# CHOICES OF LAW, CHOICES OF WAR

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Is terrorism crime, or is it war? What conceptual framework will or should the United States use to conceptualize its fight against terror? The distinction between crime and war, embodied in international and domestic legal regimes, institutional-administrative divisions, and in such legislation as the Posse Comitatus Act,[1] requires serious rethinking in the light of the terrorist attacks of September 11, 2001.[2] Whether we choose the framework of war, the framework of criminal pursuit and prosecution, or, as is more likely, some complicated combination of the two will have major ramifications in the spheres of law, politics, and policy.

This Essay proposes to examine a few of the most important and interesting problems associated with the choice of framework, and to address in a preliminary way the central question of how the crime/war distinction should be treated, developed, preserved, or revised. Part I investigates the distinction between crime and war and proposes four criteria that underlie that intuitive distinction. Applying these criteria shows that some cases, such as international terrorism, can plausibly be characterized as both crime and war and that these cases therefore undermine the binary character of the crime/war distinction. Part II considers the practical consequences of the crime/war distinction for the pursuit and

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1. 18 U.S.C. § 1385 (1994) ("Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.").

2. According to former Attorney General William Barr: "There's a basic tension as to whether to treat this as a law enforcement issue or a national security/military issue." Douglas W. Kmiec, *Infinite Justice*, NATIONAL REVIEW ONLINE (Oct. 11, 2001), *at* http://www.nationalreview.com/comment/comment-kmiec101101.shtml.

capture of international terrorists, paying particular attention to a striking asymmetry: on the one hand, criminals generally may not be killed by their pursuers if they pose no immediate threat, but may be punished after capture; adversaries in war, on the other hand, may generally be killed in pursuit without giving quarter, but generally cannot be punished after they are captured. (War criminals constitute a complicated hybrid category.) There is therefore reason to think that U.S. policy can and will treat international terrorists as war adversaries while they are being pursued and as criminals of some sort after they are captured. Part III briefly considers the institutional and administrative implications of the breakdown of the crime/war distinction in the case of combating international terror and discusses the sorts of institutional changes that may be appropriate. The general suggestion of the Essay is that it may not be necessary to choose either crime or war as an exclusive general framework for addressing problems of international terror. Rather, the framework itself may require reexamination—a reexamination perhaps long overdue, but in any case prompted in the United States by the events of September 11.

## I. WAR AND CRIME: A BRIEF EXCURSUS

What sort of distinction is the familiar one between war and crime? Begin with the traditional distinction between crimes against domestic law and acts of war against a state. Both crime and war involve acts that in some sense offend against the state—after all, crime was long said to violate "the king's peace."[3] But a crime violates the laws of the state, whereas a war involves a violation of, or a challenge to, a state's sovereignty more generally. What are the constitutive elements of this distinction?

The first element of the crime/war distinction, which interacts in complicated ways with the other elements I shall discuss, is the identity of the actor. International law traditionally took the view that only a sovereign state could

3. The common law writs recited the phrase *contra pacem regis* not only in cases of crime but also in cases of tort. In any case the basic notion is surely a violation of legal conditions specified by the sovereign. *See* Morris S. Arnold, *Accident, Mistake, and Rules of Liability in the Fourteenth-Century Law of Torts*, 128 U. PA. L. REV. 361, 370-71 (1979) (associating the phrase with crime even in the tort context).

perform an act of war. Reciprocally, the domestic law of jurisdiction has traditionally incorporated the view that sovereign states are immune from criminal (and civil) prosecution, as indeed are their leaders.[4] Call this the *identity* criterion: the actor's identity plays a role in determining the difference between war and crime. The identity criterion may not have an independent logical basis,[5] but it certainly plays a key role in our intuitive understanding of the differences between crime and war. Our intuition tells us that states make wars and individuals commit crimes.

A second salient element of the distinction lies in jurisdictional provenance. For an act to count as a crime, it must be committed by someone who falls within the relevant jurisdiction. The standard view of jurisdiction, embodied in, for example, *Restatement (Third) of Foreign Relations Law*, gives a state jurisdiction over actions taken within its borders; actions intended to have substantial effects within its borders (even if taken outside the borders); actions against its nationals, even nationals abroad under some circumstances; and actions taken outside the state that are directed against the security of the state.[6]

This view of jurisdiction builds on the basic intuition that crimes are archetypically committed within the state itself. Expansion of criminal jurisdiction outside the geographical boundaries of the state is designed to protect persons and property that are either within the state or so closely associated with the state as to count as within it. By contrast, war is

4. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 451-52 (1987) [hereinafter RESTATEMENT].

5. Notice that the identity criterion might be understood as implicit within the other two criteria. If jurisdiction is necessary for something to count as a crime, and there is no domestic jurisdiction over sovereign states, then one could plausibly find that the identity criterion is already present within the provenance criterion. Similarly, if one were to take the view that only a sovereign state can meaningfully be said to intend to challenge the legitimacy or sovereignty of another state, then the identity criterion would be built into the intentionality criterion.

6. *See* RESTATEMENT, *supra* note 4, § 402. The so-called protective jurisdiction is embodied in 18 U.S.C. § 2332 (1994), which criminalizes killing U.S. nationals abroad, and which is invoked to try, for example, terrorists who attack U.S. embassies. These sorts of jurisdiction do not necessarily depend on international agreement or consensus. Greater expansions of jurisdiction—for example, universal jurisdiction over certain crimes against humanity—do derive in some way from international law. *See* RESTATEMENT, *supra* note 4, § 404.

typically waged by some force or power that is located outside the state's jurisdiction, although in the course of war, the outside power may make incursions into the state's jurisdiction. Notwithstanding that such incursions harm the state's interests and authorize self-defense and the use of force, it is difficult to imagine a domestic law that prohibits invasion by a foreign power. It would be very strange, for example, for the United States to pass a domestic law making it a crime for Canada or Mexico to invade the United States. Part of the reason appears to be that no one state possesses the supranational jurisdiction to prohibit war. If crime violates the king's peace, then war violates a peace that (in the traditional view) does not belong to anybody, since no one state has the supranational jurisdiction to prohibit war. Call this jurisdictional element the *provenance* criterion of the crime/war distinction.

A third salient element of the crime/war distinction has to do with the intent of those who commit crime or wage war. A criminal typically intends to achieve some prohibited end and to get away with it by avoiding discovery, prosecution, and punishment. He normally does not deny the state's legitimate right to enact the law that he violates. By contrast, the body that commits an act of war against a state normally intends to contest the state's legitimate right to something.[7] Perhaps the war-maker contests the attacked state's sovereignty over some piece of land, or contests the legitimacy of some act of alleged aggression by the attacked state. Sometimes, though not always, the attacker contests the very legitimacy of the attacked state's government, and seeks to replace it. In any case, it will be rare (though not unimaginable) for those who wage war to acknowledge the complete legitimacy of the attacked state's identity and actions and to say simply that the war is aimed at expanding territory or seeking revenge. Shakespeare's Henry V

7. Compare the definition of "aggression" adopted by the U.N. General Assembly in 1974: "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations . . . ." G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, annex, at 143, U.N. Doc. A/9631 (1974). This definition focuses upon intentionality, but by describing aggression as an act of one state against another, the definition implicitly adverts to provenance as well. In my view, it is too restrictive to limit aggression or war to actions of states.

launches his invasion of France after his legal advisers reassure him that he is the legitimate heir to the French throne, notwithstanding the Salic law prohibition on inheritance through the female line.[8] The War of Jenkins's Ear took place some eight years after Captain Jenkins lost the ear in question to a Spanish knife, but as the eponym suggests, even that war was said to have a *casus belli* grounded in the illegitimate actions of Spain.[9] Call this the *intentionality* criterion of the crime/war distinction.

Finally there is a fourth element, one relating to the scale of the hostile action taken. Call it the *scale* criterion. This criterion is even less susceptible to precise characterization than the other three criteria, but nonetheless it matters in some way. Large-scale hostilities seem more plausibly to constitute war than do small-scale ones. A shot fired in anger across a hostile border by a single enemy soldier with the intent to challenge the legitimacy of the government on the other side—even if the shot were ordered through the chain of command—would not normally be considered an act of war unless it were followed by lots more shooting. Although occasionally a *casus belli* may be small (consider Jenkins's ear again), usually such a *casus belli* suggests that the attacked party is looking for an excuse to say that war has begun against it. When the hostilities mount in scale, the escalation looks more like war. Similarly crime on a large enough scale—an organized syndicate's robbing, for example, thousands of banks in a day, killing hundreds of guards and police—begins to resemble war.

The hard cases on the border of the crime/war distinction show the importance of all four criteria: identity, provenance, intentionality, and scale. Is treason under the U.S. Constitution war or a crime? The Constitution does not resolve the question satisfactorily. It says that treason may consist in "levying war against," or in "adhering to" the enemies of, the United States, but it also, of course, prescribes a trial for charges of treason.[10]

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8. WILLIAM SHAKESPEARE, HENRY V act 1, sc. 2. *See* THEODOR MERON, HENRY'S WARS AND SHAKESPEARE'S LAWS: PERSPECTIVES ON THE LAW OF WAR IN THE LATER MIDDLE AGES (1993).

9. Parliament declared war on October 19, 1739. Jenkins claimed his ear was taken in 1731.

10. U.S. CONST. art. III, § 3. One can commit treason under the U.S. Constitution by levying war against the United States—presumably, while being a citizen of the U.S.—or by adhering to "enemies" of the U.S. *See id.* These enemies are

The very notion of treason requires action by someone within the state's jurisdiction, whether geographical or personal;[11] this is a provenance argument for viewing treason as a crime. However, while those who commit treason do not themselves normally constitute a state (except in the contested case of secession), they may be "adhering to" an aggressor state, which will complicate matters and make their act look like war. The identity criterion therefore raises tricky problems. Treason will often involve a challenge to the legitimacy of the state's rule, and so the intentionality criterion also makes treason look like an act of war. Finally, treason by thousands of people looks more like war than does the treason of one or two. Perhaps the way to resolve this puzzle is to say that treason is the prohibited crime of war against the state waged by a citizen or another person within the state's jurisdiction.[12]

Rebellion poses a related problem. Rebels generally claim to be engaged in war, and they certainly challenge the state's legitimacy, thereby satisfying the intentionality criterion for war. They also often claim to have a state of their own, which would make them state actors under the identity criterion. The state, on the other hand, often insists on treating rebels as common criminals, presumably on the theory that because they fall within the state's jurisdiction and lack the state that would make them state actors, they are therefore criminals under the provenance criterion. What we think of the categorization will likely depend on whether we think the rebels' claims are justified. The American Civil War featured a classic version of this problem: the Union saw secessionist Southerners as criminals, while the Confederate States of America saw itself as a legitimate state involved in a war for its independence. It is no surprise that the crime/war distinction was often unstable during the Civil War.

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presumably state actors, but they might also include non-state actors.

11. Treason extends to events committed outside the U.S. *See* Tomoya Kawakita v. United States, 343 U.S. 717, 732-33 (1952). Nonetheless, the theory must be that the U.S. maintains jurisdiction over its citizens wherever they go.

12. Citizenship and treason interact in interesting ways. Yet a person must actually be a citizen to be convicted of treason for acts committed outside the United States. *Kawakita*, 343 U.S. at 723-33. The treason statute extends to persons "owing allegiance to the U.S." 18 U.S.C. § 2381 (1994). This strongly suggests that its reach is limited to citizens. United States v. Stephan, 50 F. Supp. 445 (E.D. Mich. 1943), *aff'd*, 139 F.2d 1022 (6th Cir. 1943). Of course it is not inconceivable that this language might be extended to, say, permanent residents.

Civil disobedience also poses interesting problems. The individual engaging in civil disobedience commits a crime under the provenance criterion. She is not typically a state actor. But whether she does or does not intend to challenge the legitimacy of the state depends on circumstances. In his *Letter from Birmingham City Jail*, Martin Luther King, Jr. went to great lengths to argue that he did not intend his actions to challenge the legitimacy of the United States or the rule of law but only the moral correctness of the law in question.[13] Under the intentionality criterion, King's disobedience looks nothing like war. He was imprisoned for an act that challenged the legitimacy of one law, not the legitimacy of the state per se. By contrast, Mahatma Gandhi's non-violent opposition to British rule in India, undertaken on a massive scale, seems to have been intended in significant part to challenge the very legitimacy of imperial rule and colonial domination. Gandhi did not directly represent a government-in-exile, so he probably was not a state actor. Nonetheless, if the leader of a civil disobedience movement were to claim to represent a legitimate government, her actions might look more like war under the intentionality and identity criteria. (This would still be war of a non-violent sort, if such a thing is possible to conceive.)[14]

The identity, provenance, intentionality, and scale criteria provide the beginnings of an account of the crime/war distinction. But what of that hybrid being, the war crime? How does the war crime fit into the crime/war distinction under these criteria? The war crime is a crime committed within the

13. *See* MARTIN LUTHER KING, JR., LETTER FROM BIRMINGHAM CITY JAIL (1994). *See also* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 186, 207 (1978) (arguing that civil disobedience derives from moral duty to conscience in conflict with law, and suggesting that punishment for civil disobedience may be inappropriate); MICHAEL WALZER, OBLIGATION: ESSAYS ON DISOBEDIENCE, WAR, AND CITIZENSHIP 43 (1970) (distinguishing direct disobedience to a law that is thought immoral from indirect disobedience to a law—like a trespassing law—in the course of engaging in protest).

14. Must war be violent to count as war? The question is beyond the scope of this Essay, but notice that one could imagine a sustained non-violent attempt to overthrow a government, waged from outside. It might be unlikely to succeed, but what would we call it? Larry Kramer suggested to me the example of economic sanctions as an instance of non-violent—or at least not always directly violent—acts that might constitute aggression against a state. There is of course a large political science literature on economic sanctions, but the literature does not focus on the essentially legal question of whether such sanctions count as "war."

rubric of war; it is not, or is not primarily, a crime against the laws of any one particular state. Rather, the war crime violates some legal norm that exists outside the rubric of domestic law—a legal norm belonging to that set of norms known as the law of war.[15] Where does the law of war come from? This question appears to be a subset of the general question of the origins of international law. Suffice it to say, for our purposes, that the law of war derives either from international agreements and custom, implicit and explicit, or else from the natural law firmament. One's general theory of international law will probably determine one's view of the law of war.

Conceptually, a war crime therefore is an act in violation of laws laid down by some supranational source of sovereignty, whether human (international agreement or common custom) or metaphysical (natural law). Recall that under the provenance criterion, actions that fall within the jurisdictional reach of the law-making capacities of an identifiable sovereign count as crime, while those that do not count as war. It follows that, under the provenance criterion, a war crime is an instance of crime. If one accepts the existence of war crimes (which one need not logically do), then one surely has the view that war crimes fall within some relevant sovereign's jurisdictional capacity to prohibit the action in question. That jurisdiction may include all those areas upon which international actors agree or all those areas to which natural law speaks.

Under the intentionality criterion, is a war crime to be considered as crime or war? The question is close. One answer is that a war crime normally is a crime as a matter of intentionality, because one who commits a war crime typically does not intend by that act to challenge the legitimacy *of the relevant sovereign that has prohibited the act.* Rather, the war crime is an act undertaken to further the local ends of winning the war in which the war criminal is engaged. A war criminal may, for example, massacre non-combatants or use gas against troops in order to defeat the adversary and achieve his war

15. In Grotian terms, a war crime may be a crime against *jus in bello* or *jus ad bellum*—that is, either a crime committed by an act against the law of war during the prosecution of war, or a crime committed by the fact of the unjust prosecution of the war. For a sophisticated modern exposition, see MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS (1992). This Essay focuses on war crimes as violations of *jus in bello*, although many war crimes are violations of *jus ad bellum*.

aims. He may also commit war crimes that do not serve his war aims but simply result from cruelty or lack of discipline. Such actions do not make war against the international order—they simply violate the law of war that derives from that order.

Of course, because the war crime is committed in the act of making war, there will always be another layer that corresponds to the intentionality of war *against the attacked party*. But this layer of making war against the adversary is incidental (at least usually) to the criminal aspect of the act, which has to do with choice of some means of behavior that happens to violate the law of war. The war criminal normally would like to avoid being held responsible for the war crime, and he normally does not intend, at the moment of commission of the crime, to challenge the legitimacy of the source of the law of war.

Regarding identity, one might observe that one who commits a war crime will normally be some sort of state actor, to the extent that an individual fighting in a war represents a state. The identity criterion then might be said to make the war crime into an act of war. But on the other hand, the war criminal is not normally the state itself but rather someone acting under the state's putative authority. Finally, a war crime can be small or large. The scale criterion therefore does not place it squarely within the category of war.

From this analysis, it emerges that the war crime is a special case of a crime, committed in violation of the international order of the law of war, while in pursuit of war against a particular enemy. The adjective in the phrase "war crime" is the word "war," which tells us when the crime was committed and which law the offender violated. The provenance criterion and the intentionality criterion point in this direction, and the force of the identity criterion does not seem sufficient to push in a different direction here.

War crimes, I have just said, imply the existence of some supranational source of law, even if that source consists of no more than an abstract truth of the law of nations that each country applies through its own legal institutions. The rise of war-crimes discourse may therefore be an interesting example of the growth of the practice of speaking as if there were some

settled supranational framework for assessing the legitimacy of action.[16] If one has sympathy for the ideal of supranational law, whether created by consent, custom, or some natural law source, one will likely be sympathetic to invoking war crimes both generally and in the case of terrorism in particular. If, to the contrary, one wishes to reject the view that there exists supranational law regulating action in war, then one will be disinclined to invoke the notion of war crimes.

## II. THE FUNCTIONAL CONSEQUENCES OF THE CRIME/WAR DISTINCTION: PURSUIT, CAPTURE, SANCTION

Why does it matter whether we characterize a given act as a crime or an act of war? The functional consequences of the crime/war distinction matter in several spheres. The first has to do with the paradigmatic models of pursuit, capture, and sanction that attach differentially to crime and war. Some of these models are required by domestic laws, constitutional or otherwise, and some by international law norms. Some, and perhaps all, may be avoided or avoidable as a matter of practical reality. The purpose of this discussion will be less to detail these requirements with legal precision—such an attempt would in any case involve details that would differ from case to case—than to capture in the broadest terms how these paradigms differ, and why it matters.

The paradigm of crime normally requires that the criminal be pursued by means aimed at his capture, not at his death. Death of the criminal at the hands of an unruly mob is, or is supposed to be, a thing of the past.[17] Under some circumstances, the criminal may be injured or killed in the pursuit, but it is generally thought that this should happen only if the criminal resists capture by violent means. The paradigmatic requirement that pursuit be aimed at capture, not death, gives

16. It is this impulse to act and speak in terms of supranational sovereignty that Antonio Negri and Michael Hardt mean to identify in their widely-discussed book, EMPIRE (2000). The "empire" exists insofaras it justifies and organizes supranational authority for prohibiting actions by states and individuals.

17. *See* 2 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, HISTORY OF ENGLISH LAW 579 (2d ed. 1959) ("Now if a man is overtaken by hue and cry while he has still about him the signs of his crime, he will have short shrift. Should he make any resistance, he will be cut down."); *see also* Garner v. Memphis Police Dep't, 710 F.2d 240, 243-44 (6th Cir. 1983), *aff'd*, Tennessee v. Garner, 471 U.S. 1 (1985) (citing POLLOCK & MAITLAND, *supra*).

rise to the notion that capture itself should be preceded by some opportunity for the criminal to give himself up. The criminal's failure to give himself up does not mean that he may be killed, however. The fleeing criminal may normally be killed only if he actively endangers his pursuers or other persons.[18] The implicit reason seems to be that otherwise we do not fear that the fleeing criminal poses an immediate mortal danger to others.[19] Or perhaps we are simply confident that he will be captured soon.

Another reason not to kill the fleeing criminal may have to do with the presumption of innocence that attaches to the criminal suspect. This presumption plays its major role in the trial that is meant to follow capture and precede sanction. The crime paradigm requires due process, aimed at ascertaining that the person to be punished actually is the criminal. Detention is permitted only pending trial and determination of guilt. Even if intended to avoid recidivism, pre-trial detention is thought to be preventive, rather than punitive. The criminal trial itself is associated with a high standard of proof, partly because we have the leisure of trying the criminal at our "speedy" convenience, and partly because our sense of justice requires it.

Finally, the punishment that follows conviction of the criminal can be very harsh, and can even include death, at least in the United States of 2002. The punishment is meant to be carried out coldly and deliberately. Although theories of criminal punishment abound, on nearly every contemporary theory the punishment is to be determined and meted out by an agent of the sovereign against whom the crime initially offended. The people make the law, and the people, through their judicial or jury delegates, punish the law-breakers.

The norms surrounding pursuit, capture, and sanction are

18. *See Garner*, 471 U.S. at 1.

19. If we did have good reason to believe that the fleeing felon were very likely to kill innocent persons before being captured, it would be doubtful as a moral matter that we should let him escape rather than kill him straightaway. Of course we want to be certain that the fleeing felon is actually the guilty party, but imagine that someone has just fired into a crowd of people, has dropped his gun, and has then fled. If there were reason to believe he might have ready access to another gun and could be likely to kill other persons with it, then surely it would be justified, and maybe even morally compulsory, to shoot at him in order to stop him from harming others imminently.

very different in the context of war.[20] First of all, subject to rather loose international law norms of necessity and proportionality, pursuit may normally take the form of pursuit with the intent to kill.[21] There is no requirement of warning. There is also no obligation to give the enemy an opportunity to surrender. Wartime rules of engagement as practiced by the U.S. typically permit fire on all identified targets, regardless of whether there exists an immediate threat to U.S. forces.[22] Capture (as opposed to killing) is usually required only when the enemy actively surrenders; that is, the burden to give way rests on the enemy, not on the pursuer. After surrender, the norms are also sharply divergent. Normally there can be no sanction for participating in war. The captured combatant becomes a prisoner of war, and must not be harmed.[23] He must be returned at the end of hostilities. He is detained not as a matter of sanction, but only so he will not fight again.

Notice the fascinating asymmetry between the paradigms of crime and war, especially with respect to killing. In crime, one generally cannot kill until after capture, but at that point, cold-blooded execution is legally permissible. In war, one may kill almost at will before surrender and capture, but after capture, the prisoner cannot be killed or otherwise sanctioned.

This striking asymmetry gives rise to serious complications in cases where there is some reason for uncertainty about which paradigm is appropriate. Consider the case of the terrorist who, from abroad, masterminds a terrorist act in the United States or another nation. What will be the position of the United States with respect to whether the act should be treated as a crime or as an act of war?

The criterion of intentionality lends weight to the view that a terrorist act is an act of war. Terrorists generally intend to contest the legitimacy of actions of the U.S. government, and this is apparently true of those who appear to have been responsible for the attacks of September 11, 2001. The terrorists—assuming they were members of Al Qaeda—deny

20. For a useful review of the issue, see Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 1 (1994).

21. *See id.* at 29 n.84 (describing necessity and proportionality requirements).

22. *Id.* at 27. Peacetime rules of engagement may differ.

23. *See id.* at 28 n.82 (citing Department of the Army regulation mandating instructing on "basic law of war rules").

the legitimacy of American support of local governments in the Middle East, of U.S. intervention against Iraq in the Gulf War, of the continued presence of U.S. troops in the region, and perhaps even of the U.S. government's fundamental right to govern its own country.

The criterion of provenance is a bit trickier. By hypothesis, we are speaking of a terrorist who plans his actions outside the U.S. But let us assume that those who carried out the attacks did so within the jurisdiction of the U.S., or attacked U.S. nationals abroad. Normal principles of jurisdiction certainly extend criminal jurisdiction to terrorist-planners whose actions abroad have effects within the United States or against its nationals. There is thus good reason to say that applying the provenance criterion leads to the conclusion that the terrorist act is a crime. The terrorist mastermind, in other words, is different with respect to provenance than a general who plans an attack that will be made on the U.S. by an army attacking from without.[24] The reason, under the provenance criterion, is that no standard principles of domestic jurisdiction would reach the general. Even though his actions will have effects within the U.S., we have the intuition that the United States cannot, in its domestic law, prohibit war being waged against it from without.

Next consider the identity criterion. The party who planned the terrorist action may or may not be a state actor—indeed the question is open even with respect to the September 11 attacks. It may, furthermore, be difficult to determine if a person who planned terrorist acts did so in concert with or at the behest of a state until after the person has been captured; and even then the facts may remain unclear. In light of this uncertainty, the identity criterion will not help us much in choosing a framework for pursuit, capture, and prosecution.

Finally, there is scale. Terrorist actions that are very large, like the attacks of September 11, seem to authorize a discourse of war much more than do smaller attacks. (Of course, small attacks that intentionally follow a large attack would seem to

24. Of course some states have adopted universal jurisdiction over war crimes, so if terrorism is in fact a species of a war crime, then jurisdiction might lie in any of these states. But universal jurisdiction, it must be noted, is itself a challenge to the very idea of the provenance criterion. If I have jurisdiction over any event that occurs anywhere, then provenance is essentially irrelevant.

be continuing parts of the war—it is not a transaction-by-transaction analysis.) Yet some acts of international terrorism may be isolated, relatively small, and not part of a larger campaign. It would clearly be more difficult, though not impossible, to classify such smaller attacks as war.

It follows from this analysis that terrorist attacks on the United States, planned from without, cannot definitively be categorized as either war or crime. They are crime from the perspective of provenance, war from the perspective of intentionality, probably crime from the perspective of identity, and very possibly war from the perspective of scale. So what course should be followed—or will be followed—in pursuing, capturing, and sanctioning terrorists? Will it be the paradigm of crime or the paradigm of war?

Applying either paradigm in its ideal form might contingently lead to results that are politically difficult, and perhaps undesirable. If the framework is war, then the terrorist—for example, Osama bin Laden and those close to him—can probably be pursued and killed as enemies, so long as he does not surrender. Of course, since the law of war is being applied here, the killing must be necessary to achieve the aims of the war. But this requisite condition should not be too difficult to achieve. The terrorist leader is analogous to the general of an opposing army in wartime—that is, a combatant who would be a fair target for attack.

But what if bin Laden, or any other terrorist leader for that matter, surrenders or is captured alive? It is easy to imagine that, as a last resort, a terrorist might surrender. Even someone who sincerely seeks martyrdom might prefer to defer that martyrdom to an opportune time and place. A media-savvy terrorist might show the white flag while video cameras were running, with a live feed to CNN or al-Jazeera or the cable network of the moment. If the war paradigm applied in its purest form, then the Geneva Convention would, in the first instance, mandate prisoner-of-war treatment. This would not be a politically acceptable outcome, nor would it make very much sense as a matter of legal logic. Not only is there no counterpart to whom the non-state-actor terrorist might be returned at the cessation of hostilities; there is no obvious counterpart with whom peace might logically be concluded at all. Indefinite detainment would seem silly and, in any case,

would not be a proper form of sanction under the war paradigm.

If the terrorist is captured alive or surrenders, then it is near certain that some other solution would have to be found than applying the paradigm of war. We would expect, at that point, for the paradigm of crime to come into play. The crime paradigm could be deployed in one of several ways. It would be possible to charge the terrorist with war crimes.[25] This appears to be the current policy of the United States in relation to at least some international terrorists, particularly those associated with Al Qaeda, the organization that the U.S. holds accountable for the attacks of September 11. On November 13, 2001, President Bush issued a Military Order authorizing the Secretary of Defense to constitute "military commissions" for the purposes of trying non-citizens whom the President determines there is reason to believe either (1) are or were members of Al Qaeda, (2) engaged in, aided or abetted, or conspired to commit "acts of international terror," or (3) knowingly harbored Al Qaeda members or international terrorists.[26]

The crime/war distinction is at work here as a matter of constitutional and statutory law. The Military order, like the World War II-era proclamation and order on which it is in part based,[27] apparently purports to rely implicitly on the executive's power as Commander in Chief. Its preamble invokes not only this constitutional power but also the Use of Military Force Joint Resolution passed by Congress after the September 11 attacks, as well as the federal statutes that refer to the existence of military commissions and that have in the past been held to authorize the creation of such commissions.[28] The

25. For an extended proposal to this effect regarding domestic terrorists, see Spencer J. Crona & Neal A. Richardson, *Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism*, 21 OKLA. CITY U. L. REV. 349 (1996).

26. Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism § 2(A)(1)(i)-(iii), 66 Fed. Reg. 57,833, 57,834 (Nov. 13, 2001) [hereinafter Military Order].

27. *See* Proclamation 2561, Denying Certain Enemies Access to the Courts of the United States, 7 Fed. Reg. 5101 (July 7, 1942); Appointment of a Military Commission, 7 Fed. Reg. 5103 (July 7, 1942).

28. *See* Military Order, *supra* note 26, preamble, at 57,833 (citing Joint Resolution to Authorize the Use of United States Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States, Pub. Law 107-40, 115 Stat. 224 (2001), and 10 U.S.C. §§ 821, 836 (1994)). In *In re* Yamashita, 327 U.S. 1, 7-8

Military Order then begins by finding that international terrorists, "including members of Al Qaeda," have attacked U.S. citizens at home and abroad "on a scale that has created a state of armed conflict that requires the use of U.S. armed forces."[29] To begin with, then, the Military Order invokes the executive branch's war powers and the congressional authorization of their use. Although the order does not expressly use the word "war," it invokes the idea of scale, presumably in order to contextualize the use of military commissions, which in the past have been used by the U.S. only in wartime and in its immediate aftermath.[30]

The predicate of punishment, however, is not war but crime; what crimes are the President's commissions intended to punish? The Military Order, unlike the World War II-era proclamation, does not specifically speak of punishing war crimes. The earlier proclamation applied to citizens or others obedient to nations at war with the U.S., who entered the U.S. and who attempted or committed "sabotage, espionage, hostile or warlike acts, or violations of the law of war."[31] The Military Order purports to authorize trial and punishment of Al Qaeda members, of international terrorists, and of those who harbor them, for "all offenses triable by military commission."[32] The Military Order does not specify what these offenses "triable by military commission" are. The implication, however, is surely that that the persons triable by military commission must be both involved in some act of war and accused of committing some war crime in the process. For military commissions do

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(1946), the Court held that a mere statutory reference to "military commissions" authorized the existence of these commissions. And here, § 821 would appear to do the trick:

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

10 U.S.C. § 821. As Professor Fletcher suggests in his Article in this Special Issue, this is a slender reed on which to rest the claim of authority. *See* George P. Fletcher, *On Justice and War: Contradictions in the Proposed Military Tribunals*, 25 HARV. J.L. & PUB. POL'Y 635 (2002). But nonetheless, the fact remains that the same rationale offered in *Yamashita* could be offered here.

29. Military Order, *supra* note 26, § 1(a), at 57,833.

30. *See Ex parte* Quirin, 317 U.S. 1, 12-13 & nn.9-10 (1942) (reviewing use of military commissions in U.S. history prior to World War II).

31. 10 U.S.C. § 906 (1994).

32. Military Order, *supra* note 26, § 4(a), at 57,834.

not, presumably, try offenses other than those against the law of war.[33] If it were not so, it would be entirely unclear on what basis such persons could be tried by military commissions.

The crime element of the war crimes that the Military Order sets out to try and punish is thus under-specified. The order never identifies what crimes the commission may try or what crimes the terrorists affected by the order have allegedly committed. The order also does not draw an explicit line between acts of terrorism and war crimes. Instead, the crime element is implicitly incorporated by reference to the jurisdiction of military commissions generally. Because of its vagueness, this may be a defect of constitutional proportions but perhaps it could be remedied by subsequent orders creating particular military commissions and specifying what crimes they may try. International terror is surely a crime of some sort, and for reasons discussed above, as well as others beyond the scope of this Essay, it is not implausible to say it is a war crime.

There are a variety of serious and interesting constitutional and legal questions associated with this order, and these should receive significant consideration from scholars and the courts.[34] Still, the war crimes position at least has the benefit of being legally and logically compatible with initially treating the

33. *Cf. Quirin*, 317 U.S. at 28-29, 30-31.

34. To name just one important constitutional problem, the order bars an "individual subject to the order" of any remedy, direct or indirect, in U.S., foreign, or international courts. Military Order, *supra* note 26, § 7(b)(2), at 57,835. What sort of habeas remedy does this leave for such individuals? One possible argument is that a petitioner should be able to claim on habeas that he is not an "individual subject to the order," because he is either a citizen or else does not fall within the category of Al Qaeda member, international terrorist, or person who has harbored either. This would have the effect of introducing meaningful judicial review in many cases, at least where the accused denies that he belongs to Al Qaeda or has committed terrorist acts. Two arguments support this reading. First, in *Quirin*, 317 U.S. at 25, the Court said there was "nothing in the Proclamation to preclude access to the courts for determining its applicability to the particular case." This could be read to suggest that the World War II order, at least, preserved this sort of review. Second, under the admittedly complicated decision in *Crowell v. Benson*, 285 U.S. 22 (1932), it could be argued that jurisdictional facts must always be determined by an Article III court, not by the executive. At a minimum this would apply to the fact of citizenship. *See* Ng Fung Ho v. White, 259 U.S. 276, 285 (1922) (stating persons claiming citizenship "are entitled to judicial determination of their claims"). On the other side of this argument, it could perhaps be maintained that unlike the World War II order, the Military order makes citizenship the only jurisdictional fact and then allows the president to determine of non-citizens whether they are Al Qaeda members, international terrorists, or persons who harbored either.

terrorist as an enemy in war. The military commissions also avoid the question of whether Article III courts have jurisdiction to hear war crimes cases.[35] There is precedent in the United States for trying war criminals before military commissions specially constituted by the executive branch and for administering capital sentences to the convicted.[36] Of course, logical work would still have to be done to show that international terrorism is in fact a species of war crime.[37]

Yet there are reasons to doubt the constitutionality of military commissions for prosecuting terrorists. There was no direct appeal from the World War II tribunals, nor does the Military Order allow for judicial review on the merits. Habeas review of the sort allowed in the World War II-era cases will surely lie, but it may not suffice as a constitutional matter. It is also conceivable that such tribunals may only be constitutional once a declaration of war has been made, although an authorization of use of military force might suffice.[38]

Moreover, the cases upholding the use of such tribunals are of doubtful continuing weight. Although the decisions have not been overturned, the cases arose in the same wartime

35. *But see* Crona & Richardson, *supra* note 25, at 371-72 (arguing that since U.S. law incorporates international law, U.S. courts have universal jurisdiction over war crimes).

36. *See In re* Yamashita, 327 U.S. 1 (1946); *Quirin*, 317 U.S. at 10-12 (holding that Congress conferred power on President to create military tribunals to try and execute infiltrators). Crona & Richardson, *supra* note 24, argue for the application of the *Yamashita* model to terrorists. *See also* Kmiec, *supra* note 1 (same). For the FBI's official account of the capture of the *Quirin* infiltrators, see *George John Dasch and the Nazi Saboteurs, at* http://www.fbi.gov/fbinbrief/historic/famcases/nazi/nazi.htm (last visited Feb. 1, 2002).

37. Professor Fletcher makes the point that the President cannot remove from the Article III courts the power to try offenses within their jurisdiction. *See* Fletcher, *supra* note 28, at 639-40; *cf. Ex parte* Milligan, 71 U.S. 2 (1866). Fletcher adds that the offenses committed by Yamashita in the Philippines were not triable in Article III courts. Yet in *Quirin*, the offenses were committed inside the U.S., and the Court found that it sufficed to avoid the *Milligan* problem that the defendants were belligerents who entered the U.S. out of uniform. The Court distinguished *Milligan* by saying that Milligan was a non-belligerent. *Quirin*, 317 U.S. at 45-46. If it could conceivably be said that international terrorists are non-belligerents, then the reasoning of *Quirin*, such as it is, could suffice to avoid the *Milligan* problem. But of course that would be a tricky argument: if the terrorists are not belligerents then who is?

38. Due process is also rudimentary in such tribunals: all evidence thought to be probative is admitted, and a two-thirds majority may convict and sentence. Military Order, *supra* note 26, §§ 7(c)(3), 7(c)(7), at 57,835. Even if due process is satisfied by these procedures, they are hardly the stuff of which confident judgments are made.

atmosphere that produced *Korematsu v. United States*,[39] which famously justified the detention of Japanese-Americans during World War II. One of the decisions was accompanied by a stinging dissent that declared, in no uncertain terms, that due process had been deeply compromised by the dispatch with which the proceedings had occurred, by the procedures that were employed, and even by the substantive law that was applied.[40] There is reason, therefore, to wonder whether courts today would be prepared to treat these cases as good law and to suggest that they ought not be treated as such.

Alternatively, an international war crimes tribunal might be constituted for the purpose of trying captured terrorists. It is very possible that political sentiment in the U.S. would balk at allowing a tribunal located abroad and not under the jurisdiction or direction of the U.S. to judge the perpetrator of a major terrorist act in the U.S. It is likely that American pride would demand trial in the U.S. by American judges.[41] Some in the U.S. would probably be uncomfortable with an international war crimes tribunal simply because it would implicitly acknowledge the presence of supranational authority that superseded the American desire to punish those who have injured the U.S. (Other Americans would, of course, welcome such a tribunal for the very same reason.)[42]

At a pragmatic political level, there would be a real risk that a tribunal might find the terrorist not guilty for lack of sufficient proof of causation between the terrorist's plan and its execution at a distance of time and space.[43] Even if the terrorist

39. 323 U.S. 214 (1944).

40. *See Yamashita*, 327 U.S. at 42-61 (Rutledge, J., dissenting).

41. The same feeling might exist in other countries, too, if they were subject to attack. The solution reached in the Lockerbie bombing trial, in which Scottish judges presided over a Scottish-procedure trial that took place in the Hague, suggests both that some European countries might demand the primacy of their law and institutions, and that Europeans may be prepared to compromise in ways that Americans might not be with respect to terrorism that occurs domestically.

42. There have also been proposals to try Islam-inspired terrorists before an Islamic court applying Islamic law. The trouble with such a proposal is, again, largely one of domestic U.S. politics. It is extremely unlikely that the American public would be prepared to tolerate judgment being passed by a court applying law particular to the defendants. Other proposals include the suggestion that whatever court might try Muslim terrorists include one Muslim judge. It seems unlikely that such a solution would satisfy anyone.

43. Acquittal of a major figure in Al Qaeda, for example, could have serious repercussions for international opinion about U.S. actions in Afghanistan.

were found guilty, since Nuremberg, international tribunals have not administered the death penalty, and the statutes governing international tribunals uniformly exclude capital punishment as an option.[44] The divergence between American law and the law of most other countries of the world (including all of Europe) would seem to rule out the death penalty, yet for better or for worse American popular sentiment surely demands a capital sentence. Again, the view that a supranational authority has the power to decide sentencing would disturb some Americans, and please others.

If an international war crimes tribunal is thought to be an unsatisfactory solution by many Americans, the next logical possibility would be to try the terrorist for murder in federal or state court.[45] This is the crime paradigm with a vengeance. Finding a venue for a fair trial might be a problem in the case of a major attack. But even leaving aside the delicate question of proper venue for a fair trial, there is again the problem of proof. It is possible that the chain of causal connections between a terrorist mastermind and the crimes of his associates might never be established with sufficient strength to satisfy the demands of the U.S. justice system. Nonetheless, assuming these problems could be overcome, in most states the death penalty would probably be available, albeit after appeals. The federal death penalty might also apply in many situations where, for example, federal workers were killed. Public demand for capital justice could therefore be satisfied, although getting to that stage might be very difficult.

If politically popular views about justice would be best satisfied by criminal prosecution, conviction, and sanction, and if we suppose for the moment that all these steps could be achieved morally and lawfully, why not just begin with the paradigm of crime? After all, it looks very awkward to set out with a paradigm of war while pursuing the terrorists and then shift to the paradigm of crime if the terrorists should be lucky

44. *See generally* William A. Schabas, *War Crimes, Crimes Against Humanity, and the Death Penalty*, 60 ALB. L. REV. 733 (1997) (reviewing history and statutes).

45. For an especially thoughtful version of this argument, see Harold Hongju Koh, *We Have the Right Courts for Bin Laden*, N.Y. TIMES, Nov. 23, 2001, at A39. One cannot but agree with Professor Koh's view of the U.S. courts as the most desirable and appropriate venue for trial of terrorists who have committed crimes against U.S. citizens, but the difficulty of proving guilt beyond a reasonable doubt may be greater than he anticipates.

enough to avoid being killed.

The short and perhaps heartless answer is that under the crime paradigm, it would be far more difficult legally to kill terrorists before apprehending them than it would be under the war paradigm. Presumably terrorists could be treated like other dangerous fugitives. There is also at least some possibility that the U.S. Constitution would not bar the killing of a suspect outside the U.S.[46] But at the level of logic and political discourse, there is a real difference between battle against an enemy and hot pursuit of a criminal, especially at the crucial moments surrounding capture. Even if the Constitution does not require it outside the U.S., a criminal suspect is normally warned to surrender, whereas an enemy at war need receive no such warning. To call someone a criminal, moreover, is already to place him in the category of people who must be tried and afforded due process. (This may be one reason why we go through the motions of trying war criminals and don't simply execute them summarily.) This rhetorical norm may have force even if the Constitution technically does not.

In practice, the strategy of the U.S. in a situation like the one I am describing will probably be to keep its options open. To maximize flexibility, the U.S. government would probably try to give itself the option of invoking either the crime paradigm or the war paradigm at any moment. If the terrorist can be killed, and is killed, then the U.S. will call that war. If the terrorist surrenders or is captured, the paradigm will be crime.[47] Whatever happens operationally can then be justified according to one of the two paradigms in question.

What are we to make of this pragmatically likely solution of preserving both paradigms and deploying the most

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46. *Cf.* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (holding that the Fourth Amendment does not apply to search and seizure by United States agents of property owned by a nonresident alien and located in a foreign country).

47. Something similar seems to have happened to Manuel Noriega, who was captured in war but was then tried in a domestic criminal trial. The difference is that Noriega was tried for actions that preceded the war against him (or against Panama, whichever one prefers). *See* United States v. Noriega, 746 F. Supp. 1506 (S.D. Fla. 1990), *aff'd*, 117 F.3d 1206 (11th Cir. 1997). The hypothetical terrorist I am describing is being tried for the very act that put him into the position of either enemy or criminal. (And indeed, although Osama bin Laden could be tried for earlier crimes for which he is under indictment, there would surely be great pressure to try him for the crimes of September 11).

convenient? We must consider several possibilities. First, it may be that as a matter of logic and law, there is nothing wrong with considering the same act to be both a crime and an act of war. After all, the identity, provenance, intentionality, and scale criteria are not technical requirements of law but heuristic devices intended to make sense of our use of the two concepts of crime and war. Surely Congress could lawfully declare an act of hostility like a massive terrorist attack to be an act of war. Similarly there is no doubt that an act of terror qualifies as a crime under the laws of the states and the United States. So perhaps there is nothing wrong with the lawyerly strategy of keeping all theories of the case on the table at all times and of being prepared to argue in the alternative should it be necessary.

There would be something troubling about this approach if we were committed to the view that the value of the rule of law somehow requires a state always to act on the basis of a specified and specific legal theory. One could imagine the Office of Legal Counsel, or the Office of the Legal Advisor at the State Department, producing a learned opinion on the crime/war distinction that privileges one paradigm over the other. And this undertaking would not seem preposterous to the legally-trained mind. There are good and independent reasons for government to set out to act according to one legal theory at a time.

On the other hand, perhaps the content of the concept "rule of law" does not demand that governments stick to one legal theory at a time. Sometimes even the government has to argue theories in the alternative. After all, as long as each paradigm is independently justified and justifiable under domestic and international law, we are still committed to the rule of law even if we apply each paradigm only in some circumstances and not in others. It is simply that the law gives us two options. We could deploy either at any moment, and still be within our legal rights. This argument, too, resonates with the legal mind, at least any legal mind that is prepared to tolerate, for example, subsequent state and federal prosecutions for the same act under different legal theories.[48] Such prosecutions, too,

48. For classic statements of the constitutionality of successive prosecutions by different sovereigns, see United States v. Wheeler, 435 U.S. 313 (1978); Bartkus v.

constitute examples of government (albeit nominally two different sovereigns) relying on alternative legal theories for the same factual situation. The very fact that we are on the border of crime and war itself means that our legal judgments may need to be drawn cautiously and with our eyes on the real world.

More generally, however, what can we say about the use and the meaning of the categories of crime and war in this complicated situation of pursuing, capturing, and sanctioning terrorists? The key point of this Part of my argument is surely that terror fits both categories—and neither. Terror defies easy categorization under the four criteria proposed here. Although terror itself has always existed, terror against the United States on the scale of the September 11 attacks is unprecedented. Law is resourceful; it can adapt old categories to new situations or create new categories to address them. But the fact that old paradigms may be malleable does not mean that they are conceptually adequate. We may need new paradigms for thinking about actions of mass terror. That would mean specifying, ex ante, both the criteria for terror and the rules for confronting it. This task will require work and time. But it is work that can, and perhaps must, be done.

## III. INSTITUTIONS AND THE CRIME/WAR DISTINCTION

In Part II, I pointed out that the crime/war distinction could break down in the case of international terrorism. I suggested, however, that maintaining that distinction may still be possible to the extent that we are willing to pursue two simultaneous, alternative theories of action. This sort of post-hoc rationalization is less easily available with respect to a second problem emerging from the uneasy status of terror: the institutional question of what agencies and instrumentalities of government will play what role in the fight against terror.

The crime/war distinction has traditionally played a key role in determining what parts of the U.S. government do what. Broadly speaking, the Department of Justice fights crime. Although FBI agents sometimes operate abroad, they do so as part of an effort to prosecute—and to a lesser extent, preemptively prevent—crimes committed against the United

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Illinois, 359 U.S. 121 (1959); and United States v. Lanza, 260 U.S. 377 (1922).

States. On the other hand, the CIA and the military, in subtly different ways, operate abroad. The CIA is arguably statutorily barred from domestic intelligence collection under the Central Intelligence Agency Act.[49] The Agency gathers intelligence that serves the national interest, often (although not only) in the sphere of defense against those who might wage war against the U.S. The CIA does not fight crime; it is not a police agency. Its primary mission is directed abroad, not within. Under some relatively well-publicized circumstances, the CIA's mission has even placed it at odds with crime prevention and law enforcement.[50]

The military, even more obviously than the CIA, is designed to fight wars, not domestic crime. A Reconstruction-era statute called the Posse Comitatus Act[51] actually codifies this principle into law. The Posse Comitatus Act bars use of the military "as a posse comitatus or otherwise to execute the laws."[52] This formulation effectively stops the military from pursuing criminals or fighting crime, and it has been so interpreted by the courts, despite an absence of prosecutions under the act.[53] A related enabling statute directs the Secretary of Defense to enact regulations to prevent military personnel from participating in "search, seizure, arrest, or other similar

49. Central Intelligence Agency Act of 1949, 50 U.S.C. §§ 403a-403j (1994). The legislative history included the statement that the CIA's focus would be "purely and completely and wholly and singly in the external or foreign field. . . . Its sole effort is outside the United States." 95 CONG. REC. 6948 (1949) (statement of Rep. Tydings). There has nonetheless always been debate about whether the CIA could gather intelligence in the U.S. for use regarding external operations. *See* Sherri J. Conrad, Note, *Executive Order 12,333: 'Unleashing' the CIA Violates the Leash Law*, 70 CORNELL L. REV. 968, 972-73 (1985) (citing FINAL REPORT OF THE SENATE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, BOOK 1, S. REP. NO. 94-755, at 97-98, 138 (1976) [hereinafter CHURCH COMM. REPORT]). The so-called Church Committee took the view that Congress in the National Security Act was "codifying the prohibition against police and internal security functions . . . ." CHURCH COMM. REPORT, *supra*, at 138.

50. Again, the example of Manuel Noriega is apt. *See supra* note 47. The CIA kept Noriega on its payroll even when Noriega was engaged, to the CIA's apparent knowledge, in some of the criminal acts for which he was later convicted.

51. 18 U.S.C. § 1385 (1994).

52. *Id.*

53. *See* Roger Blake Hohnsbeen, *Fourth Amendment and Posse Comitatus Act Restrictions on Military Involvement in Civil Law Enforcement*, 54 GEO. WASH. L. REV. 404, 409-13 (1986) (reviewing judicial interpretations of the Posse Comitatus Act).

activity."[54] This statute makes it even clearer than the Posse Comitatus Act that the military is barred from fighting domestic crime.

Leaving aside the particular Reconstruction history of the enactment of the Posse Comitatus Act, we should pause to notice that the rationale for the devotion of the military to matters of war, not domestic crime, runs deep in the history and theory of republicanism. For our purposes it should suffice to say that the republican fear of standing armies plagued the Framers.[55] The Third Amendment stands as a monument to this fear, even if this Amendment now does little else.[56] One element of the response to the concern that a standing army might influence domestic politics was to direct the military outward, to the defense of the country from external threats. Preventing the military from fighting crime is consistent with the republican impulse to maintain a separation between the military and potential domestic political involvement.

How does the crime/war distinction operate in the institutional context? Broadly speaking, as I have said, the domestic agencies fight crime, and the CIA and the military fight and prepare for war. The provenance criterion seems to be doing most of the work with respect to intelligence gathering, in the sense that the FBI generally acts domestically, while the CIA and the military typically act against persons and places that are outside U.S. jurisdiction. The domestic/foreign distinction is normally the main vehicle for discussing the respective roles of the FBI and CIA. As for the military's role, the provenance criterion might also be doing some work. It might be argued that the Posse Comitatus Act implicitly applies only within the U.S. and not abroad (though the statute

54. *See* 10 U.S.C. § 375 (1994) ("The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that any activity (including the provision of any equipment or facility or the assignment or detail of any personnel) under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.").

55. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 (1998).

56. U.S. CONST. amend. III. For the republican associations of the Amendment, see William S. Fields & David T. Hardy, *The Third Amendment and the Issue of the Maintenance of Standing Armies*, 35 AM. J. LEGAL HIST. 393 (1991). *See also* Morton Horwitz, *Is the Third Amendment Obsolete?*, 26 VAL. U. L. REV. 209, 211-13 (1991).

is silent on this point). But the intentionality criterion may also be at work when it comes to the military. The laws that bar the military from fighting crime do not operate on the basis of geographic provenance, but rather on the basis of categorizing the action to be opposed *as* crime. The military could doubtless pursue and capture foreign troops on U.S. soil, if those troops were (deemed to be) engaged in an act of war. Surely defending the U.S. against such an incursion by foreign troops would be an instance of defense, not an instance of the military's "executing the laws." The implicit premise in this reasoning is that it is possible to distinguish acts of war on U.S. soil from mere crimes. As I argued above, the basis for that distinction must be some version of the intentionality criterion.

In the wake of the September 11 attacks, there is near universal agreement that the separation of roles among crime-fighting agencies, like the FBI, and war-oriented or foreign-oriented institutions, like the military and the CIA, has ill served the objective of preventing domestic terror. There is an emerging consensus that fighting terror will require deeper coordination than existed heretofore between law enforcement agencies, the CIA, and the military. Although there have been many earlier efforts at effecting such coordination, there is now reason to think that the very distinction is misplaced when it comes to terror. The creation of a new institutional mechanism for coordination under the rubric of Homeland Security may have some effect on coordination, but as the example of the Drug Czar position has shown, that effect is not easily predictable ex ante. There are numerous ways to allocate administrative authority, and many of these may not deliver coordination.

Such coordination of agencies requires the recognition that terrorism undercuts the crime/war distinction. If terrorism is crime under the provenance criterion, then it falls within the ambit of the FBI. But the FBI is, understandably, better at investigation and arrest than it is at prevention, especially when that prevention would require action against individuals who have not yet committed crimes. The institutional focus of the FBI is on capture and arrest.[57] The FBI has had relatively

57. *Cf.* LAURIE MYLROIE, STUDY OF REVENGE: SADDAM HUSSEIN'S UNFINISHED WAR AGAINST AMERICA 4-6 (2000) (arguing that, for institutional reasons, the FBI

little success investigating terror abroad,[58] in large part because the FBI is conceived on a provenance model of fighting crime. More basically than this, the statutory mandate of the Attorney General, the Department of Justice, and the FBI is directed toward fighting crime, rather than toward providing intelligence for or fighting war.

There may be a need for a statutory—and a conceptual—fix that would reframe the respective roles of the FBI and the CIA on terms less dependent on the crime/war distinction, at least with respect to terrorism. Merely calling for coordination will not change the basic institutional orientation of the two agencies. On this view, the FBI should conceive its role as including the adoption of means directed not only at reaction, capture, and conviction, but also at prevention and at the transfer of information to the CIA or the military for sanctioning terrorists outside the domestic legal system. At present, the FBI "succeeds" when criminals are captured and punished. This notion of success may have to be altered to incorporate prevention and non-conventional (but legal) sanction abroad, outside the sphere of the U.S. justice system.[59] For its part, the CIA may need to be freed of even the

had little interest in pursuing antecedents of terror in the first World Trade Center bombing investigation).

58. Consider, for example, the frustrations faced by the FBI in pursuing the investigation into the bombings of the U.S.S. Cole in Yemen and the al-Khobar towers in Saudi Arabia.

59. The institutional changes that have been proposed or introduced in this direction are so far not deep. On November 8, 2001, Attorney General John Ashcroft announced what he called a "wartime reorganization" of the Department of Justice. The plan called for reassignment of 10% of the current headquarters-based personnel to "the field," for better coordination with local law enforcement and for non-duplication of resources. The proposals for the FBI did specifically state that the FBI should focus on prevention of terror but left that project to future strategic planning to be carried out by the FBI itself. It remains to be seen what this will bring. *See* Press Release, U.S. Dep't of Justice, Attorney General Ashcroft and Deputy Attorney General Thompson Announce Reorganization and Mobilization of the Nation's Justice and Law Enforcement Resources (Nov. 8, 2001), http://www.usdoj.gov/ag/speeches/2001/agcrisis remarks11_08.htm. For the strategic plan itself, see U.S. Dep't of Justice, *Strategic Plan 2001-2006* (2001), http://www.usdoj.gov/jmd/mps/strategic2001-2006/ entiredoc.htm. A few days later, the Attorney General announced the reorganization of the Immigration and Naturalization Service into two separate bureaus, one for immigration services, the other for immigration enforcement. Although Ashcroft described this as useful for preventing terror, he also acknowledged that the plan, with its lengthy report, had been substantially completed before September 11, 2001. Press Release, U.S. Dep't of Justice, Attorney General John Ashcroft and INS Commissioner Ziglar Announce INS Restructuring Plan (Nov. 14, 2001), http://www.usdoj.gov/ag/ speeches/2001/ agcrisisremarks11_14.htm.

possibility of a statutory disability barring it from domestically-oriented surveillance, so long as the surveillance is directed at preventing terror at home or abroad.

The objections to such proposals will be deep and reasonable. If the FBI finds itself no longer oriented solely toward criminal prosecution, this may develop habits of investigation and action that will be detrimental in enforcing domestic law and in punishing crime. The law-abiding ethos of the FBI may be damaged, perhaps irrevocably. As for the CIA, there is a real constitutional danger in encouraging domestic surveillance by an agency *not* expected to present its findings to a jury under judicially-mandated rules of procedure and constitutional protections. Expansion of the role of the CIA may actually reduce our privacy and our freedoms, even if we never become aware of it.

To say that these costs are real, though, is not to say that they are costs that should never be borne. Deciding how to proceed in the fight against terrorism requires serious, concentrated thought, and some empirical experimentation as well. Ex ante, it is difficult to anticipate all of the benefits and all of the potential harmful results that might come from acknowledging that the crime/war distinction creates problems in the sphere of fighting terror. But it is worth noticing that the crime/war distinction is not *itself* a fundamental value. It is, rather, a heuristic we have used to distinguish certain forms of institutional action from others. The true values here are liberty, privacy, the rule of law, and safety. As an instrumental distinction, the crime/war distinction is only good so long as it serves our purposes. We need to balance the underlying values to make as wise a decision as we can.

Now consider the situation of the military. Under the intentionality criterion, terrorism looks more like war than like crime. Can the military act against terror domestically without violating the Posse Comitatus Act? There is an institutional problem here that cannot be resolved as easily as the problem of pursuit and capture discussed in Part II. To the extent that terrorism is conceived as crime, the military cannot legally fight it, at least within the U.S.

One partial solution here would be the repeal of the Posse Comitatus Act, or at least the passage of legislation that would circumvent the Posse Comitatus Act by specifically authorizing

the military to be used domestically in the fight against terror. Such legislation would have some significant costs. In particular, allowing the military to execute the laws, even in limited situations, undercuts the republican value of distancing the military from involvement with civilian political affairs. The costs might be warranted under conditions in which terror is a serious threat. It also might, however, prove difficult to repeal such legislation when the threat recedes because of the powerful bureaucratic interests of the military. Again, the crucial point is that the crime/war distinction is not *itself* the value to be protected. Here republicanism is the value we wish to protect, and when making our institutional analysis, we should try to balance that value against the apparent pragmatic requirement of fighting terror.

It is tempting to conclude by proposing some new, comprehensive theory that would definitively categorize international terror as crime or as war. But like judgments made in the crucible of crisis, theories concocted for the occasion can look unwise when seen in retrospect. What we need now is caution tempered by common sense. If we begin by delineating the structures of how we think about the problem, and identify the weaknesses of our approach and its capacities for flexibility, then we may begin on the right track.