PIRA member's allegedly attacking British military barracks did not constitute war crime or crime against humanity).

If a state, such as Afghanistan, sponsored these attacks, then those responsible in the Taliban government as well as any other accomplices or conspirators are almost certainly guilty of war crimes for carrying out the outrages of September 11.<sup>188</sup> Restating long-established treaty and customary international law, the ICC codifies as a war crime, “intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in the hostilities; [and] (ii) intentionally directing attacks against civilian objects, that is, objects which are not military objectives.”<sup>189</sup> Except for the attack on the Pentagon, all the attacks were on civilians and civilian objects.<sup>190</sup>

## 2. Alternative Strategies against Terrorism

In the fight against terrorism, we must consider with whom we are dealing and the most effective approach for reducing, if not eliminating, the threat to our cities and suburbs, facilities, aircraft, communications, and, above all, our people. There are more than one billion Muslims in the world.<sup>191</sup> In the Arab world, there are more than 200 million people.<sup>192</sup> Few democracies exist in the Islamic

188. See Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1, 8 n.16 (2001).

189. ICC Statute, *supra* note 181, art. 8.2(b) (emphasis added). This full subsection, with its prefatory language is as follows:

For purposes of this statute, “war crimes” means: . . . (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; (ii) intentionally directing attacks against civilian objects, that is, objects which are not military objectives.

*Id.* art. 8.2.

190. To keep the focus on attacks on unequivocally noncombatant civilians, this discussion of crimes against humanity does not include the attack on the Pentagon, even though civilian employees of the Defense Department died in that attack. Furthermore, this is not to suggest that the attack against the Pentagon, aside from the manner of making the attack, was not a crime. It certainly was a domestic crime (actually numerous domestic crimes), and, to the extent that al Qaeda was not the alter ego of the Taliban and thereby acting as a state, those who conspired to carry out or who aided and abetted the attack are criminally responsible. If the Taliban were the alter ego of al Qaeda and entered into a state of armed conflict with the United States on September 11, 2001, that component of the attack would probably not constitute a war crime but seizing and crashing the civilian airliner into the Pentagon would be.

191. FUNK & WAGNALLS NEW ENCYCLOPEDIA, *Islam* (2003), available in LEXIS Reference File.

192. FUNK & WAGNALLS NEW ENCYCLOPEDIA, *Arabs* (2003), available in LEXIS Reference File.

world,<sup>193</sup> virtually all of the Arab countries are run by dictators or kings, some more despotic than others.<sup>194</sup> The Arab countries rank last in the world in ratings on freedom of the press and other freedoms.<sup>195</sup> Aside from the lack of individual rights, the standard of living has declined in that part of the world for the last thirty years.<sup>196</sup> Nearly fifty percent of the population in the Arab world is under the age of twenty-five,<sup>197</sup> with one-third under the age of fifteen.<sup>198</sup> In the oil rich countries—the Gulf States, for example—“economic wealth has benefited a relatively limited few, and has not been distributed to poorer Islamic countries or to their very large migrant communities.”<sup>199</sup> The young face little chance of climbing out of devastating and demoralizing poverty and repression.<sup>200</sup>

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193. The leading one is Turkey, which, unfortunately, possesses one of the worst if not the worst human rights records in Europe. See *Endemic Torture in Turkey Must End Immediately*, (Amnesty International), Nov. 8, 2001, available at <http://web.amnesty.org/ai.nsf/Index/EUR440772001?OpenDocument&of=COUNTRIES\TURKEY> (last visited Mar. 13, 2003). Turkey's parliament has, however, abolished the death penalty in peacetime, a step that Amnesty International had been urging for decades and which the European Union has required as a condition of Turkey's membership. See *Turkey: Abolition of the Death Penalty Welcomed*, (Amnesty International) Aug. 2, 2002, available at <http://web.amnesty.org/ai.nsf/Index/EUR440362002?OpenDocument&of=Abolition COUNTRIES\TURKEY> (last visited Mar. 13, 2003). Whether this also signals that Turkey will end its practice of torture and other human rights abuses remains to be seen.

194. See LEWIS, *supra* note 67, at 117-18; see also Fareed Zakaria, *The Politics of Rage: Why Do They Hate Us?*, NEWSWEEK, Oct. 15, 2001, at 22.

195. See Zakaria, *supra* note 194, at 24.

196. *Id.* at 25; see also LEWIS, *supra* note 67, 114-17. Concerning economic failure Lewis notes that “Israel's per capita GDP was three and half times that of Lebanon and Syria, twelve times that of Jordan, and thirteen and a half times that of Egypt.” *Id.* at 117 (citing Arab Human Development Report 2002; Creating Opportunities for Future Generations, sponsored by the Regional Bureau for Arab States/UNDP, Arab Fund for Economic and Social Development). He discussed the intellectual life of the Arab world again quoting the Arab Human Development Report, “The Arab world translates about 330 books annually, one-fifth of the number that Greece translates. The accumulative total of translated books since the Caliph Maa'moun's [*sic*] time [the ninth century] is about 100,000, almost the average Spain translates in one year.” *Id.* at 115-16. Even in Saudi Arabia, per capita income plummeted from \$28,600 in 1981 to \$6,800 in 2001. Eric Rouleau, *Trouble in the Kingdom*, FOREIGN AFF., July-Aug. 2002, at 75, 85.

197. Zakaria, *supra* note 194, at 22, 32.

198. *Id.* “Today, two in five Saudis are under 16 years old. [Saudi Arabia's] population has exploded while its economy has stagnated with the result that its per capita income has dropped.” Michael Scott Doran, *Palestine, Iraq, and American Strategy*, FOREIGN AFF., Jan.-Feb. 2003, at 19, 28; see also Editorial, *The Anger of Arab Youth*, N.Y. TIMES, Aug. 15, 2002, at A22.

199. Max Taylor & John Horgan, *The Psychological and Behavioural Bases of Islamic Fundamentalism*, 13 TERRORISM & POL. VIOLENCE 37, 41 (2001). These commentators add that “to many devout Muslims the effects of increased oil wealth have been to increase the influence of the West and challenge the social basis of Islam, rather than to complement and enhance it.” *Id.*

200. “Even if many terrorists are not directly driven by poverty, the inequities of globalization feed a general anti-Westernism that is a seedbed for Islamism.” Michael Hirsh, *Bush and the World*, FOREIGN AFF. Sept.-Oct. 2002, at 18, 28. *But see*

“Throughout the region [the Middle East] [Arab] people have become ever more disillusioned with the deeply-entrenched dictatorships in their own countries, with the collapse of democratic institutions, hollow nationalistic rhetoric, and with their failing economies.”<sup>201</sup>

Given the failure of economic and political institutions in the Arab world, it is not surprising that religion has emerged as a major force.<sup>202</sup> In the Muslim culture, religion and politics are intertwined in a way reminiscent of Western Europe before the Reformation.<sup>203</sup> The fight against terrorism thus needs to embrace the social and political reality of the Arab world and the nature of the organization we are fighting.

The available evidence suggests that al Qaeda is a network rather than a single, unified military organization.<sup>204</sup> As one commentator has written, “[H]aving suffered the destruction of its

DERSHOWITZ, *supra* note 185, at 25 (noting that “the vast majority of groups with equivalent or more compelling causes—and with far greater poverty and disadvantage—have never resorted to terrorism”); FAREED ZAKARIA, *THE FUTURE OF FREEDOM ILLIBERAL DEMOCRACY AT HOME AND ABROAD* 138 (2003) (arguing that “[t]he problem is wealth not poverty” and that unearned income from oil revenues, or, for example in the case of Egypt from the Suez Canal and the United States, “relieves the government of the need to tax its people—and in return provide something to them, in the form of accountability, transparency, and even representation”).

201. See Amanat, *supra* note 67, at 29; see also LEWIS, *supra* note 67, at 117-19. Given the failure of the economic and political institutions in Islamic countries, their people are outraged: “The resulting anger is naturally directed first against their rulers, and then against those whom they see as keeping those rulers in power for selfish reasons.” *Id.* at 119. This Article does not discuss economic and political measures necessary to enhance human, civil and economic rights in the Arab and Islamic worlds. See Peter G. Peterson, *Public Diplomacy and the War on Terrorism*, *FOREIGN AFF.*, Sept.-Oct. 2002, at 74, 75.

202. A noted scholar of religion, Karen Armstrong, has observed that the resounding defeat of the Arab States by Israel in the 1967 war led to a religious revival in the Arab States: “After the humiliating defeat of the Arab armies during the 1967 Six-Day War against Israel in 1967, there was a swing toward religion throughout the Middle East.” KAREN ARMSTRONG, *ISLAM: A SHORT HISTORY* 171 (2000).

203. *Id.* at 169-73; see also LEWIS, *supra* note 67, at 6-8 (noting that “[d]uring Muhammad’s lifetime, the Muslims became at once a political and a religious community with the Prophet as head of state” and contending that Islam remains deeply involved with politics and state power); Taylor & Horgan, *supra* note 199, at 42 (noting that one of the central positions of Islamic fundamentalism is “the general equation of the state with the implementation of Islam”).

204. See Diaa Rashwan, *Impossible to Fight*, *AL-AHRAM WKLY.*, Aug. 8-14, 2002, available at <http://www.weekly.ahram.org/2002/598/op11.htm> (last visited June 20, 2003) (observing that Americans had now accepted the European view that “Al Qaeda is actually nothing more than a network and that the violent Islamacist groups have no unified command, but communicate and cooperate when it suits their different purposes.”). Al Qaeda was created in the 1980s from three terrorist organizations: “bin Laden’s circle of ‘Afghan’ Arabs, together with two factions from Egypt, the Islamic Group and Egyptian Islamic Jihad, the latter led by Dr. Ayman al-Zawahiri, al Qaeda’s top theoretician.” See Paul Berman, *The Philosopher of Islamic Terror*, *N.Y. TIMES MAG.*, Mar. 23, 2003, at 24.

sanctuary in Afghanistan two years ago, al Qaeda's decentralized organization has become more decentralized still."<sup>205</sup> Another commentator has analogized al Qaeda to "a holding company run by a council (shura) including representatives of terrorist movements."<sup>206</sup> It has also been described as the terrorist equivalent of the Ford Foundation, providing money and other resources for individual terrorists or movements that propose terrorist projects.<sup>207</sup>

The nature of the organization suggests the means of combating it. Tactically, the United States and its allies must bring to justice those responsible for carrying out the outrages of September 11 and to defeat those who continue to attempt to terrorize the United States.<sup>208</sup> Strategically, the United States and its Coalition partners must take steps to end support in the Arab and greater Muslim world for al Qaeda and others who would resort to terrorism.<sup>209</sup> The

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205. Jessica Stern, *The Protean Enemy*, FOREIGN AFF., Jul.-Aug. 2003, at 27, available at 2003 WL 57276699. Stern adds that al Qaeda apparently has put into practice so-called "leaderless resistance," a tactic popularized by Louis Beam of the Aryan Nations, an American Neo-Nazi group. With the advent of the Internet, leaders do not necessarily have to secretly issue orders or to "pay operatives," rather, "they inspire small cells or individuals to take action on their own initiative." *Id.*; see also Stevenson, *supra* note 8, at 85; Eric Bonabeau, *Scale Free Networks*, SCIENCE, May 2003, abstract available at <<http://www.sciam.com/article.cfm?colID=1&articleID=000312F5-B86B-1E90-8EA5809EC5880000>>.

206. See Conesa, *supra* note 67.

207. Scott Peterson, *Islamacists Escalate Fight in N. Iraq*, CHRISTIAN SCI. MONITOR, Nov. 22, 2002, at 1 (quoting James Lindsay of the Brookings Institution); see also BURKE, *supra* note 20, at 208 (noting that "al Qaeda hardcore" rejected volunteers who requested martyrdom operations unless they "came up with their own ideas for attacks"). Al Qaeda can also be analogized to joint venture capitalists, ("individuals would approach the chief executive and board (bin Laden, Atef et al.) with ideas they believed were worthy of support") or a publishing house ("Freelancers would approach them with ideas that would sometimes be funded and resourced but often rejected"). *Id.* at 208-09.

208. See Nicholas Lemann, *Letter from Washington, What Terrorists Want; Is There a Better Way to Defeat al Qaeda?*, NEW YORKER, Oct. 29, 2001, at 36.

209. See Harold H. Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1497-1500 (2003) (criticizing, as counter-productive, Bush Administration's largely unilateralist approach to combating terrorism and Administration's violating international law in process); Thomas Carothers, *Promoting Democracy and Fighting Terror*, FOREIGN AFF., Jan.-Feb. 2003, at 84, 97 (criticizing Bush Administration's current strategy in handling the war on terror as not paying enough attention to even handedly promoting democracy around world). See also Hirsh, *supra* note 200, noting as follows:

But at the same time, the nature of the terrorist threat demonstrated the necessity of bolstering the international community, which is built on nonproliferation agreements, intelligence cooperation, and legitimizing institutions such as the UN, as well as a broad consensus on democracy, free markets, and human rights. It also demonstrates the necessity of a values-driven foreign policy—and of nation building under multilateral auspices in places such as Afghanistan.

decentralized nature of al Qaeda underlines the importance of United States' gaining the cooperation and good will not only of governments but also of their law enforcement personnel and of individual citizens in Arab and other Muslim states.<sup>210</sup> In other words, to root out those responsible for the attacks and who pose a continuing threat, we need a firm, but measured response, simultaneously demonstrating that we are not attacking all Muslims or Arabs or applying a double standard to Muslims or Arabs.<sup>211</sup>

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*Id.* at 18; O'Connor & Rumann, *supra* note 2, at 1750-51 (noting that the United States is resorting to draconian emergency measures similar to those employed by Great Britain in Northern Ireland against the IRA, measures which both failed to enhance security or to defeat the IRA. The authors advocate "[d]ialogue, cooperation, and attention to civil liberties as necessary and effective elements in the strategy to eliminate terrorism"); Robert I. Rotberg, *Failed States in a World of Terror*, FOREIGN AFF., July-Aug. 2002, at 127, 140 (concluding that "[s]tate building trumps terror," requires the cooperation of many states, and cannot be done "on the cheap"); cf. Philip A. Thomas, *Emergency and Anti-Terrorist Powers, 9/11: USA AND UK*, 26 FORDHAM INT'L L. J. 1193, 1228 (2003) (quoting Christopher Hewitt's extensive study of British counter-terrorism measures, THE EFFECTIVENESS OF ANTI-TERRORIST POLICIES (1984) ("heavy handed repression is counter-productive")).

As one commentator has observed concerning how the then impending war in Iraq was being viewed by U.S. Muslims and others:

If 1 percent of that one billion [the world population of Muslims] felt that they had sympathy for extremist views, then we are dealing with 10 million people. And if 10 percent of those 10 million were a little more active in pursuing those extreme beliefs and views, then we are dealing with a potential pool of one million people from which extremist groups and terrorists can recruit.

Michele Norris & Melissa Block, *All Things Considered: How a Potential War with Iraq Is Being Viewed by American Muslims and Others* (Nat'l Public Radio broadcast, Mar. 14, 2003) (quoting Hussein Hakani of Carnegie Endowment for International Peace), available in LEXIS, National Public Radio Newsfile.

210. *But see* Anthony Cordesman, *How Should the United States Respond to Terrorism*, CATO INSTITUTE POLICY FORUM, Nov. 27, 2000, at 16, at [www.artitranscripts.com](http://www.artitranscripts.com) (last visited June 3, 2003) (arguing that "law enforcement partnerships are extremely political, extremely limited, often inherently corrupt . . ."). Religious terrorists may also be less subject to societal constraints than secular terrorists:

Whereas secular terrorists attempt to appeal to a constituency variously composed of actual and potential sympathizers, members of the communities they purport 'to defend' or the aggrieved people for whom they claim to speak, religious terrorists are at once activists and constituents engaged in what they regard as a total war. They seek to appeal to no other constituency than themselves. Thus the restraints on violence that are imposed on secular terrorists by the desire to appeal to a tacitly supportive or uncommitted constituency are not relevant to the religious terrorist.

HOFFMAN, *supra* note 179, at 94-95

211. *See infra* note 287 (citing European Court of Human Right's decision in the Ocalan case); *see also* CARR, *supra* note 183, at 43 ("This presents us with another enduring truth about the tactics of terror [should a State be tempted to respond therewith]; they must never be viewed as an expedient or a controllable instrument of

Putting it another way, “[T]he first principle of responding to unlimited warfare against civilians is . . . not to respond with similar behavior.”<sup>212</sup> Otherwise, we risk inflaming the Islamic world. Unfortunately, the invasion of Iraq, a Muslim country (albeit with a secular regime) is likely to create such a response.<sup>213</sup> Likewise, executing members of a terrorist group like al Qaeda invites retaliation in kind. As one commentator has noted, “[R]eprisal begets reprisal.”<sup>214</sup> We have seen, in other theaters, retaliatory strike followed by retaliatory attack from the other side, devolving into a vicious cycle of seemingly ever-increasing violence.<sup>215</sup> Experience suggests that executing al Qaeda members would help create such a cycle.<sup>216</sup> We should adopt, not only with use of our military but also

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policy, one which, after its purpose is served, will simply burn itself out.”); Koh, *supra* note 209, at 1509 (noting that United States joined with the European Union in demanding that Turkey not execute notorious Kurdish Terrorist Abdullah Ocalan); Richard Falk, *A Roadmap for War: A Flawed Debate*, Sept. 27, 2002, available at [http://www.transnational.org/forum/meet/2002/Falk\\_WarFlawedDebate.html](http://www.transnational.org/forum/meet/2002/Falk_WarFlawedDebate.html) (last visited Mar. 13, 2003). Cf. LEWIS, *supra* note 67, at 103-12 (noting that many in Islamic world have criticized West and particularly United States for applying double standard to Muslims and Muslim states).

212. CARR, *supra* note 183, at 231 (emphasis added).

213. See *Iraq War Helped Boost Al Qaeda*, TORONTO STAR, May 20, 2003, at A1 (quoting Paul Wilkinson, head of Centre for the Study of Terrorism and Political Violence at St. Andrew’s University in Scotland: “The political masters in U.S. and Europe underestimated the extent to which bin Laden would use the war in Iraq as a propaganda weapon to rejuvenate the movement and attract more funds.”); Steven R. Weisman, *U.S. Must Counteract Image in Muslim World, Panel Says*, N.Y. TIMES, Oct. 1, 2003, at A1 (quoting a Bush Administration panel, “[h]ostility toward America has reached shocking levels” as a result of the Iraq war and increased tension in the Middle East). Many had predicted this outcome:

A U.S. invasion of Iraq would likely trigger a surge in the already prevalent anti-Americanism in the Middle East, strengthening the hand of hard-line Islamist groups and provoking many Arab government to tighten their grip, rather than experiment more boldly with political liberalization.”

Carothers, *supra* note 209, at 93. Don Van Natta Jr. & Desmond Butler, *Threats and Responses: Terror Network: Anger on Iraq Seen as New Qaeda Recruiting Tool*, N.Y. TIMES, Mar. 16, 2003, at A1 (noting that officials in the United States, Europe, and Africa observed that the then imminent invasion of Iraq caused a sharp increase in efforts “to identify and groom a new generation of terrorist operatives” and the officials worry that the invasion of Iraq “is almost certain to produce a groundswell of recruitment for groups committed to attacks in the United States, Europe and Israel”). But see Fouad Ajami, *Iraq and the Arabs’ Future*, FOREIGN AFF., Jan.-Feb. 2003, at 2 (arguing that the United States need not apologize for its unilateralism and that the focus of the invasion “should be modernizing the Arab world”).

214. R.C. HINGORANI, PRISONERS OF WAR 65 (1982).

215. “[M]eeting the tactics of terror in kind will only perpetuate the cycle of terrorist violence . . . .” CARR, *supra* note 183, at 23.

216. See *infra* notes 237-67 and accompanying text. Note that in obvious retaliation for imposing a death sentence on Omar Sheikh, for killing Daniel Pearl, nine Pakistani police officers were wounded from four letter bombs sent to the station; one police officer lost his hand. FOUADA & FIELDING, *supra* note 43, at 70. After receiving

with the use of the death penalty, an approach that is most likely to gain the cooperation of our allies and most likely to isolate al Qaeda.<sup>217</sup>

Achieving our strategic objective requires that we give both the fact and appearance of treating any accused Muslim fairly. For example after Britain established internment without trial in Northern Ireland in 1971 to combat the Irish Republican Army, a policy that was largely directed only at the Northern Irish Catholic community, support for the IRA increased: "The use of internment effectively alienated a sizeable minority of the population of Northern Ireland and made impossible any cooperation with authorities."<sup>218</sup>

If we ultimately use the vague doctrines of conspiracy and of willful blindness to impose the death penalty on an actor who did not directly participate in the September 11 conspiracy, such an execution will be perceived by Muslims as anything but fair. Even if the evidence ultimately shows that the individual not only directly participated in the planning of the September 11 attacks but also played a major role, resorting to the death penalty will likely be deemed by Muslims as unjust.<sup>219</sup>

### C. Using the Death Penalty to Punish Politically Motivated Terrorists

#### 1. Creating Martyrs

Making individuals martyrs by killing or executing them has throughout history often advanced the cause of repressed political

a series of death threats, Sheikh's Pakistani prosecutor resigned and is "under constant police guard." *Id.* at 70.

217. This approach would require:

[O]btaining as much specific local information as possible and then, perhaps through the use of native 'subcontractors,' convincing people that linking their future to bin Laden is a bad idea. It would have to be a slow, careful, patient process that combined punishment of specific violent people with the offer of rewards for potential allies of the West. None of this would alter the strategy of attempting to disrupt bin Laden's access to money and electronic communications and forestall further attacks. But, for the present, quiet is America's friend, *killing, of Americans by bin Laden, and of Arab civilians by Americans, is bin Laden's friend*, because it draws ordinary people as well as combat troops to his side.

Lemann, *supra* note 208, at 36 (emphasis added).

218. O'Connor & Rumann, *supra* note 2, at 1680; see also *Frontline: British Actions [in Northern Ireland]* (PBS television broadcast, Oct. 21, 1997), available at <http://www.pbs.org/wgbh/pages/frontline/shows/ira/conflict/brits.html> [hereinafter *British Actions*] (quoting the Northern Ireland Chief of Police, who described the internment policy as "a disaster").

219. See *infra* notes 237-67 and accompanying text.

groups. For example, Great Britain's execution in 1916 of all fifteen leaders and others involved with the Easter rebellion led to the formation of the Republic of Ireland five years later.<sup>220</sup> Apparently Osama bin Laden was greatly influenced by Sayyid Qutb, a religious leader who espoused Salafiyya, the central doctrine of Wahhabism, a "highly regressive monolithic interpretation of Islam."<sup>221</sup> Qutb has been described as "the real founder of Islamic fundamentalism in the Sunni world."<sup>222</sup> He called for martyrs to the cause of Islamic revolution: "Those who risk their lives and go out to fight, and who are prepared to lay down their lives for the cause of God are honorable people, pure of heart and blessed of soul."<sup>223</sup> Although he had opportunities to flee the country right before his arrest, Qutb refused and was executed in 1966 by Egyptian president, Jamal Abd al-Nasser.<sup>224</sup>

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220. The effect of the executions on Irish people was electric:

[T]housands of people who ten days ago were bitterly opposed to the whole Sinn Fein movement, and to rebellion, were now becoming infuriated against the Government on account of these executions. . . . It is not murderers who are being executed; it is insurgents who have fought a clean fight, a brave fight, however misguided, and it would be a damned good thing if your soldiers were able to put up as good a fight as did these men in Dublin—three thousand men against twenty thousand with machine guns and artillery.

TIM PAT COOGAN, *THE IRA* 88 (2002) (quoting John Dillon of Irish Parliamentary Party and noting that there were in fact far fewer than 3000 rebels). Coogan also observed that the "indiscriminate roundup of suspects after the rising, had . . . involved so many innocent along with the guilty that alienation from Westminster was given a further powerful impetus." *Id.*

221. See Amanat, *supra* note 67, at 36-37. The doctrine of Salafiyya "and its articulation by Sayyid Qutb gained an overwhelming currency among Islamic radicals in the early 1980s." *Id.* at 37. An eminent legal scholar has discussed martyrdom in a legal context:

Martyrdom is an extreme form of resistance to domination. As such it reminds us that the normative world building which constitutes "Law" is never just a mental or spiritual act. A legal world is built only to the extent that there are commitments that place bodies on the line. The torture of the martyr is an extreme and repulsive form of the organized violence of institutions. It reminds us that the interpretive commitments of officials are realized, indeed, in the flesh. As long as that is so, the interpretive commitments of a community which resists official law must also be realized in the flesh, even if it be the flesh of its own adherents.

Robert Cover, *Violence and the Word*, 95 *YALE L.J.* 1601, 1604-05 (1986) (citations omitted).

222. ARMSTRONG, *supra* note 202, at 169; see also Berman, *supra* note 204, at 24.

223. Berman, *supra* note 204, at 33.

224. *Id.*; see also ARMSTRONG, *supra* note 202, at 170. Anwar al Sadat had presided at his trial before Sadat became Egyptian president. Sadat was apparently assassinated by Muslims linked to the present al Qaeda for, among other things, his role against Qutb. See *id.*

Great Britain, Israel, and Germany, all democratic countries threatened by terrorist groups, have rejected pleas for reinstatement of the death penalty. In the early eighties when British Parliament was considering a death penalty bill, James Prior, former Secretary to Northern Ireland, wrote to conservative supporters in Parliament, "I believe that the execution of terrorists in Northern Ireland would act as a new inspiration for the IRA and other extremists."<sup>225</sup> Conservative British Prime Minister John Major opposed efforts to bring back the death penalty in 1990 and 1994. Israeli Prime Minister Yitzhak Rabin noted that Israel had not judicially executed "a single terrorist."<sup>226</sup> German Chancellor Helmut Schmidt likewise fought against those who attempted to reinstate the death penalty "during the reign of terror brought by the Red Army faction."<sup>227</sup>

Because nineteen hijackers were willing to kill themselves to carry out these crimes, the threat of the death penalty, if limited to actual perpetrators, is not likely to deter similar actors in the future.<sup>228</sup> In fact, in a perverse way, the death penalty might actually encourage such actors, standing deterrence theory "on its head."<sup>229</sup> If caught, they can still be martyrs after being executed by the government of the United States.<sup>230</sup> In fact, executing them may

225. See Thomas M. McDonnell, *A Potentially Explosive Execution*, NAT'L LAW J. July 7, 1997, at A17. Portions of this section are drawn from this op-ed piece that I wrote in connection with the Timothy McVeigh execution.

226. *Id.* Although neither Great Britain nor Israel has used capital punishment against convicted terrorists, some allege that their armed services have carried out extra-judicial executions. See COOGAN, *supra* note 220, at 575-82; *For the Sake of Democracy, Britain's 'Dirty War' Must be Investigated*, IRISH TIMES, May 21, 2003, at 14; *Israel and the Occupied Territories. Israel Must End its Policy of Assassinations*, (Amnesty International) July 4, 2003, at <http://web.amnesty.org/library/Index/ENGMDE150562003> (last visited Aug. 6, 2003); Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 HARV. INT'L L.J. 65, 107-11 (2003). *But see* J. Nicholas Kendall, *Israeli Counter-Terrorism, 'Targeted Killings' Under International Law*, 80 N.C. L. REV. 1069, 1070 (2002) (arguing that terrorists are legitimate military targets, that "targeted killings" are justified by self-defense, and that such killings do not amount to prohibited killing by "perfidy"); Louis Rene-Beres, *On Assassination as Anticipatory Self-Defense: The Case of Israel*, 20 HOFSTRA L. REV. 321 (1991) (reaching a similar conclusion). Israel has imposed the death penalty only once, on Adolf Eichman, the author of the "Final Solution." *Attorney General of Israel v. Eichmann*, Israel, Supreme Court 1962, 36 INT'L L. REP. 277 (1968), available in PAUST ET AL., *supra* note 179, at 868.

227. McDonnell, *supra* note 225.

228. *But see* Green et al., *supra* note 172, at 225 (comments of Kenneth Roth) (noting lack of enthusiasm that al Qaeda leaders have for serving as suicide bombers themselves).

229. *Id.* at 194 (comment of David Bruck).

230. As one noted capital defense attorney stated:

Having been involved directly, as defense counsel, in one of the al Qaeda prosecutions, I can tell you that in the world of martyrdom it doesn't get any better than to be captured by the United States, brought to New York, or to

elevate such persons to the status of true martyrs, at least in Muslim eyes.<sup>231</sup> Furthermore, as one commentator observed, "Terrorism is theatre."<sup>232</sup> Trial followed by execution in the United States may put the potential terrorist and his or her movement on a world stage. Witness, for example, the Bali bomber's reaction to his conviction and death sentence in Indonesia in August: "Amrozi," as he is known, was beaming with his both hands giving the thumbs up as if he had just won an academy award.<sup>233</sup> His picture appeared in the *New York Times*.<sup>234</sup>

The nineteen individuals who carried out the September 11 attacks intentionally killed not only themselves, but also over three thousand innocents. Although we may accurately describe the nineteen as suicidal mass killers, many in the Arab and Islamic worlds probably believe that the nineteen combine martyrdom with rebellion and revolution.<sup>235</sup> Thus executing an actor like Moussaoui might run counter not only to the Supreme Court's death penalty cases but also to a strategic objective, eliminating support in the Muslim world for acts of terrorism.<sup>236</sup>

Alexandria, Virginia, tried on a world stage, and then ritually put to death by the United States. That's the gold standard of martyrdom. For someone who considers blowing himself up on a plane to be a good thing, getting executed by the United States is as good as it gets.

*Id.* at 194 (comments of David Bruck).

231. See LEWIS, *supra* note 179.

Those who are killed in the jihad are called martyrs, in Arabic and other Muslim languages *shahid* . . . The Arabic term *shahid* also means 'witness' and is usually translated 'martyr' . . . In Islamic usage the term *martyrdom* is normally interpreted to mean death in a jihad and its reward is eternal bliss . . . Suicide, by contrast, is a mortal sin and earns eternal damnation, even for those who would otherwise have earned a place in paradise.

*Id.* at 38.

232. HOFFMAN, *supra* note 179, at 132 (quoting Brian Michael Jenkins, *International Terrorism: A New Mode of Conflict*, in INT'L TERRORISM AND WORLD SECURITY 16 (1975)).

233. Jane Perlez, *Court Decides to Sentence Bali Bomber to Death*, N.Y. TIMES, Aug. 8, 2003, at A8.

234. *Id.*

235. Professor Cover noted as follows:

Martyrdom is not the only possible response of a group that has failed to adjust to or accept domination while sharing a physical space. Rebellion and revolution are alternative responses when conditions make such acts feasible and when there is a willingness not only to die but also to kill for an understanding of the normative future that differs from that of the dominating power.

Cover, *supra* note 221, at 1605 (citations omitted).

236. See *infra* notes 237-67 and accompanying text for a discussion of the Aimal Kasi execution and an analogous British execution of a supposed American.

## 2. The Kasi Case—Muslim Reaction to a U.S. Execution

The case of Aimal Khan Kasi suggests how executing politically motivated terrorists may influence the Arab and Muslim worlds. Apparently “upset” with U.S. air attacks on Iraq and with the Central Intelligence Agency’s involvement in Muslim countries,<sup>237</sup> Aimal Kasi, in 1993, opened fire with an AK-47 assault rifle at Central Intelligence Agency headquarters, intentionally killing two unarmed CIA employees as they were driving to work and wounding three others.<sup>238</sup> Kasi fled to his native Pakistan on the day following the shooting and remained at large for four and a half years, traveling in Afghanistan and occasionally returning to Pakistan.<sup>239</sup> In 1997, Federal Bureau of Investigation agents abducted Kasi from his hotel in Pakistan and arranged for him to be flown by military aircraft to the United States.<sup>240</sup> Presumably because Congress had not reinstated the death penalty under federal law as of the time of the killings,<sup>241</sup> the FBI handed Kasi over to the State of Virginia. He was subsequently tried for murder in a Virginia state court, convicted, and sentenced to death.<sup>242</sup>

Religious and tribal leaders in Baluchistan called on Islamabad and Washington to commute the sentence.<sup>243</sup> In the days before Kasi’s scheduled execution by lethal injection, Quetta, a Pakistani city with over a million inhabitants and Kasi’s hometown, was

237. Kasi characterized his actions as “‘between jihad and tribal revenge,’ jihad against America for its support of Israel and revenge against the CIA, which he apparently felt had mistreated his father during Afghanistan’s war against the Soviets.” Stern, *supra* note 205, at 27.

238. Kasi v. Angelone, 300 F.3d 487, 490, 491 (4th Cir. 2002).

239. *Id.* at 491.

240. *Id.* Kasi’s motives have been described as typical of those bent on engaging in terrorist activities against the United States:

[T]he reasons that drove Kasi to kill are very similar to those commonly used to justify anti-American acts of terrorism. Kasi said he was angry about the United States’ policies abroad, believing that it was bent on destroying Muslims. He deliberately targeted the CIA because, in his eyes, it was one of the prime instruments of that destruction.

Iffat Malik, *An Uncertain Start*, AL-AHRAM WKLY., Nov. 21, 2002, available at <http://weekly.ahram.org.eg/print/2002/613/in1.htm> (last visited July 15, 2003). *But see* Kasi v. Angelone, 300 F.3d 487, 491 (4th Cir. 2002) (noting that in his confession Kasi stated he targeted the CIA not only because of his anti-American views, but also because he knew CIA workers were unarmed).

241. Although Congress had enacted a limited death penalty statute in 1988 dealing with so-called “drug king-pins,” it did not enact a broad death penalty statute until 1994. *See* The Federal Death Penalty Act of 1994, 18 U.S.C. § 3591 *et seq.*; *see also* The Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(e)-(r) (providing penalty of death for drug king-pins under certain circumstances).

242. Kasi, 300 F.3d at 490.

243. *Id.*

“rocked by protests.”<sup>244</sup> In the day following the execution, Quetta was “complete[ly] shut down” by Pakistani authorities.<sup>245</sup> The protests were echoed in other parts of Pakistan.<sup>246</sup> Hundreds of men, wearing black armbands, walked behind the ambulance carrying Kasi’s body upon its arrival in Pakistan.<sup>247</sup> The Quetta Trade Association called for a half-day strike on the day of his funeral because, a spokesperson for the Association declared, “A son of Baluchistan has embraced martyrdom.”<sup>248</sup> Apparently, more than 10,000 people attended his funeral, which was held in a stadium.<sup>249</sup> The U.S. Department of State issued a worldwide warning that Kasi’s execution “could trigger retaliatory attacks on the US or on other foreign interests overseas.”<sup>250</sup> On the Friday after Kasi’s execution, a bomb exploded in the southern Pakistani city of Hyderabad, killing two people at a bus stop.<sup>251</sup> The bomb was reportedly retaliation for Kasi’s execution.<sup>252</sup>

244. *Pakistan on Alert After US Execution* (BBC News television broadcast, Nov. 15, 2002), available at [http://news.bbc.co.uk/2/low/south\\_asia/2480009.stm](http://news.bbc.co.uk/2/low/south_asia/2480009.stm) (last visited July 13, 2003).

245. *Pakistan City Mourns Execution* (BBC News television broadcast, Nov. 15, 2002), available at [http://news.bbc.co.uk/2/low/south\\_asia/2480327.stm](http://news.bbc.co.uk/2/low/south_asia/2480327.stm) (last visited July 13, 2003).

246. *See Pakistanis in Death Row Protest*, (BBC News television broadcast, Nov. 11, 2002), available at [http://news.bbc.co.uk/2/low/south\\_asia/2445307.stm](http://news.bbc.co.uk/2/low/south_asia/2445307.stm) (last visited July 13, 2003); *see also Pakistanis in Karachi protest the execution of Mir Aimal Kasi in the US*, AL-AHRAM WKLY., Nov. 21, 2003, at <http://weekly.ahram.org/2002/613/in1.htm>.

247. Carlotta Gall, *World Briefing – Asia: Pakistan: Body of Man Executed in U.S. Is Back*, N.Y. TIMES, Nov. 19, 2002, at A18; *Thousands Receive Aimal Kasi’s Body as a Hero and a Martyr*, DAILY TIMES (PAKISTAN), Nov. 18, 2002, available at <http://www.ummahnews.com/print.php?sid=272> (last visited June 20, 2003).

248. *Id.*

249. Mazhar Abbas, *Thousands Mourn Executed Pakistani*, IAFRICA.COM, available at <http://www.iafrica.com/news/worldnews/187519.htm> (last visited Feb. 20, 2004).

250. *See Pakistanis in Death Row Protest*, *supra* note 246; State Department, U.S. Mission to Pakistan, U.S. Embassy Islamabad, *Warden Notice 3/4/2002*, at <http://usembassy.state.gov/posts/pk1/wwwwarden11212002.html> (last visited July 23, 2003); *see also State Department Press Releases and Document*, FED. INFORMATION AND NEWS DISPATCH, Nov. 19, 2002, available at 2002 WL 25973321 (press briefing with Philip T. Reeker, Deputy Spokesperson for State Department).

251. Malik, *supra* note 240.

252. *Id.*; *see also Thousand Receive Aimal Kasi’s Body as a Hero and Martyr*, *supra* note 247. In addition, four U.S. oil company employees were assassinated in Karachi on November 11, 1997, two days after Kasi’s conviction, apparently in retaliation. Bill Baskerville, *Pakistani who Killed CIA Agents in ‘93 is Executed, Appeal Rejected; Reprisals Feared*, BOSTON GLOBE, Nov. 15, 2002, at A2, available at 2002 WL 101983863; *see also* Oliver Roy, *Hazy Outlines of an Islamist International: Fundamentalists without a Common Cause*, LE MONDE, Oct. 1998 (Barry Smerin trans.), available at [http://mondediplo.com/1998/10/04afghan?var\\_recherche=%22hazy+outlines%22](http://mondediplo.com/1998/10/04afghan?var_recherche=%22hazy+outlines%22) (last visited July 22, 2003). Harakat al Ansar, a group with connections to the “Afghan camps,” claimed credit for the assassinations. *Id.*

Some point out that refusing to execute terrorists may still lead to retaliatory strikes or violent efforts to free them from prison.<sup>253</sup> I do not claim that violence would never come from imposing long prison terms rather the death penalty,<sup>254</sup> but I suspect that the risk of violence is likely greater from imposing death, particularly in the context of religiously motivated suicide bombers.<sup>255</sup> Aside from the possibility of retaliatory strikes, as the Kasi case shows, death sentences almost certainly provoke a much greater resentment and anger in the community and country, if not, in this case, the Islamic world from which the executed individual comes.<sup>256</sup>

### 3. The *Robbins* Case—Early U.S. Reaction to a British Execution

Demonstrating empirically that imposing the death penalty will inflame the Islamic world cannot be done. Aside from the Kasi case, an example from our own history does, however, suggest that imposing the death penalty on politically motivated terrorists is likely to have such an effect. The outrage that much of the Muslim world may feel if we execute members of al Qaeda probably resembles the outrage much of the United States felt when a U.S. court acceded to President John Adams' request to extradite a sailor, Jonathan Robbins (also known as Thomas Nash), to the British in 1799.<sup>257</sup> The United States having surrendered him, the British took Robbins to Jamaica for trial. The day Robbins reached Jamaica, a Thursday, the British started his trial for murder and mutiny. On the following Monday, they hung him and left him hanging in chains for all to see.<sup>258</sup> The extradition and execution led to a public outcry, to

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253. See, e.g., William F. Buckley, Jr., *String Them Up*, NAT'L REV., June 6, 2003, at Vol. LV, No. 13, available at <http://www.nationalreview.com/buckley/buckley060603.asp>.

254. For example, al Qaeda members have kidnapped western tourists and hijacked at least one airliner for the sole purpose of freeing other extremist fundamentalists from prison. See FOU DA & FIELDING, *supra* note 43, at 60-63 (noting, among other things, that six Western tourists were kidnapped by Kashmiri rebels with links to al Qaeda in southern Kashmir and were almost certainly killed when Indian authorities refused to release 15 jailed Islamists).

255. Cf. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (recognizing that "death is different," specifically stating, "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two").

256. See *supra* notes 237-254 and accompanying text and *infra* notes 257-67 and accompanying text.

257. *United States v. Robbins*, 27 F. Cas. 825 (D.S.C. 1799) (No. 16,175).

258. Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 233-35 (1990).

attempts to censure and impeach President Adams, and greatly contributed to his defeat by Thomas Jefferson the following year.<sup>259</sup>

Robbins was alleged to be the bosun's mate of the ship *Hermione*, a British ship of war.<sup>260</sup> *Hermione's* captain was a Captain Bligh, infamous for the harsh measures he adopted in treating his crew. After the captain threatened to flog the last topman to reach the deck, causing two crewmen in the rush to fall to their deaths, the crew mutinied.<sup>261</sup> However, the mutineers not only killed the despised captain, they killed three lieutenants, the purser, the ship's doctor, a midshipman, the boatswain, and a lieutenant of the marines.<sup>262</sup> Robbins apparently played a leading role not only in the mutiny but also in the homicides.<sup>263</sup> The mutineers later sailed the ship to what is now Venezuela and surrendered the ship to the Spanish authorities, then the enemy of Great Britain.<sup>264</sup>

Robbins claimed to be a U.S. citizen and claimed to have been impressed into the British Navy.<sup>265</sup> With memory of the war of independence fresh, many Americans felt that Robbins was a victim of British tyranny. Americans apparently never seriously questioned his direct complicity in the killing of the captain and his officers. Nevertheless, many Americans were apparently appalled by the President's role in turning Robbins over to then hated super-power, Great Britain, to carry out Robbins' prompt execution.

Robbins was not a mass murderer, but he was a leader in a conspiracy that took nine lives. His apparent guilt did not quell the anger that many Americans felt towards Adams and Great Britain. The apparent guilt of al Qaeda is not likely to quell the anger that many Muslims would feel if the current super-power executes al Qaeda members. The Robbins affair resembles the political offense exception to extradition, "reflecting [in part] a concern that individuals—particularly unsuccessful rebels—should not be returned to countries where they may be subjected to unfair trials and punishments [usually the death penalty]."<sup>266</sup>

259. *Id.* at 354-61; see also Michael Edmund O'Neill, *Article III and the Process Due a Connecticut Yankee before King Arthur's Court*, 76 MARQ. L. REV. 1, 43-44 (1992).

260. Wedgwood, *supra* note 258, at 224.

261. *Id.* at 236 n.9 (citing Instruction of Lord Grenville to British Minister Robert Liston (Oct. 7, 1796), in *Instructions to the British Ministers to the United States 1791-1812*, 3 Ann. Rep. Am. Hist. Ass'n 122 & n.56 (B. Mayo ed. 1936), reprinted as H.R. Doc. No. 13, 75th Cong., 1st Sess. (1941)).

262. *Id.*

263. *Id.* at 305-06.

264. *Id.*

265. The evidence the British put forward suggests that he was probably Irish and that he probably enlisted. *Id.*

266. *Quinn v. Robinson*, 783 F.3d 776, 793 (9th Cir. 1986) (citing M. BASSIOUNI, *INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER* 425 (1974)). Note, however, that the political offense exception generally may not be successfully invoked by individuals who have committed war crimes or crimes against humanity. See *Quinn v.*

Given the magnitude of September 11 attacks, one could credibly argue that the death penalty is a "fair punishment." Yet one could make a similar argument about Robbins, particularly in 1799 when the death penalty was carried out in a greater percentage of the cases. Although the reports suggest that Robbins directly participated in the killing of innocents, the political undertones and U.S. notions about the right to rebellion help explain Americans' outrage. It is hard to deny that similar political undertones exist throughout the Islamic world in the context of the current conflict between al Qaeda and the United States.

At the time of the Robbins incident, the United States had a democratic process Americans could resort to, to channel their outrage. Not only was Adams defeated, but no one was extradited by the federal government for more than forty years afterwards.<sup>267</sup> The countries making up the Islamic world, however, generally do not possess such a democratic process. There is all the more reason to believe, therefore, that Muslim outrage and resentment about such executions might be channeled towards extra-legal means and groups.

#### 4. Venue Decision and Its Possible Impact in the Muslim World

The Justice Department chose the most pro-prosecution venue in indicting not only Moussaoui, but also John Walker Lindh, the "American Taliban."<sup>268</sup> The Justice Department has laid venue in the Eastern District Court of Virginia, with generally pro-prosecution judges and a conservative jury pool.<sup>269</sup> That district lies within the Fourth Circuit Court of Appeals, the most conservative and pro-prosecution of all the federal circuit courts of appeals.<sup>270</sup> This decision

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Robinson, 783 F.2d at 799; *Eain v. Wilkes*, 641 F.2d 504, 523 (7th Cir. 1981), *cert. denied*, 454 U.S. 894 (1981). As demonstrated above, those involved with the September 11 attacks have committed crimes against humanity, war crimes, or both. *See supra* notes 179-190 and accompanying text. Some of Robbins' acts resemble war crimes, if one analogizes his and his conspirators' treatment of the captives to treatment of prisoners of war. Yet the heinousness of his crimes did not apparently assuage the U.S. reaction. *Quinn*, 783 F.3d at 793.

267. Wedgwood, *supra* note 258, at 361. Professor Wedgwood argues that President Adams did not deserve the reaction he received given a full study of the actual facts of the case. *Id.* at 362.

268. *See* Indictment, *United States v. Lindh*, No. 02-37a (E.D. Va. Feb. 5, 2002), available at <http://news.findlaw.com/hdocs/docs/lindh/uswlindh020502cmp.pdf> (last visited Aug. 25, 2003).

269. *See* Don Van Natta, *A Nation Challenged: The Legal Venue: Compromise Settles Debate Over Tribunal*, N.Y. TIMES, Dec. 12, 2001, at B1.

270. Philip Shenon, *After the War: the Courts; Hearing to Affect Government's Ability to Try Terror Suspects in Civilian Courts*, N.Y. TIMES, June 2, 2003, at A12 (noting the conservative reputation of the Fourth Circuit); John Gibeaut, *Prosecuting*

was not an accident. The government could have laid venue in New York, where the overwhelming number of people were killed, but reportedly chose the Eastern District of Virginia, because of its “strong record of imposing the death penalty.”<sup>271</sup> New York federal juries, on the other hand, had been reluctant to give the death penalty in other terrorist cases.<sup>272</sup>

The *New York Times* reported that the venue decision helped Michael Chertoff, then Chief of the Criminal Division of the Justice Department, to persuade the Bush Administration to try Moussaoui in federal court rather than by military tribunal.<sup>273</sup> So one could plausibly argue that the venue decision was the lesser of two evils.<sup>274</sup> Ironically, however, the Justice Department’s choosing this venue argues against imposing the death penalty. Selecting the most prosecution venue for all the defendants will probably be viewed in the Arab and Islamic worlds as a cynical ploy to deny the accused a fair trial. If that district court metes out any death sentences, Muslims will likely view the Department’s choice of such a venue as a veiled attempt to use the justice system to kill the Muslims involved.<sup>275</sup> In short, the procedural advantages accorded to the government in a conspiracy<sup>276</sup> may be considered unjust in the Arab

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*Moussaoui*, 88 A.B.A.J. 36 (2002) (noting the “traditionally conservative” jury pool in Virginia).

271. Shenon, *supra* note 270, at A12. The Pentagon is located in Virginia. In the East African embassy bombings case, it was later reported that one juror apparently misled the district court and refused to consider imposing the death penalty, and another juror as the sole Jew on the jury feared retaliation from al Qaeda and thus refused to vote for the death penalty. Benjamin Weiser, *A Jury Torn and Fearful in 2001 Terrorism Trial*, N.Y. TIMES, Jan. 5, 2003, at A1.

272. *Id.* New York was also reportedly not chosen, because Justice Department prosecutors believed that the district court there would probably have granted defendant’s motion to change venue. *Id.*

273. Van Natta, *supra* note 269.

274. See Paust, *supra* note 188, at 1. The Bush Administration reportedly has indicated that they considered transferring Moussaoui to a military tribunal to avoid the defendants’ carrying on in court. See Philip Shenon & Eric Schmitt, *Threats and Responses: the 9/11 Suspect; White House Weighs Letting Military Tribunal Try Moussaoui*, *Officials Say*, N.Y. TIMES, Nov. 10, 2002, at A17.

275. The Justice Department could defend its decision by arguing that using civilian courts against terrorists is difficult enough, so the Department must use every procedural advantage at its disposal. Otherwise, the government may be forced to engage in self-help or in refusing to use the civilian courts at all and transferring all these cases to military tribunals.

276. Professor Johnson concisely explained the weighted advantages that the prosecutor obtains when seeking a conspiracy charge:

Where there is evidence of conspiracy, the defendant may be tried jointly with his criminal partners and possibly with many other persons whom he has never met or seen, the joint trial may be held in a place he may never have visited, and hearsay statements of other alleged members of the conspiracy may be used to prove his guilt. Furthermore, a defendant who is found guilty of conspiracy is subject to enhanced punishment and may also be found guilty of

and Islamic worlds, at least when the death penalty is sought.<sup>277</sup>

#### D. *Might Imposing the Death Penalty Thwart Cooperation from Our Allies?*

##### 1. International Cooperation as Essential in Defeating Terrorism?

September 11 changed the political and strategic landscape in countless ways, but one of the most significant is the recognition that the United States needs the help of other countries to fight the war against terrorism. Al Qaeda reportedly has cells in over sixty countries.<sup>278</sup> To gather intelligence on such a diffused enemy requires cooperation from many states.<sup>279</sup> To apprehend those individuals requires states that are willing to arrest and either prosecute or, in some cases, extradite members of the al Qaeda conspiracy to the United States. Furthermore given the decentralized nature of al Qaeda, it requires that individual citizens of these states come forward with information about suspected members and activities of

any crime committed in furtherance of the conspiracy, whether or not he knew about the crime or aided in its commission.

Phillip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137, 1140 (1973).

277. See *supra* notes 237-67 and accompanying text.

278. See Dan Balz & Bob Woodward, *America's Chaotic Road to War; Bush's Global Strategy Began to Take Shape in First Frantic Hours after Attack*, WASH. POST, Jan. 27, 2002, at A1. Note, by the way, that the "surge in recruitment efforts" for al Qaeda has been observed most prominently in Britain, Spain, Italy, and the United States. See Van Natta & Butler, *supra* note 213, at 1. The destruction of the Afghan camps had

one perverse and unintended effect[:] Terrorists and their supporters who had formerly been concentrated in one known place were dispersed to home regions and new hideouts like Chechnya, Yemen, East Africa and Georgia's Pankisi Gorge. Regional commanders of al-Qaeda, says Rohan Gunaratna, author of a leading book on the network, are now 'operating independently of centralized control' . . . and no longer depend on anything from bin Laden and his top brass except for ideological inspiration.

*World*, TIME, May 26, 2003, at 26.

279. "In the fight on terrorism, the United States needs cooperation from European and Asian countries in intelligence, law enforcement, and logistics." G. John Ikenberry, *America's Imperial Ambition*, FOREIGN AFF., Sept.-Oct. 2002, at 44, 58; see also *supra* note 209 (collecting authorities noting need for international cooperation); Sebastian Rotella, *THE WORLD 5 Suspects Helped Fund Al Qaeda, Spain Says*, L.A. TIMES, Mar. 9, 2003, at A3 (noting that in arresting five alleged al Qaeda money launderers, the "Spanish investigation involved close cooperation with authorities in France, where the Djerba bomber lived, and in Germany. Spanish investigators also received assistance from U.S., Tunisian, Swiss and Portuguese law enforcement"). *But see* Cordesman, *supra* note 210, at 16 (minimizing the practical worth of such cooperation).

al Qaeda: "The more useful anti-insurgency [and anti-terror] tactic is to compete, literally door to door, for people's loyalty (with the coinage of loyalty being willingness to inform on one side or the other)."<sup>280</sup>

The Bush Administration at least initially recognized the necessity of international cooperation by immediately ordering the payment of back dues owed to the United Nations.<sup>281</sup> Forming a coalition rather than unilaterally attacking Afghanistan likewise is consistent with the need to cooperate with other nations of the world to stop the menace of terrorism.<sup>282</sup> With the invasion of Iraq, the Bush Administration seemed intent, however, on reverting to the pre-September 11 unilateralist approach to foreign affairs. "In the international realm, we seem to believe that our claim to national sovereignty allows us to operate unilaterally—America first and foremost, not together or in conformity with a global contract [comparable to the domestic social contract]."<sup>283</sup> Such an approach could prove, at the very least, counter-productive in the war against al Qaeda.<sup>284</sup>

At a time when we need help from other countries the most, retaining the death penalty alienates a growing number of countries that have abolished the death penalty or are taking steps to abolish or limit it. As of this writing, 112 countries have abolished the death penalty in law or in practice, while only eighty-three countries retain the death penalty.<sup>285</sup> Virtually all of Europe, including many of the Soviet Union's former satellite states, have abolished the death

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280. See also Lemann, *supra* note 208, at 36.

281. Mike Allen & Glenn Kessler, *Bush's Tax Cut Proposal Renews Party Differences; Democrats Object to President's Call for Billions in Tax Relief as Major Part of Stimulus Package*, WASH. POST, Oct. 7, 2001, at A16.

282. The U.S. forces and planes, however, have carried out the vast majority of the attacks. See Pamela Hess, *Afghan Terrorist Camps in Cross Hairs*, UNITED PRESS INT'L, Oct. 9, 2001, available in LEXIS, News Group File.

283. Benjamin R. Barber, *A Failure of Democracy, Not Capitalism*, N.Y. TIMES, July 29, 2002, at A19. For an excellent article detailing the pitfalls of U.S. unilateralism, see Harold H. Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1526-27 (2003). Professor Koh asks which fork in the international road the United States will take:

Will it be power-based internationalism, in which the United States gets its way, because of its willingness to exercise power whatever the rules? Or will it be norm-based internationalism, in which American power derives not just from hard power, but from perceived fidelity to universal values of democracy, human rights, and the rule of law?

*Id.*

284. See *supra* notes 191-219 and accompanying text; see also Koh, *supra* note 283, at 1501.

285. *Abolitionist and Retentionist Countries*, Amnesty International, Website against the Death Penalty, available at [http://web.amnesty.org/pages/deathpenalty\\_index\\_eng](http://web.amnesty.org/pages/deathpenalty_index_eng) (last visited July 23, 2003).

penalty.<sup>286</sup> All our NATO allies, with the exception of Turkey, have done so.<sup>287</sup> Neither Canada nor Mexico has the death penalty. Of the other thirty-three nations in the Western hemisphere, only the United States, Guyana, Guatemala, and Belize permit capital punishment.<sup>288</sup> European countries strongly oppose the death penalty.<sup>289</sup> As leading proponents of the four currently operating international criminal tribunals, the Europeans successfully argued for banning capital punishment from the sentencing authority of the International Criminal Court, the International Criminal Tribunals for the former Yugoslavia and Rwanda, and the Special Court for Sierra Leone.<sup>290</sup> Many abolitionist countries refuse to extradite fugitives to death penalty states absent an absolute assurance that the death penalty will not be carried out.<sup>291</sup> For example, the Home

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286. The 40-member Council of Europe has required states applying for admission to abolish the death penalty. Russia, Georgia, the Ukraine, Estonia and other eastern states are or have already taken steps to do so to gain admission to the Council. See *Montenegro Abolishes Death Penalty*, AGENCE FRANCE PRESSE, June 19, 2002 (noting that Montenegro abolished death penalty to fulfill condition of admission to Council of Europe), available in LEXIS, News Group File. Furthermore, the Council of Europe voted to extend the abolition of the death penalty to wartime offenses. See *European States Drop Wartime Exception to Death Penalty Ban*, AGENCE FRANCE PRESSE, May 3, 2002, available in LEXIS, News Group File. Protocol No. 13 to the European Convention on Human Rights, Concerning the Abolition of the Death Penalty in All Circumstances (Vilnius, May 3, 2002), entered into force, July 1, 2003, available at <http://www.statewatch.org/news/2003/jul/prot13.pdf> (last visited Oct. 15, 2003) (abolishing death penalty in wartime as well as peacetime).

287. The Turkish parliament has, however, recently abolished the death penalty for offenses committed in peacetime. See Amnesty International, *Turkey: Abolition of the Death Penalty Welcomed*, at <http://web.amnesty.org/ai.nsf/Index/EUR440362002?OpenDocument&of=AbolitionCOUNTRIES%20TURKEY> (last visited Mar. 13, 2003); see also *Ocalan v. Turkey*, Application No. 46221/99 (Eur. Ct. H.R. Mar. 12, 2003) (concluding that imposing death penalty on notorious Kurdish terror group leader, Abdullah Ocalan, would violate Article 3 of European Convention on Fundamental Rights and Freedoms, because of unfair trial procedures to which Turkey subjected him), available at [http://legal.aptich/Mechanisms/Europe/European\\_Court/Death%20Penalty/ec\\_ocalan\\_12-03-2003.htm](http://legal.aptich/Mechanisms/Europe/European_Court/Death%20Penalty/ec_ocalan_12-03-2003.htm).

288. Ian Clarke, *Terrorism, Extradition, and the Death Penalty*, 29 WM. MITCHELL L. REV. 783, 806 (2003).

289. Ethan Bronner, *Power vs. Peace: a Clash of Worldviews; Trans-Atlantic Tension*, INT'L HERALD TRIB., Feb. 1, 2003, at 4.

290. Somini Sengupta, *African Held for War Crimes Dies in Custody of a Tribunal*, N.Y. TIMES, July 31, 2003, at A6.

291. The Spanish government has indicated it will not extradite suspected al Qaeda members to the United States absent assurances that the death penalty will not be sought. See Rotella, *supra* note 279, at A3; *Europe's Doubts*, FIN. TIMES, Dec. 14, 2001, at 20. In 2001, the Canadian Supreme Court ruled against extraditing two Canadian nationals to the United States absent assurances that they will not be subject to the death penalty. *United States v. Burns*, [2001] S.C.R. 283, ¶ 143 (Can.). See Bruce Zagaris, *A Canadian Supreme Court Rules Suspects Can Be Extradited to US Only With Assurances, Extradition Part IV*, 17 INT'L L. ENFORCEMENT REP. 145 (Apr. 2001), available at LEXIS, Int'l Law Newsletters file; see also Bruce Zagaris,

Secretary of staunch ally Great Britain has told U.S. officials that he “would approve extradition [of suspected terrorists] only if the United States waived the right to impose the death penalty.”<sup>292</sup> The Supreme Court of Canada has taken the unusual step of requiring the Minister of Justice of Canada to demand assurances from the United States that it will not impose capital punishment on Canadian citizens whose extradition is sought.<sup>293</sup> Insisting on executing members of al Qaeda could thus deprive us of necessary evidence and, in some cases, of the fugitives themselves.<sup>294</sup> In short, our closest allies are abolitionist states. To the extent that we use the death penalty in the war on terror we may find those allies reluctant to cooperate fully with us.<sup>295</sup>

The threat of an eventual death sentence for Mr. Moussaoui makes it difficult for any European country to determine how far to cooperate with the American investigation. Outlawing the death penalty is a condition of membership to the 15-nation European Union, and the Council of Europe, which embraces more than 40 countries, not only forbids the

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*Uruguay Supreme Court Approves Extradition of Suspected Terrorist to Egypt, Counterterrorism Enforcement Cooperation*, 19 INT'L L. ENFORCEMENT REP. 303 (Aug. 2003), available at LEXIS, Int'l Law Newsletters file, at \*1 (noting that Uruguayan Supreme Court upheld the extradition of the terrorist suspect “after Egypt agreed not to apply the death penalty or life imprisonment”).

292. *U.S. Death Penalty Could Prove Hurdle to Extradition of Terror Suspects from Britain*, ASSOC. PRESS, Oct. 8, 2001 (statement of David Blunkett, Home Secretary); cf. Bruce Zagaris, *British Court Denies U.S. Extradition Request on Algerian Pilot in Alleged Terrorism Conspiracy*, 18 INT'L L. ENFORCEMENT REP. 6 (June 2002) (noting that British judge refused to extradite Lotfi Raissi, Algerian national, to United States on ground that United States failed to provide sufficient evidence that Raissi participated in September 11 conspiracy by training one of pilots).

293. *Minister of Justice v. Burns*, 1 S.C.R. 283, 2001 S.C.C. 7, available at <http://www.canlii.org/ca/cas/scc/2001/2001scc7.html>; see also *The Soering Case*, 161 Eur. Ct. H.R. (ser. A) at 217 (1989) (refusing to extradite German national, accused of double murder, to Virginia on ground that “death row phenomenon” there violated Article 3 of European Convention on Fundamental Rights and Freedoms).

294. See *Mohamed Dalvie v. President of the Republic of S. Afr.*, 2001 (7) SALR 685 (CC) (concluding that al Qaeda suspect in embassy bombings was wrongfully deported to United States absent receiving assurances that United States would not impose death penalty and ordering that judgment be sent to U.S. District Court of Southern District of New York where suspect was being tried). Should the U.S. Justice Department decide to move Moussaoui's case out of federal court and into a military tribunal, our allies, especially Europeans, might be even more reluctant to extradite al Qaeda suspects to the United States. See Toni Locy, *Moussaoui Prosecutors Wary of Tribunal*, USA TODAY, May 14, 2003, at A4.

295. In dealing with other crises, the United States has given assurances that the death penalty will not be sought in order to obtain certain fugitives. *Israel Agrees to Extradite Man Sought in Letter-Bomb Killing*, L.A. TIMES, July 13, 1993, at B10; Keith B. Richburg, *Court in France Approves Extradition of U.S. Fugitive*, WASH. POST, June 29, 2001, at A31 (two instances in which extradition was approved after death penalty was taken off table). Whether pursuing the death penalty would hinder the interchange of intelligence and of other matters remains to be seen.

death penalty but also recently decided that it should not apply even in wartime.<sup>296</sup>

Al Qaeda, however, appears to be attacking not just the United States, but also other western countries. Since September 11, the following attacks (among others) linked to al Qaeda have taken place: (1) In April 2002, a suicide truck bomb exploded at a Tunisian synagogue, killing twenty-one people, mostly French and German vacationers;<sup>297</sup> (2) On October 6, 2002, a speedboat packed with explosives crashed into a French oil tanker moored off the Yemen coast, piercing both hulls and causing the tanker to dump 90,000 barrels of oil into the sea;<sup>298</sup> (3) Six days later, bombs detonated at a resort in the Indonesian island of Bali, killing more than 200 civilians, including eighty-eight Australians;<sup>299</sup> (4) On November 28, 2002, militants attacked an Israeli-owned hotel in Kenya as well as making an attempted missile attack, which “narrowly missed an airliner carrying home Israeli vacationers”;<sup>300</sup> (5) On May 12, 2003, al Qaeda attacked the living quarters of Western workers in Riyadh, Saudi Arabia;<sup>301</sup> (6) On May 16, 2003, suicide bombers simultaneously carried out several attacks on civilian targets in Morocco, targeting not only Moroccans, but, possibly, Spanish nationals as well;<sup>302</sup> (7) On August 5, 2003, a bomb blew up the

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296. Steven Erlanger, *Traces of Terror: The Intelligence Reports; Germany Disputes Visit of Qaeda Figure*, N.Y. TIMES, June 11, 2002, at A19.

297. Josh Meyer, *Attack in Saudi Arabia*, L.A. TIMES, May 14, 2003, at A1.

298. Bill Coffin, *Rough Water*, 50 RISK MGMT. MAG., Mar. 3, 2003, at 10 (noting that on October 6, 2002, al Qaeda terrorists “slammed an explosive laded [sic] speedboat” into French oil tanker moored off coast of Yemen, causing it to spill oil into sea); see also Meyer, *supra* note 297.

299. Armozi, the alleged mastermind behind the Bali attacks, said at a news conference after his arrest that he regretted the bombings killed so many Australians when he intended to target Americans. *Death Penalty Sought for Main Suspect in Bali Bombings*, KYODO NEWS INT'L, July 8, 2003, available in LEXIS, International Newsletters file. Aside from blowing up the discotheque, bombs went off inside Patty's Irish Pub also in Kuta, Indonesia as well as close to the U.S. consulate in Denpasar, Indonesia. *Alleged Field Coordinator for Bali Bombing Goes on Trial*, KYODO NEWS INT'L, July 22, 2003, available in LEXIS, International Newsletter file.

300. Meyer, *supra* note 297.

301. Americans suffered the most casualties in these attacks carried out by al Qaeda, but other foreigners also died. *Saudis More Open About Recent Attacks Than They Were About September 11*, available in WESTLAW, Allnews Plus Wires Database. Along with eight Americans killed in these attacks, seven Saudis, three Filipinos, two Jordanians, and one each from Australia, Great Britain, Ireland, Lebanon, and Switzerland also died. Donna Abu-Nasr, ASSOC. PRESS, May 15, 2003.

302. The Asian Wall Street Journal reported, however, that the low-level Jordanian al Qaeda coordinator of the Moroccan attacks came up with the targets. Peter Finn, *Story of Moroccan Bombers Is Rooted in Casablanca Slum*, ASIAN WALL ST. J., June 4, 2003, available at 2003 WL-WSJA 55992014. The al Qaeda leadership had apparently informed him that they wanted attacks in Morocco without specifying any targets. *Id.* He chose targets that had Jewish links or were associated with

Mariott Hotel in Jakarta, capital of Indonesia;<sup>303</sup> and (8) On March 11, 2004, ten bombs were detonated on four commuter trains in Madrid, killing over 200 people and wounding over 1,400, constituting the worst terrorist attack on European soil since World War II.<sup>304</sup> Although the Spanish government initially blamed ETA, the Basque separatist group, the government has arrested, among others, three Morrocans, one of whom apparently “dealt closely with an [al] Qaeda cell based in Spain . . . .”<sup>305</sup>

On November 12, 2002, an audiotape containing the voice of Osama bin Laden was broadcast. On the tape, bin Laden expressly names as targets Australia, Canada, France, Germany, Israel, Italy, and the United Kingdom.<sup>306</sup> Responding to the threat, European governments “departed from their relatively circumspect low-key approach to terrorism alerts and issued stark warnings about planned attacks in Europe.”<sup>307</sup>

If our allies are also under attack, they might, arguably, not be so concerned about our position on the death penalty for accused al Qaeda killers. For example, France and Germany initially refused to turn over evidence against Moussaoui to the United States, because the Justice Department has sought the death penalty in his case. France and Germany, however, later softened their stance and agreed to turn over the requested evidence provided it was only used in the “guilt phase” of the trial.<sup>308</sup> The change in position, however, might

“debauchery”—namely, a Spanish restaurant, a Jewish-owned Italian restaurant, a Jewish social club, and the Jewish cemetery. *Id.* The Farah hotel was also on the list. *Id.* Al Qaeda apparently gave the local coordinator \$50,000 to \$70,000 to fund the attacks. *Id.*

303. Jane Perlez, *The Attack: Group Linked to Al Qaeda Seen Behind Jakarta Blast*, N.Y. TIMES, Aug. 7, 2003, at A12 (noting that 33-storey Mariott hotel was “the most visibly American building in the city”).

304. Elaine Sciolino, *10 Bombs Shatter Trains in Madrid, Killing 192*, N.Y. TIMES, Mar. 12, 2004, at A1; Tim Golden & Craig S. Smith, *Spain Arrests 5 More Suspects in Madrid Bomb Attacks*, N.Y. TIMES, Mar. 19, 2004 (noting that the death toll had risen to 202).

305. Golden & Smith, *supra* note 304, at A12. There is other evidence that is pointing towards individuals who may be linked to al Qaeda as responsible for the bombings. *See id.* Furthermore, an audiotape was broadcast last October, “reportedly” in the voice of Osama bin Laden, in which he directly threatens Spain. Sciolino, *supra* note 304, at A1. Spain has been a staunch ally of the Bush Administration and has sent 1,300 troops to Iraq. *Id.*; *see also* Richard Norton-Taylor & Rosie Cowan, *Madrid Bomb Suspect Linked to UK Extremists*, THE GUARDIAN, Mar. 17, 2004, available at 2004 WL 56438604 (reporting that a suspect in the Madrid bombings met an extremist Islamist who may have shared a flat with Zacarias Moussaoui in London).

306. *See* Rajiv Chandrasekaran, *Purported Bin Laden Tape Lauds Bali, Moscow Attacks*, WASH. POST, Nov. 13, 2002, at A1; *see also* Stevenson, *supra* note 8; Sciolino, *supra* note 304, at A1 (noting that Osama bin Laden threatened Spain last October).

307. *Id.* at 75.

308. Germany and France announced their change in position approximately two weeks after the Osama bin Laden audiotape was broadcast. Germany had initially refused to provide the evidence needed by the U.S. Justice Department for the

have been primarily due not to the urge to fight a common enemy, but to U.S. pressure on those two countries, because their governments were so outspoken in opposing the U.S. and British plan to invade Iraq.<sup>309</sup>

To help fight the terrorist threat, the United States and the European Union have also recently entered into an agreement to speed extradition of suspected terrorists to and from the United States.<sup>310</sup> That agreement, however, contains an anti-death penalty

Moussaoui case, because of German law and practice of not doing so in capital cases. See Steven Erlanger, *Traces of Terror: The Terror Trial; German Chancellor Hopes to Release Evidence Soon*, N.Y. TIMES, June 11, 2002, at A26. Apparently, Germany's constitutional ban on the death penalty prohibits handing over any evidence that "could lead to a conviction that results in execution." *Id.* Germany had apparently refused to hand over bank transfers that show that Moussaoui was wired money from Ramzi Muhammad Abdullah bin al-Shibh. *Id.* The transfers apparently have al-Shibh's fingerprints on them. *Id.* Germany requested assurances that the death penalty not be sought for Moussaoui, but the United States rejected that request. *Id.* France had also initially indicated that it would not turn over any evidence on Moussaoui, because the United States is seeking the death penalty. *Id.* Germany and France, however, ultimately agreed to hand over the requested evidence after receiving assurances that the evidence would only be used during the guilt phase of the capital trial and not in the penalty phase. Dan Eggen, *U.S. to Get Moussaoui Data from Europe*, WASH. POST, Nov. 28, 2002, at A19; see also Larry Margasak, *U.S. Seeks to Block Moussaoui Documents*, ASSOC. PRESS, Mar. 27, 2003, available at 2003 WL 17302860.

As Moussaoui's standby attorney pointed out, however, the jury in the guilt phase sits for the penalty phase if a guilty verdict is reached. *Id.* Evidence heard in the guilt phase cannot help but influence the jury in the penalty phase of the trial. See Bruce Zagaris, *Germans and French Agree to Give Evidence in Moussaoui Case Evidence Gathering and International Human Rights*, 19 INT'L L. ENFORCEMENT REP. 21, 22 (2003), available at LEXIS, Int'l Law Newsletter file. The evidence is important to the Government's case:

[The documents] arguably establish important connections between Moussaoui and al Qaeda operatives. In particular, documents in the possession of German authorities show money transfers from a member of the Hamburg group that carried out the September 11, 2001 terrorist attacks in the U.S. In particular, they include details of two money transfers that totaled \$14,000 from Ramzi Binalshibh, an alleged member of the al Qaeda cell in Hamburg, to Moussaoui. Mr. Binalshibh, who is in U.S. custody, has told U.S. authorities that Moussaoui was only a backup in the September 11 plans, because the al Qaeda cells did not view him as trustworthy. The French documents include the original version of a dossier showing Moussaoui's childhood and early adult life in southern France, including his links with Islamic radicals both there and in London.

*Id.* at 21 (citations omitted).

309. See also Stevenson, *supra* note 8, at 75; cf. Richard Bernstein, *Germany Offers to Expand Afghan Force of the U.N. Approves*, N.Y. TIMES, Aug. 28, 2003, at A5 (German offer to send 250 troops to Kabul "seems likely to help warm relations with the United States after Germany's opposition to the American military action in Iraq").

310. Agreement on Extradition, June 25, 2003, U.S.-E.U., 2003 O.J. (L 181) 27, Celex No. 203A0719 (01) [hereinafter EU-US Extradition Agreement]. *But see* European Convention on Human Rights, *supra* note 286 (abolishing death penalty in wartime as well as peacetime).

article that the European states can expect to invoke before extraditing any individuals to the United States.<sup>311</sup> Despite a possible growing perception of a threat from a common enemy, the U.S. resort to the death penalty resonates deeply within the European community and almost certainly affects the degree of cooperation we can expect from abolitionist countries in general, from Canada and Mexico, and from the citizens and governments of Europe.<sup>312</sup>

## 2. U.S. Violations of the Vienna Convention on Consular Relations

The United States has also angered its allies by refusing to enforce Article 36 of the Vienna Convention on Consular Relations, particularly in death cases.<sup>313</sup> That article requires a state-party to

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311. The capital punishment article provides as follows:

Where the offence for which extradition is sought is punishable by death under the laws in the requesting State and not punishable by death under the laws in the requested State, the requested State may grant extradition on the condition that the death penalty shall not be imposed on the person sought, or if for procedural reasons such condition cannot be complied with by the requesting State, on condition that the death penalty if imposed shall not be carried out. If the requesting State accepts extradition subject to conditions pursuant to this Article, it shall comply with the conditions. If the requesting State does not accept the conditions, the request for extradition may be denied.

EU-US Extradition Agreement, *supra* note 310, art. 13.

312. Clarke, *supra* note 288, at 807; see Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1130 (2002). But see Michael Novak, *North Atlantic Community, European Community*, NAT'L REV. ONLINE, July 24, 2003, at [www.nationalreview.com/novak072403.asp](http://www.nationalreview.com/novak072403.asp) (last visited Feb. 11, 2004) (noting that people of Europe may be in line with people of United States on death penalty, but that elites in Europe strongly oppose it). Another commentator has observed the following concerning the different attitudes and policies of the United States and Europe:

What distinguishes United States from Great Britain, France and Canada is not the percentage of the population that expresses support for the death penalty but the intensity of some elements of that support and the distinctive political structure that exists to translate sentiment into political action at the state level.

FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 136 (2003).

313. Ginger Thompson, *Texas Executes Mexican for Murder Despite President Fox's Plea*, N.Y. TIMES, Aug. 15, 2002, at A5. Noting the failure of the Texas police to advise the executed Mexican national of his right to consult with the Mexican consul, President Vicente Fox complained that "[n]ot only was Mr. Suarez Medina deprived of his right to the benefit of his country's assistance when he most needed it, but the Mexican government was also prevented from providing priority assistance that might have influenced the outcome of his trial." *Id.* As of August 6, 2003, there were 119 foreign nationals on U.S. death rows. Death Penalty Information Center, *Foreign Nationals and the Death Penalty in the United States*, Jan. 1, 2004, at <http://deathpenaltyinfo.org/> (last visited Aug. 6, 2003). At least 18 foreign nationals

inform "without delay" any foreign nationals whom it arrests of their right to consult with their consular official.<sup>314</sup> In a string of cases, U.S. federal and state courts, including the U.S. Supreme Court, have rejected challenges to the imposition of the death penalty when local law enforcement authorities failed to notify foreign nationals of their right under the Convention to consult their consular officials.<sup>315</sup> The

have been executed, none of whom apparently received notice of their right to consult with a consular official from their country. *Id.*

314. Article 36 provides as follows:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State: . . . (b) if he so requests, the competent authorities of the receiving State shall, *without delay*, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner . . . *The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.*

Vienna Convention on Consular Relations, *opened for signature*, April 24, 1963, art. 36.1(b), 596 U.N.T.S. 262 (emphasis added); *see also* U.N. Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, G.A. Res. 43/173, U.N. G.A.O.R., 43d Sess. Supp. No. 49, at prin. 16(2), U.N. Doc. A/43/49 (1988); U.N. Standard Minimum Rules for the Treatment of Prisoners, E.S.C. Res. 663(c), U.N. ESCOR 24th Sess., Supp. No. 1, art. 38(1), U.N. Doc. E/3048 (1957) (providing essentially the same right of consular notification and assistance as Article 36 of the Vienna Convention).

315. *See* *Breard v. Greene*, 523 U.S. 371, 375-76 (1998) (ruling that since Vienna Consular Convention claim was not raised at trial in state court, that claim was procedurally defaulted); *United States v. Li*, 206 F.3d 56, 71 (1st Cir. 2000) (rejecting challenge under Vienna Consular Convention); *United States v. Chaparro-Alcantara*, 226 F.3d 616, 621 (7th Cir. 2000); *United States v. Santos*, 235 F.3d 1105, 1107 (8th Cir. 2000); *United States v. Cordoba-Mosquera*, 212 F.3d 1194, 1196 (11th Cir. 2000); *United States v. Carrillo*, 70 F.2d 854, 859 (N.D. Ill. 1999); *United States v. Hongla-Yamche*, 55 F. Supp. 2d 74, 77 (D. Mass. 1999).

A few state and federal courts have given foreign defendants some limited relief. *See, e.g., United States v. Calderon-Medina*, 591 F.2d 529, 531-32 (9th Cir. 1979) (suppressing foreign defendant's statement because police failed to tell defendant of his right to speak with consular official from his country); *State v. Reyes*, 740 A.2d 7, 24-27 (Del. Super. Ct. 1999) (same). *See also United States v. Rangel-Gonzalez*, 617 F.2d 529, 532 (9th Cir. 1980) (stating that rights established by Vienna Convention on Consular Relations are personal to defendant); *United States v. Lombrera-Camorlinga*, 170 F.3d 1241 (9th Cir. 1999); *United States v. Standt*, 153 F. Supp. 2d 417 (S.D.N.Y. 2001) (concluding that foreign national who is arrested but not informed of his rights under Vienna Convention has private cause of action under Section 1983); *Valdez v. State*, 46 P.3d 703 (Okla. Crim. App. 2003) (granting Mexican national's petition for post-conviction relief, reasoning that while the ICJ's judgment in *LaGrand* did not mandate abandonment of procedural default rules, failure to provide consular notice, along with other evidence indicating lack of diligence on part of assigned counsel justified relief requested). An Ohio Supreme Court justice noted that the policy ramifications of violating the Convention on Consular Relations:

Our best way to ensure that other nations honor the treaty by providing consular access to our nationals is to demand strict adherence to the right to consular access for foreigners in our country . . . If the United States fails in its

International Court of Justice has ruled that the United States violated international law in refusing to notify the defendants of their rights under the Vienna Convention and in refusing to stay the order of execution pending the outcome of challenges filed by complaining states in the ICJ.<sup>316</sup> Apparent U.S. disregard of the Convention and the ICJ could make our allies not only less concerned about the rights of U.S. citizens traveling abroad,<sup>317</sup> but also could make them somewhat less eager<sup>318</sup> to help us in the war on terror.<sup>319</sup>

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responsibilities under the convention, then other member countries may choose to do unto us as we have done unto them.

State v. Issa, 93 Ohio St. 3d 49, 80-81 (2001) (Lundberg Stratton, J., dissenting). See also William J. Aceves & Bernard H. Oxman (ed.), *International Decision, LaGrand (Germany v. United States)*, 96 AM. J. INT'L L. 210, 218 n.48 (2002) (noting that "[i]n September 2001, the Oklahoma Court of Criminal Appeals stayed the execution of a Mexican national, in part because of the purported Consular Relations Convention violation and the broader implications of the ICJ's ruling) (citing *Okla. Court Postpones Execution of Mexican; International Law Cited in Ruling*, WASH. POST, Sept. 11, 2001, at A16). William J. Aceves, *LaGrand (Germany v. United States)*, 96 AM. J. INT'L L. 210, 218 n.48 (2002) (citing *Okla. Court Postpones Execution of Mexican; International Law Cited in Ruling*, WASH. POST, Sept. 11, 2001, at A16).

316. La Grand Case (F.R.G. v. U.S.), 2001 I.C.J. 1 (June 27), available at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm> (last visited Aug. 1, 2002). Note that on February 5, 2003, the Court granted Mexico's request for provisional measures against the United States to stop the pending executions of three Mexican nationals who likewise were not provided consular advice. Case Concerning Avena and Other Mexican Nationals (Mexico v. United States), Request for the Indication of Provisional Measures, Order, I.C.J. (Feb. 5, 2003), available at <http://212.153.43.18/icjwww/idocket/imus/imusframe.htm>; Bruce Zagaris, *ICJ Grants Provisional Remedies for Mexicans on U.S. Death Row*, 19 INT'L L. ENFORCEMENT REP. 148 (Apr. 2003), available at LEXIS, Int'l Law Newsletters file, at \*1, \*3 ("Coming only 18 months after the ICJ decision in *LaGrand*, the decision indicates that opponents of the death penalty are gaining momentum in international courts."). *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Inter-Am. C.H.R. 16, Advisory Op. OC-16/99, Ser. A (1999) (reaching same result as ICJ in *LaGrand*). The U.N. General Assembly passed a resolution by a vote of 121-1 endorsing the Advisory Opinion. See *Protection of Migrants*, G.A. Res. A/Res/54, U.N. GAOR, 55th Sess., Agenda Item 4, U.N. Doc. 16624 (2000) ("[t]aking note of the decisions of the relevant international juridical bodies on questions relating to migrants, in particular the Advisory Opinion OC-16/99 issued by the Inter-American Court of Human Rights . . . regarding the right to information about consular assistance within the framework of due process guarantees"). See generally *Declaration on the Human Rights of Individual Who Are Not Nationals of the Country in Which They Live*, G.A. Res. 144, U.N. GAOR, 40th Sess., Supp. No. 53, U.N. Doc. A/Res/40/144 (1985) (linking consular assistance to due process). The United States was the only country to vote against the resolution. Under the purpose and plain meaning of "the Supremacy Clause," the *LaGrand* case is binding on state and federal courts. See U.S. CONST. art. VI, § 2.

317. Our moral standing to argue for the protection of our nationals when they are arrested abroad is compromised by the judicial rejection of the Vienna Convention. Note: *Too Sovereign but not Sovereign Enough: The U.S. Stales Beyond the Reach of the Law of Nations?*, 116 HARV. L. REV. 2654, 2677 (2003). That standing has further been weakened by our apparent unqualified resort to military tribunals in virtually all cases involving the Taliban and al Qaeda. Charles V. Pena, *Blowback: The Unintended*

### E. Other Troubling Issues Involving the Death Penalty and Terrorism

#### 1. The Death Penalty, a Necessary Tool to Obtain Information from the "Ticking Bomb Terrorist"?

Some might argue that we should still wield the threat of death to force suspected terrorists to reveal information about plots of mass destruction. After all, private terror groups might be able to obtain chemical weapons, biological weapons, and even nuclear arms. The devastation that these weapons could wreak would justify our taking extreme measures—including the threat of the death penalty—against individual suspects who would be thus compelled to tell us how to thwart such an attack.<sup>320</sup> One governmental official gave such a justification for seeking the death penalty in the Moussaoui case.<sup>321</sup> Thus, the issue is not one of retributive justice or of general or specific deterrence, but of instrumentalism,<sup>322</sup> an issue indistinguishable from whether torture may be used to extract information from suspected terrorists.<sup>323</sup>

*Consequences of Military Tribunals*, 16 N.D.J.L. ETHICS & PUB. POL'Y 119, 122-23 (2002). Appeals of the sort we have made on behalf of Laurie Berenson, tried by military tribunal in Peru, would have little credibility today. *Id.* at 125.

318. But see *supra* notes 297-307 and accompanying text for a discussion about al Qaeda's broadening its targets.

319. The President of the European Union opposed the execution of Stanley Faulder, a Canadian national denied his consular rights in Texas. The Death Penalty Information Center, *1998 Year End Report: New Voices Raise Dissent, Executions, Decline* (Dec. 1998), at <http://www.deathpenaltyinfo.org> (last visited July 7, 2002).

320. Even terrorists' resort to conventional weapons could prove devastating, as September 11 so tragically illustrates.

321. Dan Eggen and Brooke A. Masters, *U.S. Indicts Suspect in Sept. 11 Attacks; Action Formally Links Man to Al Qaeda, States Evidence Against Bin Laden*, WASH. POST, Dec. 12, 2001, at A01 (quoting one law enforcement official as declaring that "[i]f the death penalty doesn't make him talk, nothing will").

322. Immanuel Kant, for example, who advocated the death penalty under a theory of just desert or retribution, opposed punishing an individual "merely as a means of promoting another good either to himself or to civil society . . ." KADISH & SCHULHOFER, *supra* note 56, at 102 (quoting IMMANUEL KANT, *THE PHILOSOPHY OF LAW* (W. Hastie trans., 1887)); see also Chanterelle Sung, *Torturing the Ticking Bomb Terrorist: An Analysis of Judicially Sanctioned Torture in the Context of Terrorism*, (Book Review), 23 B.C. THIRD WORLD L.J. 193, 200 (2003). See also DERSHOWITZ, *supra* note 185, at 142-43 (quoting Jeremy Bentham as justifying torture in certain extraordinary situations) (quoted in W.L. Twining & P.E. Twining, "Bentham on Torture," N. IR. LEGAL Q., Autumn 1987, at 347). Kant strongly opposed the idea of mistreating those who are condemned to death. KADISH & SCHULHOFER, *supra* note 56, at 103.

323. This issue has arisen with the capture of leading figures of al Qaeda, such as Ramzi Bin al-Shibh and Khalid Shaikh Mohammed. The current administration has insisted that Khalid Shaikh Mohammed will be treated humanely. Eric Lichtblau &

The United States is a party to the Convention against Torture, which prohibits inflicting “extreme pain or suffering whether physical or mental.”<sup>324</sup> There are no exceptions to the Torture Convention.<sup>325</sup> Under the International Covenant for Civil and Political Rights (ICCPR), a state may in times of emergency derogate from certain obligations to provide civil liberties.<sup>326</sup> The Covenant expressly prohibits, however, derogation from a state’s obligation to refrain from “subject[ing] [any person] to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>327</sup> The United States is also a party to the ICCPR.<sup>328</sup>

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Adam Liptak, *Questioning to be Legal, Humane and Aggressive, the White House Says*, N.Y. TIMES, Mar. 4, 2003, at A13. “There are a lot of ways short of torturing someone to get information from a subject,” said one U.S. official. *Id.* In dealing with other al Qaeda suspects, “[t]he United States has deprived suspects of sleep and light, kept them in awkward positions for hours and used psychological intimidation or deception to confuse and disorient them.” *Id.* The European Court of Human Rights, however, declared a similar practice engaged in by the British against IRA prisoners to be “inhuman and degrading treatment,” but not “torture” within the meaning of Article 3 of the European Convention on Human Rights. *See Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) ¶ 167 (1978).

324. Convention Against Torture and Other Cruel Inhuman or Degrading Treatment, Dec. 10, 1984, 23 I.L.M. 1027, *entered into force* June 26, 1987 [hereinafter Torture Convention]. Concerning the death penalty, the U.S. Senate attached an understanding to its advice and consent to the Convention:

That the United States understands that international law does not prohibit the death penalty, and does not consider this Convention to restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty

United States Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CONG. REC. S17486-01 (daily ed. Oct. 27, 1990) (U.S. Understanding, II(4)). The U.S. Senate also attached a reservation purporting to equate torture to violations of the Fifth, Eighth and Fourteenth Amendments to the U.S. Constitution:

That the United States considers itself bound by the obligation under Article 16 to prevent “cruel, inhuman or degrading treatment or punishment,” only insofar as the term “cruel, inhuman or degrading treatment or punishment” means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

*Id.* at I(2).

325. Article 2.2 of the Torture Convention states as follows: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” Torture Convention, *supra* note 324, Art. II.

326. *See* International Covenant on Civil and Political Rights (ICCPR), *concluded* Dec. 16, 1966, arts. 4.1, 4.2, 993 U.N.T.S. 171, 6 I.L.M. 368 (1967).

327. *Id.* at 4.2. The Torture Convention itself has a similar provision: “No exceptional circumstances whatsoever, whether a state of war or a threat of war,

A debate has arisen in the United States, however, over whether the government should embark on a policy of torture, at least when dealing with the so-called “ticking-bomb terrorist.”<sup>329</sup> One noted commentator has suggested that, given the stakes, a judicial warrant exception allowing torture in such narrow circumstances should be created.<sup>330</sup> Some additional respected authorities have indicated that torture may be justified in “extraordinary circumstances.”<sup>331</sup> Others have pointed out, however, that identification of such “ticking-bomb terrorists” is usually difficult, that information provided under torture is often unreliable, that such a policy would lead to a slippery slope here (if we can torture suspected terrorists, why not suspected

internal political instability or any other public emergency, may be invoked as a justification of torture.” Torture Convention, *supra* note 324, art. II.

328. President Bush issued a declaration of national emergency on September 14, 2001, which would presumably comply with the ICCPR, as a result of the September 11 attacks. See Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 18, 2001). The U.S. Senate attached to its advice and consent to the ICCPR a similar reservation, namely, equating torture and degrading treatment with a violation under the Fifth, Eighth, and Fourteenth Amendments. U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, Reservation I (3), 138 CONG. REC. S4781-01 (daily ed. Apr. 2, 1992).

329. The ticking bomb terrorist is generally a recently apprehended terrorist suspect who is potentially able “to disclose information that would prevent an imminent and massive terrorist attack.” Sung, *supra* note 322, at 194.

330. DERSHOWITZ, *supra* note 185, at 158-59.

331. John T. Parry & Welsh S. White, *Interrogating Suspected Terrorists: Should Torture Be an Option?* 63 U. PITT. L. REV. 743, 745 n.8 (2002):

*Symposium on the Report of the Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity*, 23 ISR. L. REV. 141 (1989) (collecting comments by Alan Dershowitz, Sanford Kadish, Michael Moore, and Paul Robinson, all of whom conclude torture could be permissible in limited circumstances); Steve Chapman, *Should We Use Torture to Stop Terrorism?*, CHI. TRIB., Nov. 1, 2001, at 31; Michael James & Peter Hermann, *Torture Likely Tool in Anti-Terror Fight*, BALT. SUN, Oct. 10, 2001, at 11A (quoting Professor David Powell’s claim that “[e]xtraordinary behavior is necessary under extraordinary circumstances”); Jodie Morse, *How Do We Make Him Talk?*, TIME, Apr. 15, 2002, at 44 (quoting Professor Anthony D’Amato’s suggestion that torture may be “required to save lives” in certain cases); Walter Pincus, *Silence of 4 Terror Probe Suspects Poses Dilemma for FBI*, WASH. POST, Oct. 21, 2001, at A6 (quoting Professor David Cole’s admission that, “[i]f there is a ticking bomb, it is not an easy issue, it’s tough”); Jim Rutenberg, *Torture Seeps into Discussion by News Media*, N.Y. TIMES, Nov. 5, 2001, at C1 (noting a former deputy attorney general argued, “it might also be permissible to transfer terrorist subjects to other nations with different standards of interrogation”); Patricia Williams, *War and the Law*, THE OBSERVER (London), Dec. 2, 2001 (discussing former Clinton Justice Department official Robert Litt’s argument that torture could be used in emergencies even though it is not authorized by law).

murderers, rapists, and child molesters?),<sup>332</sup> that it would encourage other countries to resort to torture, that it violates moral standards as well as U.S. and international law,<sup>333</sup> and that the use of torture might so anger the religious and ethnic groups of the tortured individuals that torture will only increase terrorism.<sup>334</sup>

In Northern Ireland, Great Britain's policy initiated in 1971 of subjecting mainly members of the minority Catholic community suspected of IRA activity to internment including degrading treatment, if not torture, enraged the Catholic community and provided the IRA with one of its best recruiting tools.<sup>335</sup> Perceived to be aimed at that already discriminated-against minority, the policy "undermined British rule in Northern Ireland."<sup>336</sup> Given the ethnic and religious overtones in the current struggle against al Qaeda, there is substantial reason to believe that the United States' employing an official or unofficial policy of torture will also strengthen that organization.<sup>337</sup> A torture policy may also endanger U.S. troops who are attempting to arrest or capture al Qaeda members. Such al Qaeda operatives would have an additional incentive to fight to the death rather than lay down their arms.<sup>338</sup>

332. Peter Maass, *The World: Torture, Tough or Lite; If a Terror Suspect Won't Talk, Should He Be Made To?* N.Y. TIMES, Mar. 9, 2003, D4.

333. Sung, *supra* note 322, at 199-210, *See* Regina v. Bartle (the Pinochet case), 381 I.L.M. 581 (House of Lords, Mar. 24, 1999), *in* JORDAN J. PAUST ET AL., INTERNATIONAL LAW AND LITIGATION IN THE U.S. 653, 655 (2000) ("The *jus cogens* nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed.") (Browne-Wilkinson, L.J.); *cf.* Barbara Crossette, *U.S. Fails in Effort to Block Vote on U.N. Convention on Torture*, N.Y. TIMES, July 25, 2002, at A7 (apparently fearing demands for access to Guantanamo Bay detention camp, United States unsuccessfully opposed proposed "optional protocol" to Torture Convention "to establish a system of regular inspections of prisons and detention centers worldwide to check for abuses").

334. Crossette, *supra* note 333.

335. *See* O'Connor & Rumann, *supra* note 2, at 1663, 1679; *see also* *British Actions*, *supra* note 218 (noting that "as a result of it [internment], the IRA were able to recruit young men in scores if not in hundreds").

336. *British Actions*, *supra* note 218.

337. The U.S. record is hardly spotless. Washington apparently has turned some terrorist suspects over to countries (such as Egypt, Jordan and Morocco) that do torture. Lichtblau & Liptak, *supra* note 323. It is also reported that the United States has threatened suspects with their being turned over to such countries to encourage these suspects to talk. *Id.* The *New York Times* quotes a senior Moroccan intelligence official as follows:

I am allowed to use all means in my possession in interrogating a suspect. You have to fight all his resistance at all levels and show him that he is wrong, that his ideology is wrong and is not connected to religion. We break them, yes. And when they are weakened, they realize that they are wrong.

*Id.*

338. *See infra* notes 340-51 and accompanying text for a discussion of this issue.

Furthermore, given the lengthy delays before trial and the lengthy appellate process in capital cases, the threat of a remote penalty of death is not likely to induce the “ticking bomb terrorist” to reveal the plot. Furthermore, the death penalty could be counterproductive when dealing with individuals who are willing to commit suicide to advance their group’s cause. Thus, the lure of martyrdom by the death penalty might actually encourage such persons to refuse to cooperate.<sup>339</sup>

## 2. Placing U.S. Military Personnel and Civilians at Risk

If individuals associated with al Qaeda learn that the United States is executing imprisoned al Qaeda members, then U.S. civilians, military personnel, and federal agents may be at greater risk. First, if al Qaeda captures any Americans, there may be a greater chance that they will be killed.<sup>340</sup> Second, if al Qaeda members know they will face death by execution, they have a strong incentive to fight to the death when U.S. military or special agents are trying to subdue or arrest them in the field.<sup>341</sup>

These policies rest on the same foundation as some basic rules of international humanitarian law. The Geneva Conventions that protect prisoners of war are based not only on humanitarian concerns, but also on pragmatic ones. If state *A* mistreats the captured soldiers of state *B*, then state *B* may be inclined to mistreat the captured soldiers of *A*.<sup>342</sup> Granted, reciprocity does not always

339. See *supra* notes 220-36 and accompanying text.

340. Green et al., *supra* note 172, at 219 (Comments of Kenneth Roth, Director of Human Rights Watch). Note the statement allegedly made by Daniel Pearl’s kidnappers:

The National Movement for the Restoration of Pakistani Sovereignty had kidnapped him [Pearl] and was holding him in ‘very inhuman [*sic*] circumstances’, similar to the way that ‘Pakistanis and nationals of other sovereign countries were kept in Cuba by the American Army. . . . If the Americans keep our countryman in better conditions we will better the conditions of Mr. Pearl and all the other Americans we capture.

FOUDA & FIELDING, *supra* note 43, at 65 (quoting an e-mail message sent reportedly by the kidnappers of Daniel Pearl, the Wall Street Journal reporter). A second e-mail was sent threatening the execution of Pearl within 24 hours. *Id.* Apparently, authorities believe that Pearl was already dead by the time that the second e-mail was sent. *Id.* That executing al Qaeda terrorists puts Americans and the U.S. military at greater risk cannot be proved empirically. Furthermore, we cannot accept at face value the statements made by such individuals. But these and other experiences suggest that executing or otherwise mistreating al Qaeda captives *may* increase this risk.

341. *Id.* at 224.

342. See George H. Aldrich, *Some Reflections on the Origins of the 1977 Geneva Protocols*, in *STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOR OF JEAN PICTET* 129, 131 (Christophe Swinarski ed., 1984) (noting that “it was apparent that mistreatment of North Vietnamese prisoners by the

happen. During its war with the United States, North Korea and China routinely mistreated U.S. soldiers and airmen, violating the third Geneva Convention while the United States generally abided by it.<sup>343</sup> One could readily argue that a terrorist organization like al Qaeda is certain to treat captives harshly no matter how well the United States treats arrested al Qaeda members (and at the moment we are not treating them well). On the other hand, al Qaeda is a loosely structured organization. Who is to say that some people associated with that organization might be motivated to treat captured Americans humanely but for the fact that captured al Qaeda members are being mistreated by the United States (most are being held incommunicado without trial) and may be subject to execution.<sup>344</sup>

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South Vietnamese undermined our efforts to obtain better treatment for our men captured by North Vietnam"). However, there is an opposing view:

The Geneva Conventions are coming to be regarded less and less as contracts concluded on a basis of reciprocity in the national interests of the parties . . . A state does not proclaim the principle of protection due to prisoners of war merely in the hope of improving the lot of a certain number of its own nationals. It does so out of respect for the human person.

III COMMENTARY, THE GENEVA CONVENTIONS OF 12 AUGUST 1949, GENEVA CONVENTION III RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 20 (Jean S. Pictet ed. 1960). In a colloquy between Professor Ruth Wedgwood of the John Hopkins University and Professor Jordan Paust of the University of Denver on January 3, 2004, Professor Wedgwood argued that humanitarian law is based, to a great extent, on reciprocity. In answer to a question from the audience, Professor Paust argued that certain aspects of humanitarian law, the prohibition against torture being the prominent example, are fundamental rights, not founded on the notion of reciprocity. *The Constitutional and Enemy Combatants*, Panel Discussion of the American Association of Law Schools' Annual Meeting, Atlanta, Georgia, Jan. 3, 2003 (attended by author).

343. Ralph Michael Stein, "Artillery Lends Dignity to What Otherwise Would be a Common Brawl"; *An Essay on Post-Modern Warfare and the Classification of Captured Adversaries*, 14 PACE INT'L L. REV. 133, 146 (2002). North Vietnam mistreated U.S. captives, but South Vietnam, to whom we turned over a large percentage of captured Viet Cong and North Vietnamese fighters generally mistreated them in turn. *See id.* By the way, the American Continental Army in the War of Independence generally treated British captives well, but the British did not return the favor, viewing the Americans as lawless rebels, not so differently from how the United States views al Qaeda today. *See id.* at 142.

344. This is not to suggest that all al Qaeda and Taliban are necessarily entitled to the protection of Geneva Conventions as prisoners of war. For a discussion of that issue, see Paust, *supra* note 188 at 8 n.16; Laura A. Dickinson, *Using Legal Process to Fight Terrorism, Detentions, Military Commissions, International Tribunals and the Rule of Law*, 75 S. CAL. L. REV. 1407, 1472-77 (2003). *See also*, Jonathan D. Glater, *A.B.A. Urges Wider Rights in Cases Tried by Tribunals*, N.Y. TIMES, Aug. 13, 2003, at A18 (noting that American Bar Association called upon Congress and White House to ensure that all defendants before military tribunals have "adequate access" to civilian lawyers). *But see* Ruth Wedgwood, *al Qaeda, Terrorism and Military Commissions*, 96 AM. J. INT'L L. 328, 330 (2002) (defending detentions in Guantanamo Bay and use of military commissions as necessary security measure, noting that "the fabric of

In addition, humanitarian law prohibits an armed force from killing soldiers who are attempting to surrender, who have given up, or who are wounded and otherwise “hors de combat.” Thus, a “take no prisoners” order is per se illegal. Specifically, 1977 Additional Protocol I to the Geneva Convention of 1949 provides as follows, “It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.”<sup>345</sup> This requirement “to give quarter” also appears in the Hague Regulations of 1907.<sup>346</sup> The United States has never ratified Protocol I, but is a party to the Hague Convention of 1907, including the Annex containing the Hague Regulations. The requirement “to give quarter” is considered binding customary international law.<sup>347</sup>

If the United States embarks on a policy of executing al Qaeda members, it may be viewed by al Qaeda members in the field essentially as refusing to give quarter. This is not to suggest that carrying out the death penalty would violate international law or would in fact violate the provisions referred to above. (The Geneva Conventions expressly authorize criminal prosecution for war crimes and crimes against humanity.<sup>348</sup> These Conventions, including the 1977 Protocols, permit capital punishment, except for juveniles and women with dependent infants.<sup>349</sup>) Nonetheless, one of the benefits gained by the attacking force in giving quarter, aside from potential reciprocity, is that the besieged force has greater incentive to lay

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American liberalism and democracy would be irreparably coarsened if government proves unable to provide a reasonable guarantee of life and safety to its citizens.”); Lee A. Casey, David B. Rivkin, Jr., & Darin R. Bartram, *An Assessment of the Recommendations of the American Bar Association Regarding the Use of Military Commissions in the War on Terror*, THE FEDERALIST SOCIETY WHITE PAPERS ON TERRORISM, at <http://www.fed-soc.org/Publications/Terrorism/ABAResponse.pdf> (last visited Aug. 1, 2003) (criticizing some of ABA recommendations on military commissions).

345. Additional Protocol I to the Geneva Conventions of 1949, *opened for signature* Dec. 12, 1977, art. 40, 1125 U.N.T.S. 3-608, 16 I.L.M. 1391; *see also* DOCUMENTS ON THE LAWS OF WAR 443 (Adam Roberts & Richard Guelff eds., 1989).

346. Regulations Respecting the Laws and Customs of War on Land, Annex to the 1907 Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 23(2), 36 Stat. 2199 (“In addition to the prohibitions provided by special Conventions, it is especially forbidden . . . (d) To declare that no quarter will be given . . .”).

347. L.R. Penna, *Customary International Law and Protocol I: an Analysis of Some Provisions*, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOR OF JEAN PICTET, *supra* note 342, at 212.

348. *See, e.g.*, 1977 Additional Protocol I, *supra* note 343, art. 75.7, at 465-66 (implicitly authorizing trial of individuals, including prisoners of war, for war crimes or crimes against humanity or both). *See also* Ronald J. Sievert, *War on Terrorism or Global Law Enforcement Operation*, 78 NOTRE DAME L. REV. 307, 357 (2003).

349. 1977 Protocol I, *supra* note 345, art. 77.5, at 467 (prohibiting imposition of death penalty upon minors, but implicitly authorizing death penalty for adults); *id.* art. 7, at 466 (prohibiting execution of death penalty on mothers with “dependent infants”).

down their arms. If they know they are going to be killed in any event, why not fight to the last? If the besieged force, in this case, members of al Qaeda, believe that they will face execution anyway (or indefinite detention without trial or both),<sup>350</sup> they may be more motivated to die a glorious warrior's death in battle rather than to go quietly.<sup>351</sup>

## V. CONCLUSION

The thundering weight of the crimes of September 11 inevitably demands the maximum punishment that our judicial system allows. If anyone deserves the death penalty, then those who planned and actively participated in the September 11 conspiracy do. The United States will almost certainly execute those, like Mohammed Shaikh Khalid, Ramzi bin al-Shibh, and Abu Zubaydah, assuming, as expected, they are found responsible for the attacks. Yet as we enter the third year in the "war on terrorism," the euphoria of the seemingly quick victory in the largely unilateral war against Iraq is beginning to give way to recognition that we need the United Nations, the help of our allies, and respect for the rule of law.

Similarly, the natural demand for retribution after a terrorist organization has committed mass murder and other heinous crimes needs to be tempered by the fact that carrying out the death penalty may strengthen the terrorists. Given the perceived and actual grievances that the Arab and the greater Islamic worlds have towards the West in general and the United States in particular, carrying out such executions will probably tend to inflame the Arab and Islamic worlds, increase their support of terrorist movements and thwart cooperation with our allies, almost all of whom have abolished the death penalty. In addition, assuming the evidence at trial fails to show that Zacarias Moussaoui directly participated in the conspiracy to carry out the September 11 attacks, executing him may be contrary to our current death penalty jurisprudence and would appear unjust to our allies and the Islamic world alike. Even if the evidence shows

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350. One could add to this list the possibility of captured al Qaeda members being subject to degrading treatment and torture. *See supra* notes 320-51 and accompanying text.

351. Furthermore, the failure to give quarter may ultimately strengthen the terrorist organization. COOGAN, *supra* note 220, at 578. In 1987, Great Britain's Special Air Services Unit (SAS) lay in wait for IRA members who had planned to blow up a police barracks in Northern Ireland. *Id.* at 575-78. Allegedly carrying out a "shoot to kill" order, SAS killed nine men, eight IRA members and one innocent bystander who happened to be Protestant. *Id.* at 578. Allegedly, SAS ordered three IRA men to lie on the road and then proceeded to kill each of them. One commentator noted that each of the eight men's funerals drew enormous crowds and each probably recruited more than "fifty replacements for the IRA" while greatly increasing support for Sinn Fein. *Id.*

that Moussaoui directly participated in the September 11 conspiracy, executing him will, as the Kasi case so well illustrates, almost certainly make him the twentieth martyr for Muslims.

Because, however, we routinely carry out executions on individuals such as Paul Hill, the anti-abortion killer, who murdered two persons, a physician and his bodyguard,<sup>352</sup> how can we not execute one who, at the very least, was actively involved in an organization that killed over three thousand innocent people? We should, however, learn from the mistakes and the successes of Great Britain in fighting the IRA, that executing politically motivated agents of terror is likely to spawn greater terrorism.<sup>353</sup> Such restraint is a surer path towards isolating al Qaeda and its allies in the lands of the aggrieved and the repressed. The death penalty is a luxury that we can ill afford in this international struggle.

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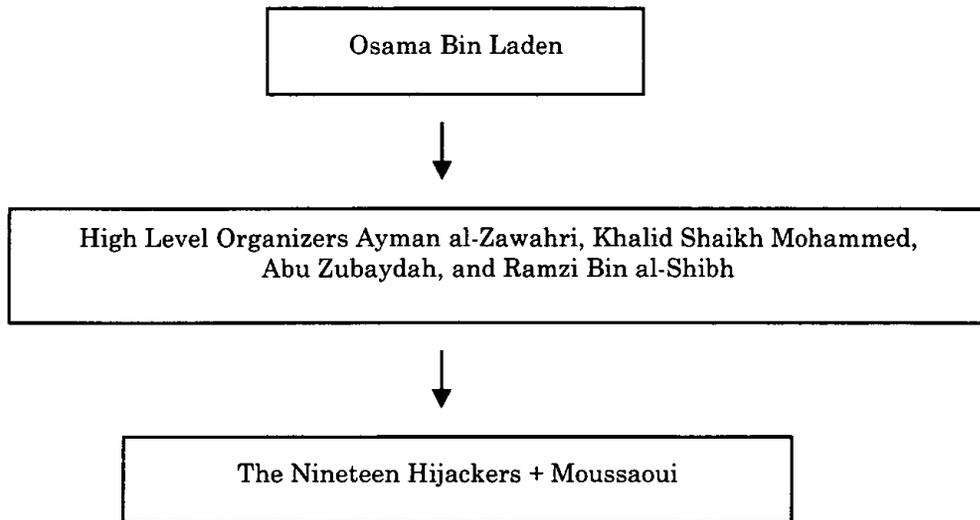
352. See David Royse, *Abortion Clinics Safe So Far, Police Say; No Credible Threats Since Execution*, MIAMI HERALD, Sept. 5, 2003, at B1, available at 2003 WL 62530293.

353. See COOGAN, *supra* note 220, at 578.

## APPENDIX

*Table 1*

Possible Conspiracy A:

*Table 2*

Two Possible Conspiracies B and C:

