

2015

Indefinite Detention in the War on Terror: Why the Criminal Justice System is the Answer

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Recommended Citation

Wesley S. McCann *Indefinite Detention in the War on Terror: Why the Criminal Justice System is the Answer*, 12 Loy. U. Chi. Int'l L. Rev. 109 (2015).

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INDEFINITE DETENTION IN THE WAR ON TERROR: WHY THE CRIMINAL JUSTICE SYSTEM IS THE ANSWER

Wesley S. McCann*

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* Department of Criminal Justice and Criminology, PhD Student, Washington State University. Thanks to Dr. Craig Hemmens, JD, Dr. David Brody, JD, and Adam Jussel, JD for the guidance, added perspective and comments. Also thank you to Lindsey A. Marco for all the love and encouragement throughout this process.

Abstract

The act of terrorism is not a new form of deviance or bravado. Yet since 9/11, it has been treated as a form of 'war' rather than as 'crime'. This distinction has served to legitimize terrorist organizations objectives, weaken the rule of law, converge the military and traditional criminal justice system models in adjudicating terrorists, and call into question the reach humanitarian law has in this convergence. This article examines the development of indefinite detention as it has been used in the 'War on Terror' and argues that the American criminal justice system holds the key to resolving many of these aforementioned issues. Thus, a divergence of military and criminal justice models is necessary if we are to preserve constitutional safeguards and exemplify both a strong and unified response to terrorism, while simultaneously exhibiting the standards of an evolving society under the paradigm of Just War.

I. Introduction

A discernible problem with the War on Terror, other than its amorphous definition, is how to impose justice upon those who are committing these acts of terror. The transition from the enemy being the 'nation-state' to the unidentified arbiter of terror has created a legal conundrum concerning what must be done with these individuals once captured by our nation's armed forces and law enforcement. Since 9/11 and the use of Guantanamo Bay Naval Base as the predetermined residence for many unlawful enemy combatants, we have incrementally solved several of the legal problems regarding their confinement and constitutional rights. This includes: extraterritoriality questions,¹ the right to habeas corpus petitions,² and the legality of detention of enemy combatants.³ Following landmark Supreme Court decisions *Hamdan v. Rumsfeld* and *Boumediene v. Bush*, the Obama Administration responded by promoting legislation that seeks to curb the individual due process rights of detained enemy combatants.⁴ Furthermore, there is a 'tug-of-war' that is occurring between the executive and judicial branches. When the former restricts the rights endowed to detainees, the latter concedes alternative routes to previously embargoed liberties.⁵ In light of each

¹ See generally *Boumediene v. Bush*, 553 U.S. 723 (2008).

² *Id.*

³ *Id.*; see also *Hamdan v. Rumsfeld*, 548 U.S. 557, 670 (2006).

⁴ *Boumediene*, 533 U.S. 723 at 739. ("If this ongoing dialogue between and among the branches of Government is to be respected, we cannot ignore that the MCA was a direct response to *Hamdan's* holding that the DTA's jurisdiction-stripping provision had no application to pending cases. The Court of Appeals was correct to take note of the legislative history when construing the statute." The Supreme Court also cited relevant floor statements and agreed with the Court of Appeal's conclusion that the MCA deprives the federal courts of jurisdiction to entertain the habeas corpus actions now before us.").

⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding that a U.S. citizen being held as an "enemy combatant" had the same procedural due process rights as lawful citizens in that they were entitled to the opportunity to refute such accusations before a rightful authority. Detainees had a right to challenge the legality of their detention via 28 U.S.C. §2241, at the federal district court in Washington D.C.); see also *Rasul v. Bush*, 542 U.S. 466, 466-67 (2004) (explaining that in 2005, The DoD established Combatant Status Review Tribunals (CSRT) where detainees are allowed to defend themselves against their reason for detention. Later that year, the DoD enacted the Detainee Treatment Act, which prevented them from

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branch's differing opinions on the efficacy of indefinite detention, it is important to understand the basic controversies that lie at the root of the War on Terror. Collectively, they can most aptly be described as:

the international legality of the U.S. invasion and occupation of Iraq; our indefinite detention of so-called "enemy combatants" at Guantanamo and perhaps other secret locations; our use of cruel, inhumane and degrading interrogation methods at Abu Ghraib and elsewhere; our "extraordinary rendition" of alleged terrorists to countries that we know engage in torture; our arrest and sentencing to death of aliens without having informed their consulates as required by the Vienna Convention on Consular Relations.⁶

The purpose of this paper is to examine whether indefinite detention is a viable, practical and ethical form of incarceration within the paradigm of the War on Terror as compared to traditional criminal justice modes of adjudication. This article argues that while both the criminal justice and military models each have their respective benefits, the former posits the least long-term concerns and costs, and by solely using the criminal justice model to adjudicate terrorists, we can increase the strength of the rule of law, see the incorporation of international humanitarian law into domestic courts, and witness a divergence of military and criminal procedure.

While significant review of detainee due process has been evident, the question regarding the viability and legality of indefinite detention has not been fully answered. Moreover, the Obama administration plans to counter the Bush administration's policy on indefinite detention.⁷ Nations around the world decide how to adjudicate terrorists in different ways. Their various responses have yet to depict a clear cut set of procedural safeguards in accordance with the laws of war,⁸ which will be discussed in depth in section III.

seeking habeas corpus relief in federal courts, but allowed them to seek further review of their CSRT determinations in the D.C. Circuit. In *Hamdan* the Supreme Court held that the use of military commissions were invalid because they violated both the Uniform Code of Military Justice (UCMJ) and common article 3 of the Geneva Conventions. Congress then passed the Military Commissions Act in 2006 barring the application to federal courts by detainees seeking habeas corpus relief. In 2008, the Supreme Court ruled in *Boumediene* that the suspension of the writ was unconstitutional and that all detainees had access to Article III courts for habeas relief. Congress then passed the Enemy Belligerent Interrogation, Detention and Prosecution Act of 2010, S. 3081 and the National Defense Authorization Act for Fiscal Year 2012 (NDAA), Public Law 112-81. The former seeks to curb the Department of Justice's involvement in prosecuting terrorists in Article III courts, while the latter allows for the indefinite detention of suspected terrorists, namely alien unlawful enemy combatants. See also Robert Chesney and Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, at 1108-1119 (explaining the procedures of the current military model).

⁶ Richard B. Bilder, *On Being an International Lawyer*, 3 LOY. U. CHI. INT'L L. REV. 135, 135 (2007).

⁷ See Lolita C. Baldor, *Obama Restarts Guantanamo Trials After Two-year Ban*, Salon.com (Mar. 7, 2011) http://www.salon.com/2011/03/07/obama_restarts_guantanamo_trials/.

⁸ Chesney & Goldsmith, *supra* note 5, at 1092 ("The variability of these frameworks . . . belies any claim that a specific set of procedural safeguards is mandated by the customary laws of war. Indeed, it would be difficult to show that any particular set of procedures used in actual practice reflects opinion juris rather than practical or political expediency.")

II. Development of Current Legislation

Following the September 11 attacks, Congress expeditiously constructed the USA PATRIOT Act to hasten the search and seizure and, when warranted, execution of unlawful enemy belligerents that were responsible for the attacks. This piece of legislation also served as the gateway for what many Americans feel has evolved into an abusive use of power with regards to the surveillance and intelligence community. Irrespective of the specific sections of the act, the prime focus of this legislation, in accordance with the newly mandated Authorization for Use of Military Force (AUMF), was to bring to justice those responsible for the hostilities against the United States on 9/11 and to protect America from future attacks from these organizations, persons or nations.⁹ The President has the authority to use any means necessary to enforce these motivations. However, the PATRIOT Act has been scrutinized for its authorization to indefinitely detain suspected and 'certified' alien terrorists. Nonetheless, several questions remain regarding the legal means the President can use to see that our nation's objective goals come to fruition. More importantly, the question remains whether the President can 'indefinitely detain' suspected or confirmed enemy combatants. What measures has the government taken to ensure that 'indefinite detention' does not mean 'forever', and how is this not a violation of due process? How does 'indefinite detention' comport with International Humanitarian Law, namely the Geneva Conventions? Lastly, is 'indefinitely detention' a viable, albeit legal route in adjudicating the War on Terror? This section seeks to examine these aforementioned questions and in doing so, will examine the legislation and legal reasoning that the executive feels they are justified in using.

A. Government Restriction?

1. *Stripping the Courts*

As of May 2014, there are 149 detainees¹⁰ being held at Guantanamo Naval Base, despite close to 779 detainees having stayed there at some point since 2002.¹¹ Current rationales for detaining enemy combatants are as follows:

(1) persons [are] placed in non-penal, preventative detention to stop them from rejoining hostilities; (2) persons who have been brought, or are expected to be brought, before a military tribunal to face criminal charges for alleged war crimes; and (3) persons who have been cleared for trans-

⁹ See Authorization for Use of Military Force Act of 2001 [hereinafter AUMF], Pub. L. No. 107-40, 115 Stat. 224.

¹⁰ See Fox News, *US soldier held captive by Taliban in Afghanistan for nearly five years freed*, May 31, 2014, available at <http://www.foxnews.com/politics/2014/05/31/wh-us-soldier-held-in-afghanistan-bergdahl-is-released-after-five-years/> ("There are now 149 detainees remaining at Guantanamo Bay.").

¹¹ See The New York Times, *The Guantanamo Docket*, available at <http://projects.nytimes.com/guantanamo> (last visited February 15, 2015).

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fer or release to a third country, whom the United States continues to detain pending transfer.¹²

While significant literature exists on the jurisdiction question (whether Article III courts have the authorization to hear *habeas corpus* petitions of detainees),¹³ the legality of our mode of indefinite detention is unclear. What is clear, however, is that the passage of the National Defense Authorization Act for Fiscal Year 2012¹⁴ limited the Executive's ability to only detain unlawful aliens captures outside of the United States.¹⁵ The Executive refuses to entitle individuals we capture during hostilities as 'prisoners of war' (POW), and instead uses the term 'unlawful enemy combatant,' a term not explicitly defined within international humanitarian law (IHL). This enables the Executive to determine the treatment of unlawful enemy combatants without an explicitly mandated rubric. This changed slightly when the Obama administration redefined those being detained as 'unprivileged belligerent(s)' in order to make the system more party to IHL.¹⁶ This was done to preclude the notion that we were in a declared war and to abstain from conceding international humanitarian rights to non-state actors- despite the fact that over the past decade, non-state actors have been achieving gradual forms of legal personality.¹⁷

Furthermore, repeated efforts to "strip the federal courts of jurisdiction to hear challenges by detainees [was] a key part of this strategy" by the executive.¹⁸ In each case, the executive's objective was to minimize the legal constraints on executive action, to confine decision making within the executive branch, and to avoid the procedural and substantive protections.¹⁹ One of the first attempts of the executive to accomplish this objective was restricting the ability of article III courts to hear or even have jurisdiction over such cases. The Court in *Boumediene* relied on the *Insular* cases to determine the 'de facto' sovereignty that the United States exercises over Guantanamo Bay, Cuba.²⁰ In doing so, the

¹² Michael John Garcia et al., *Closing the Guantanamo Detention Center: Legal Issues*, Cong. Research Serv. R40139, (2009), available at http://assets.opencrs.com/rpts/R40139_20090115.pdf; see also NDAA, *supra* note 5.

¹³ See sources cited *supra* note 5; see also *Munaf v. Geren*, 553 U.S. 674, 679 (2008) ("Federal district courts . . . may not exercise their habeas jurisdiction to enjoin the United States from transferring individuals alleged to have committed crimes and detained within the territory of a foreign sovereign to that sovereign for criminal prosecution."). See also 28 U.S.C.A. § 2241(c)(1) (West 2008)).

¹⁴ NDAA, *supra* note 5 at § 1021; 10 U.S.C.A. § 801 (2006).

¹⁵ *Hedges v. Obama*, 724 F.3d 170, 173 (2d Cir. 2013).

¹⁶ See Scott Wilson & Al Kamen, *Global War on Terror Is Given New Name*, WASH. POST (Mar. 25, 2009) available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032402818.html>. But cf. John Floyd & Billy Sinclair, *Is Osama bin Laden a Terrorist or an Unprivileged Belligerent?* JOHN T. FLOYD: CRIM. JURISDICTION: ARTICLES ON CRIMINAL LAW (Nov. 21, 2009), <http://www.johntfloyd.com/blog/is-osama-bin-laden-a-terrorist-or-an-unprivileged-belligerent>.

¹⁷ Wilson, *supra* note 16.

¹⁸ Janet Cooper Alexander, *The Law-Free Zone and Back Again*, 2013 U. ILL. L. REV. 551, 553 (2013).

¹⁹ *Id.*

²⁰ See *Boumediene v. Bush*, 553 U.S. 723, 758-59 (2008); see also *Balzac v. Puerto Rico*, 258 U.S. 298, 312 (1922) ("The Constitution of the United States is in force in Porto Rico as it is wherever and whenever the sovereign power of that government is exerted. This has not only been admitted, but em-

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Court structured an avenue for future habeas petitions to be heard and questions of jurisdiction quelled. More specifically, the Court construed the applicability of the Suspension Clause in *Boumediene*. Despite the lack of territorial sovereignty, Guantanamo Bay remained under ‘effective control’ by the United States.²¹ The Court also addresses this in *Dorr v. United States* (1904):

In every case where Congress undertakes to legislate in the exercise of the power conferred by the Constitution, the question may arise as to how far the exercise of the power is limited by the ‘prohibitions’ of that instrument. The limitations which are to be applied in any given case involving territorial government must depend upon the relation of the particular territory to the United States, concerning which Congress is exercising the power conferred by the Constitution.²²

2. *Limiting the Reach of International Law*

Subsequently, invoking Common Article III of the Geneva Convention instead of Convention IV bridged the gap between IHL and U.S. law.²³ The Court subjected the entire War on Terror, not just action in Afghanistan, to the limitations of IHL.²⁴ When President Obama took office, he not only declared that Common Article III of the Geneva Convention was the ‘minimum baseline’²⁵ with regards to treatment of detainees, but also that if it was feasible to do so, detainees would be prosecuted in Article III courts.²⁶ This would temporarily halt the use of military commissions.²⁷ Also, despite the passing of the Detainee Treatment Act (2005), the Military Commissions Act of 2006 failed to set forth adequate procedures and standards for future use.²⁸ Since 9/11, the detention policy allowed

phasized, by this court in all its authoritative expressions upon the issues arising in the Insular Cases, especially in the *Downes v. Bidwell* and the *Door Cases*. The Constitution, however, contains grants of power, and limitations which in the nature of things are not always and everywhere applicable and the real issue in the Insular Cases was not whether the Constitution extended to the Philippines or Puerto Rico when we went there, but which ones of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements.”); see generally *Torres v. Puerto Rico*, 442 U.S. 465 (1979).

²¹ Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 LOY. L. REV. 1, 15-34 (2004).

²² *Fred L. Dorr v. US*, 195 U.S. 138, 142 (1904); see also *Downes v. Bidwell*, 182 U.S. 244, 288 (1901).

²³ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 670 (2006).

²⁴ *Id.*; see generally Eric Heize, *The Evolution of International Law in Light of the ‘Global War on Terror*, 37 REV. INT’L STUD., 1069 (2011).

²⁵ Ensuring Lawful Interrogations, 74 Fed. Reg. 4893, 4894 (Jan. 22, 2009) (“Common Article 3 Standards as a Minimum Baseline. Consistent with the requirements of the Federal torture statute, 18 U.S.C. 2340-2340A, section 1003 of the Detainee Treatment Act of 2005, 42 U.S.C. 2000dd, the Convention Against Torture, Common Article 3, and other laws regulating the treatment and interrogation of individuals detained in any armed conflict.”).

²⁶ Review and Disposition of Individuals Detained At the Guantanamo Bay Naval Base and Closure of Detention Facilities, 74 Fed. Reg. 4897, 4899 (Jan. 22, 2009).

²⁷ *Id.*

²⁸ See generally Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600. (2006) [hereinafter *MCA*]; see also Pub. L. No. 109-148, 119 Stat. 2739 (regarding the Detainee Treatment Act).

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criminal trials, military commissions, and indefinite military detention to adjudicate the War on Terror.²⁹

The government also amended the War Crimes Act in redefining the scope of what constitutes violations of common Article III of the Geneva Conventions³⁰:

The provisions of section 2441 of title 18, United States Code, as amended by this section, fully satisfy the obligation under Article 129 of the Third Geneva Convention for the United States to provide effective penal sanctions for grave breaches which are encompassed in common Article 3 in the context of an armed conflict not of an international character. No foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated in subsection (d) of such section 2441.³¹

Also, it limits the reach of the Conventions themselves into habeas proceedings:

No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.³²

The MCA holds that “the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions.”³³

A chief concern of the PATRIOT Act and subsequent legislation is that its overarching structure and scope abridges individual rights, mainly the right to privacy. The argument that its broad scope undermines some individual protections for the greater good of society is beyond the purpose of this piece. Nonetheless, Lewis Dunn sheds some prophetic light on what might evolve from the threat of terrorism:

At least some of the measures required to deal with the threats of clandestine nuclear attack . . . will be in tension with or in outright violation of the civil liberties procedures and underlying values of Western liberal democracies. Because of the stakes, there will be strong pressures to circumvent or set aside—in the United States and elsewhere—various constitutional and legal restrictions on invasions of privacy or other traditional civil liberties. . . . The use of warrantless or illegal wiretaps, and the secret detentions and questioning of suspects for days or even weeks might follow, all motivated by the need to acquire information as fast as

²⁹ See Chesney & Goldsmith, *supra* note 5, at 1080.

³⁰ See generally Curtis A. Bradley, *The Military Commissions Act, Habeas Corpus, and the Geneva Conventions*, 101 AM. J. INT'L L. 322 (2007).

³¹ MCA, *supra* note 28, at 6(a); 18 U.S.C. § 2441 (2006).

³² MCA, *supra* note 28, at 5(a); 18 U.S.C. § 2441 (2006).

³³ MCA, *supra* note 28, at 6(a)(3)(A).

possible. . . . Within the United States, both rigorous administrative supervision of any emergency measures and strict judicial review after the fact would help prevent those measures from spilling over their boundaries and corrupting procedures in other areas of law enforcement. . . . But if the frequency of proliferation-related threats grows, and if violations of traditional civil liberties cease to be isolated occurrences, it will become more difficult to check this corrosion of liberal democracy here and elsewhere.³⁴

Even though Dunn's focus is nuclear proliferation and the threats that non-state actors pose to Western democracies, that threat was and is still a viable one, hence the invasion of Iraq, focus on WMDs following 9/11, and other preventive measures taken by other nations in the War on Terror. Nonetheless, despite the immeasurable costs we would suffer if WMD's were employed by a terrorist organization, terrorists acquire and use such weapons.³⁵ The important take-away is how government responses to terrorism may lead to acerbic curtailment of individual liberties in a utilitarian framework that posits national security and defense above individual freedom. The sacrifice of individual liberties may be necessary, to an extent. In sum, the courts will serve as the balancing test for this challenge.³⁶

B. Expansion of Powers

1. *Are the President's Powers 'Sweeping'?*

The world has witnessed a 'closing of the gap' between the law of non-international armed conflicts and international armed conflicts.³⁷ The law of war "does indeed provide for detention without charge of both prisoners of war and civilians in certain circumstances; however, the question here is whether the indefinite detention currently at issue can truly be called 'law of war' detention."³⁸ Within the paradigm of an international armed conflict, the detention powers of the state are 'sweeping.'³⁹ However, the *Hamdan* court ruled that despite the

³⁴ Lewis Dunn, *What Difference Will it Make?*, in *THE USE OF FORCE: INTERNATIONAL POLITICS AND FOREIGN POLICY* 525-526 (Art and Waltz, 1993).

³⁵ See Gary LaFree et al., *The Interplay between Terrorism, Nonstate Actors, and Weapons of Mass Destruction: An Exploration of the Pinkerton Database*, 7 *INT'L STUD. REV.* 155, 156 (2005) ("Incidents involving these weapons remain a rare occurrence. In fact, only forty-one of the 69,000 cases in our database used such weapons. Most involved long-range missiles capable of carrying warheads; chemical attacks typically included the use of mercury, acid, napalm, cyanide (found in water supplies), and chemical bombs, often intended to disrupt the targeted nation's economy.").

³⁶ See *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 478 (S.D.N.Y. 2004) ("The high stakes here pressing the scales thus compel the Court to strike the most sensitive judicial balance, calibrating by delicate increments toward a result that adequately protects national security without unduly sacrificing individual freedoms, that endeavors to do what is just for one and right for all.").

³⁷ Marco Sassòli & Marie-Louise Tougas, *International Law Issues Raised by the Transfer of Detainees by Canadian Forces in Afghanistan*, 56 *McGILL L. J.* 959, 969-970 (2011).

³⁸ Laurie R. Blank, *A Square Peg in a Round Hole: Stretching Law of War Detention Too Far*, 63 *RUTGERS L. REV.* 1169, 1170 (2011).

³⁹ Robert M. Chesney, *Iraq and the Military Detention Debate: Firsthand Perspectives from the Other War*, 51 *VA. J. INT'L L.* 549, 560 (2011).

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President's powers to create such Commissions to determine the detention and prosecution of unlawful belligerents, his power *is not* 'sweeping.'⁴⁰ The court made reference to the laws of war through the sublime invocation of section 821 of the U.C.M.J., namely mandating compliance with common Article 3 of the Geneva Conventions.⁴¹ Article 3 addresses the prevention of the "passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."⁴² Nonetheless, in *Boumediene*, the Court maintained that the MCA was an unconstitutional suspension of habeas corpus rights. The MCA was a prime example of government intention to mold constitutional limits into what best served the 'War on Terror.' Furthermore, history has shown us that:

constitutional limits have flexed not merely to protect the public but also to advance new ambitions and interests. . . . In the twentieth century, the Supreme Court rarely got in the way of the exercise of executive power in wartime, . . . [but] since September 11, 2001, the U.S. Supreme Court has refused to rubber-stamp Executive Branch security programs in the "war" against global terrorism. . . . [T]he Court has also declined to take steps that bind the Executive and Congress all that tightly in their exercise of foreign affairs powers.⁴³

Nonetheless, the Court has chosen not to fully bind the remaining branches' exercise of foreign affairs.⁴⁴ Despite further developments in the due process rights available to detainees, Congress continues to limit the fruition of these rights via subsequent legislation⁴⁵ that mandates the detention of alien enemy combatants.⁴⁶ The overall scope and purpose of detention, pursuant to both the AUMF and PATRIOT Act, should be to detain enemy combatants who are responsible for attacks previously conducted against the United States and those

⁴⁰ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 (2006) ("Contrary to the Government's assertion, however, even Quirin did not view the authorization as a sweeping mandate for the President to invoke military commissions when he deems them necessary."); *id.* at 594 ("The Government would have us dispense with the inquiry that the Quirin Court undertook and find in either the AUMF or the DTA specific, overriding authorization for the very commission that has been convened to try Hamdan. Neither of these congressional Acts, however, expands the President's authority to convene military commissions. First, while we assume that the AUMF activated the President's war powers, "and that those powers include the authority to convene military commissions in appropriate circumstances, there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ."). See also *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004); see generally *Ex Parte Quirin*, 317 U.S. 1 (1942); see *Yamashita v. Styer*, 327 U.S. 1, 11 (1946).

⁴¹ Chesney, *supra* note 39, at 630.

⁴² See Geneva Convention Relative to the Treatment of Prisoners of War art., 3 Aug 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, Article 118.

⁴³ John Fabian Witt, *Law and War in American History*, AMERICAN HISTORICAL REVIEW, 777 (2010).

⁴⁴ *Id.* at 778 (citing *Rasul*, 542 U.S. at 466; *Hamdi*, 542 U.S. at 507; *Hamdan* 548 U.S. at 557; *Boumediene v. Bush*, 553 U.S. 723, 801 (2008) (Roberts, C. J. dissenting) ("The modest practical results of the majority's ambitious opinion.")).

⁴⁵ See NDAA, *supra* note 5, at §§ 1021-22.

⁴⁶ *Id.* at §§ 1562-65.

who are suspected to be mounting future attacks as well. Detaining aliens who do not fall into either of those categories exemplifies the slippery slope stance that both the Bush and Obama Administrations have maintained. One can argue that preventive detention is a useful tool for insuring the risks posed by suspected terrorists can be negated.⁴⁷ Furthermore, many scholars contend that a utilitarian framework justifies preventive detention.⁴⁸ However, as this article will argue that preventive detention may not serve a utilitarian framework better than criminalizing terrorist acts and using conventional criminal justice methods of adjudication to do so.

2. *The Politicization of Terrorism*

Removing “politics from terrorist acts for purposes of jurisdiction and extradition” may enable the continual development of international legal norms and treatises and serve as a maximum benefit for future international gains.⁴⁹ While this note does not focus on the living conditions or interrogation techniques utilized by either the military or the intelligence community, it is essential in understanding the Guantanamo narrative. For example, a study by the Seton Hall Law School Center for Policy Research has shown that most of the individuals incarcerated at Guantanamo were not captured by American forces, but were instead acquired through the use of ‘bounty hunters,’ and then subsequently were transferred to Guantanamo.⁵⁰ Furthermore, the study analyzed declassified information from the Department of Defense (DoD) and concluded that a majority of these detainees were ‘low-level enemy combatants.’⁵¹ This is in stark contrast to the Bush administration’s claims that the United States was incarcerating known terrorists and dangerous enemy combatants. The significance of authority to use force in detaining unlawful enemy combatants is inherently derived from the AUMF, which is in danger of losing its power if hostilities end in the near future.⁵² The purposes of detention and the trial by military commission are also delineated in the ‘Detention, Treatment, and Trial of Certain Non-Citizens in the

⁴⁷ See Alec Walen, *A Unified Theory of Detention, With Application to Preventive Detention for Suspected Terrorists*, 70 MD. L. REV. 871, 891 (2011).

⁴⁸ *Id.* (citing Benjamin Wittes, *Law and the Long War: The Future of Justice in the Age of Terror*, London: Penguin Books (2009); David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 698 (2009); Michael Louis Corrado, *Sex Offenders, Unlawful Combatants, and Preventive Detention*, 84 N.C. L. REV. 77, 105 (2005)).

⁴⁹ Zdzislaw Galicki, *International Law and Terrorism*, 48 AM. BEHAVIORAL SCIENTIST 743, 749 (2005) available at <http://www.sagepub.com/martin3study/articles/Galicki.pdf>.

⁵⁰ See Scott Horton, *Law School Study Finds Evidence Of Cover-Up After Three Alleged Suicides At Guantanamo in 2006*, HUFFINGTON POST (Dec. 7, 2009), available at http://www.huffingtonpost.com/2009/12/07/law-school-study-finds-ev_n_382085.html.

⁵¹ *Id.*

⁵² See Kylie Alexandra, *Battlefield Earth: The Danger of Executive Overreach in the Global Fight Against Terrorism and Why Congress Must Act*, 82 GEO. WASH. L. REV. 471, 475-476 (2014); see also Barack Obama, President of the United States, *State of the Union Address* (Jan. 28, 2014), available at http://www.washingtonpost.com/politics/transcript-state-of-the-union-address-2015-remarks-as-prepared-for-delivery/2015/01/20/fd803c4c-a0ef-11e4-b146-577832eafcb4_story.html.

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War Against Terrorism', or Mil. Order 2001.⁵³ Given these purposes of detention, it is curious as to what will happen to the remaining detainees if hostilities do indeed end. If this becomes reality, the Obama and future administrations, will have to combat the limited authority that the Supreme Court in *Hamdi v. Rumsfeld* placed on the AUMF's ability to 'detain enemy combatants' once the hostilities end.⁵⁴ Furthermore, prisoners are not to be detained once hostilities have ended, per the Geneva Conventions,⁵⁵ "unless they are being lawfully prosecuted or have been lawfully convicted of crimes and are serving sentences."⁵⁶

To better understand the juncture between incorporating international law into the criminal justice mode, we need to look at the instigating legislation that began the practice of indefinite detention in the 'War on Terror'. Section two of the AUMF states:

The President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.⁵⁷

The National Defense Authorization Act for Fiscal Year 2012 indicates that there may be evidence that there has been an evolution of scope concerning who falls into the indefinite detention pit:

A person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.⁵⁸

While the distinction between alien and non-alien combatant determinations has come under scrutiny, the Armed Forces are not required to take U.S. citizens into military custody pending a determination.⁵⁹ Furthermore, in an appeal to the Second Circuit, a group of journalists and human rights activists maintained that

⁵³ Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833- 57,835 (Nov. 16, 2001). *But cf.* Tucker Culbertson, *The Constitution, the Camps, and the Humanitarian Fifth Amendment*, 62 U. MIAMI L. REV. 307, 312-313 (2004).

⁵⁴ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 507 (2004).

⁵⁵ See Geneva Convention Relative to the Treatment of Prisoners of War art. 3, *supra* note 42.

⁵⁶ Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained without Trial*, 44 HARV. INT'L L. J. 503, 510-11 (2003) (citing *id.* arts. 118, 85, 99, 119, 129; 6 U.S.T., at 3384, 3392, 3406, 3418).

⁵⁷ AUMF, *supra* note 9, at § 2(a).

⁵⁸ See NDAA, *supra* note 5, at § 1021(b)(2).

⁵⁹ *Id.* at § 1022(b)(1) ("The requirement to detain a person in military custody under this section does not extend to citizens of the United States. (2) . . . The requirement to detain a person in military custody under this section does not extend to a lawful resident alien of the United States on the basis of conduct taking place within the United States, except to the extent permitted by the Constitution of the United States.").

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the Government increased the scope of the original AUMF by positing potential dangers of indefinite detention on both U.S. citizens and lawful resident aliens. The court maintained:

While it is true that Section 1021(e) does not foreclose the possibility that previously “existing law” may permit the detention of American citizens in some circumstances—a possibility that *Hamdi* clearly envisioned in any event—Section 1021 cannot itself be challenged as unconstitutional by citizens on the grounds advanced by plaintiffs because as to them it neither adds to nor subtracts from whatever authority would have existed in its absence.⁶⁰

The court concluded that existing law regarding the detainment of citizens was not enumerated in the NDAA and that the plaintiffs essentially lacked standing to challenge Section 1021 in Article III courts.⁶¹ Furthermore, the court declined to answer whether the laws of war have any bearing on the indefinite detention question under Section 1021.⁶² This ruling vacated an earlier ruling, which placed a temporary injunction on Section 1021 validity.⁶³ In *Al-Bihani*, the Court of Appeals for the D.C. Circuit held that, “there is no indication . . . that Congress intended the international laws of war to act as extra-textual limiting principles for the President’s war powers under the AUMF. [They] as a whole have not been implemented domestically by Congress and are therefore not a source of authority for U.S. courts.”⁶⁴ While these arguments delineate alleged shifts in scope, the determination of how international law as a whole being incorporated into domestic law will be discussed later.

C. International vs. Non-International Armed Conflict

The problem of “indefinite detention may be limited to the prisoners at Guantánamo, at least during an Obama administration . . . including many whom the government concedes are not terrorists, complete a full decade of detention without charge. Current practices provide precedent for a continued system of preven-

⁶⁰ *Hedges v. Obama*, 724 F.3d 170, 193 (2d Cir. 2013).

⁶¹ *Id.* at 204-5 (holding Plaintiffs’ “do not have Article III standing to challenge the statute because Section 1021 simply says nothing about the government’s authority to detain citizens.”).

⁶² *See Hedges*, 724 F.3d at 199 (“In these circumstances, we are faced with a somewhat peculiar situation. The government has invited us to resolve standing in this case by codifying, as a matter of law, the meaningful limits it has placed on itself in its interpretation of Section 1021. We decline the government’s invitation to do so. Thus, we express no view regarding whether the laws of war inform and limit detention authority under Section 1021(b)(2) or whether such principles would foreclose the detention of individuals like Jonsdottir and Wargalla. This issue presents important questions about the scope of the government’s detention authority under the AUMF, and we are wary of allowing a pre-enforcement standing inquiry to become the vehicle by which a court addresses these matters unless it is necessary. Because we conclude that standing is absent in any event, we will assume without deciding that Section 1021(b)(2) covers Jonsdottir and Wargalla in light of their stated activities.”).

⁶³ *See Hedges v. Obama*, 890 F. Supp. 2d 424 (S.D.N.Y. 2012).

⁶⁴ *Al-Bihani v. Obama*, 590 F.3d 866, 871 (D.C. Cir. 2010).

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tive detention well into the future.”⁶⁵ Nonetheless, it is imperative that states party to an armed conflict release those detained *if* at some point during the hostilities, the reasons necessitating the detention of said persons no longer exists.⁶⁶ However, this does not mean that “such persons are combatants only for such time as they take part in the hostilities, but merely that their actual participation is what makes them combatants, and not their membership in a certain organization.”⁶⁷ The Supreme Court in *Hamdi* accepted that the indefinite detention of Taliban members was a ‘fundamental incident’ of war in lieu of POW status.⁶⁸ The Conventions provide a model outlining who qualifies as a POW in times of an armed conflict.⁶⁹ POW status only occurs in warring states, which is not the case in the global War on Terror. Irrespective of the loaded terminology employed by the U.S. Government, the War on Terror not only is war with no end, but is also a war without territorial definition.

Nonetheless, “membership in a specific group is a necessary condition for POW status in five out of six scenarios, and for the most part, it is a sufficient condition as well. Associational status in that sense is the primary triggering condition for military detention during international armed conflict.”⁷⁰

While an international armed conflict consists of two ‘High Contracting Parties,’⁷¹ the non-international armed conflict dubbed the ‘War on Terror’ transcends the nation-state; analogously rectified as a Manichean fight between good and evil that should not be constricted to questions of sovereignty. However ironical the task and volition of the executive, it is rather to their benefit that we are not signatories to Protocol II of the Conventions, given that this would impede our ability to viably detain unprivileged belligerents.

III. Preventative Action and Right to Self-Defense within International Law

An important component of understanding why terrorism is currently being treated as ‘war’ and not crime revolves around the threat it poses to the state, not just individual persons. The indiscriminate nature of coercive force may be the differentiating factor in determining whether preventative action is justified. Before we address preventative action within the criminal justice system, it is essential to examine preventative action within international law.

⁶⁵ Janet Cooper Alexander, *The Law-Free Zone and Back Again*, 2013 U. ILL. L. REV. 551, 621 (2013).

⁶⁶ See Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 42, at art. 3.

⁶⁷ N. Rodley, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW*, 189 (2nd ed., 1999); Col. K.W. Watkin, *Combatants, Unprivileged Belligerents and Conflicts in the 21st Century*. HPCR Policy Brief. Jan. 2003, at 14.

⁶⁸ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004).

⁶⁹ See Geneva Convention Relative to the Treatment of Prisoners of War *supra* note 42, at art. 3.

⁷⁰ See Chesney and Goldsmith, *supra* note 5 at 1085.

⁷¹ See Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 42, at art. 2.

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A. 'Armed Attack' and the 'Military Necessity' doctrine.

1. *Self-Defense vs. Aggression*

Many criticize the United States' response to the attacks of 9/11. While there was no international consensus on the 'laws of war' between state and non-state actors, the United States' approach was seemingly justified, but certainly not legal. The ambiguities inherent in this crisis stem from the discourse on international humanitarian law, or the 'laws of war.' Nonetheless, many of the Conventions codified since the end of the Second World War did not clearly give the United States the jurisdiction to proceed with the 'imminent right of self-defense' in combating those responsible months later. While both Congress and the President retain their innate powers in pursuing these aims, they were not internationally necessary. No nation, particularly members of the UN, would deny 9/11 was indeed an 'armed attack,'⁷² which is a necessary predicate for the continuance of American's right to self-defense. Article 51 of the UN Charter states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.⁷³

In this, we see ambiguities with regards to definitional interpretation of 'armed attack' and 'peace.' In its rudimentary form, these words mean exactly what they encompass. However, under the growing paradigm of international law, which draws primarily on international customs, there remains what necessarily constitutes an 'armed attack' and what constitutes a maleficent disruption of 'peace.' As previously mentioned, there seems to be little conflict regarding the applicability of an 'armed conflict' applying to 9/11, despite its definitional entanglement.

2. *Necessary and Imminence Standards*

Regarding the legality of self-defense, customary international law affirms what Secretary of State Daniel Webster concluded regarding the infamous *Caroline* case. This case involved British, Canadian and American parties. Settlers within the Upper Province of Canada were rebelling against the British government and in doing so, had received aid from American supporters by way of the *Caroline*. The British forces responded by encroaching into U.S. territory at night

⁷² Christopher Greenwood, *International Law and the 'war against terrorism,'* 78, INTERNATIONAL AFFAIRS 301-317 (2002).

⁷³ U.N. Charter art. 51 para. 1.

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and destroying the ship and its supplies in an effort to circumvent an attack. The letter to the British ambassador maintained that in that showing a right to self-defense, a [state] must show:

necessity of self-defense was instant, overwhelming, leaving no choice of means, and no moment of deliberation . . . , and that the British force, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it.⁷⁴

The *Caroline* case has been lauded as the cornerstone for demonstrating the specific and necessary requirements that need to be evident *before* a preemptive attack of self-defense. It also shows that these matters can be viewed within the paradigm of the War on Terror like the *Caroline* case, as the ‘necessary’ and imminent nature of the situation originated from non-state actors. Furthermore, states may not have to show that the threat came from another sovereign nation.⁷⁵ However, the judiciary has shown that “It is the law of self-defense among nations. Like self-defense, it is a use of elemental force sanctioned by common law, initiated solely by stark necessity and vanishing when the necessity no longer exists.”⁷⁶ In order for action to constitute a lawful avenue of self-defense, “any use of force in self-defense under the U.N. Charter requires that it meet the requirements of military necessity, distinctions between civilians and military targets, proportionality, and avoidance of unnecessary suffering.”⁷⁷ To further this point, when one considers the use of targeted killings in the War on Terror, “. . . [u]nder International Humanitarian Law, use of force in self-defense by a victim state must conform to the requirements of imminence and proportionality—and hence military necessity—in order to be just.”⁷⁸

B. Just War Tradition

1. Development of International Law

The principles underlying the *Caroline* case are embedded in centuries of international law development within the Just War Tradition. For one, there must

⁷⁴ Webster, Daniel, Letter to Henry Stephen Fox, in *The Papers of Daniel Webster: Diplomatic Papers, 1841-43* (1983). Excerpt available at http://en.wikipedia.org/wiki/Caroline_test.

⁷⁵ Greenwood, *supra* note 72, at 308.

⁷⁶ *U.S. vs. Minoru Yasui*, 48 F. Supp. 40, 51-52 (D.C. Cir. 1942) (citing *Ex Parte Milligan* 71 U.S. 2 (1866)).

⁷⁷ David Weissbrodt, *Cyber-Conflict, Cyber-Crime, and Cyber-Espionage*, 22 MINN. J. INT’L L. 347, 386 (2013); see also, Alexander Melnitzky, *Defending America Against Cyber Espionage Through the Use of Active Defenses*, 20 CARDOZO J. INT’L AND COMP. L. 537, 560-61 (2012); David E. Graham, *Cyber Threats and the Law of War*, 4 J. NAT’L SECURITY L. & POL’Y 87, 98 (2010); International and Operational Law Dept., Judge Advocate General’s Legal Center and School, *Operational Law Handbook*, at 12-14 (2008).

⁷⁸ Melanie J. Foreman, *When Targeted Killing is Not Permissible: An Evaluation of Targeted Killing Under the Laws of War and Morality*, 15 U. PA. J. CONST. L. 921, 936 (2013); see generally Helen Frowe, *THE ETHICS OF WAR AND PEACE: AN INTRODUCTION* 103 (2011).

be an action that necessitates military action (just cause); the actions must be proportionate to the warranted armed attack; the intentions of the military is declared prior to actual action; the declaration came from the sovereign; that it is the last resort, and that it has a reasonable chance of the success in order for it to be a justifiable act of war.⁷⁹ While several arguments can be made regarding whether or not the Just War paradigm applies in state-non-state conflicts, and whether or not the War on Terror constitutes a war that has a 'reasonable chance of success,' it is nonetheless imperative to trace some of the historical conditions that exemplify the contemporary state of international law within this context.

Following World War II, the prosecution of Nazi Officers and officials were an example of 'universal moral truths' transcending national obligations.⁸⁰ The trials created principles concerning conduct in war and both the strict and vicarious liabilities of those both subordinate and super-ordinate actions, respectively. Similar to much of the legislation after 9/11, claims that the trials were *ex post facto* were not persuasive. Even if individuals being tried for both crimes against humanity and war crimes, both of which were new legal definitions under the auspices of international humanitarian law and the laws of war, hadn't violated laws, which they had.⁸¹ the International Military Tribunal (IMT) chose to bring existing law to bear by enforcing both international law and moral truths. The convergence of natural justice and international humanitarian law was set in motion by making the implicit law explicitly applied.⁸² This played a part in making the laws of war less 'fuzzy' due to the newly systematic enforcement concerning the conduct of war.⁸³

The War on Terror marks the first global war that transcends both the nation-state and the state as the sole actor in the theatre of war in history. While terrorism is not a new condition, the legal teeth utilized in its submission face a penumbra of issues. Nonetheless, while Geneva Conventions III and IV do not explicitly authorize the use of force against non-state actors within the current context, the additional Protocols (I-III) do cover many of the legal issues that are evident in the enemy combatant-military detention debate. Examining the foundation of the legality of our concentrated efforts is paramount in understanding and determining both the legality and viability of indefinite detention in combating terrorism.

⁷⁹ See PAUL CHRISTOPHER, *THE ETHICS OF WAR AND PEACE: AN INTRODUCTION TO LEGAL AND MORAL ISSUES* 82-3 (Pearson-Prentice Hall 2004) (concerning conditions of Just War in alignment with Hugo Grotius).

⁸⁰ *Id.* at 135.

⁸¹ See generally Hague Rules of 1907 available at <https://www.icrc.org/ihl/INTRO/195>, Treaty of Versailles available at http://avalon.law.yale.edu/subject_menus/versailles_menu.asp, Kellogg-Briand Pact available at <http://www.yale.edu/lawweb/avalon/imt/kbpact.htm>, and the Cocarno Pact available at http://avalon.law.yale.edu/20th_century/locarno_001.asp.

⁸² CHRISTOPHER, *supra* note 79, at 245.

⁸³ MALHAM D. WAKIN, *WAR, MORALITY AND THE MILITARY PROFESSION* 373-74 (Westview Press, 1986).

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Hugo Grotius has been deemed the father of international law,⁸⁴ namely through his work *The Law of War and Peace*. Even though this is not a philosophical analysis, it is imperative to briefly examine his main points that are relevant to indefinite detention as a response to 'preemptive' attacks by terrorists. His primary point relevant to this analysis was that wars are just if done with regards to self-defense or when a state has experienced injury at the hands of another.⁸⁵ Arguments using the aforementioned framework can be made for both. For one, the United States operates under the assumption that the hostilities against it will continue (irrespective of the aggressor), and that those hostilities necessitate self-defense. Also, the United States experienced injury at the hands of another, especially during the 9/11 attacks and the 'failed' attempt at the World Trade Center that occurred in 1993, both exhibited by foreign non-state actors. This necessitated a response. In *Ex Parte Milligan*, the Court maintains that:

An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.⁸⁶

2. *Just Response in Just War*

A just response is one where the executive determines the scope and conditions of warfare with Congressional approval.⁸⁷ Nonetheless, war and its character should never constitute more than what is necessary.⁸⁸ Furthermore, the Court also ruled that the establishment and prosecution of unlawful belligerents is warranted and constitutional in times of war.⁸⁹ This coincides with the legal necessity that validates our attempt to not only condemn and punish unlawful hostilities, whereupon, much has been directly at noncombatants outside the thea-

⁸⁴ See CHRISTOPHER, *supra* note 79.

⁸⁵ See generally HUGO GROTIUS, *ON THE LAW OF WAR AND PEACE* (Kessinger Publishing, LLC, 2004) available at <http://www.constitution.org/gro/djbp.htm>.

⁸⁶ *Ex Parte Quirin*, 317 U.S. 1, 28 (1942) ("Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it.").

⁸⁷ See *Hirabayashi v. U.S.*, 320 U.S. 81, 93 (1943) ("Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it.").

⁸⁸ See *Raymond v. Thomas* 91 U.S. 712, 716 (1875) ("The exercise of military power, where the rights of citizens are concerned, should never be pushed beyond what the exigency requires.").

⁸⁹ *Quirin*, 317 U.S. at 31 ("Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.").

tre of war, but to also see to that those we are combating are afforded attenuated protections.⁹⁰

Nonetheless, many could argue that the U.S. toed the line of the incursion being a legitimate response, within the scope of self-defense, and it being a reprisal. A reprisal does not fall strictly within the bounds of the Just War Tradition. While states have a legitimate right to self-defense, outlined in the UN Charter, they are not justified in responding with actions that qualifies as a reprisal. Reprisals are only legitimate when they follow the traditionally lawful form of self-defense. Legality begins to blur when actions of a state begin to target citizens and property of other states or specific groups within states. Reprisals against prisoners of war have been deemed unlawful by the Conventions.⁹¹ General Telford Taylor, primary prosecutor during the Nuremberg Trials maintains that "reprisals . . . are not much used today, partly because they are generally ineffective, and partly because the resort to crime in order to reform the criminal is an unappetizing method."⁹² It is, however, difficult to distinguish the legal separation of 'self-defense' and 'reprisal,' seeing as the former is a lawful form of the latter, and the primary precedent within the international legal community is the Nuremberg trials themselves. The trials resulted in the seven primary principles that outline what constitute war crimes and crimes against humanity.

While this piece is not about the Just War Tradition, it is essential to understand the principles inherent in customary international law; the origination of much of the precedent on the laws of war, treatment of POW, and *jus in bello* concerning both combatants and non-combatants. The primary objective of lawful reprisals has been to force the enemy back into accordance with the law; thus ending violations of the laws of war.⁹³ This last concept is relative to the War on Terror because our attempts at curbing terrorism fall within the constructs of a lawful reprisal with regards to lawful self-defense. Our attempts, however, begin

⁹⁰ *In re Yamashita*, 327 U.S. 1, 46-47 (1946) ("Punitive action taken now can be effective only for the next war, for purposes of military security. And enemy aliens, including belligerents, need the attenuated protections our system extends to them more now than before hostilities ceased Ample power there is to punish them or others for crimes, whether under the laws of war during its course or later during occupation. There can be no question of that. The only question is how it shall be done, consistently with universal constitutional commands or outside their restricting effects.").

⁹¹ Geneva Convention Relative to the Treatment of Prisoners War, art. 2, Jul. 27, 1929, 6 U.S.T. 3316, 75 U.N.T.S., 132 ("Prisoners of war are in the power of the hostile Power, but not of the individuals or corps who have captured them. They must at all times be humanely treated and protected, particularly against acts of violence, insults and public curiosity. Measures of reprisal against them are prohibited."). See also, Convention III ("Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest. Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity. Measures of reprisal against prisoners of war are prohibited.").

⁹² See CHRISTOPHER, *supra* note 79, at 175 (citing TELFORD TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 54 (Quadrangle Books, 1970)).

⁹³ See CHRISTOPHER, *supra* note 79, at 171 ("In the parlance of contemporary international law, reprisals are acts that would normally be violations of the laws of war but that are exceptionally permitted as a means of compelling a lawless enemy back into conformity with the law.").

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to get muddled once we try to decipher the intent. The surface intent of the War on Terror and correlated legislation such as AUMF and the MCA screams for the defeat of evil and upholding of established interstate order. Nonetheless, the means by which we have conducted ourselves on many of the fronts within the war can be criticized for reasons such as: 1) failing to abide by customary international law (irrespective of the fact that we *are not* signatories to Protocols I or II), 2) failure to follow procedural and substantive due process regimes, 3) failing to adequately construct a system that includes other state actors in the adjudication of unlawful belligerents, and 4) undermining the advancement of international law.

IV. Divergence into a Criminal Justice Model

The utilization of the American criminal justice system may serve as a more fundamental and efficient means of adjudicating terrorists. This avenue may lead to increased legitimacy of government, greater transparency, strengthening of the rule of law, more consistent and equitable legal provisions and remedies, and decreases in motivated offenders. Through the ‘criminalization’ of terrorism, we can depart from the debate between whether terrorism is a criminal act, or an act of war.⁹⁴ Some language used by the courts would suggest that in many respects, it is ‘war.’⁹⁵ The section below delineates many of the current issues we face in adjudicating terrorism, and how, shifting to the criminal justice system will increase the efficacy of terrorism prevention and dissolution.

A. Sentencing and Detention Issues

Despite the prosecution of civilian terrorists within the United States, the introduction of a more ‘global’ prosecution has yet to enter into fruition. The aforementioned discussions about legislative history, federal precedent, military law, and the moral and ethical issues concerning the *jus in bello* doctrine all exhibit how the United States developed and responded to the War on Terror. What more can be done to ensure that we are not perpetuating a cyclical conundrum? Some argue that indefinite detention serves our political objectives of reducing hostilities at home and abroad, while others maintain that it reduces terrorist recidivism. This is illogical because in order for there to be recidivism, there has to be a sentence levied. Nonetheless, there has not been much guidance under the current laws and U.S. sentencing guidelines as to *how* we might properly adjudicate ‘unlawful enemy combatants.’⁹⁶

⁹⁴ J. Harvey Wilkinson, *In Defense of American Criminal Justice*, 67 *VAND. L. REV.* 1099, 1171-72 (2014) (explaining the difficulty in choosing what side terrorism falls under “This is no place to explore the complicated question of whether alleged terrorism is more aptly regarded as a criminal offense or as an act of war.”).

⁹⁵ See *United States v. Bin Laden*, 92 F. Supp. 2d 225, 230 (S.D.N.Y. 2000) (holding that Usama Bin Laden had declared a ‘jihad’, meaning holy war, against the United States).

⁹⁶ Christina P. Skinner, *Punishing Crimes of Terror in Article III Courts*, 31 *YALE L. & POL’Y REV.* 309, 373-374 (2013).

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If we are to create a sentencing framework for terrorist subjects, we need to explicate a viable model that transcends punishing only actions and determining 'combatant status' abroad. For example, in an article within the *Yale Law and Policy Review* on sentencing guidelines, the author states:

Neither the Sentencing Guidelines nor the terrorism statutes employ military necessity reasoning in setting out the maximum or minimum penalties proscribed for crimes of international terrorism. Some of the federal terrorism statutes provide for maximum terms of life in prison, but again, only in limited circumstances, such as where a death results. Otherwise, the maximum terms of imprisonments are less—the material support statutes, for instance, carry only fifteen-year maximums.⁹⁷

Furthermore, in construing a more effective mode of adjudication, one that relies *not* solely on military discretion, the Government needs to incorporate, at a minimum, the same procedural and substantive due process rights and evidentiary process applications that our current criminal penal model employs. Furthermore, “[by] leaving the rules of evidence, burdens of proof, and related procedural safeguards associated with POW and security internee decisions to the discretion of the detaining power (armed forces) . . . [the United States] place[s] little pressure on militaries to engage in law enforcement-style methods of collecting and preserving evidence.”⁹⁸ While this comports with intuitive measures of security, the lack of uniform guiding evidentiary and ‘procedural’ protections during investigative- and detention-related components of the ‘laws of war’ or IHL is problematic.⁹⁹

The aforementioned attempts to incorporate the laws of war into detention policy¹⁰⁰ have proved extremely problematic. Nonetheless, courts have entertained avenues for how citizens and lawful resident aliens may challenge indefi-

⁹⁷ 18 U.S.C. § 2332a-b, 2332d, 2339A-B, 2339D (2012). See also *Suppression of the Financing of Terrorism Convention Implementation Act of 2002*, Pub. L. No. 107-197, §§ 202-203, 116 Stat. 724, 724-28; See generally *Bin Laden*, 93 F. Supp. 2d at 484; and *United States v. Rcid*, 206 F. Supp. 2d 132 (D. Mass. 2002) giving examples of federal cases pertaining to 2332b (C)(1)). See also *Skinner*, *supra* note 91, at 340-352.

⁹⁸ Chesney & Goldsmith, *supra* note 5, at 562.

⁹⁹ See 10 U.S.C. § 949(a); see also Andy Worthington, *Obama Brings Guantanamo and Rendition (Not Geneva Conventions) to Bagram*, THE WORLD CAN'T WAIT (April 9, 2009) <http://www.worldcantwait.net/index.php/96-voices-of-resistance/andy-worthington/5849-obama-brings-guantanamo-and-rendition-not-geneva-conventions-to-bagram>; see also, Lindsey Goldwert, *Gitmo Panel Slams Hearing Process*, ASSOCIATED PRESS (Jun. 23 2007) <http://www.cbsnews.com/news/gitmo-panclist-slams-hearing-process/>; cf. Andy Worthington, *The Guantanamo Whistleblower, A Libyan Shopkeeper, Some Chinese Muslims, and a Desperate Government*, HUFFINGTON POST (Jul. 26 2007) http://www.huffingtonpost.com/andy-worthington/the-guantanamo-whistleblo_b_57857.html; cf. 10 U.S.C. § 948r(b), § 948 r(c). Garcia et al., *supra* note 13, at 15 (concerning the prosecution of Guantanamo Detainees in federal criminal courts, quoting “the use of any such evidence in the criminal trial of a detainee would likely be subject to legal challenge under the Fifth Amendment on the ground that the statement was gained through undue coercion. As a general rule, statements made in response to coercive interrogation methods are inadmissible in U.S. courts.”).

¹⁰⁰ See *supra* notes 48-55.

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nite detention policies via Supreme Court precedent.¹⁰¹ Furthermore, a problem that could persist is the stigma that attaches to individuals who are indefinitely detained. This is more than evident in conventional criminal justice. The plurality in *Hamdi* examined some of the varying reasons for detention in war:

The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by “universal agreement and practice,” are “important incident[s] of war.” (citation omitted). The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again. Naqvi, *Doubtful Prisoner-of-War Status*, 84 *Int’l Rev. Red Cross* 571, 572 (2002) (“[C]aptivity in war is ‘neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war.’” (citation omitted) (“The time has long passed when ‘no quarter’ was the rule on the battlefield It is now recognized that ‘Captivity is neither a punishment nor an act of vengeance,’ but ‘merely a temporary detention which is devoid of all penal character.’ . . . ‘A prisoner of war is no convict; his imprisonment is a simple war measure.’”) (citation omitted) (“The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on must be removed as completely as practicable from the front, treated humanely and in time exchanged, repatriated or otherwise released.” . . .).¹⁰²

The debate between processing terrorists through the criminal justice system or military tribunals is ‘contentious.’¹⁰³ One scholar furthers this in stating that:

Characterizing terrorism as a military issue, rather than a law enforcement problem, has the inexorable consequence of expanding the scope of executive discretion, unfettered from the judicial oversight inherent in the criminal justice system and the need to prove guilt beyond a reasonable doubt. For reasons grounded in separation of powers and institutional competency, courts are apt to be more deferential to the President when he acts as Commander-in-Chief, than when he acts as a prosecutor.¹⁰⁴

¹⁰¹ *Hedges*, *supra* note 60, at 200 (“The Supreme Court’s recognition that a pre-enforcement challenge is justiciable when enforcement is a ‘realistic danger’ when there is a “credible threat of prosecution, when a plaintiff has an “actual and well-founded fear.”).

¹⁰² *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004).

¹⁰³ Charlie Savage, *G.O.P. Takes Hard Line in Pushing Military Trials for All Terrorism Suspects*, *N.Y. TIMES*, Oct. 28, 2011, at A4, available at http://www.nytimes.com/2011/10/28/us/politics/replicans-push-military-trials-for-terrorism-suspects.html?_r=0.

¹⁰⁴ Norman C. Bay, *Executive Power and the War on Terror*, 83 *DENV. U. L. REV.* 335, 369 (2005).

B. Macro-Explanations

1. *State Legitimacy*

One of the many predictors of terrorism is the perception of state legitimacy, or a state's ability to retain both citizen and non-citizen trust in state institutions and governance. An argument that the United States poses significant hegemonic predispositions towards 'inferior' nations or groups, and the 'War on Terror' is really the war of ideologies.¹⁰⁵ This leaves the question: where do terrorist's motives stem from?

Within the macro context, there are several explanations. The legitimacy of governments serves as a fundamental predictor of many forms of domestic and international terrorism.¹⁰⁶ In a survey of citizens within Muslim nations, researchers discovered that citizens were less supportive of terrorist attacks against Americans when they had higher perceptions of U.S. legitimacy and culture, and were also less supportive of domestic terrorism within their own countries when perceptions of state legitimacy were higher.¹⁰⁷ Researchers also have found that weak democratic societies and transitioning societies experience higher terrorism rates.¹⁰⁸ Other research supports the idea that terrorism occurs more often in weak or failed states.¹⁰⁹

Another factor is religious fanaticism. Juergensmeyer maintains that terrorism is a form of symbolic terrorism rather than strategic or anti-western platforms.¹¹⁰ Stern contends that both alienation and separation from society create increases in religious forms of terrorism.¹¹¹ Counter-intuitively, some refute that suicide bombers commit acts of terrorism as modes of religious sentiment and creed.¹¹²

Many researchers maintain that focusing on "strategies aimed at decreasing the benefits of terrorism through improving the legitimacy of government, solving widespread grievances that produce strain, or attending to situational features

¹⁰⁵ Bruce Hoffman, *Rethinking Terrorism and Counterterrorism Since 9/11*, 25 STUDIES IN CONFLICT AND TERRORISM, 303, 303-16 (2005).

¹⁰⁶ Gary LaFree & Gary Ackerman, *The Empirical Study of Terrorism: Social and Legal Research*, 5 THE ANNUAL REVIEW OF LAW AND SCIENCE 347, 347-374 (Dec. 2009); Gary LaFree, & Nancy A. Morris, *Does Legitimacy Matter? Attitudes toward Anti-American Violence in Egypt, Morocco, and Indonesia*, 58 J. RES. CRIME & DELINQUENCY. 689, 689-719 (Sept. 10 2012). See generally Martha Crenshaw, *Terrorism, Legitimacy, and Power: Consequences of Political Violence*, WESLEYAN UNIV. PRESS (1983).

¹⁰⁷ See LaFree & Morris, *supra* note 106.

¹⁰⁸ See Krisztina Kis-Katos et al., *On the Origin of Domestic and International Terrorism*, 28 EUROPEAN JOURNAL OF POLITICAL ECONOMY S17, S17-S36 (2011) (claiming that experiences of instability-domestic conflict, anarchy and regime transitions-increase likelihood of terror originating from that nation).

¹⁰⁹ See LaFree et al, *Global Terrorism And Failed States*, in PEACE AND CONFLICT 39 (JJ Hewitt, J Wilkenfeld, TR Gurr, ed., 2008); see also Lafree and Ackerman, *supra* note 107, at 363 ("There is also evidence that democratization exhibits a curvilinear relationship with terrorism—the highest rates of terrorist attacks are in countries that are in democratic transition.").

¹¹⁰ MARK JUERGENSMEYER, *TERROR IN THE MIND OF GOD: THE GLOBAL RISE OF RELIGIOUS VIOLENCE* (2003).

¹¹¹ See also JESSICA STERN, *TERROR IN THE NAME OF GOD: WHY RELIGIOUS MILITANTS KILL* (2003).

¹¹² RA PAPE, *DYING TO WIN* (2005).

that increase the costs of terrorism might be more effective.”¹¹³ Nonetheless, significant reviews of literature exist to exemplify the influence that state institutions and legitimacy have on terrorism fruition.¹¹⁴ It is not surprising that “perceived legitimacy [is] especially important in predicting terrorism because, compared with most ordinary crime, terrorism is an especially public type of deviance.”¹¹⁵ LaFree also writes:

Legitimacy explanations assume that terrorism represents a struggle over who has the power to define terrorism. Thus, governments may have many reasons, not all just, for defining particular groups or individuals as terrorists. And as we have already seen, despite the abhorrent nature of terrorist violence, disagreement regarding its definition is more widespread and contentious than the classification of any other type of crime.¹¹⁶

2. *The Third War*

The ‘War on Terror’ marks the third assault on a form of deviance at the national level using the ‘war’ allegory to symbolize our nation’s unyielding attempt to stymie acts of terror.¹¹⁷ The first two assaults, the War on Crime, and the War on Drugs, are similar in entitlement but quite dissimilar in nature. The first two ‘wars’ focused on national pandemics of crime, but we know that terrorism is much more complex than either of those forms of deviance. For example, consider the following excerpt:

Compared with ordinary crime and drug crime, terrorism is far less common and is affected by much more than single extraordinary events like the September 11 attacks. Ordinary crime is to a large extent local; drug trafficking and terrorism are more likely to cross national borders. But while drug trafficking and terrorism can involve crossing national borders, the scope of border crossing is far greater for drug crimes than terrorism. And given the poor record of border security in stopping drug trafficking, the probability of success of border control for stopping the much less common problem of terrorism is correspondingly diminished.¹¹⁸

Our response, in collaboration with other nations, is a justified and sound response within the confines of international law. From a policy perspective, however, how do our means of adjudications fit within the model for combating

¹¹³ Gary LaFree & Laura Dugan, *Research on Terrorism and Countering Terrorism*, 38 CRIME AND JUST. 413, 416 (2009).

¹¹⁴ *Id.*; see also LaFree & Ackerman, *supra* note 106.

¹¹⁵ LaFree & Ackerman, *supra* note 106, at 361.

¹¹⁶ *Id.* at 362 (citing BRUCE HOFFMAN, *INSIDE TERRORISM* (Columbia Univ. Press 1998); SCHMID & JONGMAN, *POLITICAL TERRORISM: A NEW GUIDE TO ACTORS, AUTHORS, CONCEPTS, DATABASES, THEORIES AND LITERATURE* (North-Holland 1988)).

¹¹⁷ See Gary LaFree, *Criminology’s Third War*, 8 AMERICAN SOCIETY OF CRIMINOLOGY 431 (2009).

¹¹⁸ *Id.* at 441.

terrorism? In traditional approaches, incarceration's sole purpose to thwart and deter future crime by relying on both individual specific deterrence and collective general deterrence for various deviances. It seems indefinite detention may be undermining deterrence.¹¹⁹ While terrorism is not like any other crime and there is not a significant and widely-accepted theoretical foundations for its occurrence, how should we proceed in ensuring both swift and consistent punishment, while also adhering to international norms and law? This comports with the 'evolving standards of decency' doctrine.¹²⁰ While it seems that the overall strategic modality of national defense has shifted from deterrence toward both pre-emptive and preventive strategies, it is yet to be seen which of the three is most effective in the New World Order.¹²¹ The overall utility of discrete and irreconcilable incarceration methods, on the other hand, cannot amount to serve either *just desserts* or a retributivist model.

To an extent there will always be national security interests that must outweigh the balancing interest of a state being whole-heartedly forthcoming. This issue is no longer discrete and deserves to be reformed. Some scholars maintain that the lack of transparency is due to a shift away from the Freedom of Information Act, Federal Advisory Committee Act, and the Critical Infrastructure Information Act models and towards greater government secrecy.¹²²

3. Counter-productivity of Military Model

From a criminological perspective, if we are to deter terrorism, or even pre-empt it, we cannot do so behind a veil of secrecy. Soldiers often commit 'war crimes' due to their lack of knowledge on the classification of such and the promulgation of the just war doctrine would improve the efficacy of international law.¹²³ It cannot be argued that terrorists do not know their activities are illegal. However, due to the lack of celerity and inconsistent adjudication methods, terrorists are, to an extent, 'winning' the War on Terror. This is due in part by purveying our response at Guantanamo and other detention centers abroad as equally unjust and barbaric. In essence, our actions only further delegitimize our objectives in the War on Terror. Our policies may actually be counter-productive.¹²⁴

¹¹⁹ See generally Brad Roberts, *Deterrence and WMD Terrorism: Calibrating Its Potential Contributions to Risk Reduction* (Institute for Defense Analysis IDA Paper no. P-4231 2007); Pedahzur & Perliger, *The changing nature of suicide attacks: a social network perspective*, Soc. Forces 84:1983-2000 (2006).

¹²⁰ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

¹²¹ See Damon Coletta, *Unipolarity, Globalization and the War on Terror: Why Security Studies Should Refocus on Comparative Defense*, 9 INT'L STUD. REV. 385, 397 (2007).

¹²² Sidney A. Shapiro & Rena I Steinzor, *The People's Agent: Executive Branch Secrecy and Accountability in an Age of Terrorism*, 69-SUM LAW & CONTEMP. PROBS. 99, 113-14 (2005).

¹²³ See CHRISTOPHER, *supra* note 79, at 113-114.

¹²⁴ See LaFree & Dugan, *supra* note 113, at 424 ("According to Donohue, as a liberal democracy, the United States must appear to respond immediately to attacks against its citizens. However, others . . . claim that by aggressively countering terrorism, the United States and other countries may also be undermining their legitimacy and increasing popular support for those who use terrorist methods."). See generally Ethan Bueno de Mesquita & Eric S. Dickson, *The Propaganda of the Deed: Terrorism*,

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Many find the court systems encompass both “fair, impartial, and effective judicial systems and a non-arbitrary basis according to which laws and the legal system as a whole can be viewed as legitimate.”¹²⁵ Herein lies one of the issues with our use of indefinite detention regarding the War on Terror. First and foremost, if the United States creates the image that we are a ‘leading nation, one whose democratic ideals should be followed by other countries,’¹²⁶ we are undermining our own legitimacy by acting in both arbitrary and variant forms of adjudication, according to the aforementioned model. Secondly, if terrorism is to be curtailed by advancing a myriad of democratic norms while simultaneously increasing the level of perceived legitimacy of our nation, wouldn’t indefinite detention, or the threat of it, seemingly violate these notions?

Scholars call for reducing both opportunities for terrorists and the vulnerabilities of our security by decreasing the benefits of terrorism to the perpetrators through increasing the legitimacy of the government.¹²⁷ This is primarily due to the complex social, cultural and psychological elements of terrorism that are both hard to elucidate and target with a single policy.¹²⁸ Put another way, the policies and means of adjudicating terrorism may be the real enemy and only further perpetuating the ‘war.’¹²⁹ Researchers studying the relationship between physical integrity rights of terrorists and aggregate effects on both international and domestic terrorism have found that:

Governments that refrain from imprisoning citizens for political reasons and avoid engaging in disappearances and extrajudicial killings experience less domestic and international terrorism By a significant margin, improvement in respect for rights against political imprisonment and

Counterterrorism, and Mobilization, 51 AM. J. OF POL. SCI. 364 (2007); Kevin Siqueira, & Todd Sandler, *Terrorist Backlash, Terrorism Mitigation, and Policy Delegation*, 9 J. OF PUB. ECON. 91 (2007); Audrey K Cronin, *How al-Qaida Ends*, 31 INT’L SECURITY 7, (2007).

¹²⁵ Scung-Whan Choi, *Fighting Terrorism Through the Rule of Law?*, 54 J. OF CONFLICT RESOL. 940, 944 (2010).

¹²⁶ See Foreman, *supra* note 78, at 936.

¹²⁷ See LaFree & Dugan, *supra* note 113, at 416 (“It would be very beneficial for future research on terrorism to expand beyond traditional deterrence perspectives to include theories that incorporate legitimacy, strain, and situational variables. This strategy is supported by some recent research suggesting that strategies aimed at decreasing the benefits of terrorism through improving the legitimacy of government, solving widespread grievances that produce strain, or attending to situational features that increase the costs of terrorism might be more effective than strategies based only on increasing punishment. In general, despite the enormous resources devoted to countering terrorism, we have surprisingly little empirical information about which strategies are most effective. One conclusion seems certain: the divergent reactions by terrorists across differing contexts strongly suggest that selecting an appropriate counterterrorism strategy is not a task that should be taken lightly.”). See generally John Braithwaite, *Pre-empting Terrorism*, 17 CURRENT ISSUES IN CRIMINAL JUSTICE 96 (2005).

¹²⁸ See generally LaFree & Ackerman, *supra* note 106 (citing generally RONALD V. CLARKE, AND GRAEME R. NEWMAN, *OUTSMARTING THE TERRORISTS* (2006)).

¹²⁹ *Id.* (citing Clark McCauley, *Psychological Issues in Understanding Terrorism and the Response to Terrorism*, in *THE PSYCHOLOGY OF TERRORISM* (C. Stout ed., Praeger 2003); Clark McCauley, *Psychological Issues in Understanding Terrorism and the Response to Terrorism*, in *THE PSYCHOLOGY OF TERRORISM* (B. Bongar, L. M. Brown, L. E. Beutler, J. N. Breckenridge, and P. G. Zimbardo eds., Oxford University Press 2006)).

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extrajudicial killings yield the most dramatic reduction in terrorist attacks.¹³⁰

Put bluntly, “it must be recognized that terrorism is fundamentally a form of psychological warfare . . . designed to undermine confidence in government and leadership and to rent the fabric of trust that bonds society.”¹³¹ While responses to our counterterrorism policies can successfully curb both international and domestic terrorism, they can also do the reverse, as evident from some of the aforementioned empirical studies. In essence, we need to fight fire with fire, or as Jerald Post suggests, “counter psychological warfare with psychological warfare.”¹³² How is this best done? Destabilizing the network of terrorists would be a viable form of preventive warfare. This can be done by 1) reducing the flow of communication within the terrorist organization; 2) hampering decision-making and consensus formation; and 3) intensifying collective-action problems and security vulnerability.¹³³ Post adds supplemental factors: 1) inhibiting potential recruits from joining; 2) producing tension within groups; 3) facilitating exits from groups; and 4) reducing external support for groups and their leaders would serve to thwart the growth of terrorism.¹³⁴ While it should remain obvious that we cannot fight the War on Terror using conventional methods, we need an adjudication process that subverts the overall objectives of terrorists in conjunction with adaptive and technologically superior methods as well.

Despite the numerous definitions for terrorism,¹³⁵ if acts of terror are meant to coerce another state into politically capitulating to their demands, or instilling fear within a population of people in hopes of undermining government legitimacy, then how can our judiciary best help subvert those aims? Terrorism is not a new phenomenon, but is what many see as acts of violence by the weak.¹³⁶ If the intention of terrorists is to achieve some form of ideological, religious, or political goal, then the bulwark of how we diffuse and ‘destabilize’ those attempts begin with the rule of law. Military and political ambitions aside, if we lack a strong and decisive rule of law in adjudicating both domestic and international acts of terror that target the United States, then we can never fully quell this continuing generation of terror. For one, there is no inherent ‘glory’ or purpose that be achieved if an individual or group is in prison. The way we regain

¹³⁰ James A. Piazza & James I. Walsh, *Physical Integrity Rights and Terrorism*, 43 PS: POL. SCI. & POLITICS 411, 412 (2010); see also James Walsh & James A. Piazza, *Why Respecting Physical Integrity Rights Reduces Terrorism*, 43 COMPARATIVE POL. STUD. 551 (2010).

¹³¹ See Hoffman, *supra* note 105, at 313.

¹³² JERROLD M. POST, LEADERS AND THEIR FOLLOWERS IN A DANGEROUS WORLD: THE PSYCHOLOGY OF POLITICAL BEHAVIOR 161 (2004).

¹³³ Mette Eilstrup-Sangiovanni & Calvert Jones, *Assessing the Dangers of Illicit Networks: Why al-Qaida May Be Less Threatening Than You Think*, 33 INT'L SECURITY 7, 43 (2008).

¹³⁴ POST, *supra* note 132, at 160. See generally Jerald Post, *Terrorist Psycho-Logic: Terrorist Behaviour as a Product of Psychological Forces*, in ORIGINS OF TERRORISM: PSYCHOLOGIES, IDEOLOGIES, THEOLOGIES, STATES OF MIND 25 (Walter Reich ed., 1990). See also Jerrold Post, *The New Face Of Terrorism: Socio-Cultural Foundations Of Contemporary Terrorism*, 23 BEHAV. SCI. LAW 451 (2005).

¹³⁵ See generally SCHMID & JONGMAN, POLITICAL TERRORISM: A NEW GUIDE TO ACTORS, AUTHORS, CONCEPTS, DATABASES, THEORIES AND LITERATURE. (1988). See also LaFree, *supra* note 109.

¹³⁶ See generally TARAK BARKAWI, GLOBALIZATION AND WAR (2006).

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our moral high ground, which has been under criticism throughout the War on Terror, is by 'reducing acts of terror to common criminality.'¹³⁷ In essence, the military alone cannot win this war.¹³⁸ While the scope of this article is not to analyze all of the law enforcement strategies in both assessing and enforcing state and federal laws against various acts of terror, it goes without saying how important the criminal justice system will be in operationalizing the national effort against terrorism. Preventive measures should always be employed, as they are with regards to 'normal' criminal activity like burglary, larceny, arson, and drug trafficking. This can even include preventive modes of detention, as the "Department of Justice officials have used preventative methods of detention, whether on the groups of inchoate crimes or material witness applications, with regards to protecting intelligence assets while at the same preventing terrorists from acting on United States soil."¹³⁹ Again however, the responsibility of both deterring and razing acts of terror needs to reside within the legal system because our Constitution is the final, albeit necessary, check on authority.¹⁴⁰

It could be argued that both Guantanamo and prisons throughout the Middle East utilized during the War on Terror serve these aforementioned purposes. They incarcerate individuals who are both suspected and confirmed terrorists and provide both specific and general deterrence to the remaining members of their respective terrorist organizations. Furthermore, penal facilities operate within the bounds of legal authority. They have been authorized, vetted and deemed constitutional by all three branches during their evolution. Lastly, penal facilities contribute to the overall objective of 'incarcerating our way out of terrorism' by placing individuals who are either terrorists, or exhibit the potential to be future recruits and inevitable recidivists in prison.

C. Why Indefinite Detention?

The logical reasoning behind indefinitely detaining or incarcerating an individual stems from the determination that the individual still poses a significant threat to society. This determination is not particular to just international or military law, but has roots in both civil and criminal law within the United States. One example is the continued and involuntary civil commitments of sex offenders upon completion of their sentences.¹⁴¹ Another is the indefinite detention meth-

¹³⁷ See generally Marc Sageman, *The Next Generation of Terror*, March/April, FOREIGN POLICY, 37 (2008).

¹³⁸ See generally Bruce Hoffman, *The Myth of Grass-Roots Terrorism: Why Osama bin Laden Still Matters*, May/June, FOREIGN AFFAIRS, 133 (2008).

¹³⁹ See generally Robert Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J.LEGIS 1 (2001).

¹⁴⁰ See generally *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

¹⁴¹ Meaghan Kelly, *Lock Them Up and Throw Away the Key: The Preventive Detention of Sex Offenders in the United States and Germany*, 39 GEO. J. INT'L L. 551, 553 (2007) ("In general, SVP laws provide for the post-incarceration involuntary civil commitment of sex offenders after a finding that the individual: (1) committed a sexually violent act; (2) suffers from a mental abnormality or a personality disorder; and (3) is likely to pose a future danger as a result of his mental abnormality. These criteria are relatively vague, but if they are deemed satisfied, the sex offender will remain in civil commitment indefinitely until he is determined no longer to be dangerous as a result of his mental abnormality. Civil

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ods utilized during the removal period of an alien by INS “until it has been determined that there is no significant likelihood of removal in the ‘reasonably foreseeable future.’”¹⁴² This seemingly constituted a period of six months, after which, the constitutionality would be called into question.¹⁴³ This removal period is also affected by whether the individual still poses a risk to society.¹⁴⁴ However, the discretion to indefinitely detain is not unbounded¹⁴⁵ because deportation and removal proceedings are civil and not under the ‘panoply’ of protections that criminal trials are privy to.¹⁴⁶ Furthermore, the U.S. has a history of preventively detaining mentally ill persons¹⁴⁷ and those who pose a significant health risk to other citizens.¹⁴⁸

The decision to indefinitely detain may be more political than punitive. The attachment of terrorism as an international security issue enables the Executive to deem the ‘right’ response to be our Armed Forces. Furthermore, if the threat itself is ‘imminent,’ the government will care less about substantive or procedural due process measures that would promote and ensure consistency in processing terrorists. When such a threat is imminent, the courts are more likely to defer to government authority.¹⁴⁹ Former Secretary of Defense Donald Rumsfeld stated numerous reasons for pushing terrorists through the military detention instead of the criminal justice system.¹⁵⁰ Regarding Jose Padilla, an individual who was found to have had the intent of gathering radioactive materials in an attempt to construct a ‘dirty bomb,’ and whom had ties to al-Qaeda, Rumsfeld placed a premium of gathering information first, before processing Padilla.¹⁵¹ Rumsfeld maintained that:

commitment need not be imposed at the time of the original sentencing but can be imposed at the end of the prison sentence.”).

¹⁴² *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1099 (9th Cir. 2001). See also 8 U.S.C.A. § 1231.

¹⁴³ *Kim Ho Ma*, 257 F.3d at 1099 (citing *U.S. v. Witkovich* 353 U.S. 194 (1957)); see also 8 U.S.C.A. § 1252).

¹⁴⁴ *Arango Marquez v. INS*, 346 F.3d. 892, 898 (9th Cir. 2002) (“Authorized indefinite detention of an excluded alien convicted of an aggravated felony beyond the statutory removal period codified in § 1252(c); see *Alvarez-Mendez v. Stock*, 941 F.2d 956, 961 (9th Cir.1991) (“When read in the context of the whole 1990 Act, it is clear that [former § 1226(e)] is part of a scheme requiring the Attorney General to detain all aliens convicted of aggravated felonies whose release would pose a threat to society.”).

¹⁴⁵ See *Clark v. Martinez*, 543 U.S. 371, 377 (2005).

¹⁴⁶ See *Lara-Torres v. Ashcroft*, 383 F.3d 968, 973 (9th Cir. 2004) (“Since deportation and removal proceedings are civil, they are ‘not subject to the full panoply of procedural safeguards accompanying criminal trials’ including the right to counsel under the Sixth Amendment.”).

¹⁴⁷ See *Addington v. Texas*, 441 U.S. 418, 426 (1979).

¹⁴⁸ See A. John Radsan, *A Better Model for Interrogating High-Level Terrorists*, 79 TEMP. L. REV. 1227, 1269-71 (2006).

¹⁴⁹ See Avidan Y. Cover, *Presumed Innocence: Judicial Risk Assessment in the Post-9/11 World*, 35 CARDOZO L. REV. 415, 1452 (2014) (arguing that *Padilla v. Rumsfeld* depicted the Judiciary as deferring to government authority, so as to decline jurisdiction, in cases whether the threat is perceived as imminent).

¹⁵⁰ *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 573-74 (S.D.N.Y. 2002) (citing News Briefing, Department of Defense (June 12, 2002), 2002 WL 22026773).

¹⁵¹ *Padilla*, 233 F. Supp. 2d at 573-74.

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It seems to me that the problem in the United States is that we have—we are in a certain mode. Our normal procedure is that if somebody does something unlawful, illegal against our system of government, that the first thing we want to do is apprehend them, then try them in a court and then punish them. In this case that is not our first interest.

Our interest is to—we are not interested in trying him at the moment; we are not interested in punishing him at the moment. We are interested in finding out what he knows. Here is a person who unambiguously was interested in radiation weapons and terrorist activity, and was in league with al Qaeda. Now our job, as responsible government officials, is to do everything possible to find out what that person knows, and see if we can't help our country or other countries.¹⁵²

He later offered more evidence supporting why differentiating between criminal procedure and the processing of terrorists should remain:

If you think about it, we found some material in Kandahar that within a week was used—information, intelligence information—that was used to prevent a[t] least three terrorist attacks in Singapore—against a U.S. ship, against a U.S. facility and against a Singaporean facility. Now if someone had said when we found that information or person, well now let's us arrest the person and let's start the process of punishing that person for having done what he had did, we never would have gotten that information. People would have died.

So I think what our country and other countries have to think of is, what is your priority today? And given the power of weapons and given the number of terrorists that exist in the world, our approach has to [be] to try to protect the American people, and provide information to friendly countries and allies, and protect deployed forces from those kind of attacks . . . I think the American people understand that.¹⁵³

D. Applying International Law and Treaties to U.S. Courts

1. *Can Domestic Criminal Law Alone Deter Terrorism?*

Many contend that the Charming Betsy canon ought to apply in situations where vague legislation requires that judges look to international treaties and customary law for insight on how to construct an amiable interpretation¹⁵⁴ histor-

¹⁵² *Id.* at 574.

¹⁵³ *Id.*

¹⁵⁴ See generally *Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804); see also *Talbot v. Seeman*, 5 U.S. 1, 43 (1801) (“The laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law.”); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); see also Restatement (Third) of Foreign Relations Law of the United States § 111(3) (1986) (“Courts in the United States are bound to give effect to international law and to international agreements of the United States, except that a ‘non-self-executing’ agreement will not be given effect as law in the absence of necessary implementation.”); see also Rebecca Crotof,

ically relating to prescriptive jurisdiction.¹⁵⁵ Nonetheless, the Supreme Court ruled in *Al-Bahani v. Obama* that “international-law principles found in non-self-executing treaties and customary international law, but not incorporated into statutes or self-executing treaties, are not part of domestic U.S. law.”¹⁵⁶ Furthermore, the Court held that customary international law is:

a kind of international common law. It does not result from any of the mechanisms specified in the U.S. Constitution for the creation of U.S. law. For that reason, although norms of customary international law may obligate the United States internationally, they are not part of domestic U.S. law. Customary-international-law norms become part of domestic U.S. law only if the norms are incorporated into a statute or self-executing treaty.¹⁵⁷

Thus, if legislation or international multilateral agreements are ratified within the United States and made ‘self-executing,’ then the informal tacit of incorporating principles into domestic law would be less difficult to achieve. This, in turn, relates to aforementioned propensity of the United States to abstain from ratifying Protocols I and II of the Geneva Convention. Even though it was seemingly convenient during times where, absent certain domestic law, the United States relied on international customary law to discern its proper stance on an issue. Nonetheless, now that we are more ‘fortified’ in both our legal prowess and stance within the international system, it seems both trivial and counterproductive for us to rely on other ambient nations laws. The *Medellin* decision by the United States Supreme Court surprised many nations because of its ban on private litigants applying international customs and law in court.¹⁵⁸ Also, even though we were signatories to the Vienna Convention on Consular Relations, it was not clear when international treaties and law are domestically equivalent or enforceable in court, and when they are only binding after Congress has enacted appropriate legislation.¹⁵⁹

Another conundrum is whether U.S. criminal law can be efficiently applied to preventive forms of terrorist threat. In a case surrounding the potential negative impact drug trafficking has on both national security and well-being, the Ninth Circuit ruled in *U.S. v. Patterson* that “there was more than a sufficient nexus with the United States to allow the exercise of jurisdiction [and that] drug traf-

Judicious Influence: Non-Self-Executing Treaties and the Charming Betsy Canon. 120 YALE L. J. 1784, 1789 (2011).

¹⁵⁵ See Zachary D. Clopton, *Replacing the Presumption Against Extraterritoriality*, 94 B.U. L. REV. 1, 24-25 (2013) (“By applying the Charming Betsy canon to prescriptive jurisdiction, courts can interpret geoambiguous statutes to apply only as far as international law permits.”). The Charming Betsy canon has also been used by the Supreme Court with regards to prescriptive justice in *Hartford Fire Ins. v. California*, 509 U.S. 764, 815 (1993) and *McCulloch v. Sociedad Nacional*, 372 U.S. 10, 21-22 (1963).

¹⁵⁶ *Al-Bihani v. Obama*, 619 F.3d 1, 16 (D.C. Cir. 2010) (“Responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress.”).

¹⁵⁷ *Id.* at 17.

¹⁵⁸ See Oona Hathaway et al., *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT’L L. 51, 52 (2012). See generally *Medellin v. Texas*, 552 U.S. 491 (2008).

¹⁵⁹ *Id.* at 52.

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ficking may be prevented under the protective principle of jurisdiction, without any showing of an actual effect on the United States.”¹⁶⁰ Thus, “if the activity threatens the security or governmental functions of the United States” the United States can apply jurisdictional claims.¹⁶¹ Furthermore, the Fifth Circuit also stated that “a foreign vessel on the high seas becomes subject to the operation of the laws of the United States within the meaning of [14 U.S.C.] section 89(a) when those aboard are engaged in a conspiracy to violate federal narcotics statutes.”¹⁶² The court drew off a similar Fifth Circuit case just two years prior: *United States v. Cadena*.¹⁶³ The court held that despite possible legal issues surrounding Government apprehension and detention that “the violation of international law . . . may be redressed by other remedies and does not depend upon the granting of what amounts to an effective immunity from criminal prosecution to safeguard individuals against police or armed forces misconduct.”¹⁶⁴ Even if the government plausibly commits illegal acts, it does not mean that the individual can gain standing in a case against the government’s initial motivation for apprehension. The court in *Cadena* further claimed that “[e]ven if individuals have standing to raise treaty violations, their personal rights are derived from the rights of a signatory state. Article 32 of the Convention¹⁶⁵ provides that it is subject to ratification.”¹⁶⁶ This seems to limit the ability of detainees to question whether or not their rights were violated within Protocols I and II. To acquiesce this point, the Second Circuit has also stated that only signatory nations to a treaty can protest its violation.¹⁶⁷ This calls into question the applicability of non-citizens rights in exigent circumstances, which in our current state of affairs, is the War on Terror. In *Eyde v. Robertson* (1884), the Supreme Court stated:

And such is, in fact, the case in a declaration of war, which must be made by congress, and which, when made, usually suspends or destroys existing treaties between the nations thus at war. In short, we are of opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as congress may pass for its enforcement, modification, or repeal.¹⁶⁸

Even if international law was binding on the United States, the Government retains the authority to change the direction of such law’s utility within the judicial system. Put another way, the government in times of declared war can sus-

¹⁶⁰ *U.S. v. Peterson*, 812 F.2d 486, 493-94 (9th Cir. 1987).

¹⁶¹ *Id.* at 494.

¹⁶² *United States v. Postal*, 589 F.2d 862, 884 (5th Cir. 1979); *see also* 14 U.S.C.A. § 89 (2006).

¹⁶³ *United States v. Cadena-Sanchez*, 68 F.3d 466, 466 (5th Cir. 1995) (per curiam).

¹⁶⁴ *United States v. Cadena*, 585 F.2d 1252, 1261 (5th Cir. 1978), *overruled by United States v. Michelena-Orovio*, 719 F.2d 738 (1983).

¹⁶⁵ Law of the Sea: Convention on the High Seas art. 32, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11.

¹⁶⁶ *Id.*

¹⁶⁷ *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 67 (2d Cir. 1975).

¹⁶⁸ *Eyde v. Robertson*, 112 U.S. 580, 599 (1884).

pend treaties between warring nations. However, the War on Terror does not fall under the paradigm of conventional war and there are no treaties or laws directly between the United States and non-state actors, despite laws between nations applying indirectly in this manner. Furthermore, Afghanistan is a signatory to all of the Geneva Conventions and Protocols, while Iraq is subject to the Conventions but only to Protocol I. Since the U.S. does have the signatory relationship with those states, due to differences in both being parties to, and ratifying all of the Protocols, it makes it easier for the U.S. to distance itself from having to abide by international law with regards to the laws of war principles discussed earlier, and detention procedures and rights for those in an armed conflict. Put simply, the U.S. is not buying in to the global application of alien detention practices, so is it less likely that the United States will think alien detention could be done better domestically.

2. *The Debate of 'Self-Executing' Treaties*

International law and treaties between nations can be contractual in nature.¹⁶⁹ Nonetheless, the lack of explicit applicability to national laws renders many laws non-self-executing. Determining whether international law is self-executing or not, however, is a vibrant double standard. Traditionally, "there should be a strong presumption that a treaty is self-executing unless the contrary is clearly indicated," because if the treaty has been in effect and has not been implemented by legislation "a finding that it is not self-executing in effect puts the United States in default on its international obligations."¹⁷⁰ Consider the following excerpt from *Sosa v. Alvarez-Machain* (2004):

We assume, too, that no development in the two centuries from the enactment of [28 U.S.C.A] § 1350 to the birth of the modern line of cases beginning with *Filartiga v. Pena-Irala*, 630 F.2d 876 (C.A.2 1980), has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law; Congress has not in any relevant way amended § 1350 or limited civil common law power by another statute. Still, there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind. Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a

¹⁶⁹ See *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 253 (1984) ("A treaty is in the nature of a contract between nations."); *Wash. v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979) ("A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations."); *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931) ("As treaties are contracts between independent nations, their words are to be taken in their ordinary meaning as understood in the public law of nations."); *Edye*, 112 U.S. at 598.

¹⁷⁰ Jon M. Van Dyke, *The Role of Customary International Law in Federal and State Court Litigation*, 26 U. HAW. L. REV. 361, 376 (2004) (quoting Louis Henkin, Richard Crawford Pugh, Oscar Schachter & Hans Smit, *INTERNATIONAL LAW* 215 (Louis Henkin ed., 3d ed. 1993)).

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specificity comparable to the features of the 18th-century paradigms we have recognized.¹⁷¹

Balancing the interests of foreign policy and the evolving landscape of international norms integration into law is something that may prove difficult for federal judges to accomplish. This is why interpretations of national interests are primarily the duties of Congress and the Executive. Nonetheless, there remains a place, however restricted, for judges to make international law a formidable part of domestic law. This is important in the evolution of the War on Terror and its subsequent impact on how to adjudicate terrorists. Differentiating between self-executing and non-self-executing determines how far international law will permeate our substantive and procedural measures regarding our national response to terrorism. It is no secret that many nations have called for Guantanamo Bay to be closed due to the litany of humanitarian and ethical concerns that have been cast into the limelight, furthered only by the questionable legality of the detention itself. Within criminal justice, only capital punishment is debated as often as the detention and legal methods we have employed in the War on Terror. Courts' involvement in the international specter of customary law will provide the criminal justice system a way to partake in adjudicating terrorists and their respective organizations. This engagement has shifted over time:

Between 1790 and 1947, the Court found a treaty self-executing on the basis that a private right was secured by the treaty in at least twenty-two cases. In each case, the Court held not only that the treaty was self-executing, but also that it created a private right of action. The treaties from which the Court inferred this right to private enforcement fell into four areas: (1) contract matters; (2) property and inheritance law matters; (3) the right to challenge the legality of detention through a writ of habeas corpus; and (4) rights to carry on a trade.¹⁷²

3. *International Transparency*

Even though local law enforcement and federal agencies monitor and process individuals within our criminal justice system, the viability of the assault on terrorism following the 9/11-attacks can only be increased with greater transparency, cooperation, intelligence gathering, consistent procedural and substantive due process measures, and moral appeasement to the world. Cutting off the Judiciary from this process, as both the Executive and Congress have done, only further undermines our ability to thwart the scope of terrorism's reach because it conveys a weak rule of law not only to the rest of the world but most importantly to those non-state actors we fear the most. Multiple times, the Senate "has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the Interna-

¹⁷¹ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724-25 (2004).

¹⁷² Hathaway, *supra* note 158, at 57-58.

tional Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing.¹⁷³

Courts will not always interpret claims or assertions in the favor of the international community. This should not weaken their ability to utilize international customs or explicit international law in domestic situations. Courts need to retain the ability to determine the efficacy of an international law in light of domestic situations. Though an international terrorist attack requires an international response, it also requires national policies that delineate various constraints or legal obstacles. Simply, while individual assertions concerning what policies will be most effective in thwarting terrorism at the national and global levels may be determined at the national level, it is important for all nations taking part in this assault to maintain transparent and analogous principles that create and uphold fundamental natural rights. In *Saleh v. Titan Corp* (2006), the District Court of the District of Columbia heard numerous Iraqi nationals' complaints that they were tortured by the same private government contractors who provided interrogators and interpreters to the U.S. Armed forces. The court ruled that "the conduct of private parties described by plaintiffs' allegations was not actionable under the ATS's grant of jurisdiction as violative of the law of nations," even if was under the 'color of law.'¹⁷⁴

In sum, courts can chose to either defer to government authority and ignore international law or decide to incorporate international law domestically. The latter provides more collaborative strength and preserves the rule of law within and across nations. Furthermore, domestic criminal law may have some gaps in addressing terrorism. Only time will tell if those gaps will be filled by international law and transnational response.

V. Criminalizing Terrorism

The debate continues between civilian and military models as modes of adjudicating terrorists. Some experts claim that the military model offers less procedural and substantive hurdles while maintaining flexibility, but the criminal model poses the most significant barriers to easily processing terrorists.¹⁷⁵ Consider the following except from Chesney and Goldsmith:

¹⁷³ *Sosa*, 542 U.S. at 728.

¹⁷⁴ *Saleh v. Titan Corp.*, 436 F. Supp. 2d 55, 57 (D.D.C. 2006); see also *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208-09 (D.C. Cir. 1985) (holding alleged actions by executive officials, in their private capacity, of supporting forces bearing arms against government of Nicaragua did not violate any treaty or "customary international law" so as to confer original jurisdiction upon district court over suit by citizens and residents of Nicaragua against federal officials pursuant to the alien tort statute, 28 U.S.C.A. § 1350, which provides that district court shall have jurisdiction of action by alien for tort committed in violation of law of nations or treaty of the United States); *Ibrahim v. Titan Corp.*, 391 F.Supp.2d 10, 20 (D.D.C. 2005) (noting district court did not have diversity jurisdiction over claims by Iraqi nationals who were detained in Iraqi prison against a private governmental contractor incorporated in The Netherlands, who provided interrogators to United States military in Iraq); cf. 28 U.S.C.A. § 1350 (stating the district courts are vested with original jurisdiction over any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States).

¹⁷⁵ Chesney & Goldsmith, *supra* note 5, at 1080-1081 ("These detention models have traditionally differed along two dimensions: detention criteria (i.e., what the government must prove to detain someone) and procedural safeguards (i.e., the rights and procedures employed to reduce the risk of error in

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Neither model in its traditional guise can easily meet the central legal challenge of modern terrorism: the legitimate preventive incapacitation of uniformless terrorists who have the capacity to inflict mass casualties and enormous economic harms and who thus must be stopped before they act. The traditional criminal model, with its demanding substantive and procedural requirements, is the most legitimate institution for long-term incapacitation. But it has difficulty achieving preventive incapacitation. Traditional military detention, by contrast, combines associational detention criteria with procedural flexibility to make it relatively easy to incapacitate. But because the enemy in this war operates clandestinely, and because the war has no obvious end, this model runs an unusually high risk of erroneous long-term detentions, and thus in its traditional guise lacks adequate legitimacy.¹⁷⁶

Where do we go from here? If neither one is adequate, how can our nation delegitimize terrorism as a form of politically or religiously coercive violence and abstain from capitulating to terrorist demands and goals while maintaining and strengthening a rule of law? The previous section explains why the criminal justice model is both necessary and sufficient to address the terrorist threat. This section explains in greater detail how *further* ‘criminalizing’ terrorism may be the way to adopt the criminal justice model.¹⁷⁷

A. Is criminalization necessary?

How does using the criminal justice system to adjudicate all forms of terrorism come to fruition? Prosecuting terrorists is not a novel concept in the American criminal justice system. However, over the last two decades, it has partially subverted to military and executive oversight. We treat terrorism as an act of war, rather than as a crime.¹⁷⁸ Nonetheless, there is a fundamental legal reason for treating terrorists as criminals.¹⁷⁹ Before U.S. involvement in the War on Terror, “the conventional mindset was that acts of terrorism were a criminal matter to be adjudicated within our criminal justice system along with crimes committed by

making detention determinations). The military detention model is the least demanding, traditionally requiring a showing of mere group membership in the enemy armed forces and providing alleged detainees with relatively trivial procedural protections. At the other extreme, the civilian criminal model is the most demanding, tending to require a showing of specific criminal conduct and providing defendants with a panoply of rights designed to reduce the risk of erroneous convictions.”)

¹⁷⁶ *Id.* at 1081.

¹⁷⁷ While terrorism itself is already criminalized within U.S. Code, focusing on terrorism as a criminal act rather than stigmatizing it as a religious, social, or political act alone may serve both America’s vital interests while also circumventing terrorism more efficiently.

¹⁷⁸ See David T. Hartmann, *The Public Safety Exception to Miranda and the War on Terror: Desperate Times Do Not Always Call for Desperate Measures*, 22 *GEO. MASON. U. CIV. RTS. L. J.* 217, 235 (2012) (discussing President Obama’s shift away from his predecessor’s policy to treat terrorism as war rather than as crime).

¹⁷⁹ David Glazier, *Playing by the Rules: Combating Al Qaeda within the Law of War*, 51 *WM. & MARY L. REV.* 957, 967 (2009) (noting that there is an indisputable basis for the treatment of terrorists as criminals).

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bank robbers, car thieves, and drug dealers.”¹⁸⁰ Many times we have “successfully tried and convicted in federal criminal court, including the Oklahoma City bombers Timothy McVeigh and Terry Nichols, the Unabomber Theodore Kaczynski, and the 1993 World Trade Center bomber Ramzi Yousef.”¹⁸¹ Nonetheless, the prosecution of terrorists in the criminal justice system poses significant hurdles because it consumes an extreme amount of time and resources¹⁸² as was evident in the *Moussaoui* trial.¹⁸³ Additionally, law enforcement agencies will have to balance intelligence and evidence gathering.¹⁸⁴

In the debate over Miranda warnings for terrorism suspects, the Executive Branch’s continued commitment to prosecuting terrorists in Article III courts and the military system makes the question of admissibility of evidence pressing and relevant.¹⁸⁵ Many believe that trying terrorists in military commissions is preferable because they remove several procedural safeguards present in the criminal justice system to protect the constitutional rights of criminal defendants. However, the federal criminal justice system is no less effective in prosecuting terrorists.¹⁸⁶

It is time, then, for a new approach to counterterrorism detention that recognizes the advantages that the criminal justice system offers for defendants and counterterrorism efforts. The criminal justice system is highly effective at detaining and prosecuting terrorists and provides a level of predictability, legitimacy, and flexibility that is missing in current wartime prosecution and detention practice. The well-established procedural protections within the criminal justice system can reduce the risk of error and provide more legitimate results than those in the military commission process. A more fair and flexible detention regime will also effectively contribute to counterterrorism operations.¹⁸⁷

Adherence to the Fifth Amendment is not as stringent in military tribunals as it is in criminal courts.¹⁸⁸ Along with the Fifth Amendment, both the Fourth and Sixth Amendments were purposely left as ‘uncertain at best.’¹⁸⁹ Furthermore, while prosecution of terrorism follows a nationalist guideline and citizens are

¹⁸⁰ Alberto R. Gonzales, *Waging War Within the Constitution*, 42 TEX. TECH. L. REV. 843, 861 (2010).

¹⁸¹ Hartmann, *supra* note 178, at 236-37.

¹⁸² Gonzales, *supra* note 180, at 865-66.

¹⁸³ See generally *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004); Harry Samit, *An Account of the Arrest and Interview of Zacarias Moussaoui*, 37 WM. MITCHELL L. REV. 5191 (2011) (discussing the details of Moussaoui’s detainment).

¹⁸⁴ M.K.B. Darmer, *Beyond Bin Laden and Lindh: Confessions Law in an Age of Terrorism*, 12 CORNELL J.L. & PUB. POL’Y 319, 353-54 (2003).

¹⁸⁵ Savage, *supra* note 103.

¹⁸⁶ Christie Tomm, *The United States Criminal Justice System: Protecting Constitutional Rights and National Security*, 26 J. CIV. RTS. & ECON. DEV. 1051, 1054-58 (2009).

¹⁸⁷ Hathaway, *supra* note 158, at 77.

¹⁸⁸ See 10 U.S.C. § 948c (2009).

¹⁸⁹ Hartmann, *supra* note 178, at 235.

processed through the criminal justice system smoothly,¹⁹⁰ if you are not a citizen, it is much different. Processing terrorists through the criminal justice system helps in “disrupt[ing] terrorist plots by taking conspirators into custody; incapacitating convicted terrorists through incarceration; and providing a vehicle for gathering intelligence through interrogations.”¹⁹¹

B. What would it look like?

1. *Addressing the Disjunction Between Domestic and Military Policing*

Setting aside legal, theoretical and idealist arguments, what would this full integration of terrorism into the criminal justice system look like? One obvious difference would be the problematic component of ‘policing abroad.’ It would be extremely difficult to uphold procedural safeguards throughout the broad spectrum of how we are currently policing the War on Terror. The litany of the United States and other nations’ arresting powers to combat terrorism only enflames this problem. To put in perspective, current criminal procedure in the American criminal justice system adheres to specific due process standards, which enable constitutional rights to be upheld throughout the immensely fragmented criminal justice system. Whether or not these safeguards and rights are upheld ‘uniformly’ is not the argument here, it is the complete disjunction that has occurred between police and military adjudication standards. This includes, but is not limited to: evidentiary standards, due process rights, detention procedures, policing practices, administrative policies, and overall adherences to system-specific law (i.e. criminal law vs. UCMJ, International Treaties, Executive Orders, etc).

A much simpler answer involves existing laws that govern terrorism. The United States Code defines international terrorism as activities that involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State, appear to be intended—to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping.¹⁹²

This operates on a broad spectrum regarding territoriality. Crimes committed, or inchoate crimes may be criminalized as terrorist acts irrespective of where the act or premonition originates from. The major differentiation between this definition from that of ‘domestic terrorism’ is where the act occurs, or if it would have violated United States law.¹⁹³ Furthermore, punishments for terrorism under fed-

¹⁹⁰ See Kim D. Chanbonpin, Ditching “The Disposal Plan:” Revisiting Miranda in an Age of Terror, 20 St. Thomas L. Rev. 155, 174-75 (2008).

¹⁹¹ Tomm, *supra* note 186, at 1055.

¹⁹² 18 U.S.C. § 2331(1) (2001).

¹⁹³ Regarding the territorial differentiation, international terrorism, under 18 U.S.C. § 2331(1)(C) is defined as activities that “occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum;” while

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eral criminal law cover a myriad of different terrorist acts.¹⁹⁴ Important components in assessing the viability of indefinite detention within the War on Terror are criminal procedure, sentencing guidelines and detention practices in comparison to conventional criminal adjudication. Put another way, looking at our current criminal justice system ought to offer a better method to employ in lieu of indefinite detention.

2. Addressing Punishment

One way to look at indefinite detention of terrorists in comparison to conventional incarceration practices and length of sentencing in the criminal justice system is to look at the United States Sentencing Guidelines (USSG). Mandatory minimums and enhancement provisions in subsequent legislation since 2001 increased the overall penalties for terrorism perpetrators and accomplices. This has been evident in the use of immigration law as both a law enforcement tool and adjunct to criminal law in the War on Terror.¹⁹⁵ While procedures under the

domestic terrorism, under 18 U.S.C. § 2331(5)(C) is defined as activities that “occur primarily within the territorial jurisdiction of the United States.” Regarding the potential of criminal law violation, 18 U.S.C. § 2331(1) dictates that international terrorism encompasses “activities that . . . would be a criminal violation if committed within the jurisdiction of the United States or of any State.” This opens up the broad range of activities that can be construed to seemingly violate U.S. criminal law.

¹⁹⁴ The enormous amount of crimes that fall under the ‘terrorism’ penumbra that transcend national boundaries includes all of the following under 18 U.S.C § 2332b(g)(5)(B)(i): “section 32 (relating to destruction of aircraft or aircraft facilities), 37 (relating to violence at international airports), 81 (relating to arson within special maritime and territorial jurisdiction), 175 or 175b (relating to biological weapons), 175c (relating to variola virus), 229 (relating to chemical weapons), subsection (a), (b), (c), or (d) of section 351 (relating to congressional, cabinet, and Supreme Court assassination and kidnapping), 831 (relating to nuclear materials), 832 (relating to participation in nuclear and weapons of mass destruction threats to the United States) 842(m) or (n) (relating to plastic explosives), 844(f)(2) or (3) (relating to arson and bombing of Government property risking or causing death), 844(i) (relating to arson and bombing of property used in interstate commerce), 930(c) (relating to killing or attempted killing during an attack on a Federal facility with a dangerous weapon), 956(a)(1) (relating to conspiracy to murder, kidnap, or maim persons abroad), 1030(a)(1) (relating to protection of computers), 1030(a)(5)(A) resulting in damage as defined in 1030(c)(4)(A)(i)(II) through (VI) (relating to protection of computers), 1114 (relating to killing or attempted killing of officers and employees of the United States), 1116 (relating to murder or manslaughter of foreign officials, official guests, or internationally protected persons), 1203 (relating to hostage taking), 1361 (relating to government property or contracts), 1362 (relating to destruction of communication lines, stations, or systems), 1363 (relating to injury to buildings or property within special maritime and territorial jurisdiction of the United States), 1366(a) (relating to destruction of an energy facility), 1751(a), (b), (c), or (d) (relating to Presidential and Presidential staff assassination and kidnapping), 1992 (relating to terrorist attacks and other acts of violence against railroad carriers and against mass transportation systems on land, on water, or through the air), 2155 (relating to destruction of national defense materials, premises, or utilities), 2156 (relating to national defense material, premises, or utilities), 2280 (relating to violence against maritime navigation), 2281 (relating to violence against maritime fixed platforms), 2332 (relating to certain homicides and other violence against United States nationals occurring outside of the United States), 2332a (relating to use of weapons of mass destruction), 2332b (relating to acts of terrorism transcending national boundaries), 2332f (relating to bombing of public places and facilities), 2332g (relating to missile systems designed to destroy aircraft), 2332h (relating to radiological dispersal devices), 2339 (relating to harboring terrorists), 2339A (relating to providing material support to terrorists), 2339B (relating to providing material support to terrorist organizations), 2339C (relating to financing of terrorism), 2339D (relating to military-type training from a foreign terrorist organization), or 2340A (relating to torture) of this title.”

¹⁹⁵ Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the “War” on Terrorism?*, 51 EMORY L.J. 1059, 1061-73 (2002) (discussing immigration law as a tool of the criminal justice system).

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current indefinite detention protocol call for the re-certification of enemy combatant status every six months by the U.S. Attorney General,¹⁹⁶ the USSG seemingly offers a more consistent and robust mode of determining sentence length.¹⁹⁷ Stringent enhancement levels in sentencing and an upward departure provision enable the courts to assess what the appropriate punishment should be according to both enumerated and unenumerated acts of terror. These constructions of domestic terrorism sentencing are promulgated from both the Antiterrorism and Effective Death Penalty Act of 1996 and the Violent Crime Control and Law Enforcement Act of 1994.¹⁹⁸

In *U.S. v. Meskini*, the court held that “the wording of § 3A1.4 could not be clearer: It directs courts to increase both the offense level and the criminal history category based on a single crime involving terrorism.”¹⁹⁹ The court also held that so long as Congress has a rational basis for establishing certain penalties, due process challenges will have no merit.²⁰⁰ The adherence to federal sentencing standards will increase the strength of the rule of law.

However, sentencing terrorists has changed significantly since 1996. The politicization of terrorism may have followed the same trends of the War on Crime, and the War on Drugs. The decision-making by judges surrounding the sentencing of terrorists used to be treated as a typical violent-crime, not one where the political or religious motivations were the primary concern.²⁰¹ In conventional armed conflicts of an international nature, POW status is given to terrorists solely to prevent them from returning to active hostilities. This is a preventive measure used to reduce the risks inherent in soldiers returning to their respective theatres of war.²⁰² As mentioned earlier, conduct in war follows the *jus ad bellum* and *jus in bello* principles, and thus conventional use of force in legitimate warfare is exempt from criminal liability. The War on Terror, despite its inherent moral and ethical concerns, precludes terrorists from being designated as POWs. Enabling terrorists to return to their respective countries or transferring them to different nations increases the risk of them returning to active

¹⁹⁶ See 8 U.S.C. § 1226(a)(6) (2001).

¹⁹⁷ See U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (2014).

¹⁹⁸ See generally Deborah F. Buckman, *Construction and Application of Federal Domestic Terrorism Sentencing Enhancement, U.S.S.G. § 3A1.4*, 186 A.L.R. FED. 147 (2003).

¹⁹⁹ *United States v. Meskini*, 319 F.3d 88, 91-92 (2d Cir. 2003).

²⁰⁰ *Id.* at 91.

²⁰¹ Wadie E. Said, *Sentencing Terrorist Crimes*, 75 OHIO ST. L.J. 477, 493-494 (2014) (stating that prior to the shift in legislation in 1996, “sentencing for crimes involving terrorism was relatively straightforward, since defendants usually faced charges of carrying out violent criminal activity, rendering their political motivations irrelevant. It followed logically that given the criminal law’s capacity for dealing easily with a violent attack-regardless of what motivated it-the type of sentence courts handed down was relatively unremarkable. Even where a court pointed out the political context of a given incident, such details did not affect the nature of the sentence on their own, but the more sensational or violent the conduct the more severe the resulting sentence.”).

²⁰² Walen, *supra* note 47, at 872-873 (stating “in war, the risks associated with giving members of the enemy’s forces their liberty are large, and therefore prisoners of war (“POWs”) can be detained without having been convicted of a crime.”).

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hostilities. This is one of the prime reasons all of aforementioned legislation was constructed.

While some contend that short-term preventive detention is justified,²⁰³ discerning what constitutes short-term preventive detention for purposes of thwarting terrorist activities is problematic.²⁰⁴ The aforementioned re-certification process, which enables unlawful enemy combatants to be held for additional periods of six months, would seemingly be labeled as a long-term preventive strategy.²⁰⁵ Nonetheless, determining how to subvert risks posed by terrorism while maintaining adequate due process measures remains pragmatic in this sense. Universally criminalizing acts of terror under federal domestic law creates consistency in how terrorists are processed, irrespective of their status as aliens or citizens. Furthermore, dynamic laws, such as those which enhance sentencing and offender levels, may serve to better marginalize terrorists' ability to escape certain modes of criminal prosecution. For example, inchoate crimes, such as threats with intent or conspiracy, or financial crimes associated with terrorism can either be prosecuted or indefinitely detained under current conditions; the latter being the subject of controversy. If we were to realign both inchoate and financial crimes associated with terrorism with current criminal adjudication and sentencing models, we would not only avert ethical and moral controversy, but could also serve to delegitimize the acts themselves. Consider the following passage:

If these people cannot be prosecuted for crimes such as conspiring or attempting to commit terrorist acts (or ancillary crimes), then they must be either preventively detained or released and policed. The first of these options is indefensible in a liberal society; and the latter seems to provide inadequate security [However], they can be prosecuted for the ultimate inchoate crime: stating the intention to commit unlawful, violent acts.

This is not legally controversial, but it is nonetheless philosophically problematic. The doctrine concerning threat law is a mess, and has failed to clearly distinguish the crime that concerns causing fear and disruption from the crime that concerns stating that one has the intention to commit a particular violent crime. But the distinction can be made and defended. Forming the intention to commit a criminal act is the essence of inchoate crimes. And while the crime of stating the intention to commit unlawful, violent acts pushes the outer limits of the idea of an inchoate crime, it does not surpass those limits. As long as the crime itself is sufficiently serious, and the prospects for deterrence sufficiently low, there is reason

²⁰³ *Id.* at 913-16.

²⁰⁴ *Id.* at 915 ("It is hard to put a number on what would count as 'short-term' detention. Benjamin Wittes and Colleen Peppard suggest that the executive should have 'broad short-term detention authority' to detain STs for up to fourteen days, a time they think is sufficient to disrupt terrorist plots.").

²⁰⁵ Alec Walen, *Criminalizing Statements of Terrorist Intent: How to Understand the Law Governing Terrorist Threats, and Why it Should Be Used Instead of Long-Term Preventive Detention*, 101 J. CRIM. L. & CRIMINOLOGY 803, 807 (2011).

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to have such a crime. Further, those conditions are met when dealing with politically or religiously motivated terrorist crime.²⁰⁶

The last part is the most significant declaration on criminalizing terrorism. Our enhancements and upward departure provisions exemplify how we as a society view terrorism: a direct threat to liberty. Yet, the incursion of military detention, rather than conventional incarceration in the criminal justice system, prevents the criminalization of terrorism. Yes, it is true we tried, convicted and even executed domestic terrorists like Timothy McVeigh. It is also true that local and federal law enforcement agencies subdued and circumvented both individual terrorists and organizations within the United States, all the while prosecuting them in conventional criminal courts. The argument and scope of this piece is not that we have shifted all policing and prosecution powers to the military. It is that the current state of affairs in which we indefinitely incarcerate individuals whose guilt or innocence has not yet been determined in a court of law is seemingly out of line in with bringing those responsible of terrorism to justice. This includes those who planned to commit acts of terror, have done so, or are parties before or after the fact to terrorism. Using criminal law to undermine terrorist efforts better addresses the question of how we should combat terrorism, "particularly when dealing with the threat to commit terrorist acts, with their potentially devastating results, there is good reason to want the criminal law to step in and prevent the act from occurring as soon as a culpable act based on that intention has been performed."²⁰⁷

Have we used all of these tools, or are they still subject to inquiry and theoretical debate? This is the essential question to be answered. According to research, these enhancements were used 197 times between 1996 and 2012.²⁰⁸ Most of these did not occur until after *Blakely v. Washington* and *United States v. Booker* were resolved.²⁰⁹ Nonetheless, this shift gives sentencing judges even more latitude in adjudicating terrorists, which should be seen as an ability for criminal courts to impose a sentence that reflects the full nature of the offense. It was during the 1990's that "the law would shift to allow individuals to be sanctioned criminally for providing material support to a proscribed foreign terrorist organization where the support was not directly linked to violence of any kind,"²¹⁰ but it was not for over a decade until the shift ended when courts received more power to determine what punishments for terrorism could be imposed. While our criminal court system was capable of handling terrorism as a crime in the wake

²⁰⁶ *Id.* at 853.

²⁰⁷ *Id.*

²⁰⁸ Said, *supra* note 201, at 502.

²⁰⁹ *Id.* at 502-03 (explaining the constitutional debate, sparked by both *Blakely v. Washington* and *Booker v. United States*, over imposing sentences that exceeded that maximum threshold under the Sentencing Guidelines. Subsequent cases such as *Kimbrough v. United States*, *Gall v. United States*, and *Rita v. United States* enabled judges to see sentencing guidelines as 'advisory'. In *Kimrough*, the court held "[t]he Government acknowledges that the Guidelines 'are now advisory' and that, as a general matter, 'courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines.'").

²¹⁰ *Id.* at 498.

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of 9/11, shifts in legislation gave increased deference to judicial sentencing practices. Wider definitional scope was created so that terrorism could be fully adjudicated by the criminal justice system. However, this has not come to fruition despite some positive activity. In the post-Booker world, it seems that trial courts will rely on appellate courts to determine whether sentences handed down encompass these special enhancements or departures, or whether courts will adhere to 18 U.S.C.A. § 3553 in treating terrorists like ordinary violent criminals.²¹¹ However, in the broader context of treating terrorism as conventional crime, “harsh sentences seem to be a fair trade-off” given that Congress has dictated a national policy goal via the enhancement provisions.²¹²

VI. Conclusion

Why are examinations of the legislative history surrounding the War on Terror, the laws of war and the just war doctrine, application of international law to domestic courts, and current criminal justice processes important to the debate on indefinite detention? First, they depict how both sidestep and abide by various domestic and international legal hurdles. Second, they show where current models originate, and more specifically, how the military justice system and criminal justice system began to converge, and where global principles and law fit into each system. Third, while one could examine indefinite detention from a philosophical, namely utilitarian perspective, analyzing the ethical conundrums is not independent of all of the aforementioned sections. Put another way, to examine how we adjudicate and combat terrorism in a post-9/11 world, we need to understand our current framework.²¹³ However, it seems that while the military and criminal justice models each have inadequacies, the traditional military model is the most problematic due to higher risks of erroneous errors occurring, the indefinite nature of the war itself, and the associational “triggers of detention.”²¹⁴

²¹¹ George D. Brown, *Punishing Terrorists: Congress, The Sentencing Commission, The Guidelines and the Courts*, 23 CORNELL J.L. & PUB. POL’Y 517, 540 (2014) (“To some extent, judges will look to appellate courts for answers. The appellate opinions appear to tilt in favor of the enhancement and the approach it embodies. However, the value of any message that appellate courts might send is inevitably bound up with broader questions about the sentencing relationship between trial and appellate courts in the post-Booker era.”).

²¹² *Id.* at 546.

²¹³ See Chesney & Goldsmith, *supra* note 5, at 1092-1096 (arguing that the three pre-9/11 developments that created the convergence of military detention and criminal justice were: criminal justice preventive methods, the laws of war and human rights, and terrorism and the crime versus war debate. Collectively, these three developments enabled military detention of terrorists to be seen as viable. The authors state, “these three pre-9/11 trends—the rise of prevention in the criminal law system, the importation of human rights law standards into the laws of war, and the growing realization that modern terrorism warranted military responses based on military authorities—were the seeds of the post-9/11 convergence of the criminal and military detention models.”); see also Chesney & Goldsmith, *supra* note 5, at 1133 (illustrating a more robust comparison of various models of procedural safeguards, in Appendix A).

²¹⁴ Chesney & Goldsmith, *supra* note 5, at 1100 (concerning how the traditional military model was perceived to be inadequate following 9/11: “All of these factors make it much more likely that the traditional military detention process will result in erroneous detentions. The costs of such erroneous detentions are also higher in this war. The war against al Qaeda and affiliates has an endless quality in the sense that there is little or no prospect for negotiations leading to an agreed end to hostilities or an

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Nonetheless, while indefinite detention may serve specific short-term goals within the military model, the use of the criminal justice system afford individuals more robust procedural protections. Specific problems associated with the legality of such detention under the laws of war and international humanitarian law can be averted. The criminalization of terrorism is not without its problems. The largest controversy is the protection of sensitive information that could otherwise be kept from public awareness if terrorists are dealt with in the current military model. However, while military detention is more flexible than civilian detention, because of the safeguards it must provide, its usage seemingly undermines the rule of law and our attempt to legitimize a unified and effective stance against terrorism. Furthermore, this creates pressure on the criminal justice system to 'prove' it can handle prosecuting terrorists. This pressure that might sacrifice integrity in lieu of fairness.²¹⁵ The "national security interests implicated by the prosecution of Zacarias Moussaoui, indicted as the so-called 'twentieth hijacker,' would not be different were he a citizen."²¹⁶ The following passage conveniently sums up the viability of adjudicating terrorism through the criminal justice system. Ressay was an individual caught smuggling weapons into Washington State from the Canadian border in an attempt to set them off at the Los Angeles International Airport (LAX). The majority held that:

I would suggest that the message to the world from today's sentencing is that our courts have not abandoned our commitment to the ideals that set our nation apart. We can deal with the threats to our national security without denying the accused fundamental constitutional protections.

Despite the fact that Mr. Ressay is not an American citizen and despite the fact that he entered this country intent upon killing American citizens, he received an effective, vigorous defense, and the opportunity to have his guilt or innocence determined by a jury of 12 ordinary citizens. Most importantly, all of this occurred in the sunlight of a public trial. There were no secret proceedings, no indefinite detention, no denial of counsel.

The tragedy of September 11th shook our sense of security and made us realize that we, too, are vulnerable to acts of terrorism. Unfortunately, some believe that this threat renders our Constitution obsolete. This is a Constitution for which men and women have died and continue to die and

unconditional surrender. Even if the conflict can be terminated in practical terms through the suppression or elimination of al Qaeda, moreover, there is reason to believe the conflict could span generations. The same seemed theoretically possible in the midst of traditional conflicts, of course, but in this war there is an unusually high risk that preventive detention may prove indefinite.").

²¹⁵ Jonathan Hafetz, *Military Detention in the "War on Terrorism": Normalizing the Exceptional After 9/11*, 112 COLUM. L. REV. SIDEBAR 31, 44-45 ("Conversely, maintaining this alternative military detention system forces the civilian criminal justice system to demonstrate its capacity to prosecute terrorism cases successfully— with success measured in terms of convictions obtained rather than in the fairness and integrity of the procedures. This creates pressure to limit criminal defendants' rights—a trend reflected by recent proposals to expand the 'public safety' exception to *Miranda v. Arizona* to deflect criticisms of prosecuting terrorism suspects in federal court.").

²¹⁶ David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 378 (2003).

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which has made us a model among nations. If that view is allowed to prevail, the terrorists will have won.²¹⁷

A few things are of note in this case. First, the individual was known to be a member of al-Qaeda-which has been the prime focus of much of our legislation. Second, the incident occurred prior to 9/11. This reflects aforementioned statements about our criminal justice already being capable of processing terrorists prior to the onslaught of legislation following 9/11. Third, this case poses a significant amount of physical danger due to the intended lethality of his actions. Nonetheless, our criminal justice system disposed of the individual without resorting to arbitrary or clandestine means. Thus, terrorism enhancements and the upward departure provision enacted in the PATRIOT Act ought to further the strength of courts ability to prosecute terrorists. Utilizing our federal court system instead of relying on military commissions that are modeled on the laws of war, international law, and treaties should serve as a symbol that crime is crime, and should deflect the politicization of terrorism and worldviews. Even if we attempt to undermine the political nature of terrorism, it still proves difficult because political motivations may serve as the prime basis of terrorism definitions.²¹⁸ To preserve the rule of law and the principles that guided the bulwark of our nation's due process development, it is essential to uphold democratic safeguards to all who are subject to punishment in the War on Terror.²¹⁹ We need to divert terrorist proceedings and status determinations to the criminal justice system. This will ensure that international law and norms are upheld, domestic procedural due process safeguards are met, terrorists receive definitive punishment, and the resolve of our rule of law goes unfettered.

²¹⁷ United States v. Ressaam, 679 F.3d. 1069, 1078 (9th Cir. 2012).

²¹⁸ See Marny A. Requa, *Considering Just-World Thinking in Counterterrorism Cases: Miscarriages of Justice in Northern Ireland*, 27 HARV. HUM. RTS. J. 7, 17 (2014) (discussing the attempts of British leaders to thwart IRA terrorism by undermining their political motivations through 'criminalizing' terrorism; thus depriving it of its weight. However, the author concludes that this is problematic given that politics lies at the root of the definition of terrorism).

²¹⁹ Report to the House of Delegates, Am. Bar Ass'n, Task Force on Treatment of Enemy Combatants (February 10, 2003), available at <http://www.americanbar.org/content/dam/aba/migrated/leadership/rccommendations03/109.authcheckdam.pdf>.