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A DEMOCRATIC RESPONSE TO FOREIGN POLITICAL OFFENSES: THE NEED FOR LEGISLATION TO COUNTER ANTI-TERRORISM EXCESSES

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Prologue: Terrorism, Ends and Unjustified Means

The term "terrorism" has an extremely broad connotation, but it is properly applied to the use of unacceptably destructive means to achieve relatively unworthy ends. It first emerged to describe the wholesale slaughter and imprisonment of suspected counter-revolutionaries during the French Revolution's Reign of Terror.¹ What earned those activities this special label was not so much the merits of their end — preserving the revolution — or the harshness of the punishments inflicted — which were not exceptional for that time — but rather the indiscriminacy involved. Because punishment was visited on not only overt opponents of republicanism but also persons suspected of

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1. R. FRIEDLANDER, 3 TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL 6-7 (1979)[hereinafter TERRORISM]; G. WARDLAW, POLITICAL TERRORISM: THEORY, TACTICS AND COUNTERMEASURES 15 (1982) [hereinafter POLITICAL TERRORISM].

anti-republican tendencies, the Reign of Terror frightened would-be critics of the government into silence.

Currently, the kind of terrorism receiving the greatest attention is that directed against governments. A government under violent attack is apt to label its opponents terrorists regardless of their ends or means, but the label is best reserved for opponents whose attacks are indiscriminate — endangering not only government law enforcement or military personnel, but civilians as well.²

Whether perpetrated by or against a government, the indiscriminacy of terrorist attacks may result from a deliberate practical decision. Indiscriminate attacks are far more difficult to defend against than are attacks directed at logical targets, and they are likely to intimidate a far greater proportion of the population. Thus, greater frustration and greater fear tend to result from increased indiscriminacy.³

Indiscriminacy may be favored by anti-government terrorists for an additional, distinctive reason — provocation. The frustration and fear caused by indiscriminate attacks provide a government with greater motivation to prevent such attacks at the same time that direct measures seem least promising. As a result, a government may be tempted to resort to indirect measures — such as wide-scale searches, preventive detention, or shoot-on-sight orders — which are likely to harm innocent individuals.⁴ The more drastic the government's counter-measures, the more it becomes involved in indiscriminate harm. In the end, an over-reacting government may undermine its own popularity and moral authority, thus playing into the hands of its terrorist adversaries.⁵

When terrorist activities involve more than one nation, issues of international cooperation arise. Involvement of more than one government can occur in four ways. The first is when a single terrorist organization attacks the governments of more than one nation; the second, when terrorists attack communication or transportation facilities of importance to the global community. The third is when terrorists use the territory of one nation for planning and staging attacks on a government of another nation; the last, when terrorists seeking to evade cap-

2. Rapoport, *Introduction*, in *THE RATIONALIZATION OF TERRORISM* 3-6 (D. Rapoport & Y. Alexander eds. 1982).

3. Freidlander, *Commentary*, in *TERRORISM* *supra* note 1, at 36, 41-42, 52-53.

4. *POLITICAL TERRORISM*, *supra* note 1, at 37 citing C. MARIGHELA, *MINIMANUAL OF THE URBAN GUERRILLA* (Harmondsworth trans. 1971).

5. *Id.* at 69 (citing P. WILKINSON, *TERRORISM AND THE LIBERAL STATE* 121 (1977)).

ture flee to the territory of another nation.⁶ Cooperation has been easiest to achieve in the first two situations because of the common interests they implicate. In the third situation, the interests of the involved nations are not always similar, so cooperation has been erratic.⁷ In the fourth situation, cooperation has also lagged, apparently because the non-victim government that becomes a place of refuge for alleged terrorists is not inclined to take sides in a struggle between another government and that government's enemies.⁸

The lack of cooperation regarding fugitive terrorists has been frustrating for governments that believe that terrorists are the enemies of all humanity. In particular, the Reagan administration, which noisily espoused a hard-line approach to terrorism, was embarrassed and outraged to find that firmly established extradition practices could sometimes make the United States a safe haven for members of the Provisional Wing of the Irish Republican Army (PIRA), which is considered a terrorist organization by not only the United Kingdom, but by the Republic of Ireland as well.⁹

Out of this frustration, the Reagan administration sought to sweep aside or circumvent laws that interfere with the delivery of terrorists into the hands of the governments they have attacked. The Republican administration's chief weapon was a new kind of extradition treaty that constitutes an alliance between governments against their enemies rather than a coordination of criminal law systems. It also endeavored to turn deportation into an unbridled substitute for extradition. However, it sought no statutory amendments or new legislation, measures that would have required the assent of the Democratically-controlled House of Representatives. Moreover, the fashioning of these new weapons was not delayed by the troublesome task of defining terrorism; instead, the weapons were designed to cut a wide swath through all conduct that even remotely resembles terrorism.

The thesis of this article is that the Reagan administration was driven by frustration into the kind of over-reaction that discredits gov-

6. Except for the last, these situations correspond to the transnational elements for an international crime as set forth M.C. BASSIOUNI, *A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL* 36 (1987).

7. The most obvious examples are Palestinian groups, based in sympathetic Arab nations, who train and plan for operations against Israeli and pro-Israeli targets.

8. See C. VAN DEN WIJNGAERT, *THE POLITICAL OFFENCE EXCEPTION TO EXTRADITION* 204 (1980) [hereinafter *POLITICAL OFFENCE EXCEPTION*]. See also *infra*, notes 103-09 and accompanying text.

9. The legislation of both countries targeting this organization can be found in *LEGISLATIVE RESPONSES TO TERRORISM* 73-90, 259-301 (Y. Alexander & A.S. Nanes eds. 1986) [hereinafter *LEGISLATIVE RESPONSES*].

ernments by making their uses of coercive power appear as indiscriminate and responsive to political whim as the attacks of terrorists. The article concludes that the administration's efforts subordinate basic concerns for individual rights under criminal process to short-term foreign policy goals, while creating a long-term foreign policy nightmare for future U.S. administrations.

This article begins by noting the policy shortcomings of the new kind of extradition treaty. These have been described before, but without the benefit of recent manifestations of the overall administration approach. A more comprehensive analysis is now possible. Next, this article discusses serious questions concerning the constitutionality and legality of the administration's efforts that have yet to be explored fully. Finally, this article goes beyond noting the desirability of legislative action to counter the new treaties and offers a description of suitable legislation.

I. EXTRADITION OF POLITICAL OFFENDERS — George Washington, Terrorist

[T]hat whenever any form of government
becomes destructive of these ends,
it is the right of the people to
alter or abolish it, . . .
Declaration of Independence¹⁰

While the American people were celebrating the bicentennial of the United States Constitution, the Reagan administration was taking its first steps toward repudiating the central theme of the Declaration of Independence.

The repudiation involved collaboration with selected governments in punishing as criminals all who forcefully oppose or resist the U.S. or those other governments by force, regardless of their reasons. Such collaboration was a reversal of a 150 year-old practice of remaining neutral as to disputes between foreign citizens and their governments, as well as a substantial repudiation of the 200-year-old American dogma that the governed are entitled to overthrow governments they find oppressive.

All along, extradition has been available generally as a means for a foreign government to obtain delivery from the U.S. of fugitives ac-

10. para. 2 (U.S. 1776).

cused of engaging in criminal conduct within the territory controlled by that government.¹¹ The only significant practical limitation on the availability of extradition is that the U.S. be able to locate the fugitive within its territory. The chief legal conditions that must be satisfied are that there be an extradition treaty in force, that the alleged conduct be criminal under U.S. law, and that there be sufficient evidence to establish probable cause.¹² The first condition rarely poses problems, for the U.S. has extradition treaties with more than one hundred nations.¹³ The second poses no problem for ordinary crimes. The third merely imposes, in relation to the foreign allegation, the same burden of proof that must be met in order for a U.S. allegation to result in detention and delivery for trial.¹⁴ Accordingly, foreign criminal fugitives generally find no safe haven in the U.S. — if they can be found here, they will normally be apprehended and delivered at the request of the government within whose territory they allegedly committed a crime.

However, none of the foregoing has been true regarding conduct that constitutes a “political offense”; even when all of the other conditions for extradition are satisfied, fugitives sought for political offenses have not been subject to extradition.¹⁵ Political offenses include two classes of conduct, called “pure” and “mixed” political offenses. Pure political offenses consist of conduct that is criminal only for political reasons. Classic examples would be treason and espionage.¹⁶ The underlying conduct — serving one government to the detriment of another — seems neither good nor bad until the position of one of the involved governments is considered. Then, the conduct seems good to the government being served and bad to the other. Naturally, each government has laws protecting its own interests, so the criminality of the conduct turns upon the political choice between governments.

Mixed political offenses, as their name implies, also consist of conduct whose wrongfulness may depend on a political viewpoint, but they also consist of conduct that is generally considered criminal.¹⁷ An example would be participation in a *coup d'etat*, which would involve

11. Extradition now may also be granted for cases outside the territory of the requesting state, but offenses within a state's territory have always been considered within its jurisdiction. M.C. BASSIOUNI, 1 INTERNATIONAL EXTRADITION UNITED STATES LAW AND PRACTICE VI, §2-2 (1983) [hereinafter 1 EXTRADITION].

12. M.C. BASSIOUNI, 2 INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE IX, § 5-12 (1983) [hereinafter 2 EXTRADITION].

13. Those in force are listed as annotations to 18 U.S.C.A. § 3181 (West 1987).

14. 2 EXTRADITION, *supra* note 12, IX, at § 5-15.

15. *Id.* at VIII, §§2-1 to 2-114.

16. *Id.* at VIII, §2-15.

17. *Id.* at VIII, §2-19.

illegally threatening or using force in order to overthrow a government. This would correspond to such common crimes as assault or battery. However, the wrongfulness of such conduct could depend on whether one regarded the end of overthrowing the government as justifying the use of such violent means. If the government overthrown was arguably evil, a bystander might have difficulty deciding whether the means were justified, while the old government would consider them unjustified and the new government would also surely consider them justified. Accordingly, the wrongfulness of mixed political offenses hinges upon justifiability, with the positions of governments on that question likely to be shaped by self-interest, and the positions of objective bystanders turning upon delicate balancing of relative benefits and detriments.

For the past 150 years, non-extradition for political offenses has been the prevailing practice among Western nations. This has been true of not only pure political offenses, but also mixed political offenses. However, for mixed political offenses other than the kind of classic example just mentioned, the situation has been complicated by the use by different nations of somewhat different theoretical criteria for determining what conduct qualifies as a political offense.¹⁸ There has been agreement at one extreme that conduct reasonably necessary to actually topple a government so qualifies, and at the other extreme that the mere existence of a political motive is not sufficient for an offense to so qualify. However, there is disagreement as to conduct that merely destabilizes a government or that is not strictly necessary to a revolution.

The practical significance of these theoretical disagreements is difficult to assess because of peculiarities of the extradition process. For example, the procedural constraints of extradition in the U.S. make a determination that conduct does qualify as a political offense essentially unreviewable, and permit only a highly deferential review of determinations that conduct does not qualify.¹⁹ Accordingly, the supposed theoretical criteria are not strictly binding. In France, the doctrine that the courts should defer to executive interpretations of treaties, coupled with the view that political offense issues amount to treaty interpretation issues, raises the possibility that the criteria actually applied may vary

18. *Id.* at VIII, §§2-24 to 2-71. See also THE POLITICAL OFFENSE EXCEPTION, *supra* note 8 at 108-10; Blakesley, *Extradition Between France and the United States An Exercise in Comparative and International Law*, 2013 VAND. J. INT'L L. 654 (1980)[hereinafter *Blakesley*]; Carbonneau, *The Political Offense Exception to Extradition and Transnational Terrorists Old Doctrine Reformed and New Norms Created*, 1 A. STUD. INT'L L. SOC. 1, 33-40 (1977); and Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226 (1962).

19. 2 EXTRADITION *supra* note 12, IX, at §6-1 & 6-22. For an extensive treatment of government appeal see *In re Mackin*, 668 F. 2d 122 (2d Cir. 1981).

with changes of administration or with differences in attitudes of a single administration either as to different situations or over a period of time.²⁰

It seems fair to generalize, however, that Western nations have refused extradition not only for pure political offenses, but also for most forms of illegal conduct associated with revolutions. As a result, revolutionaries from one nation are often able to find a safe haven in another.

Such favorable treatment of political offenders began only after the French Revolution.²¹ Earlier, extradition was generally unimpeded by the fact that the offense in question was political, and some very old extradition treaties actually targeted political offenders while making no provision for extradition of ordinary criminals.²²

The dramatic change in the wake of the French Revolution was due to the establishment of the right of peoples to alter or abolish governments they found oppressive, a right first asserted officially in the U.S. Declaration of Independence. That right was the basis for claims to legitimacy of republics that had supplanted monarchies by revolution, and it followed that republics could not cooperate in punishing foreigners who sought to do the same in their own homelands. Some have suggested that the doctrine that political offenders should not be extradited was designed to be one-sided, in favor of republicanism,²³ but the underlying principle was stated in neutral terms and nations that adopted the political offense doctrine refused extradition to fellow republics as well as monarchies.²⁴

Moreover, even Great Britain — a monarchy — adopted a form of the political offense doctrine, and did so while acting in concert with the other great monarchies of Europe — Prussia, Russia and Austria — to reverse history by destroying republics and restoring monarchies.²⁵ It may be significant that the British version of the doctrine corresponds more closely to the requirements of international law con-

20. See Blakesley, *supra* note 18.

21. THE POLITICAL OFFENCE EXCEPTION, *supra* note 8, at 10-14.

22. M.C. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 1-2 (1974); THE POLITICAL OFFENCE EXCEPTION, *supra* note 8, at 5-6.

23. T. STEIN, SUMMARY (IN ENGLISH), in DIE AUSLIEFERUNGS-AUSNAHME BEI POLITISCHEN DELIKTEN 377-81 (1981).

24. THE POLITICAL OFFENCE EXCEPTION, *supra* note 8, at 13-15.

25. *Id.* at 10-14. In re Castione, 1 Q.B. 149 (1891), discussed in M.C. BASSIOUNI *supra* note 22, at 388-90.

cerning neutrality in foreign civil wars than do the more expansive Continental versions of the doctrine.²⁶

Because terrorism generally involves political motivations, there is a possibility of overlap between terrorism and vaguely defined political offenses. When the political offense doctrine prevented extraditions of several members of the PIRA for violent crimes in the U.K., the Reagan administration took the position that the established practice concerning mixed political offenses was providing asylum to terrorists, such as members of the PIRA. When multilateral efforts to assure extradition of terrorists among Western nations foundered, the administration joined with the U.K. in a novel bilateral treaty making virtually all violent crimes extraditable regardless of their political character.²⁷

The new treaty was sold to the U.S. Senate on the basis that it was necessary to prevent terrorists from evading justice. However, the terms of the U.S. - U.K. agreement do not restrict its operation to either the PIRA or terrorists. Accordingly, if the administration's argument is taken at face value, its implications are ironic.

Conduct like that of George Washington, the Continental Army and the Continental Congress constituted illegal violence²⁸ under contemporary British law, and the availability of extradition for such conduct hinges upon the existence of the political offense doctrine. Under the prior doctrine, such conduct would not be extraditable but under the new U.S. - U.K. treaty the reverse is true.²⁹ Thus, to insist that the new treaty reaches only terrorism is to describe the conduct of the Founding Fathers of the U.S. as terrorism.

It is ironic that the first treaty of this kind was with the U.K. It is obvious that the current British government differs greatly from that of 1776, but it is equally obvious that conduct like that of George Washington's differs greatly from that which merits the label terrorism.

26. See Derby, *Coming to Terms With Terrorism*, 3 *TOURO L. REV.* 151, 180 (1987).

27. Supplementary Extradition Treaty, signed June 25, 1985, 97 U.S.T.; ratified July 17, 1986, 132 CONG. REC. S9251; proclaimed Feb. 4, 1988 [hereinafter *Supplementary Treaty*].

28. Obviously, all were guilty of treason, which can be a pure political offense. However, they were also guilty in varying degrees of complicity in murder, assault and other common crimes. The guilt stems from participation in killings and attacks without legal justification. Legal justification was lacking because the victims — agents of the British monarchy — were performing law enforcement functions within their legal authority. The Americans lacked legal status entitling them to prisoner-of-war treatment because they were not members of an army representing any sovereign recognized as such by Great Britain.

29. Because these offenses were committed in furtherance of an uprising, extradition would be unavailable if the usual political offense doctrine were applicable. However, because these offenses involved the use of firearms, they would be ineligible for political offense treatment according to the *Supplementary Extradition Treaty*, clearing the way for extradition. See *infra* notes 30 to 32 and accompanying text.

What is not obvious is why concern for terrorism should lead the government of one nation to regard as enemies all who oppose the government of another.

II. WHY SUCH OVERBREADTH

A. How Broad Is it?

The supplementary treaty³⁰ is quite brief. As originally negotiated, it contained only six articles. Articles 4 through 6 merely describe in one paragraph each the date of effectiveness, the territories affected, and the procedures for ratification or termination. Article 3 affects the duration of detention pending a formal extradition request.

Only the first two articles of the original text are substantive. Article 2 provides that the only limitation period that matters is that of the requesting party. Article 1 lists offenses that will not be regarded as political offenses and begins with sub-paragraphs a through d, which deal with crimes that the U.S. has already agreed in multilateral conventions not to treat as political offenses for the purposes of extradition. These include offenses against civil aviation, offenses against diplomats, and hostage-taking. As a result, these four sub-paragraphs appear to be redundant. However, the U.S. prefers to rely on bilateral treaties rather than multilateral conventions for extradition.

Sub-paragraphs e through l are the only novel provisions in Article 1. They describe the following crimes:

- e. murder;
- f. manslaughter;
- g. maliciously wounding or inflicting grievous bodily harm;
- h. kidnapping and related conduct;
- i. criminal conduct relating to use of explosives to endanger life or cause serious damage to property;
- j. firearms and ammunition offenses —
 - 1. possession of a firearm or ammunition by a person who intends either himself or through another person to endanger life; or
 - 2. use of a firearm by a person with intent to resist or prevent the arrest or detention of himself or another person;

30. Supplementary Treaty, *supra* note 27.

- k. damaging property with intent to endanger life or with reckless disregard as to whether the life of another would be thereby endangered; and,
- l. an attempt to commit any of the foregoing offenses.

At the insistence of the U.S. Senate, a further provision was added, forbidding extraditions if the person sought has a well-founded fear of persecution in the requesting state on the basis of his race, religion, nationality, or political opinion.³¹

It may be worth noting that the supplementary treaty applies not only to the United Kingdom, but also to territories for whose international relations the U.K. is responsible, including several Caribbean nations, Bermuda, the Falkland Islands and dependencies, Gibraltar, Hong Kong, sovereign bases on Cyprus, and some islands in the Pacific and Atlantic Oceans.

The supplementary treaty never mentions the PIRA, the situation in Northern Ireland, or terrorism. It simply provides that extradition will be granted for certain violent crimes even if they would ordinarily be regarded as political offenses and therefore non-extraditable. The violent crimes included range from murder to attempting to gain possession of a firearm with intent to endanger life.³²

The new treaty would also reach such marginal conduct as attempting to gain possession of or the use of a firearm to resist arrest, regardless of the legal basis for the arrest. For example, it would not matter if the arrest was to be for contempt of an English court for violating the English rule that nothing that transpires in a court case can be reported by the media until the case is concluded.

Although terrorism has been variously and vaguely defined, no serious definition has ever embraced conduct so lacking in terror-inspiring character.

B. Narrower Alternatives

1. The PIRA as common enemy

Discussion of the merits of the supplementary treaty has been hampered by references to such collateral issues as the merits of the PIRA cause, the morality of PIRA tactics, the propriety of continued British rule in Northern Ireland, and the quality of justice under emergency

31. Added by the Senate, 132 CONG. REC. S91119 (July 16, 1986).

32. Supplementary Treaty, *supra* note 27, art. 1, paras. j(1) and l.

measures in Northern Ireland.³³ Some supporters of the supplementary treaty tended to equate opposition to it to sympathy for the PIRA.³⁴

However, the wording of the treaty does not limit its operation to PIRA fugitives or to conduct relating to Northern Ireland. On the contrary, it makes all who violently oppose the U.K. government extraditable from the U.S. and all who violently oppose the U.S. government extraditable from the U.K. Accordingly, the possible grounds for opposing it include concerns for persons and conduct unrelated to Northern Ireland.

If the two governments had wished simply to assure extradition of PIRA fugitives from the U.S., this could have been accomplished by merely using treaty language to the effect that conduct by members of the PIRA or done on behalf of the PIRA would no longer be treated as political offenses. This language might not always be crystal clear in relation to a given concrete case, but the role of such language would be procedural rather than substantive, so reliance on it would not violate U.S. due process constraints relating to clarity of substantive criminal law prohibitions.³⁵

If the concerns of the two governments extended to conduct done by other organizations in Northern Ireland, the names of those organizations could have been incorporated into such a treaty, as they were incorporated into emergency legislation for Northern Ireland.³⁶ If the concerns extended to organizations that might emerge in the future, the list of subject organizations could be made expressly non-inclusive, ending with language like “. . . and similar organizations.” Or, the treaty could have expressly provided for updating of the list by executive agreement.³⁷

33. UNITED STATES AND UNITED KINGDOM SUPPLEMENTARY EXTRADITION TREATY HEARINGS ON TREATY DOC. 99-8 BEFORE THE SENATE COMM. ON FOREIGN RELATIONS, 99th Cong., 1st Sess. 17 (1985).

34. *Id.* at 97.

35. Because the U.S. Supreme Court has upheld extraditions based on *ex post facto* treaties, provided the subject conduct was criminal in both places at the time of its occurrence, *Re De Giacomo*, 7 F. Cas. 366 75 (S.D.N.Y. 1874)(No. 3747), it seems clear that extradition treaties would be treated as procedural for the purposes of due process analysis, provided the requirements of double-criminality were met.

36. LEGISLATIVE RESPONSES, *supra* note 9, at 262.

37. Executive agreements have been upheld as bases for international renditions in a military context, when based on an adequate legislative grant of authority. *Williams v. Rogers*, 449 F.2d 513 (8th Cir. 1971), *cert. denied.*, 405 U.S. 926 (1972).

2. Terrorism as a term of art

It is possible that the concerns of the two nations extended beyond the situation in Northern Ireland, or that they felt that a solution for extradition problems arising from Northern Ireland would be easier to sell if it were embedded in a measure that would deal with all extradition problems arising from terrorism.

If "terrorism" was to be the target of the new treaty, that term could have been used in its text. Although terrorism is difficult to define to everyone's satisfaction, some definitions have achieved wide support,³⁸ and U.S. law contains two very similar operative definitions that satisfied a majority of each house of the U.S. Congress.³⁹ Accordingly, if the two nations felt that the term terrorism needed to be defined, they could have attempted to provide a definition, and there is little reason to believe that a consensus between two negotiating teams would be unobtainable.

Moreover, if the term remained undefined or if the definition agreed upon was somewhat vague, this would not raise due process problems, and a mechanism for dealing with the vagueness, such as submitting cases to an arbitration panel, could have been provided.⁴⁰

C. Significance of the Chosen Scope

The availability of simple alternatives that would have focused on a narrower range of conduct suggests that the two nations deliberately opted for the broader scope or that the personnel involved in negotiating the supplementary treaty were either blind to these obvious alternatives or lacked the skill to pursue them to fruition. If the reason for the broad scope was blindness or lack of skill, that might be reason enough to scrap the treaty and insist that the negotiators try again.

If, instead, election of the broader scope was deliberate, the central question is why. Some clues are available from the statements of Secretary of State Schultz and his legal advisor, Abraham Sofaer.

Schultz' comments⁴¹ are consistent with a view that it is better that non-terrorists be reached by the new treaty than that any terrorists escape its reach. This would suggest the additional scope could have been desirable as a buffer; that any attempt to focus strictly on terrorists

38. See J. MURPHY, PUNISHING INTERNATIONAL TERRORISTS 109-15 (1985).

39. 18 U.S.C. §§2331, 3077 (Supp. 1988).

40. See *supra* note 35.

41. Sofaer, *The Political Offense and Terrorism*, 15 DENVER J. INT'L L. & POL'Y 125 (1986).

might have led to a formula that would have offered a loophole for some terrorists. If that is the meaning Schultz intended, it is an unworthy sentiment. In criminal law matters, overbreadth is seldom considered an acceptable remedy to drafting problems; also, the fear that a definition of terrorism might not include all terrorism constitutes a shameless admission that the speaker's fear exceeds his ability to apply rational thought and proper English.

Sofaer's comments⁴² indicate he believes that, because truly free and democratic nations like the U.K. or the U.S. offer ample opportunity for grievances to be voiced, discussed and put to vote, the use of force against their governments to effect change is never justifiable. This could serve as an argument for the full scope of the new treaty, but it poses several problems.

First, if the argument is intended as support of the treaty simply as an anti-terrorism measure, it is defective either for its failure to take into account the fact that the scope of the treaty goes beyond terrorism, or for its failure to explain why such conduct as forcefully resisting arrest is sufficiently comparable to terrorism to merit inclusion in an instrument heralded as an anti-terrorism measure.

Second, because it is presented in connection with arguments that such treaties are essential to prevent terrorism, if it is intended as an argument for the full scope of the treaty, the lack of a label indicating that it is intended to justify reaching conduct beyond terrorism is extremely misleading.

On the whole, the administration's attitude appears to be that, at least among nations with democratic governments, criminals are criminals, regardless of where their crimes occurred or what their motives may have been. The most obvious indication of this attitude is a provision in the U.S. - U.K. treaty providing that requests for extradition shall be regarded as timely as long as the limitation period of the requesting state has not expired.⁴³

This means that a fugitive from the U.K., found in the U.S. would be extraditable if the prosecution was not time-barred in the U.K. even if a prosecution would be time-barred under U.S. law had the alleged offense occurred here. This is contrary to long-standing U.S. practice and the general practice among nations, which has been sensitive to the differences in interests of nations in relation to extradition.⁴⁴

42. *Id.*

43. Supplementary Treaty, *supra* note 27.

44. 2 EXTRADITION, *supra* note 12, VIII, §4-17.

Time bars to criminal prosecutions are generally based on some combination of three legislative judgments:⁴⁵ Accordingly, when a crime is time-barred in a given nation, that nation has chosen to expose its own society to the risk that possible past conduct of an accused makes him dangerous rather than to jeopardize the interests of the accused in violation of the foregoing principles. But by making the limitation period of the requesting state dispositive for extradition, the new treaty puts the requested state in the position of jeopardizing the interests of the accused for the sake of another society from which he has absented himself when it would not have done so for the sake of its own society within which the accused dwells.

A similar insensitivity to coordination of criminal law policies is evident in the inclusion of attempts to commit such crimes as possession of a firearm with intent to endanger life or use of a firearm with intent to resist arrest. Crimes fitting these definitions are unlikely to exist within a given state of the U.S.,⁴⁶ so that operation of these treaty provisions may be defeated by the requirement of double-criminality, or application of that requirement may be extremely difficult.⁴⁷

III. POLITICAL JUSTIFICATIONS AND LAW

Policy contradictions are also threatened when the treatment of political offenses under extradition treaties is insensitive to differences in national laws.

To explain why those who use violence against one government are not necessarily legal enemies of another, even similar, government, it is necessary to trace the legal treatment of distinctively anti-governmental violence through various contexts.

A. The Need for Reference Points

In general, persons who break laws for political reasons may be regarded as romantics, idealists, heroes or terrorists. How they will be regarded depends not only on which laws they break and their reasons

45. W. LAFAVE & J. ISRAEL, 2 *CRIMINAL PROCEDURE*, §18.5, at 423-27 (1984) [hereinafter LAFAVE & ISRAEL].

46. Possession of a firearm is generally either legal or illegal depending on the status of the possessor and the means of acquisition. For there to be any further crime with respect to possible use to resist an illegal arrest, the Model Penal Code would require an attempt. MOD. PENAL CODE §5.01, 10 U.L.A. 499 (1974).

47. See Herman, Bernholz & Bernholz, *Double Criminality and Complex Crimes*, in *INTERNATIONAL CRIMINAL LAW* 365 (V. Nanda and M.C. Bassiouni eds. 1987)[hereinafter *Herman et al.*].

for breaking them, but also on who does the judging and what body of principles is applied.

Legal assessments of political offenses depend on similar factors. As a starting point, it is necessary to consider the perspective of one state at a time. Even for one state, different rules apply in different contexts. For example, in a normal domestic context, ordinary criminal law applies, but in an armed conflict the laws of war may be applicable.

B. Criminal Law and Justification of Domestic Conduct

For domestic, peacetime violent offenses, contemporary legal systems do not distinguish between common crimes and political crimes. Accordingly, most observers are used to the idea that all uses of violence not authorized by law are crimes. Moreover, when arguments seeking to justify such violence on political grounds are advanced, these arguments are invariably rejected by the courts.⁴⁸ However, for some instances of violence, the conclusion of unjustifiability may be based on legally-mandated circular reasoning rather than an objective appraisal of the justification argument.

An illustration is provided by the Sanctuary Case,⁴⁹ which involved the operation of an "underground railroad" for bringing persons from war-torn Central American countries into the U.S. and hiding them from immigration authorities. This conduct was contrary to a criminal prohibition in the U.S. immigration law, but the defendants apparently felt that violating this prohibition was justified.

One form of their justification argument would be a "lesser of evils" defense.⁵⁰ They apparently believed that the Central Americans were very likely to be injured or killed if they were forced to return to the war zones from which they came and that the harm to U.S. society from absorbing a few hundred or a few thousand such illegal immigrants would be very small or non-existent, depending on whether any of them would take jobs that legal residents otherwise would have held. Thus, they might have argued that it was better to risk a loss of jobs for a few legal residents than to risk injury or death for numerous illegal aliens.

If this argument had been made directly to a court, as in a bench trial or in a request for jury instructions concerning the "lesser of evils"

48. See, e.g., 38 Ill. REV. STAT. §7.13 (1972) and N.Y. Penal Law §35.05(2) (1987), cited in M.C. BASSIOUNI, *SUBSTANTIVE CRIMINAL LAW* 460 (1978).

49. U.S. v. Aguilar, No. Cr. 85-008 (D. Ariz. 1986), cited in Colbert, *infra* note 54.

50. G. FLETCHER, *RETHINKING CRIMINAL LAW* 774-94 (1978)[hereinafter G. FLETCHER].

defense, it would have been rejected. Rejection is predictable not because a court is certain to disagree with the defendants concerning the relative risks of harm involved or because a court is certain to consider the jobs of legal residents more important than the lives of illegal immigrants. Rather, the rejection would be based on a legalistic analysis under which the relevance of real facts and values is controlled by law.

Under such a legalistic analysis, the balance between the two sets of possible harms has been fixed by act of Congress. Aliens who wish to enter the U.S. must fit one or more of the categories under the immigration law, and the aliens in the Sanctuary Case fit none. Although the defendants in that case considered themselves refugees, refugee status is available only to persons having a well-founded fear of *persecution on the basis of their race, religion, or political opinion*.⁵¹

These aliens apparently had a well-founded fear of harm, but the harm was not to be visited on them as persecution of the kinds prescribed in the law. They risked being killed in the cross-fire of civil war or for failing to cooperate with one of the fighting factions. Congress could have made refugee status available to such persons, but it did not. Accordingly, Congress passed judgment on whether it was better to expose aliens to such risks or to incur the social costs of admitting them as refugees, and decided against the aliens. The courts are bound by the judgment of Congress because they will not characterize as evil a state of affairs that is clearly permitted by law.⁵²

To a less legalistically-inclined audience, such an argument can be very persuasive, as evidenced by jury responsiveness to similar arguments in other criminal cases.⁵³ However, even in a system like that of the U.S., which permits lay persons alone to decide guilt, the legal system can make it difficult or impossible to present such arguments in coherent form for the simple reason that they are legally irrelevant.⁵⁴

The use of some violence might not destroy the persuasiveness to a non-legalistic audience of the justification argument in the Sanctuary Case. For example, if a group of border patrol agents had fired on a group of aliens led by the defendants as they made a night crossing of the border, a few shots fired back at the border patrol in hopes of keeping them at a distance to improve the group's chances of escaping into the night might be justified. In that event, a risk of harm to the

51. 8 U.S.C. §1101(a)(42) (Supp. 1988).

52. See *supra* note 48.

53. F. BOYLE, *DEFENDING CIVIL RESISTANCE UNDER INTERNATIONAL LAW* (1987).

54. Colbert, *The Motion in Limine Trial Without Jury — A Governmental Weapon Against the Sanctuary Movement*, 15 *HOFSTRA L. REV.* 1 (1987).

border patrol agents would be added against the risk of harm to the numerous aliens, and some observers might still regard the defendants' conduct as the lesser evil.

The role of legalistic factors can also be seen in the analysis of use of force by border patrol agents in a situation like the one just mentioned. As law enforcement authorities, they would be entitled to block the route of illegal immigrants, and if the immigrants pressed forward, they would be entitled to push them back, and so on, using as much force as necessary to detain them. If the escalation of force led to threatened use by an immigrant of a knife, bludgeon, or other lethal weapon, the border patrol would be entitled to use still greater force — shooting the immigrant in question if the threat was imminent.⁵⁵

Under a simple lesser-of-evils analysis, the defense of an agent who shot and killed an illegal immigrant would seem to depend on the rather weak argument that it was better that the immigrant die than that a band of illegal immigrants enter the U.S. However, the legal analysis of the agent's conduct would not proceed along those lines. Instead, the express analysis would simply focus on the special defense of use of force by law officers. Implicitly, though, the legal system will have deemed the life of the illegal immigrant less important than enforcement of the immigration law.

Thus is the treatment by any given legal system of those who defy that system. Legal systems are inherently biased against conduct that is contrary to system values. That reality is both inevitable and unpleasant. It is inevitable because each system always regards its law-making processes as legitimate, and to accept justification arguments that are contrary to system values would be to defer to alternative law-making processes or to legitimize derogations from laws. No system could do so and remain coherent.

This reality is unpleasant not only because the legitimacy of legal systems is often open to question, but even more so because it is obvious that even legal systems whose legitimacy is difficult to question sometimes make tragic mistakes. To some, the failure of the U.S. to grant refugee status to persons whose homelands are being devastated by war may seem to be such a tragic mistake;⁵⁶ to others, admitting any immigrants at all may seem to be a tragic mistake. However, any-

55. G. FLETCHER, *supra* note 50, at 771-74; W. LAFAVE & A. SCOTT, CRIMINAL LAW 402-08 (1972)[hereinafter LAFAVE & SCOTT].

56. See, e.g., Heyman, *Redefining Refugee: A Proposal for Relief for the Victims of Civil Strife*, 24 SAN DIEGO L. REV. 449 (1987).

one who tries to rectify either "mistake" will find that the argument that the law is mistaken is of limited usefulness in striving to evade a judgment of guilt in court.

In sum, each legal system considers itself right and its opponents wrong. In a purely domestic, normal legal situation, there is room for only one view of right and wrong in the courtroom.

C. International Armed Conflicts and Wrongfulness

In contrast to the foregoing, if an alien enters the U.S. and kills every person he encounters who is armed with the goal of destroying all government here and replacing it with new forms, his conduct would not be criminal if he met certain conditions relating to the laws of war. These would include that he was a uniformed member of the armed forces of a foreign nation and that either his nation did not initiate the war or that he did not participate in the planning of that war.⁵⁷ Such a person, if apprehended, would merely be detained until the war ended or until an exchange of prisoners could be arranged.

That an alien engaged in such homicidal conduct should be treated as a non-criminal can be glibly explained on the basis that war is subject to a distinct body of law. However, that begs the question of why there should be a separate body of law for war. The simple answer to that question is that criminal law is designed to protect society from persons likely to harm that society, and that the likelihood that a foreign soldier will harm the U.S. depends solely on whether his nation is at war with the U.S.; but for the war, he would probably not have encountered any U.S. agents, and but for the war he probably would never have used force against them. Accordingly, if he is merely incapacitated for the duration of the war, U.S. society will be adequately protected.

However, similar principles are not necessarily applied to persons who engage in conduct that is criminal out of a belief that the proscription is wrong. Although such persons may evade punishment if the prohibition is repealed before they are convicted, or obtain a lighter punishment if the penalty for the offense is reduced before their appeals are exhausted, they are not automatically released if the proscription is repealed after their appeals are exhausted.⁵⁸ But it would seem

57. H. LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 44-52 (1977)[hereinafter H. LEVIE].

58. AM. JUR. 2d, *Statutes*, §§420, 524, citing *Tinder v. U.S.*, 345 U.S. 565, (1953), and various state authorities.

that society does not need protection from persons who have violated a proscription that has been repealed.

Moreover, domestic political offenders are not given the same privileges as prisoners of war, such as segregation from ordinary criminals and shared responsibility for maintenance of their prisons.⁵⁹

These discrepancies may be explainable on the basis that soldiers taken as prisoners of war are not regarded as true criminals since they have done no worse than soldiers of the nation that captured them, while political offenders are considered criminals because what they have done is contrary to the moral precepts of their society as embodied in local criminal law. Although rather self-righteous, this explanation is plausible.

However, a less moralistic interpretation of the discrepancy is available. The practice of treating prisoners of war relatively well is often described as humanitarian,⁶⁰ but its history and character suggest a less noble motivation. First, the laws of war have generally conditioned the availability of prisoner-of-war status on whether the individual was a member of a group whose character permitted it to take prisoners itself.⁶¹ Thus, unless reciprocity can be expected, good treatment need not be extended.

However, not all enemy soldiers taken as prisoners in war are entitled to non-criminal treatment. As mentioned above, persons not belonging to units which have the capacity to take prisoners may be denied "prisoner of war" status. This would include not only spies and saboteurs operating undercover, but also members of some irregularly constituted units that live off the land and do not generally coordinate their activities with those of regular units.⁶²

More important, it has long been the rule that members of regular units can also be punished if it is established that they committed war crimes.⁶³ Additionally, the trials held by the Allies after World War II established that punishment may also be imposed for crimes of aggres-

59. H. LEVIE, *supra* note 57, at 120-87.

60. The shift to such terminology is reflected in J. PICTET, *LE DROIT HUMANITAIRE ET LA PROTECTION DES VICTIMES DE GUERRE* (1973); CANTRELL, *Humanitarian Law in Armed Conflict The Third Diplomatic Conference*, 61 MARQ. L. REV. 253 (1977); and Veuthey, *Some Problems of Humanitarian Law in Non-International Armed Conflicts and Guerrilla Warfare*, in 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW 422 (M. C. Bassiouni & V. Nanda eds. 1973).

61. H. LEVIE, *supra* note 57; Lieber, *Guerrilla Parties Considered with Reference to the Laws and Usages of War*, in R. HARTIGAN, *LIEBER'S CODE AND THE LAW OF WAR* 41-49 (1983)[hereinafter R. HARTIGAN].

62. Lieber, *Guerrilla Parties Considered with Reference to the Laws and Usages of War*, in R. HARTIGAN, *supra* note 61, at 34-38.

63. H. LEVIE, *supra* note 57, at 379-93.

sion and crimes against humanity.⁶⁴ Such treatment for prisoners follows *a fortiori* from the fact that every nation has condemned such conduct and has acknowledged an obligation to punish its own agents for such conduct, even when they act with the intent to benefit that nation.

Thus, each nation treats the general violence of warfare as if such means were justified by the ends of service to the nation, but the three classes of conduct just mentioned are treated as unjustifiable regardless of the ends to be served.

D. Between War and Peace — Civil Strife

It is not because they are foreign that prisoners of war are spared from criminal punishment. Domestic foes receive similar treatment in full-scale civil wars. For example, in the U.S. Civil War, the Union accorded prisoner-of-war status to Confederate captives who were members of regular forces.⁶⁵ It is possible that adoption of this practice was influenced by the fact that regular Confederate forces were raised by "states,"⁶⁶ but the Union's legal position was that deployment of such forces for the cause of secession was illegal. Also, it is apparent that Union prisoner-of-war policy was modeled on practices of European states in international conflicts, and that hope that reciprocal treatment would be accorded to Union prisoners was a major consideration.⁶⁷

Even when hostilities are on a scale reminiscent of international armed conflict, civil wars are likely to feature a greater proportion of irregular forces, and members of such forces are not assured favorable treatment merely because of the scale of hostilities. Instead, their treatment is likely to depend on whether their units are well organized enough to take prisoners or coordinated sufficiently with regular units to permit transfers of prisoners to such units, as was the case during the U.S. Civil War.⁶⁸

64. Besides the tribunal's proceedings, the Nuremberg precedent is reflected in the tribunal's organic document, Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (London Charter), signed at London, Aug. 1945, 59 Stat. 1544, EAS No. 472, 82 U.N.T.S. 279, entered into force Aug. 8, 1945, Annex, Charter of the International Military Tribunal (Nuremberg).

65. General Orders No. 100, reprinted in R. HARTIGAN, *supra* note 61, at 45, 55-57; Hartigan, *Introduction*, in *id.* at 21.

66. General Orders No. 100, §57, in R. HARTIGAN, *supra* note 61.

67. *Id.* §§62, 66, 68; and Lieber, *Guerilla Parties Considered with Reference to the Laws and Usages of War* in R. HARTIGAN, *supra* note 61, at 33.

68. H. LEVIE, *supra* note 57.

The current rules concerning treatment of captured foes in civil wars are not well settled. Two relevant additional protocols to the Geneva Conventions concerning humanitarian law of armed conflict have been opened for signature,⁶⁹ but the rules they embody are not definitive. The first problem is that neither protocol has been ratified by enough nations to make it clearly binding as customary international law upon non-signatories.⁷⁰ The second is that the two protocols are not necessarily consistent with prior practice — or with each other — in establishing the level of hostilities necessary to invoke international standards for application of prisoner-of-war standards.⁷¹

What is clear is that many nations now believe that insurgent prisoners in a full-scale civil war should be kept apart from ordinary criminals and that consideration should be given toward granting them amnesty in the event that the insurgency is defeated, provided they belonged to units capable of taking prisoners, wore uniforms of some kind when undertaking hostilities and did not engage in war crimes or other indefensible behavior.⁷² What is unclear is the level of hostilities necessary for such standards to become applicable, and the degree of consensus that such standards are ever applicable.

One other thing is clear: Unless the scale of hostilities is relatively great, few nations would maintain that a government facing civil unrest is obligated to treat its prisoner-foes as anything other than common criminals.

E. Armed Conflict and Enemies of Friends

In international armed conflicts, opposing sides sometimes consist of alliances of nations, with all members of one alliance at war with all members of the other. In such a case, a given nation may be regarded as acting on behalf of its allies as well as itself. Thus, in punishing spies

69. Protocol Additional to the Geneva Convention of Aug. 12, 1949 Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144, Annex I, *reprinted in* 16 I.L.M. 1391 (1977) [*hereinafter* Protocol I]; Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and relating to the Protection of Noninternational Armed Conflicts (Protocol II), *opened for signature* 69 Dec. 12, 1977, U.N. doc. A/32/144, Annex II, *reprinted in* 16 I.L.M. 1442 (1977) [*hereinafter* Protocol II].

70. H. LEVIE, *THE CODE OF INTERNATIONAL ARMED CONFLICT* xxii (1985), explains that his model code takes account of Protocol I because it may become widely accepted, but ignores Protocol II. For a less optimistic assessment of Protocol I see L.C. GREEN, *ESSAYS ON THE MODERN LAW OF WAR* 208 (1985).

71. See Aldrich, *Protocols Additional to the Geneva Conventions on the Laws of War*, 74 PROC. AM. SOC'Y INT'L L. 191 (1980).

72. See Veuthey, *Non-International Armed Conflict and Guerilla War*, in 1 INTERNATIONAL CRIMINAL LAW, at 243, 253-65 (M.C. Bassiouni ed. 1987).

or war criminals or in detaining prisoners of war, one nation may appear to be cooperating in protecting another from its enemies.

In civil wars, the same may be true when a foreign nation allies itself with one side or the other and has armed forces in the field where they may take prisoners.

Only in such peculiar settings, and only in this technical sense, have Western nations seemed to use their criminal processes against the political enemies of other states — until the advent of the U.S. - U.K. supplementary extradition treaty.⁷³

Even in time of war, outside of war zones persons loyal to enemy nations are not subject to criminal process on account of their nationality or loyalty,⁷⁴ and they cannot be detained as prisoners of war. They can be punished for specific criminal acts like espionage or sabotage, but for such crimes only a victim nation can undertake prosecution and it cannot rely on extradition to obtain custody of an absent accused due to the political offense doctrine.

As a result, away from the battlefield, even allied nations generally do not use their criminal processes to protect any other nation. The one qualification that must be added is that such exceptional crimes as crimes of aggression, war crimes, and crimes against humanity are given exceptional treatment. They can be punished by non-victim nations and the political offense doctrine does not prevent extradition of persons accused of such crimes.⁷⁵ However, punishment of such crimes is not merely a common cause for allies; it is said to be a common cause for all humanity on the basis that such conduct is unjustifiable regardless of which nations are targets and which nations are intended beneficiaries.

Accordingly, even for allies in time of war, Western nations do not make their criminal processes available to serve interests other than their own; they reserve these processes for the punishment of persons whose conduct victimizes them directly, or for exceptional crimes that victimize all humanity.

73. Bassiouni, *The "Political Offense Exception" Revisited: Extradition Between the U.S. and the U.K.—A Choice Between Friendly Cooperation Among Allies and Sound Law and Policy*, 15 DEN. J. INT'L L. & POL'Y 255, 275 (1987).

74. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter Convention IV].

75. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§404, 423 (Tent. Draft No. 6, 1985).

F. Enemies of Friends in Peacetime

1. Extradition

a. Double-criminality, generally

In view of the foregoing, it is not surprising that normal extradition processes are designed so that a nation where fugitives are found is obligated to take adverse action only when the conduct of such fugitives implicates its own interests. This basic principle is established by the global requirement of double-criminality — that a fugitive will not be extradited unless his conduct was criminal not only under the law of the nation where he acted, but also under the law of the nation where he is found.⁷⁶

For most criminal conduct, double-criminality poses no serious obstacle because all nations proscribe theft, assault, murder, forcible rape, and other serious common crimes. However, this requirement can prevent the extradition of a polygamist who flees to a Moslem country and it can confuse or prevent extraditions for some white-collar crimes like securities fraud.⁷⁷

Where double-criminality prevents extradition, it may at first appear that the nation where the fugitive is found is self-righteously insisting that conduct it permits or encourages is “good” regardless of where it occurs, or of the social and legal framework in effect at that place. However, it must be remembered that the nation in which the fugitive is found is not being asked to express an opinion concerning the propriety of either foreign law or foreign conduct; it is being asked to interfere with the liberty of a person within its territory and to deliver that person for trial.

Even if the nation in which the fugitive is found was to concede that foreign conditions might warrant prohibition of what it permits under its own local conditions, there would remain the problem of determining the precise conditions existing at the actual place where the conduct occurred and judging whether they were sufficiently different to warrant a different rule. The first step would be very difficult to perform reliably from a distance, and the second would involve speculation, subjectivity and arrogance.

Even if the validity of the foreign rule and the wrongfulness of the foreign conduct were conceded, there would remain the problem of

76. M.C. BASSIOUNI, *INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER* 325-29 (1974).

77. See Herman et al., *supra* note 47.

justifying an interference with a person's liberty in the absence of any basis for believing that person has violated a local law or poses any danger to the society of the nation in which he is found. Because individual liberty is highly valued, it is unreasonable to expect that such action would be permitted under the law of the nation where the fugitive is found. In fact, the principle of legality in criminal law — that no conduct will be subject to criminal process unless a law so providing is in force at the time of the conduct — would make it difficult to assure extradition for conduct that is not criminal under local laws.⁷⁸

b. Political offenses

Ordinarily, application of the double-criminality requirement focuses only on the proscription, not on possible defenses. Thus, generally, murder is an extraditable offense, even when insanity is an issue and the nation where the fugitive is found has a more generous insanity defense than the nation in which the conduct occurred.⁷⁹ Why seemingly major differences in defenses should be generally ignored is difficult to explain, but it may be noteworthy that many defenses are characterized as excuses rather than justifications and that many defenses seem designed to take account of distinctive local circumstances.⁸⁰

It is clear that unless political offenses are involved, the nation in which the conduct occurred can usually be expected to make an unbiased assessment of the relevant factual evidence and to apply an objective rule to determine whether the conduct is defensible. As a result, for a nation where a fugitive is found to delegate a determination of defensibility to a nation where the conduct occurred does not seem unwarranted; having violated a proscription in force in both nations, the fugitive is apt to pose a threat to the societies of both if he remains free, and deferring to the judgment of another nation as to his dangerousness is not inherently unfair.

However, where political offenses are involved, the nation where the conduct occurred is an interested party, and — as described above — its laws concerning defenses are apt to reflect its particular legal attitudes and exclude consideration of alternative legal attitudes. As a result, the state where the conduct occurred cannot be relied upon for an unbiased treatment of defense arguments.

78. 1 EXTRADITION, *supra* note 11, at VII §§4.4, 4.5, 4.10.

79. Evidence concerning defenses is not even relevant in an extradition proceeding. 2 EXTRADITION *supra* note 12, at IX, §§5.20-26.

80. Fletcher, *supra* note 50, at 810-13.

The alternative of assessing the fugitive's defenses is attractive to the state where he is found because the question of what defenses should apply abroad involves the same problems mentioned above in connection with conduct not satisfying the double-criminality requirement: unreliable determination of facts, speculation, subjectivity and arrogance.

The result has been a blanket refusal of extradition where political motives are prominent in the commission of an offense. This state of affairs may seem to be a necessary product of concern for individual liberty and a recognition that the legitimacy of a government depends on the consent of the governed. However, not all foreign violent political conduct implicates the difficult questions concerning defensibility described above.

c. Terrorism

Spectacular crimes such as aircraft hijacking, which are aptly labeled by most observers as "terrorism," led the world community, including Western nations, to seek limits on the application of the political offense doctrine. During a period of about two decades, consensus was achieved in multilateral conventions to extradite, regardless of political motives, persons accused of specific offenses. Chief among these were interferences with civil aviation,⁸¹ hostage-taking,⁸² and attacks on diplomats.⁸³

Efforts were made to establish other multilateral conventions extending this approach to a broader range of offenses, but these efforts floundered.⁸⁴ Then came the bilateral initiative spearheaded by the U.K., which has treaties excluding violent crimes from political offense treatment with both the Republic of Ireland⁸⁵ and the U.S.

81. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570, 974 U.N.T.S. 177 (entered into force for the United States Jan. 26, 1973).

82. International Convention Against the Taking of Hostages, *opened for signature* Dec. 18, 1979, G.A. Res. 34/14 (XXXIV), 34 U.N.G.A.O.R. Supp. (No. 46) at 245, U.N. Doc. A/34, (1979) (entered into force for the United States Jan. 6, 1985).

83. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *adopted* Dec. 14, 1973, 23 U.S.T. 1975, T.I.A.S. No. 8532 (entered into force for the United States Feb. 20, 1977).

84. Convention for the Prevention and Punishment of Terrorism, *signed* Nov. 16, 1937, League of Nations O.J. No. 19, at 23 (1938), League of Nations Doc. C.546(I).M. 1/383(I).1937.V (1938) (never entered into force).

85. See Cantrell, *The Political Offense Exception in International Extradition: A Comparison of the United States, Great Britain and the Republic of Ireland*, 60 MARQ. L. REV. 777 (1977).

What distinguishes the offenses for which multilateral efforts were successful is that they are closely analogous to war crimes in that they involve the infliction of harm on persons having no direct relation to any particular political purpose of the offender,⁸⁶ so that such conduct can be regarded as indefensible regardless of the circumstances. That is, even if the government opposed was evil and the alternative political order advocated by the offender was laudable, resort to such means would be unjustifiable.

In contrast, most other offenses — even grave ones like homicide by means of explosives or automatic weapons — might be considered justifiable by an objective observer if the legal order opposed were sufficiently evil or the alternative legal order were sufficiently benign, depending on such factors as the position of the victim in relation to the controversy. For example, most Western observers would agree that a person who was to be arrested for mere expression of a political opinion would be justified in using necessary force to resist arrest in a system that denied legal protection or remedies against such arrests.

d. The new, bilateral approach

It must be noted that no Western nation has proposed adoption of a treaty eliminating political offense treatment for violent crimes in relation to a nation that does not have an operational democracy with a legal system that protects fundamental rights. So far, the U.S. has adopted a treaty eliminating the political offense exception with the U.K. and has negotiated similar treaties with the German Federal Republic, Spain, and Canada.⁸⁷ The first three are not only operational democracies, but also adherents to the European Human Rights Convention, and Canada is an operational democracy with a new charter of basic rights that may be enforceable in its courts in much the same

86. See Paust, *Terrorism and the International Law of War*, 64 MIL. L. REV. 1, 11-13 (1974); Rubin, *Terrorism and the Laws of War*, 12 DEN. J. INT'L L. & POL'Y. 219 (1983). See also THE POLITICAL OFFENCE EXCEPTION, *supra* note 8, at 132; Paust, *The Human Right to Participate in Armed Revolution and Related Forms of Social Violence Testing Limits of Permissibility*, 32 EMORY L. J. 545 (1983).

87. Supplementary Treaty to the Extradition Treaty of June 20, 1978 United States-Federal Republic of Germany, ____ U.S.T. ____, T.I.A.S. No. ____, cited in 87 DEPT. OF ST. BULL. NO. 2125 at 68 (Oct. 1987). Second Supplementary Treaty on Extradition, done Feb. 9, 1988, United States-Spain, ____ U.S.T. ____, T.I.A.S. No. ____, cited in 88 DEPT. OF ST. BULL. No. 3135 at 69 (June 1988). Protocol Amending the Treaty of Extradition of Dec. 3, 1971, done Jan. 11, 1988, United States-Canada, ____ U.S.T. ____, T.I.A.S. No. ____, cited in 88 DEPT. OF ST. BULL. No. 2132 at 884 (Mar. 1988), excerpted in Leich, *Contemporary Practice of the United States Relating to International Law*, 82 AM. J. INT'L L. 336, 337-38 (1988).

way that the U.S. Bill of Rights is enforceable in U.S. courts.⁸⁸ As a result, extreme situations like an arrest for merely expressing a political opinion as described above may seem impossible.

However, even nations evincing similar degrees of concern for individual liberties may have surprisingly different specific rules. For example, in the U.K., there is a prohibition against publishing any information revealed in court while a case is pending.⁸⁹ Thus, while a momentous trial concerning the birth-deformity inducing drug thalidomide was in progress — for several years — the press was prevented from apprising the public of revelations concerning the desirability of avoiding that drug or of seeking legal counsel if one had used that drug and given birth to a child with physical defects.⁹⁰

An editor or broadcaster who defied that law and then fled to the U.S. would be protected from extradition by the double-criminality requirement, but if he found it necessary to use violence to accomplish his escape, he would be extraditable under the new treaty. Adverse use of U.S. criminal process in relation to such a person seems difficult to justify because a similar course of conduct in the U.S. would never have resulted in a comparable confrontation with law enforcement personnel, so the use of force by such an individual under such circumstances would not seem to establish dangerousness of such a person to U.S. society. Also, the fact that the U.K. is a party to the European Human Rights Convention does not seem to assure that such an offender will be spared punishment due to the questionable wisdom of the basic U.K. prohibition against publications of this kind; the precise limits of freedom of the press vary from nation to nation, and the European Court of Human Rights can be expected to enforce a lowest-common-denominator approach to determining whether the U.K. prohibition is acceptable.⁹¹

Accordingly, the mandate under the new bilateral approach that political motives be disregarded for violent crimes could result in extradition of fugitives who used force to resist laws that have no counterparts

88. CHARTER OF RIGHTS AND FREEDOMS. For a general discussion, see Wilson, *The Making of a Constitution*, JUDICATURE 334 (1988).

89. *Distillers Co. (Biochemicals) Ltd. v. Times Newspapers* [1974] A.C. 273; see also *Attorney-General v. London Weekend Television* [1972] 3 All E.R. 1146; [1973] 1 W.L.R. 202. Discussed in R. CRANSTON, *CONSUMERS AND THE LAW* 154-56 (1978).

90. *S. v. Distillers Co. (Biochemicals) Ltd.*, 3 All E.R. 1412 (1969); 1 W.L.R. 114 (1970).

91. The chief problem is that in cases of national emergency derogation from many provisions is permitted and the European Court of Human Rights has shown some deference to the judgments of governments. See Warbrick, *The European Court of Human Rights and Terrorism*, 32 INT'L & COMP. L. Q. 143 (1982).

in the nation in which they are found, thus causing that nation to use its criminal process against individuals when no interest of its own would warrant such action. This would constitute an unprecedented departure from the consistent practice of reserving criminal process for the service of one's own interests.

2. Non-criminal measures

a. General immigration practice

Alleged criminal conduct elsewhere can disqualify an alien from entering or remaining within a nation.⁹² As a result, the immigration practices of denial of entry and deportation can function as non-criminal measures of social protection by isolating dangerous persons. Also, these practices sometimes leave the alien with nowhere to go but back to the nation where the alleged crime occurred, and thus function as aids to enforcement of foreign criminal laws. However, even these non-criminal practices operate only when the interests of the nation the alien seeks to enter are implicated.

Denial of entry — termed exclusion in U.S. law — for crimes committed abroad occurs only when the conduct in question is also a crime under the law of the nation the alien seeks to enter. Under U.S. law it is expressly inapplicable to offenses of a purely political nature.⁹³ Also, exclusion is mandated only for multiple convictions or when the alien has been convicted of or admits committing a crime involving moral turpitude.⁹⁴ As a result, persons who flee to avoid prosecution are not excludable unless they admit their guilt; and when the crime was based on political motives, even admitting guilt may not render the fugitive excludable.

Deportation for foreign crimes generally occurs under U.S. law when the alien was in fact excludable at the time of his entry due to foreign crimes, but gained entry by falsely denying their existence.⁹⁵ As a result, such deportations are based as much on the alien's defrauding the U.S. immigration service as on his foreign conduct.

92. 8 U.S.C. § 1182(a)(9) & (10) (1970).

93. *Id.*

94. *Id.*

95. 8 U.S.C. §1251(a) (1970) makes an alien deportable if he was excludable at the time of entry, but 8 U.S.C. §1254 (1970) gives the Attorney General discretion to suspend deportations based on prior foreign crimes.

Generally, an excluded or deported alien is permitted to depart to any nation willing to admit him.⁹⁶ However, similar immigration rules in other nations may render him unwelcome in any nation other than the one of his nationality and the one from which he fled prosecution — which could be two nations or only one. In the latter case, the exclusion or deportation has the same effect as extradition, but in the former the alien is able to return to the nation of his nationality, remaining out of the reach of the nation that wishes to prosecute him unless extradition is possible.

When taken together with the fact that exclusion and deportation are inapplicable to citizens, it is even more apparent that these immigration processes are not designed to protect the interests of foreign nations despite the fact that they may occasionally have that effect.

However, the Reagan administration has recently attempted to use an ambiguous proviso in the deportation statute to turn this situation inside out.

b. Designating the destination of deportee

U.S. immigration law provides for deportation to a nation chosen by a deportee that is willing to accept him, "unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States."⁹⁷ As one of several attempts to assure delivery of a PIRA fugitive to the U.K., the Reagan administration attempted to use this provision to designate the U.K. despite the fact that the fugitive had chosen the Republic of Ireland as his destination.⁹⁸ The administration's approach was accepted in general by federal courts at two levels, but while the case was still pending it was mooted. An extradition treaty between the U.K. and Ireland became effective, making Ireland an undesirable destination for the fugitive, so he fled for asylum instead.⁹⁹

The use of designated deportation in this fashion is not only an unprecedented use of the legal process of one nation for the exclusive interests of another nation, but a dramatic subversion of extradition.

96. 8 U.S.C. §1253(a)(1)-(7) (1970).

97. 8 U.S.C. §1253(a) (1970) provides for designation by the alien "unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States."

98. *Doherty v. Meese*, 808 F. 2d 938 (2d Cir. 1986).

99. May, *Thornburgh to Review Deportation of I.R.A. Man*, N.Y. Times, Feb. 26, 1989, §1, at 4, col. 1; Shenon, *Meese Orders I.R.A. Fugitive in New York to Go to Britain*, N.Y. Times, June 15, 1988, at A1, col. 1.

Such a practice would assure delivery of a fugitive without regard to the normal constraints of an extradition treaty, double-criminality, probable cause, specialty, etc.¹⁰⁰

In sum, the concerted practice among nations has been that each uses its criminal law processes only to serve its own social protection interests. That is, one nation never devotes its criminal law processes to the service of exclusively foreign interests. Also, even when they themselves are the victims of large-scale politically-motivated violence, nations often forego criminal punishment of individuals, treating them as prisoners of war rather than punishing them for being affiliated with the "wrong" side in an armed conflict.

Moreover, a nation will use its own criminal law processes against politically motivated crimes that directly victimize only a foreign nation only when the conduct is of such an abhorrent nature that it would be unjustifiable regardless of circumstances. Finally, in deciding whether to use their own criminal law processes, nations have never departed from the principle of individual responsibility.

Accordingly, the new bilateral mode of cooperation reflected in the U.S. - U.K. treaty constitutes a drastic departure from basic, well-settled practice. It makes the availability of the criminal law processes of one nation depend not on the individual responsibility of a fugitive, but on the identity of the nation requesting his extradition. This is authorized as to conduct that is not especially abhorrent — as to conduct that the nation where the fugitive is found might not punish even if it had been the victim had the conduct occurred in the course of large-scale hostilities. And this is authorized even when there is no reliable basis for believing that the fugitive poses any danger to the society of the nation where he is found.

IV. POLICY PROBLEMS WITH THE U.S. - U.K. APPROACH

The mere fact that the new approach is a departure from past practice does not make it evil. However, drastic change is usually warranted only under two kinds of circumstances. The first is when there is a major change of policy. The second is when a major technical flaw in prior practice is suddenly discovered, revealing that policies are not actually being served as intended.

100. The specialty requirement in extradition mandates that an extradited person be tried only for extraditable crimes. 1 EXTRADITION *supra* note 11, at VII, §§6-1 to 6-14.

There has been no genuine policy change with respect to foreign political offenses. There has certainly been no change in U.S. legislative policy because there has been no legislative action in that field. In other respects, there is little evidence of a true change of policy. Some kinds of foreign offenses that are labeled "terrorism" have jointly been condemned by Western nations for over fifty years.¹⁰¹ However, this sentiment has been counter-balanced by other concerns, including neutrality as to conflicts within other nations, non-interference in the internal affairs of other nations, avoidance of disputes between nations, and the rights of populations to alter or abolish oppressive governments.¹⁰² There is no apparent basis for believing that these concerns have abated.

Nor have there been any startling revelations concerning technical flaws in past practices relating to foreign political offenses. During this decade, two exhaustive doctoral theses in law have been devoted to this subject and published as books in Europe.¹⁰³ Both noted that the handling of political offenses has benefited seemingly unworthy persons while exposing some persons who may have deserved consideration to a risk of persecution through return to the nation where their conduct occurred.¹⁰⁴ However, the divergence between the scope of offenses protected under extradition practice and the scope of offenses that do and do not merit protection has been well-known for some time.¹⁰⁵ The only specific enhancement of policy effectiveness recommended in the two theses is that persons sought for extradition should be protected by the kind of safeguard against persecution found in conventions concerning refugees.¹⁰⁶

Beyond that, the theses do not suggest policy enhancements, but rather they offer conflicting views of the degree to which prevailing practices have served relevant policies. One apparently finds that the variety of concerns implicated by political offenses are crudely served by past practices.¹⁰⁷ The other argues that the relevant policies merely serve the ends of establishing and maintaining representative govern-

101. Conventions to deal with terrorism have been discussed since at least the 1930's. See *supra* note 84.

102. THE POLITICAL OFFENCE EXCEPTION, *supra* note 8, at 154-62.

103. *Id.* See also STEIN, *supra* note 23.

104. THE POLITICAL OFFENCE EXCEPTION, *supra* note 8, at 205-06; STEIN, *supra* note 23, at 379-80.

105. THE POLITICAL OFFENCE EXCEPTION, *supra* note 8, at 14-17.

106. *Id.* at 208; STEIN, *supra* note 23, at 380.

107. She would permit non-extradition for all crimes fitting traditional political offense criteria, but would require that all crimes be prosecuted within the Requested State. THE POLITICAL OFFENCE EXCEPTION, *supra* note 8, at 208-10.

ments, so that protection for political offenders has no place in relations between nations that have representative governments.¹⁰⁸

The latter opinion may find support elsewhere, but it does not find support in history. Republican governments gave protection to political offenses in republican nations from the very beginning and monarchies followed their example.¹⁰⁹ Accordingly, this argument does not constitute a discovery of a defect in policy service of prior practice, but rather a new position concerning which policies are relevant.

In view of the above inadequate basis for a drastic change in an area of law impacting on individual liberty, it is not surprising that most commentators have denounced the supplementary extradition treaty. Because that treaty is still in effect and because the more recent efforts to turn deportation into a robust alternative to extradition reflect much the same thinking, it must be assumed that these criticisms have so far fallen on deaf ears. Accordingly, it is appropriate to reiterate them in summary fashion, while elaborating others, in hopes that the administration's innovations will be recognized for the policy disasters that they are.

A. A Diplomatic Nightmare

It seems self-evident that a nation's criminal processes should be used only to vindicate its own criminal law policies. However, foreign policy purposes might seem acceptable alternatives to some.

Obviously, the new bilateralism has some potential for positive foreign policy effects. When one nation refuses to surrender a violent political offender to the nation whose government he has attacked, relations between the two nations do not benefit. The fact that the refusal is based on a neutral standard — immunization of all foreign political offenses — may make the refusal inoffensive, but the incident has no positive effect.

In contrast, it is possible that the surrender of a political enemy could cause the recipient nation to feel some appreciation. Because the surrender is required under a reciprocal agreement, it could be argued that the surrendering nation has merely done its duty, and that all it is entitled to is similar performance by the other nation should a suitable occasion arise. However, the possibility that a feeling of appreciation could arise cannot be ruled out.

108. He considers acceptable a clause permitting refusal if the surrender would be contrary to "essential national interests." STEIN, *supra* note 23, at 380.

109. THE POLITICAL OFFENCE EXCEPTION, *supra* note 8, at 11-16.

Unfortunately, this speculative foreign policy benefit is more than offset by enormous problems inherent in the nature of the new bilateral approach.

1. Which governments are good today

The kind of cooperation exemplified by the U.S. - U.K. treaty has yet to be achieved in multilateral conventions, and efforts to achieve it seem to have cooled. This is because even the Reagan administration admits that such cooperation can only be proper when each party regards the other as a fully democratic nation.¹¹⁰ The problem is that nations that are not fully democratic may leave their political opponents with no realistic alternative to violence as a means for exercising or acquiring such basic rights as freedom of speech or the right to vote.

For example, South Africa is currently an unsuitable partner for such cooperation because its racial policy denies numerous basic rights, including the right to vote, to the black population. As a result, that population cannot make its wishes known and felt through the ballot box, and efforts to effect change through such non-violent means as job actions, demonstrations and civil disobedience have been ineffective, and have been countered forcefully by the government.¹¹¹ Under these circumstances, for another nation to help in punishing all uses of violence in South Africa aimed at change would involve it in the maintenance of the status quo. Because general human rights principles support the view that some violence is justifiable in attempting to end massive human rights abuses,¹¹² no Western nation would consider such an arrangement with South Africa.

While the admission that not all nations are suitable partners for such close cooperation seems unavoidable, it also suggests that there must be nations that are suitable partners. Thus, the admission does not seem at first to damage the argument in favor of bilateral cooperation. However, the fact that the worthiness of potential partners for such cooperation must be judged is the flaw that makes the bilateral approach an invitation to disaster rather than a foreign policy achievement.

110. Sofaer, *supra* note 41, at 132. In "ratifying" the Supplementary Treaty with the U.K., the Senate issued a declaration against such agreements with non-democratic regimes. 132 CONG. REC. S9120 (Daily ed. July 16, 1986).

111. See THE STUDY COMM'N ON U.S. POLICY TOWARD SOUTHERN AFRICA, SOUTH AFRICA — TIME RUNNING OUT 169-205 (1981).

112. See Paust, *supra* note 86.

The problem is that rejecting potential partners amounts to a damning of a system of government in another nation, which entails adverse foreign policy consequences. Because the new bilateralism is not well-grounded in domestic criminal law policy but is responsive to general foreign relations notions of the duties of allies to assist one another, rejecting the approaches of an unworthy partner may be extremely difficult.

For example, although the Cold War is not being waged with notable vigor at the present, the tendency of the U.S. to regard allies or potential allies of the Soviet Union as enemies is still apparent in such matters as the invasion of Grenada and the support given to the Contras as challengers to the leftist Sandinista government of Nicaragua. Evidence of the survival of the concomitant tendency to regard all enemies of the Soviet Union as allies may be found in U.S. support of the genocidal Khmer Rouge as rivals to Vietnamese hegemony in Kampuchea (Cambodia), and in the relative silence of the U.S. regarding credible reports of serious human rights violations in Pakistan, which provides a haven for the anti-Soviet Afghanistan resistance.¹¹³

Thus, many nations besides the members of the North Atlantic Treaty Organization (NATO) bear a relationship to the U.S. that approaches that of an ally. Other Western nations have similar quasi-allies through either a similar Cold War legacy or the legacy of colonialism.¹¹⁴

The existence of such relationships poses a grave problem for bilateralism. To reject a proposal from an ally for a pact against one another's politically violent foes would amount to an insult that could poison the relationship and to a judgment that could be regarded as an encouragement of opposition to such a nation's government. In either case, a valuable ally might be lost through such a refusal.

A similar effect could be produced by making such pacts with most but not all allies within a given region. The omission of one or two nations from a pattern of such pacts could be interpreted either as an indication that they are not regarded as equally important as allies or as an implicit adverse judgment on the quality of their governments. In either case, a valuable ally might be lost.

113. Preston, *Asylum Adjudications: Do State Department Advisory Opinions Violate Refugees' Rights and U.S. International Obligations?*, 45 MD. L. REV. 91 (1986).

114. The largest other system is the British Commonwealth, which includes most former British colonies. France also has close relations with numerous former colonies, especially in Africa.

Even in the absence of a *de facto* alliance, relations among nations can be valuable for many reasons, including economic and social interactions. As a consequence, snubbing any nation by failing to extend to it the same bilateral cooperation extended to others could chill relations, impairing a valuable relationship.

As a result, the new bilateralism, by tempting nations to worry about other foreign policy concerns, poses a grave challenge to the ability of nations to be faithful to the human rights limitations on acceptability of close cooperation against politically violent offenders. That the foreign affairs authorities of any nation can be counted on to reject all unworthy suitors is doubtful.

The foregoing is true not only of treaties for extradition, but also of the practice of designating the destination of deportees, because nations who do not benefit from designations can be expected to feel the same kind of rejection as those rejected as special extradition partners.

2. When governments turn bad

The greatest threat of all to both human rights and diplomacy would arise when one nation retrogresses from democracy to tyranny and its partners in bilateral treaties for the extradition of political offenders must face the problem of terminating the treaties.

Terminating such a treaty would be far more offensive than rejecting a proposed one. A nation can avoid an outright rejection of an unsuitable partner by delaying action on a proposal, or it can soften a rejection by citing collateral excuses. However, for one nation to terminate a special extradition arrangement with a second just as the second undergoes changes in its form of government would be a transparent, severe criticism. Moreover, because shifts toward more authoritarian government are likely to coincide with domestic political unrest, the government of the second nation is liable to regard the termination of the treaty as an expression of support for its opponents.

If concern for these negative results was to result in hesitation to terminate such treaties, matters could be made worse. If the terminating nation waits until requests for extradition are made, it will be forced to choose between violating treaty obligations and contributing to violations of human rights.

This is a serious concern because regressions from democracy are always possible and recent history has provided examples on every continent, including Greece in Western Europe.¹¹⁵

B. Human Rights Backstops

One argument made regarding the suitability of the U.K. as a partner under the new extradition treaty with the U.S. was that it has a long democratic tradition.¹¹⁶ This is true, but it is not in itself a guarantee of continued democracy.

Moreover, the U.K. lacks one protection against authoritarian tendencies the U.S. regards as basic — a written constitution enforceable by the judiciary. One of the proposed parties for future bilateral treaties, Canada, which has a long democratic tradition, now has such a protection, but it is so new that its effectiveness has not yet been demonstrated.¹¹⁷

A third proposed treaty partner, the Federal Republic of Germany, has a court-enforced constitution,¹¹⁸ but its strong democratic tradition is only four decades old. A fourth, Spain, has been a democracy for only a short time.¹¹⁹

1. Limits of human rights conventions

External protection of human rights do exist, and these might be cited as bases for discounting human rights concerns in connection with extradition of violent political offenders. For example, the U.K., the Federal Republic of Germany, and Spain, as well as most other Western European nations, are subject to the European Human Rights Convention.¹²⁰ That convention features an international court that has jurisdiction to hear unresolved human rights grievances. Decisions of that court are binding under the national laws of signatories. As a result, that convention is by far the most effective external human rights protection system in existence.¹²¹

115. See *THE POLITICAL OFFENCE EXCEPTION*, *supra* note 8, at 88-89.

116. Sofaer, *supra* note 41.

117. See Wilson, *supra* note 88.

118. See FINER, *FIVE CONSTITUTIONS* 23-27 (1979), excerpted in *COMPARATIVE LEGAL TRADITIONS* 67 (M. Glendon, M. Gordon & C. Osakwe eds. 1985) [hereinafter *COMPARATIVE LEGAL TRADITIONS*].

119. Cappellitti, *Repudiating Montesquieu? Expansion and Legitimacy of "Constitutional Justice,"* 35 *CATH. U. L. REV.* 1, 8 (1985).

120. See J.E.S. FAWCETT, *APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 404 (2d ed. 1987).

121. See *INTERNATIONAL HUMAN RIGHTS* 627 (R. Lillich & F. Newman eds. 1979).

However, even that system has two significant shortcomings. First, a nation that fears an adverse decision concerning its human rights practices may simply terminate its adherence to the convention, as Greece did under the generals.¹²² Second, effective review of revocations of liberties in time of emergency is hampered by the fact that the European human rights court has adopted a policy of deferring within limits to the judgment of a member nation as to whether the emergency actually warrants such revocations.¹²³

Even if the European human rights system were regarded as providing adequate protection, treating only members of that system as suitable partners for bilateral arrangements would create a new diplomatic problem. Western Hemisphere nations are subject to an Inter-American human rights system that is not as effective as the European one, so that discrimination between human rights systems would amount to criticism of the disfavored system. However, entering special bilateral extradition treaties with signatories of the less effective Inter-American system would pose a considerable risk in terms of possible complicity in suppression of human rights.

2. Persecution clauses as cure

To the extent that the human rights concerns alluded to above are limited to fear of complicity in sham trials, a simple mechanism is available to allay those concerns — an anti-persecution provision of the kind found in international instruments concerning refugees. Such a provision prohibits delivery of a person to a nation where he is apt to be persecuted on the basis of race, religion, ethnicity or political opinion.¹²⁴ Such a provision was added to the U.S. - U.K. treaty in the face of concerns raised in the U.S. Senate.¹²⁵ However, insertion of such a provision does not allay all human rights concerns.

a. Washington and persecution

The most obvious problem is that persecution is not the only kind of human rights violation that can create grave issues in extradition of violent political offenders. The Revolutionary War offers an example.

122. *See supra* note 115.

123. *See supra* note 91.

124. This type of provision is found in U.S. law in 8 U.S.C. §1253(h)(1) (1980), which follows the language of the Convention Relating to the Status of Refugees, *signed* July 28, 1951, art. 33(1), 189 U.N.T.S. 137.

125. *See supra* note 31.

The Declaration of Independence recites a litany of human rights abuses that were regarded as provocations justifying armed resistance to British rule in the American colonies.¹²⁶ George Washington and other conspirators against British rule participated in violence intended to end those abuses. Participants who fell into the custody of the British would have found no comfort in an assurance that they would not be persecuted on the basis of their background or opinion, because they could still be executed for their *conduct*.

As a result, if such persons had been turned over to the British by some other nation, that nation's action would have amounted to either complicity in perpetuating the abuses or a disagreement with the Continental Congress as to the existence of such abuses or the need for force to end them. The last two possibilities are actually rather weak because the entitlement of a third party to rely on its own judgment regarding the merits of a foreign dispute is questionable.

Accordingly, the fact that persecution is not a problem in a nation seeking extradition is not an answer to all human rights concerns.

b. The provision proves too much

The European Human Rights Convention forbids persecution of the kind addressed by the added provision in the U.S. - U.K. treaty.¹²⁷ Accordingly, if that Convention is regarded as an adequate assurance that the U.K. would never engage in human rights abuses that would justify violent opposition to its policies, it is difficult to understand why that convention is not an adequate assurance against persecution.

Therefore, adoption of the anti-persecution clause therefore suggests either confusion regarding the content of the European convention or reservations concerning its procedural effectiveness. Reservations of that sort might be warranted because relief from the European court is available only after all national legal remedies have been exhausted,¹²⁸ and after a commission has considered the matter,¹²⁹ so an accused can languish for years in jail pending ultimate relief.

However, the same reservation would be applicable to other human rights abuses that might provoke violent resistance.

126. *See supra* note 10.

127. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 14, E.T.S. No. 5 (1950).

128. *Id.* at art. 26.

129. *Id.* at art. 44.

C. Conclusion

The policy flaws inventoried above provide ample reason for rejecting the new bilateral approach as creating more problems than it solves in international relations and as callous to important criminal law policies. However, many of these flaws were apparent at the time the new approach was adopted, or were pointed out during the first year it was in effect.¹³⁰ This suggests that policy arguments are of limited effect in dealing with passionate anti-terrorism sentiments.

130. The following is an attempt to summarize the voluminous discussion in law journals concerning the U.S. - U.K. treaty by grouping contributions according to the positions taken by their authors. An effort has been made to indicate by parenthetical comments some of the most distinctive ideas put forward.

Articles expressing overall approval: Sofaer, *supra* note 41 (unqualified support); Goldie, *The "Political Offense" Exception and Extradition Between Democratic States*, 13 OHIO N. U. L. REV. 53 (1986) (emphasizing that persons who victimize civilians should be treated as ordinary criminals); Sapiro, *Extradition in an Era of Terrorism the Need to Abolish the Political Offense Exception*, 61 N.Y.U.L.REV. 654 (1986); Lowe & Warbich, *Current Legal Developments — Extra-territorial Jurisdiction and Extradition*, 36 INT'L & COMP. L. Q. 398 (1987) (departing briefly from commercial topics, they approve the closing of the political offense "loophole"); Hannay, *An Analysis of the U.S.-U.K. Supplementary Extradition Treaty*, INT'L LAW. 925 (1987); LUBET, *Taking the Terror Out of Political Terrorism The Supplementary Treaty of Extradition Between the U.S. and the U.K.*, 19 CONN. L. REV. 863 (1987); Note, *Extradition — The Role of the Political Offense Exception in Combatting Terrorism*, 10 SUFF. TRANSNAT'L L. J. 441 (1986); Note, *The United States - United Kingdom Supplementary Treaty Limiting Availability of the "Political Crime" Defense*, 9 HOUS. J. INT'L L. 303 (1987).

Opposed to the treaty: Gilbert, *Terrorism & the Political Offense Exemption Reappraised*, 34 INT'L & COMP. L.Q. 695 (1985) (espousing trials in asylum nations or before an international criminal court as better than eliminating the exemption); Bassiouni, *supra* note 73 (strongly critical); Blakesley, *The Evisceration of the Political Offense Exception to Extradition*, 15 DEN. J. INT'L L. & POL'Y 109 (1986) (strongly opposed); Derby, *supra* note 26; Fascell, *Combatting International Terrorism The Role of Congress*, 16 GA. J. INT'L & COMP. L. 655 (1986) (advocating a legislative approach); Baunach, *The U.S.-U.K. Supplementary Extradition Treaty Justice for Terrorists or Terror for Justice?*, 2 CONN. J. INT'L L. 463 (1987); Benes, *Terrorism, Insurgency & Geopolitics: The Errors of U.S. Foreign Policy*, 17 CAL. W. INT'L L. REV. 161 (1987); KUBER, *A Sewing Lesson in Political Offense Determinations: Stitching Up the International Terrorists' Loophole*, 10 HASTINGS INT'L & COMP. L. REV. 499 (1987) (advocating a legislative definition of political offenses); Note, *Extradition Reform: The Role of the Judiciary in Protecting the Rights of a Requested Individual*, 9 B. C. INT'L & COMP. L. REV. 293 (1986); Note, *Question of Justice U.S. Courts' Powers of Inquiry Under Article 3(a) of the U.S.-U.K. Supplementary Treaty*, 62 NOTRE DAME L. REV. 8474 (1987); Note, *The Turning Point Approaches: The Political Offense Exception to Extradition*, 24 SAN DIEGO L. REV. 549 (1987); Comment, *Abrogating the Relative Political Offense Exception to Extradition: The U.S.-U.K. Supplementary Extradition Treaty*, J. MARSHALL L. REV. 453 (1987).

Expressing mixed views: Carter, *Swiss Aspects of Extradition (New Law & Affirmed Concepts)*, 6 N.Y.L. SCH. INT'L & COMP. L. REV. 539 (1986) (emphasizes advantages of Swiss law); Falvey, *Legislative Response to International Terrorism International & National Efforts to Deter & Punish Terrorists*, 9 B.C. INT'L & COMP. L. REV. 323 (1986); Halberstam, *Terrorism*, 9 GEO. MASON U. L. REV. 12 (1986); Larschan, *Extradition, the Political Offense Exception and Terrorism: An Overview of Three Principles of Law*, 4 B.U. INT'L L. J. 231 (1986); Mullally, *Combatting International Terrorism: Limiting the Political Offense Exception Doctrine in Order to Prevent "One Man's Terrorism" from Becoming "Another Man's Heroism,"* 31 VILL. L. REV. 159 (1986); Murray, *The Future of Multilateralism and Efforts to Combat International Terrorism*, 25 COLUM. J. TRANSNAT'L L. 35 (1986); Comment, *Extradition Limitation of the Political Offense Exception*, 27 HARV. INT'L L. J.

Accordingly, it is worth considering whether the bilateral approach can be defeated on the basis of illegality.

V. LAWFULNESS OF POLITICAL OFFENSE EXTRADITIONS

A. Separation of Powers and Fugitive Renditions

In foreign affairs, the executive is often free to act unilaterally, and even treaties require only the acquiescence of the Senate.¹³¹ However, there has never been any doubt that governmental action in the United States must conform to all constraints of the Constitution regardless of any connection they might have to foreign policy or a treaty.¹³² This point is particularly relevant for the kind of governmental action involved in the new bilateral approach — depriving an individual of his liberty and then conveying him against his will to a place where he will face criminal process.

1. The need for a legislative basis

The authority of the executive branch to take persons into custody and to confine them is crucially dependent on the existence of some legislative basis.¹³³ Only when there is probable cause to believe that an individual has engaged in conduct that violates a criminal law may that individual be arrested.¹³⁴ In the field of extradition, the ramifications of this fundamental principle take unusual twists, but the principle is fully applicable.

In the usual setting, the arrest power of the federal executive is linked to the existence of a federal criminal law, passed by both houses of Congress.¹³⁵ However, a request for international extradition from the U.S. is prompted by a violation of a foreign criminal law rather than any U.S. criminal law. Accordingly, the basis for executive power to arrest such fugitives is not found directly in any U.S. substantive

266 (1986); Note, *Eliminating the Political Offense Exception for Violent Crimes*, 6 VA. J. INT'L L. 755 (1986); Comment, *The Political Offense Exemption in Extradition Protecting the Right of Rebellion in an Era of International Political Violence*, 66 ORE. L. REV. 405 (1987).

131. U.S. CONST., art. II, §2.

132. Cf. *Reid v. Covert*, 354 U.S. 1 (1957); see also 1 EXTRADITION, *supra* note 11, at II §1-2, citing J.B. MOORE, 1 A TREATISE ON EXTRADITION AND INTERSTATE RENDITION 97 (1891).

133. See, e.g., *Williams v. Rogers*, 449 F.2d 513 (8th Cir. 1971) (holding that an executive agreement made pursuant to a joint resolution of Congress was adequate for returning a member of the armed forces to the Philippines to face trial in a local court).

134. Evidence is assessed in relation to an "extraditable offense," but the doctrine of double-criminality assures that extraditable offenses will be offenses under U.S. law.

135. U.S. CONST., ART. I, §1.

criminal proscription, and the weight of authority holds that the lawfulness of extradition depends on the existence of extradition 1/legislation and compliance with its terms.¹³⁶

2. Issues of statutory compliance

The statute authorizing international extradition authorizes issuance of a warrant for apprehension when the offense charged is extraditable under a treaty in force and a judicial officer finds, "the evidence sufficient to sustain the charge under the provisions of the proper treaty. . . ."¹³⁷ The statute does not expressly state any further conditions, but decisional law provides the standard of proof — probable cause — and establishes as domestic law various customary rules of international extradition, including the definitions of political offenses exempt from extradition and the requirement of double-criminality.¹³⁸

The long-standing Western practice of exempting political offenses from extradition certainly supports the view that such an exemption should be implied where a treaty is silent on the subject.¹³⁹ Likewise, a century of U.S. practice of inserting exempting language in its extradition treaties supports the inference that Congress approved of the exemptions and expected that they would be continued.¹⁴⁰ As a result, there is reason to question whether extraditions of political offenders would comply with a construction of the extradition statute that was sensitive to legislative intent.

The same is true with respect to the double-criminality requirement. Insistence on double criminality in extradition has been the uniform practice of Western nations.¹⁴¹ Moreover, until recently, the U.S. used treaty provisions that prevented any confusion on that score by listing

136. 1 EXTRADITION, *supra* note 11, at II, §4-8, citing *Grin v. Shine*, 187 U.S. 181 (1902), and *Charlton v. Kelly*, 229 U.S. 447, 465 (1912).

137. 18 U.S.C. §3184 (1969).

138. Double-criminality was described as an implicit condition in any treaty silent on the subject in *Factor v. Laubenheimer*, 290 U.S. 276, 298-300 (1933). Specialty was described as an implicit condition for treaty-based extradition (though not for extradition based on comity) in *Fiocconi and Kella v. Attorney General*, 462 F.2d 475 (2d Cir. 1976), cited in 1 EXTRADITION, *supra* note 11, at VII, §6-5. The political offense exception in U.S. extradition law is purely court-developed. 2 EXTRADITION *supra* note 12, at VIII, §2-7.

139. *In re Ezeta*, 62 F. 972 (N.D. Calif. 1894).

140. Treaties had routinely included such exceptions. 2 EXTRADITION, *supra* note 11, VIII §2-4. Moreover, the desire of the Congress to avoid extraditions for political offenses is evident from the language of 18 U.S.C. §3185 (1979 & Supp. I 1988), which forbids such extraditions *even to foreign territories occupied or controlled by the United States*. In contrast, there is no such language in 18 U.S.C. §3183 (1979), which provides for extraditions from foreign places where the U.S. exercises extraterritorial jurisdiction to the U.S.

141. *Herman et al.*, *supra* note 47.

the offenses covered.¹⁴² Such lists never included conduct that was not criminal under U.S. laws, and such lists were in use at the time the current extradition statute was enacted.¹⁴³ As a result, it is apparent that Congress expected that the double-criminality requirement would be maintained in any treaty relationship, and there is a very genuine issue as to whether Congress would have authorized extradition where the accused's conduct abroad would not constitute an offense under U.S. law.

3. Legislative intent

It seems unlikely that the Congress intended to authorize extraditions for political offenses or offenses not criminal under U.S. law.

Only a half-decade ago, the handling of political offenses in extradition was debated in Congress in connection with a proposed comprehensive revision of the extradition act.¹⁴⁴ The debate concerned who should make the determination of whether a foreign crime constitutes a political offense — the courts or the executive.¹⁴⁵ Modification of the definition to be applied was discussed, and bills in both houses provided that violent offenses would not qualify — “normally” — for political offense exemption.¹⁴⁶ However, both bills would have left the question of whether a particular case merited “abnormal” classification for ultimate judicial determination under ill-defined principles. Accordingly, there is a strong basis for concluding that legislative intent is contrary to the blanket exclusion of violent offenses from political offense treatment under the U.S. - U.K. treaty.

The evidence is even stronger regarding the intent that the double-criminality requirement be maintained; one of the bills expressly made it a condition for extradition.¹⁴⁷ Oddly, however, the report accompanying that bill spoke without disapproval of the possibility of extradition after expiration of a U.S. limitation period provided the limitation period in the requesting nation had not expired.¹⁴⁸

142. 1 EXTRADITION, *supra* note 11, at VII, §§4-1 to 4-12.

143. The statutory provision of greatest relevance is 18 U.S.C. §3184, enacted June 25, 1948, ch. 645, 62 Stat. 822.

144. 2 EXTRADITION, *supra* note 12, at VIII, §§2-93 to 2-103.

145. *Id.* at §2-93.

146. *Id.* at §§2-95 to 2-96.

147. 1 EXTRADITION, *supra* note 11, at VII, §§4-12 to 4-13.

148. H.R. 6046, ch. 210, §3194(d)(2)(A), 97th Cong. 2d Sess. (1982).

B. Constitutional Issues

1. Separation of powers

Obviously, executive action that is contrary to a valid statute is unlawful, and it does appear that some extraditions under the new U.S. - U.K. treaty would be contrary to a proper construction of the extradition act.

Although it is generally the rule that a subsequent treaty takes precedence over an inconsistent statute,¹⁴⁹ an extradition treaty is an exception. This is because extradition involves arrest, and the power to arrest depends fundamentally on the existence of a criminal law basis. As a result, any treaty purporting to permit extradition under circumstances not authorized by statute should be treated as *ultra vires* for domestic legal purposes.¹⁵⁰

It is important to note, however, that the double-criminality requirement and the political offense exception are not simply creatures of legislative policy. Both relate to constitutional imperatives.

a. Double criminality

The relation is most easily seen in the double-criminality requirement. Although the most obvious legislative basis for international extradition is the federal extradition statute, that statute by itself can neither explain nor justify arrests based on foreign crimes. Standing alone, the act appears to authorize arrest and delivery of a person found within the U.S. to a foreign nation upon a showing that he committed a punishable act while in that foreign nation. This suggests that enforcement of foreign criminal law in the U.S. depends solely on the existence of a treaty, and not on any domestic U.S. legal policies or provisions.

Viewed in that way, the effect of the U.S. extradition statute would be to delegate to treaty partners the power to determine what conduct abroad would subject a person to arrest in the U.S. This would lead to such absurd results as extradition for adultery if the person sought engaged in such conduct in the territory of a treaty nation that considered it a crime, despite the fact that there is no federal crime of adultery and even if the person were found in one of the many states in the U.S. that no longer consider adultery a crime. The absurdity lies in the

149. See *supra* note 136.

150. 1 EXTRADITION, *supra* note 11, at II, §4-9 & §§5-1 to 5-3.

use of U.S. criminal measures against a person, who is innocent under U.S. law, for the sole reason that another nation wishes it.

In contrast, when the requirement of double criminality is in place, authorizing arrest and delivery only for persons whose conduct abroad would have constituted a crime if done within the U.S., the availability of U.S. criminal processes is limited by the substantive criminal law of the U.S. This state of affairs seems more natural, and for good reason; such a limitation makes U.S. criminal processes available only when U.S. criminal policy justifies it. As a result, extradition functions as an additional consequence to conduct that is contrary to U.S. criminal proscriptions — one that applies to conduct abroad. In this respect, it serves to extend the effect of U.S. substantive law to foreign nations.

That such a characterization is meaningful is apparent from the policy ramifications involved. A person who engages in conduct contrary to a U.S. criminal proscription is punished in order to protect society when his conduct occurs inside the U.S. A person who engages in such conduct is no less dangerous to U.S. society, if the conduct occurs abroad, in a nation that also proscribed such conduct. Extradition serves as an alternative to local punishment, eliminating the danger by removing that person and permitting his return only if he is found innocent or if he has undergone punishment calculated to reform him.

Thus, when extradition from the U.S. is conditioned on double criminality, it serves the purpose of protecting U.S. society from conduct defined as criminal by U.S. legislation. In contrast, extradition for offenses not satisfying the double-criminality requirement would serve no U.S. criminal law purpose. Herein lies the separation of powers issue: Extradition without double criminality involves interference with individual liberty for conduct that has not been legislatively determined to be dangerous to U.S. society. It therefore amounts to a delegation of the legislative function.

The legislative function delegated is that of defining the conduct that is sufficiently dangerous to U.S. society to warrant interference with individual liberty. At the federal level, this function is exercised jointly by both houses of Congress in enacting criminal statutes. Extradition without double criminality would amount to exercise of this function through treaty-making by the executive and Senate, eliminating the role of the lower house. Moreover, because adoption of a treaty calling for extradition regardless of double criminality would make the range of conduct that is extraditable depend on changeable foreign criminal laws, the function would also be shared by a foreign legisla-

ture. Thus, the separation of powers problem at the federal level is quite obvious.

However, under the U.S. federal system most crimes are subject to state laws, so the double-criminality requirement usually makes state proscriptions crucial. Accordingly, the legislative function that is at stake is usually that which is exercised by state legislatures. Nevertheless, this poses a federal separation of powers problem.

It must be remembered that federal criminal law power is conferred upon the Congress and that the foreign affairs power is exclusively federal. As a result, when criminal law policy at the state level can only be served by resort to foreign criminal processes, the decision to do so is a federal decision. The Congress, by enacting legislation prescribing the conditions for all international extraditions, authorizes the use of treaties that can serve the criminal policy purposes of the states. When the double-criminality requirement is adhered to, the delegation of authority for treaty-making is well-defined. However, in the absence of such a requirement, the delegation is unlimited, seemingly authorizing treaties that serve any criminal law purpose of any potential treaty partner. Such an unlimited delegation with respect to such a fundamental right as physical liberty would be unconstitutional.¹⁵¹

b. Political offenses

The role of the political offense exception to extradition is surprisingly similar to that of double criminality. The only difference is that, for political offenses, a comparison of proscriptions is insufficient to determine whether an offender's conduct in one nation makes him dangerous to the society of another. As described above, the political motivations of such offenders make their dangerousness depend on political circumstances.

However, the criminal law has its own tests for determining whether an accused who has engaged in proscribed conduct should be subject to measures of social protection. These tests do not focus simply on differences in political circumstances. Rather, they take the form of specific defenses, of which the most applicable is that which assesses the balance between the harm done and the harm the conduct was intended to prevent.¹⁵²

151. B. SCHWARTZ, *ADMINISTRATIVE LAW* 49-50, and 81-89 (1984), *discussing* *Schechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935) and *Wong Wing v. U.S.*, 163 U.S. 228 (1896).

152. G. FLETCHER, *supra* note 50.

As a result, the dangerousness of a foreign political offender to the U.S. depends on whether his conduct would be defensible under a U.S. "lesser of evils" test. The problem is that a U.S. court is generally unable to make such a determination, and the determination cannot be left to a court of the nation where the offense occurred.

A U.S. court cannot do so for both practical and policy reasons. The practical reasons include difficulties in obtaining reliable evidence and in assessing it competently and impartially. The policy reasons include international relations concerns,¹⁵³ particularly the "act of state doctrine," which requires federal courts to treat domestic laws and legal processes as valid.¹⁵⁴

The decision cannot be left to a court of the nation where the offense occurred for at least two reasons. The first is that the government of that nation is in an adversarial stance with respect to the accused, and legal systems overtly favor their governments in assessing justiciability of anti-government violence.¹⁵⁵ The second is that a foreign court would apply, its own standard for assessing defensibility.¹⁵⁶ Also, even generally fair legal systems often handle political offenses unfairly.¹⁵⁷

When it is impossible to obtain a proper determination of whether a foreign political offender should be the subject of social protection measures for the sake of U.S. society, the accused must be given the benefit of any doubt. This means that exemption of at least some political offenses — including violent ones — is an inevitable consequence of the double-criminality requirement. And it means that elimination of the exemption for such offenses, even when it is impossible to establish the dangerousness of the accused, involves the same separation of powers problem as other deviations from double criminality.

c. Limitations periods

Obviously, extraditions from the U.S. when the U.S. limitation period for the offense in question has expired constitute deviations from the double-criminality requirement and its social defense basis.

153. Bassiouni, *supra* note 73, at 263.

154. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

155. See *supra* note 48 and accompanying text.

156. In criminal law, there is no such thing as "choice-of law" because all courts apply the laws of their own legal system. See Sarkar, *The Proper Law of Crime*, in *INTERNATIONAL CRIMINAL LAW* 35 (G.O.W. Mueller & E. Wise eds. 1964).

157. See Force, *The Bill of Rights and the Courts Imperfect and Incomplete Protection of Human Rights in Criminal Cases*, 56 *TULANE L. REV.* 148-85 (1981), discussed in *COMPARATIVE LEGAL TRADITIONS*, *supra* note 118, at 852, and Osakwe, *Modern Soviet Criminal Procedure A Critical Analysis*, 57 *TULANE L. REV.* 439, 499-564 (1983).

2. Due process

The reasoning brought to bear on the separation of powers issues above can be applied to support the conclusion that extraditions for political offenses — or other offenses that do not satisfy the double-criminality requirement — violate due process in several ways.

a. Rational basis

As mentioned above, unless a person's conduct indicates that he is dangerous to U.S. society, there is no U.S. criminal policy basis for interfering with his personal liberty. As a result, any extradition not based on proper double criminality amounts to an interference with individual liberty for a non-criminal law purpose. Moreover, because the only occasion for such an interference is a treaty, the purpose at hand is a foreign relations one. Accordingly, the lawfulness of such an interference raises the issue of whether the federal government may subject persons to criminal process solely to serve its foreign policy.

Generally, legislatures are granted wide latitude in determining what conduct will result in criminal process,¹⁵⁸ but due process requires a substantial purpose for interferences with individual liberty,¹⁵⁹ and no laws with a comparable lack of social protection purpose appear to have been enacted, much less to have withstood due process scrutiny.

b. Notice

The principle of legality, which requires that punishment of conduct be based on a prior law warning that such conduct is punishable, is applicable to criminal process leading to extradition.¹⁶⁰ When double criminality exists, a person who enters the U.S. can determine what kinds of conduct would subject him to criminal process by acquainting himself with U.S. laws. However, in the absence of double criminality, it would be necessary to take the further step of determining what treaties of extradition are in force and ascertaining their terms. It might even be necessary to examine the laws of one or more of the foreign parties to such treaties. Such a state of affairs is not easy to reconcile with the principle of legality.

158. LAFAYE & SCOTT, *supra* note 55, at 138.

159. *Id.* at 138-46.

160. 1 EXTRADITION, *supra* note 11, at VII, §4-10.

Under federal due process, the corresponding criterion is usually applied in assessing whether vague statutes are too vague.¹⁶¹ It would seem that, if a warning stated vaguely in a criminal statute can violate federal due process, a warning not stated at all in any U.S. statute would be *per se* inadequate.

c. Impartial trial

The final due process problem is applicable only to political offenses that do not satisfy double criminality. Extradition to the place of the offense would result in trial by a tribunal subject to the influence of a foreign government toward which the accused is an adversary. The overt bias of such a court toward the laws and law enforcement practices of its own government, plus the possibility of covert biases, would raise the prospect of partiality.

Of course, an accused in the U.S. has no right to a court that is impartial as to the validity of U.S. laws, but whether he has a right to have his arrest in the U.S. lead to a trial before a court that is impartial as to the validity of foreign law is another matter. Because U.S. courts do not enforce foreign criminal laws,¹⁶² it is impossible to say how they would treat a defense to a foreign crime based on "lesser of evils" where an evil to be avoided was one permitted by foreign law but not permitted by U.S. law. Also, because affirmative defenses are not relevant in extradition proceedings¹⁶³ and political offenses have never before been open to extradition, it is impossible to say how such defenses would be treated in connection with extradition.

However, persons subject to U.S. criminal process generally have a right to trial before an impartial tribunal,¹⁶⁴ so a potential difference in approach between a U.S. court and a foreign court would seem to present a substantial issue.

C. Extradition and Deportation

The designation of a deportee's destination in order to assure his return to a nation that will subject him to criminal process is in every respect equivalent to extradition. Consequently, all of the considerations discussed above are applicable. As a result, any such deportation in

161. LAFAVE & SCOTT, *supra* note 55, at 83-87.

162. *Huntington v. Attrill*, 146 U.S. 657 (1892).

163. *Sayne v. Shipley*, 418 F. 2d 679 (5th Cir. 1969) *cert. den.* 398 U.S. 903 (1970).

164. LAFAVE & ISRAEL, *supra* note 45, at §21.4, 745.

violation of double criminality would be unlawful on the basis that indirectness of means will not justify a forbidden result.

In addition, designated deportation as a substitute for extradition is contrary to Congressional enactments in numerous respects.

1. General statutory construction

Because extradition is most widely used in relation to aliens,¹⁶⁵ it must be regarded as Congress' chosen vehicle for returning aliens to foreign nations where they have committed crimes so that they can face trial. To regard the deportation provisions of the immigration laws as an alternative is to ignore the fact that extradition is designed to assure punishment while deportation is designed merely to remove an alien from the U.S. Moreover, it is to ignore the fact that extradition has been subject to numerous conditions designed to assure regularity of process and sensitivity to criminal law policies, while deportation involves no such conditions.

Among the major differences are the following:

1. Extradition requires a treaty; deportation does not.
2. Extradition is conditioned on double criminality; deportation is not.
3. Extradition requires that the accused be tried only for conduct included in the treaty; there is no such limitation where deportation is used.
4. Basic findings of fact in extradition are made by a judicial officer; in deportation they are made by an administrative officer.¹⁶⁶

It would be absurd to conclude that Congress intended to apply the incidents of extradition to some deliveries of aliens to foreign governments for trial, but for deportation to be used for others at the discretion of the executive.

2. Deportation and unextraditable political offenders

It is true that the attorney general is given the power to designate the nation to which a deportee will be sent, even when the deportee has designated a nation that is willing to receive him.¹⁶⁷ However, the exercise of that power is to be based on the interests of the U.S.

165. Although some offenses abroad may result in deportation, deportation is not well-designed as a means of protecting U.S. society from persons who have shown criminal tendencies through conduct abroad. It can never reach citizens, and it is unavailable for many offenses.

166. 8 U.S.C. §1252(b) (1970).

167. See *supra* note 97.

In the case of a foreign political offender who has been adjudged non-extraditable, there is no reason to suppose generally that any criminal law interest of the U.S. would be served by assuring that he is delivered to a nation that wishes to prosecute him as opposed to some other nation. Unless there is an independent basis for believing that the offender is likely to engage in conduct directly harmful to the U.S., such as attacks aimed at U.S. citizens abroad, U.S. criminal law interests are not implicated.

Likewise, the only foreign affairs interest of the U.S. will generally be that of satisfying the needs of another nation's criminal law system. However, that interest is always implicated where foreign offenders are found in the U.S., and the intent of Congress is plain that service of that interest is subject to the requirements of extradition. Accordingly, that interest is no justification for designating a destination.

Only in the most unusual circumstances would it seem possible to identify a different U.S. interest; no cases of designation under that provision have reached the courts. Perhaps if the accused had information affecting U.S. security and his destination of choice was a nation hostile to the U.S., sending such a person to a friendly nation likely to imprison him would be proper.

It seems, however, that the Reagan administration has simply misread the immigration law or forgotten which nation it serves; its attempt to use designated deportation to return a political offender to the U.K. would appear calculated to serve no interest other than the U.K.'s.

VI. PROPER TREATMENT OF FOREIGN POLITICAL CRIMES

A. A Suitable Framework

The number and severity of the criticisms of the U.S. - U.K. bilateral approach to political offenses may give the impression that the handling of foreign political offenses is fraught with perils — that finding an approach that is above criticism would be a complex or subtle problem, or that no such approach is possible. On the contrary, the numerous faults of the U.S. - U.K. approach are the product of total insensitivity to the basic policies at stake.

The U.S. and U.K. based their approach on the unfounded assumption that the criminal law system of one good nation should be available to serve the needs of the criminal law system of any other good nation. Instead, the basic policies are that each nation's criminal law

system serves only that nation's needs and that no nation should judge whether another is *good* in conjunction with criminal cooperation issues.

Once these basic policies are taken into account, it is not difficult to devise an appropriate approach to political offenses. The problem that U.S. courts cannot properly judge foreign circumstances that might justify foreign political violence does not prevent effective handling of violent foreign political crimes for three reasons.

First, many of the most dramatic such crimes are unjustifiable regardless of the attending circumstances. The most obvious examples of such offenses are those already addressed by multilateral conventions excluding their treatment as political offenses. They include crimes against civil aviation, hostage-taking, and attacks on diplomats. Such offenses are *per se* unjustifiable because they are analogous to the kinds of conduct that nations forbid to their own agents in times of war because they constitute war crimes. Other examples would be bombings like that of Harrods' department store in London (for which the PIRA apologized)¹⁶⁸ or the Bologna railroad station.¹⁶⁹

The second reason is that other offenses must be treated as justifiable by a U.S. court regardless of the attendant circumstances. Most offenses that would so qualify are non-violent or are excluded from adverse treatment when the requirement of double-criminality is followed. However, occasional instances of violent conduct satisfying the double-criminality requirement as to the basic offense may arise that merit special treatment due to differences in laws concerning defensibility. That is, when the nature of the defense available or the application of such a defense might be affected by political factors, a U.S. court should apply U.S. standards regarding defensibility before authorizing any adverse action like extradition, deportation or exclusion. One possible example would be resisting arrest. Some states of the U.S. allow the use of force to resist an illegal arrest,¹⁷⁰ while others do not. If a fugitive is found in a state with the former type of law and is sought for resisting arrest in a foreign nation, extradition should be denied if the

168. *I.R.A., Admitting Bombing, Says Leaders Didn't Plan It*, N.Y. Times, Dec. 19, 1983, at 1, col. 5.

169. A bomb blast in the Bologna rail station on Aug. 2, 1980, killed more than 80 and injured more than 200 persons. *Bologna Station Blast Kills at Least 80 and Hurts 200*, N.Y. Times, Aug. 3, 1980, at A1, col. 2. The blast was later attributed to rightist extremists. Tannner, *New Murders, Political Bombs Mark Probes of 'Black' Terror*, N.Y. Times, Sept. 21, 1980, §4, at 4, col. 4.

170. Chivigny, *The Right to Resist Unlawful Arrest*, 78 YALE L. J. 1128, 1129-30, 1137-38 (1969); Waite, *The Law of Arrest*, 24 TEX. L. REV. 279, 281 (1946); P. ROBINSON, CRIMINAL LAW DEFENSES §131(e)(5)(1984); LAFAVE & SCOTT, *supra* note 55, at 396.

arrest was not authorized by foreign law, at least where the resistance to the arrest or the alleged underlying crime involves political motives.

The third reason is that the fact that U.S. courts cannot judge foreign circumstances does not mean that these circumstances cannot be judged. When foreign political offenses are neither *per se* unjustified nor *per se* defensible, the question of their defensibility under attending circumstances can be referred to another tribunal — one that is not as encumbered. The most obvious relevant encumbrance of U.S. courts is their identification with the U.S., which causes their judgments of foreign circumstances to amount to judgments by the U.S. However, they are also encumbered by the laws they are obliged to apply, which are designed for application in local contexts.

In contrast, any international tribunal would be divorced from the U.S. and could be empowered to assess overall circumstances of a violent political crime under international standards. Such international standards could include both human rights norms protecting individuals and international norms protecting societies. As a result, such a tribunal could consider such questions as whether violently resisting a lawful arrest in a nation that authorized arrest without probable cause would be justifiable.

Such a tribunal would also be a more suitable instrument for such issues as whether an individual sought for extradition or facing deportation has a well-founded fear of persecution that should prevent his transmission to a particular nation.

That tribunal could ordinarily decide whether an individual should be sent to another nation where to face trial. However, in cases where persecution is a risk, that tribunal could attempt to conduct the trial itself. In the event of an acquittal, the individual could remain free in the U.S. In the event of a conviction, imprisonment could be in a U.S. facility or a foreign facility.

Occasionally a trial by such a tribunal may be impossible due to non-cooperation by the nation where the crime occurred or practical problems in obtaining evidence. In these cases, the tribunal might be called upon to assess the probable dangerousness of the individual on the basis of available evidence and to attempt to find an appropriate place for the individual to remain, at least until a proper trial can be conducted.

The precise composition of such a tribunal is unimportant. All that is necessary is that it be composed of persons who are not controlled by the U.S. government and that it be mandated to apply international standards. A simple, workable approach would be to constitute such

tribunals on an *ad hoc* basis. One member would be designated by the U.S., another by the nation where the individual's conduct occurred. A third person would be chosen by the first two. The tribunal could be authorized simply to apply international standards in determining the proper disposition of the individual, or it could be given detailed instructions.

B. Implementation

1. Executive initiative

In theory, there would be no harm in relying on the Executive Branch to implement the elements of the above approach by re-negotiating treaties as necessary, inserting language describing how violent foreign political offenses will be handled. However, decisions to negotiate such additional provisions with some nations and not others — or in a sequence suggesting priority — would create diplomatic problems.

Moreover, the Reagan administration showed no sensitivity to the relevant policies, and there is no assurance that the Bush administration will be more sensitive. In fact, the foreign policy responsibilities of the Executive Branch may inherently encourage a blending of issues that is at odds with sound criminal law policy.

2. Legislation

The most appropriate way to implement the above approach is by legislation. The approach impacts upon legal issues that have always been the province of the legislature: substantive criminal law, criminal procedure, and immigration law. The policy decisions involved in fashioning rules to deal with such issues call for a sensitivity to general social values that the legislature is well-equipped to reflect.

These policy decisions actually are logical pre-requisites to decisions concerning international cooperation. They identify conduct the society considers dangerous and prescribe responses to it; international cooperation extends domestic policies to further situations.

Moreover, legislation would undo and prevent the kind of mischief the Reagan administration created with its new bilateral approach. It would assure similar treatment for all foreign fugitives in the U.S. without discrimination on the basis of the identity of the nation from which they fled. The treatment they would receive would reflect the criminal law interests of the U.S. It would be effective because Congress has plenary authority with respect to these issues, so the legisla-

tion would prevail over both prior and subsequent treaties to the contrary.

Enacting such legislation would make it impossible for the U.S. to fulfill its obligations under the supplemental extradition treaty with the U.K. However, it would not necessarily force the U.S. to violate that treaty; the effective date of the legislation could be adjusted to permit timely termination of the treaty in accordance with its own terms.

CONCLUSION

In their zeal against terrorism, the U.S. and U.K. have brushed aside a centuries old practice of immunizing political offenses as if it were no more than an annoying historical curiosity. Their new approach is an obvious alternative rejected by two centuries of Western jurists. It is no more than a classic over-reaction, provoked by frustration. It threatens numerous important policies and probably violates the U.S. Constitution in one or more respects.

Fortunately, there is a ready remedy to this mischief. Congressional enactment of new laws regulating the handling of foreign violent political offenses in extradition and immigration contexts would put an end to the ill-conceived bilateral approach while providing the U.S. with an unprecedentedly effective mechanism for dealing with such offenses. This new legislation could serve as a model for other Western nations.

When this proper approach to foreign political offenses is in place, nations will be able to coordinate their efforts to suppress offenses of the kind that are *per se* unjustifiable, and they will be able to act jointly against many offenses for which only weak political justifications can be argued. Suppressing these offenses — bombings of civil aircraft and department stores, taking civilians as hostages, and spraying airports with machine-gun fire — is crucial to international security, and cooperation must not be hampered by political issues.

A united front against these unquestionably contemptible crimes should not be jeopardized by efforts to achieve cooperation against persons who plan to use weapons to resist arrest for offenses that may be unique to the nation where the arrest was to be attempted, or for any other form of cooperation that is not properly grounded in established patterns of criminal cooperation. Attempts to pursue such policy-bereft goals merely contribute to the impression that political offenses are dealt with in a political manner.

Accordingly, if the U.S. Congress will take the initiative and pass suitable legislation, it can not only avert potentially unwarranted extra-

ditions or protracted litigation invalidating the U.S. - U.K. treaty, but also assure full cooperation in suppressing serious crimes that truly merit the label of terrorism, eliminating the injection of foreign policy and other political issues into the handling of such offenses. In sum, Congressional action would make the U.S. Congress the leader in legal strategy to suppress terrorism, ahead of the outgoing administration and ahead of the rest of the world.

