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I. THE ILLUSION OF CLARITY

Suppose that, in 1938, the Prague government of President Edvard Benes, foreseeing the inevitable dismemberment of Czechoslovakia after the Munich Pact, had infiltrated a trained death squad of German Jew-

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ish exiles across the German border, in civilian clothing, to assassinate Adolf Hitler. Suppose they had succeeded and had then fled to Holland.

How should international law govern this hypothetical event? Should it require Holland either to try the assassins for murder or to return them to Germany for trial? Or should it exculpate, even commend, the assassins for a job well done? Or should the law remain silent? Would the answer be the same if the assassins had also killed some German civilian bystanders?

The hypothetical, we admit, is fragile in posturing such an exceptionally excellent justification for state terrorism. It is even more fragile in imagining that what international law said about the problem would make any real difference. Yet the hypothetical raises important questions which, if we are to talk about terrorism and law at all, we must address. The current spate of terrorist activity[1] has engendered a flurry of counteractivity, exhortations and efforts to do something about it—among other things, to forge more effective international legal weapons against the scourge. At the annual meeting of the American Bar Association in 1985, for example, President Reagan charged the lawyers, "I want you to accept a challenge—to become part of the solution to the problem of terrorism."[2]

In taking up this challenge, the lawyers must do more than devise a law. If we are to effectively implement a norm, then the international community must widely perceive the formula devised as *legitimate.*

Our hypothetical about Hitler's assassins challenges the legitimacy of a straightforward prohibition that brooks no exculpatory factors, an approach that simply makes it an international crime for a state or an individual, regardless of the circumstances, to engage in or promote terrorism. Since widespread support currently exists, certainly in the United States Government, for such an unqualified prohibition, we must pre-test its legitimacy and efficacy by resorting to such hypotheticals. To honestly pursue such a formula, the law we advocate must be one with which, considering all its possible future implications, we are willing to abide. If law is to be part of the answer to international terrorism, we must first define and explain the nature of the problem before we advocate a remedy in the councils of states. Such clarity of purpose, however, is difficult to achieve and, too often, is merely assumed.

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1. For an overview of terrorist activities and American responses to terrorism in 1986 see Oakley, *International Terrorism,* 65 FOREIGN AFF. 611 (1987).

2. *The Network of Terrorist States,* 85 DEP'T ST. BULL. No. 2101, at 7, 9 (1985) (address by Ronald Reagan).

II. PORFIRY'S PROPOSITION

In Fyodor Dostoevsky's *Crime and Punishment*, Riodin Raskolnikov, a poor student, kills a malevolent pawnbroker with an ax. Some staged versions of the novel portray this event as an invitation to meditate on transcendental guilt and expiation. Other productions, notably some that Soviet directors in Stalin's time mounted, treated Raskolnikov's crime as a revolutionary blow against oppressive capitalism, a symbolic call for the overthrow of Czarist repression. However, in a recent version by the exiled Soviet director Yuri Lyubimov, Porfiry Petrovich, the police investigator, proclaims: "Pity the criminal all you like, but don't call evil good."[3] Porfiry, in that pivotal moment, is rejecting all excuses. To determine whether Raskolnikov's act is a crime, he says, one must refer solely to what he has done, not why or to whom he did it. It is not that Porfiry is immune to pity. He believes, however, that to allow pity to shape the law would be to destroy legality and, ultimately, society based on respect for law. Among citizens of an organized society, Porfiry believes, a social compact exists: a promise to act lawfully provided the society punishes those who act unlawfully. The line between lawful and unlawful conduct must be clear, simple and enforced, which is why one should generally define crime by an act, not by motive or object. One should delineate crime by *what* has been done, not *why* it was done or *to whom*. The *why* and the *to whom* in certain circumstances may serve to mitigate society's vengeance and even arouse pity, but no conceivable answer to *why* or *to whom* should be able to repeal the criminal character of the act. Otherwise, the distinctions would threaten the fundamental social compact because the line between what is and what is not permissible would become blurred. *Why* and *to whom* are dust thrown into the eyes of the law, confusing and obscuring it.

Unfortunately for international lawyers in search of simple answers, Porfiry's imagined defense of his proposition by reference to the social compact presupposes systemic reciprocity. The social compact promises those who obey the law that society will punish those who do not. Domestic legal systems, which generally enforce their law, meet this promise. Accordingly, domestic law does not usually recognize a right of disobedience based on the disobedience of another. In contrast, the more rudimentary international community does not meet this promise. Its habitual failure to enforce law inevitably undermines the fragile normative system, releasing tendencies of states to "take the law into their own hands."

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3. N.Y. Times, Jan. 9, 1987, at C3, col. 2.

This anarchic element in the international order is a socially-observed phenomenon. What is the law's response to it? An international system, unable to stop Idi Amin from conducting a reign of state terror in Uganda, has several strategic options. The system may sanction the defensive use of counterterror by Amin's enemies or, recognizing that the legal regime had broken down, it could permit every party to act as it wished. Or it could enforce the norm against Amin's weaker enemies even while failing to enforce it against Amin himself, arguing that some law, or law for some, is better than no law at all.

None of these three strategies is satisfactory, presenting an unattractive choice. Porfiry, it seems, would choose the third option. The law is the law. It brooks no excuses. True, some criminals escape unpunished and authorities fail to enforce some laws against the powerful, but we cannot permit even such egregious failings to dismantle the system.

Porfiry's creed came to mind on reading Judge Abraham D. Sofaer's timely essay, *Terrorism and the Law.*[4] In the essay the current Legal Adviser to the Department of State harshly criticizes what he describes as recent efforts to revise the international law criminalizing the killing of innocents in civil wars, hostage-taking, piracy and crimes against diplomats by adding caveats that appear to give special consideration—such as prisoner of war status—to those fighting against "colonial, racist or alien" domination. He notes that treaties and General Assembly resolutions that purport to condemn as criminal—and seek joint action against—various kinds of terrorist acts usually also contain some version of a formula reaffirming the legitimacy of the struggle against colonialist, racist and alien regimes.[5] The result, according to Sofaer, is that "international law has been systematically and intentionally fashioned to give special treatment to, or to leave unregulated, those activities which are the source of most acts of international terror."[6]

His interpretation of the effect of such caveats, for example, on the Hostages Convention[7] or on the High Seas Convention[8] is not beyond

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4. Sofaer, *Terrorism and the Law,* 64 FOREIGN AFF. 901 (1986).

5. *See, e.g.,* G.A. Res. 40/61 (Dec. 9, 1985), *reprinted in* 25 I.L.M. 239 (1986).

6. Sofaer, *supra* note 4, at 922.

7. Sofaer directs his criticism at article 12 of the hostages convention. According to article 12, to the extent the 1949 Geneva Conventions or the 1977 Geneva Protocols or both are applicable to hostage-taking, and to the extent the Conventions or Protocols or both require the prosecution or extradition of the hostage-taker, the Conventions or Protocols or both govern instead of the Hostages Convention. International Convention Against the Taking of Hostages, G.A. Res. 34/146, 34 U.N. GAOR Supp. (No. 39), at 245, U.N. Doc. A/34/46 (1979), *reprinted in* 18 I.L.M. 1457 (1979). (The United States deposited its ratification of the Hostages Convention on December 7, 1984, and

reproach. Yet even if he has correctly characterized those caveats, one

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the Convention entered into force for the United States on January 6, 1985. Congress passed concomitant domestic legislation. 18 U.S.C.A. § 1203 (West Supp. 1986)). Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick of Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Convention II for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Convention III Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Convention IV 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; Protocols I & II to the Geneva Conventions, U.N. Doc. A/32/144, Annexes I & II (1977), *reprinted in* 72 AM. J. INT'L L. 457 (1978). In other words, if the coverage of the Hostages Convention and the Geneva Conventions/Protocols coincide, the latter controls, but in no event can one actually evade the prosecute or extradite standard embodied in the Hostages Convention. *See generally* Verwey, *The International Hostages Convention and National Liberation Movements,* 75 AM. J. INT'L L. 69 (1981).

Under the coverage of the Hostages Convention and its Geneva Conventions/Protocols subset, the Hostages Convention would directly govern most instances of terrorist hostage-taking. If the terrorist action takes place during a noninternational armed conflict, that act violates common article 3 of the Geneva Conventions. However, that violation does not constitute a "grave breach" of the Conventions and consequently does not give rise to an obligation to prosecute or extradite. Therefore, because the obligations incurred under the Geneva Conventions fall short of the standards the Hostages Convention imposes, the latter controls. If a terrorist takes a hostage during an international armed conflict, that act, if against civilians, violates article 34 of the fourth Geneva Convention and constitutes an explicit article 147 "grave breach" of that Convention, giving rise to an obligation to prosecute or extradite. To this extent, the Geneva Convention rather than the Hostages Convention directly controls. However, a terrorist group would rarely be engaged in an international armed conflict. *See infra* note 22.

Sofaer accepts that article 12 of the Hostages Convention does not "create a legal gap in coverage" but complains that its language by countenancing application of the Geneva Conventions/Protocols, gives national liberation movements and terrorism a "rhetorical and political victory." Sofaer, *supra* note 4, at 916. That assessment is wrong; the twenty-nine countries that have ratified the Hostages Convention have accepted an idiots' rule, see *infra* note 76 and accompanying text, with which Sofaer should identify. His criticism aims at what the West widely regarded as a victory. As the State Department emphasized at the time, article 12 "ensures that all those who violate the Hostages Convention will be subject to prosecution or extradition under either the Convention itself or the Geneva Conventions/Protocols of 1977." Letter from Anthony Quainton, Director of the Office for Combatting Terrorism, to Israel Singer, Executive Director of the North American Branch of the World Jewish Congress (Dec. 11, 1979), *reprinted in* 74 AM. J. INT'L L. 420 (1980). An American participant in the negotiations enthusiastically reported that article 12 "underline[s] the application of the prohibition against the taking of hostages as to liberation movements." Rosenstock, *International Convention Against the Taking of Hostages: Another International Community Step Against Terrorism,* 9 DEN. J. INT'L L. & POL'Y 169 (1980).

8. As Sofaer correctly notes, international conventions define piracy to encompass

may still ask why they distress the legal adviser.

Several regimes powerful enough to get away with it contrive to practice colonialism, racism and alien domination, although these acts are surely illegal in modern international law.[9] South Africa in Namibia, the Soviet Union in Afghanistan and Vietnam in Cambodia come readily to mind as examples where the system has tolerated egregious violations of human rights laws by malefactor regimes. Because the system seems unable to enforce its norms, others "take the law into their own hands." The revisionists implicitly or explicitly accept that such struggles against illegal regimes, in the absence of collective action by the international community to bring violators of the law to account, may be justified or excused. Even the United States Government, one hears, sometimes sup-

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only "illegal act[s] of violence, detention or depredation, committed against a ship for *private ends.*" Sofaer, *supra* note 4, at 911; *referring to* article 15 of the 1958 Geneva Convention on the High Seas, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (emphasis added); *see also* article 101 of the United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF. 62/122, *reprinted in* 21 I.L.M. 1261 (1982). However, Sofaer is wrong to use this as "yet another" example of third world irresponsibility or to imply that pirate-terrorism necessarily escapes international law. The exclusion dates to a 1932 Harvard Research Draft, composed long before the third world's ascendancy. *See* Draft Convention on Piracy, 26 AM. J. INT'L L. 768-69 (Supp. 1932). Commentators have attributed its provision to an anachronistic "Captain Kidd" model of piracy; to a desire to altogether avoid nineteenth century distinctions between the legal attacks of belligerents and the pirate attacks of insurgents by definitionally excluding all "public" piracy; and to a perception that the flag state of the captured vessel could adequately handle the matter by applying its own municipal law. Note, *Towards a New Definition of Piracy: The* Achille Lauro *Incident*, 26 VA. J. INT'L L. 723, 731-32, 738 (1986); Draft Convention on Piracy, *supra*, at 786. Moreover, a broader piracy *jure gestum* arguably survives these conventions and continues to supplement the conventions in condemning politically motivated attacks by parties to a civil conflict when made against neutrals. *See The Magellan Pirates*, 164 Eng. Rep. 47 (1853); L. Oppenheim, 1 INTERNATIONAL LAW 612 (H. Lauterpacht, ed., 8th ed. 1955). Applying this broader definition to the 1985 seizure of the Italian liner *Achille Lauro* by the Palestine Liberation Front, Gerald McGinvey concludes its captors were pirates. McGinvey, *The Achille Lauro Affair—Implications for International Law*, 52 TENN. L. REV. 691, 700 (1985). *But see* Note, *supra*, 26 VA. J. INT'L L. at 744. United States law, that criminalizes "piracy as defined by the law of nations," might well refer to this broader customary standard. 18 U.S.C.A. § 1651 (1984). The Department of Justice, in its arrest warrants against the *Achille Lauro* captors, however, stated that the seizure was in pursuit of "private ends," preferring to use the narrower treaty language in charging the Palestinians with piracy. 24 I.L.M. 1553, 1556-57 (1985). The Justice Department apparently did not give credence to Sofaer's misgivings.

9. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16 (Advisory Opinion); *Western Sahara*, 1975 I.C.J. 12 (Advisory Opinion).

plies arms and money to rebels fighting such rogue regimes. Sofaer, however, applying Porfiry to international law, sharply condemns the current perceived tendency of many states to embrace "the premise that terrorist acts can be lawful in the pursuit of proper goals."[10] He underscores President Reagan's dictum that in a world where "there are innumerable groups with grievances . . . the first step in solving some of these fundamental challenges, in getting to the root cause of conflict, is to declare that terrorism is not an acceptable alternative and will not be tolerated."[11]

Should international law invariably criminalize all terrorist acts entirely without regard for goals and provocations? Would Sofaer extradite the hypothetical Jewish assassins to Nazi Germany?

We certainly do not intend to imply that an easy answer to such hard cases exists. At the very least, however, a blanket policy of excluding all exculpatory *why* and *to whom* factors is likely to create some considerable dissonance or ambiguity in the minds of many sensitive persons. In other words, such a law incurs legitimacy costs that may bear directly on its public acceptance and, ultimately, on its effectiveness. Yet Sofaer is surely right to point out that the other legal option—legalizing terrorist acts of violence if committed for good cause against venal victims—could open the door to even more selective enforcement, ushering in a final breakdown of the social compact and releasing chaos. Evidently we will not discover a conceptual, principled answer easily.

III. THE DEFINITIONAL PROBLEMS

In Porfiry's domestic jurisprudence, most law is *what* oriented, but exceptions exist, of which justifiable homicide is the most comparable. But what homicide can we justify? The common law chooses not to justify murder when starving passengers in a life boat save many by eating one. English law extends pity, and perhaps even clemency, to persons haplessly caught in such a no-win situation, but it leaves the norm clear: cannibalism is always illegal.[12] German codified law, on the other hand, uses the opposite approach. It contains detailed exceptions to the normative prohibition, justifying in certain external circumstances what would be impermissible in most others.[13] Thus, under the German approach, a

10. Sofaer, *supra* note 4, at 906.

11. *International Terrorism*, 86 DEP'T ST. BULL. No. 2114, at 23 (Sept. 1986) (radio address by Ronald Reagan).

12. Regina v. Dudley and Stephens, 14 Q.B.D. 273 (1884).

13. German Penal Code of 1871, § 54 (G. Mueller & T. Buergenthal trans. 1961). *Cf.* Model Penal Code § 3.02 (1985). *See* T. FRANCK, THE STRUCTURE OF IMPARTIAL-

sufficiently provocative exigency can transform cannibalism into noncannibalism or turn otherwise criminal conduct into sanctioned behavior. The German approach has thus introduced the *why* factor into the definition alongside the *what* factor.

Just as each state has a choice between the German model and the English model when it comes to regulating cannibalism, so too has the international community a choice in respect to terrorism. In practice the international community makes that sort of choice over and over in many legal contexts, such as in various multilateral and bilateral treaties as well as in investigations and resolutions of United Nations organs, suits before the International Court of Justice or cases before the Human Rights Commission and Committee. Sometimes the subject matter is terrorism per se; at other times it pertains more narrowly to sub-categories or specific cases: the disappearance of persons, aerial hijacking, piracy, the conduct of the Nicaraguan Contras, United States support for the Contras, hostage-taking, the use of biological and chemical weapons or the retaliatory United States bombing of Libya.

One should not doubt that international law could contribute to the control of international terrorism. Possible sanctions include mandating prompt extradition or prosecution of terrorists or terminating aerial communications or trade with a state that sponsors terrorism. The absence of effective remedies has not inhibited the system, but the lack of definitional consensus has. The first step in dealing with terrorism is to define it. Even Porfiry did not specify what constitutes the evil that should not be relabelled good.

While no single, theoretical definition of terrorism is at hand, we take some characteristics of terrorism to be axiomatic. We accept that terrorism is a form of violence in which governments as well as individuals and groups engage. It applies equally to describe acts committed within one country and acts committed internationally. Terrorism becomes an activity potentially subject to international legal control when activities within one country internally cross the threshold that international law establishes—the prohibition on genocide is one example—or when the terrorist activities or the terrorists cross national boundaries, or when governments or persons in one country support terrorists in another.

Beyond such common ground, however, the definitional road becomes rockier. Martin Boire, a Vanderbilt University Graduate Fellow, in a recently published study[14] more narrowly defines terrorism as an act em-

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ITY 52-56 (1968).

14. Boire, *Terrorism Reconsidered as Punishment: Toward an Evaluation of the Acceptability of Terrorism as a Method of Societal Change or Maintenance,* 20 STAN. J.

ploying violence to injure or destroy, but primarily to instill coercive fear against those not attacked in order to influence their behavior.[15] But the League of Nations directed the earliest international legal efforts against terrorism, the 1937 Convention for the Prevention and Punishment of Terrorism,[16] at anarchists who had recently assassinated top government officials such as the King of Yugoslavia and the French Foreign Minister, acts primarily intended to kill, not influence. Terrorists usually intend hostage-taking to gain concrete concessions, not just to sway the public. Of course, all such acts have the added dividend for the terrorists of demonstrating to the public that it is not safe to rely on their constituted authorities.[17] But all violence—even the pinpoint bombing of a munitions factory—invariably has some such secondary fallout. To define terrorism as activity that is primarily intended as street theater is, to say the least, as controversial as the question of what to do about it.[18]

INT'L L. 45 (1984).

15. *Id.* at 55.

16. The countries negotiated the treaty in response to the assassination at Marseilles in 1934 of King Alexander of Yugoslavia and Mr. Louis Barthou, the French Foreign Minister. In response, the Council of the League of Nations passed a resolution stating that "the rules of international law concerning the repression of terrorist activity are not at present sufficiently precise to guarantee efficient international co-operation in this matter" and established a Committee of Experts to draw up a convention "to assure the repression of conspiracies or crimes committed with a political and terrorist purpose." *Proceedings of the International Conference on the Repression of Terrorism*, League of Nations Doc. C.94 M.47 1938 V, Annex I, at 183 (1938). This led to the Convention of 1937 for the Prevention and Punishment of Terrorism. *Id.*, Appendix I, at 196 [hereinafter 1937 Convention]. Unfortunately, although twenty-four countries signed the 1937 Convention, only one (India) ratified it. *See Measures to Prevent International Terrorism*, U.N. Doc. A/C.6/418 (1972).

17. In the words of Secretary of State George Shultz: "The terrorists want people to feel helpless and defenseless; they want people to lose faith in their government's capacity to protect them and thereby to undermine the legitimacy of the government itself, or its policies, or both." Shultz, *Terrorism and the Modern World*, 84 DEP'T ST. BULL. No. 2093, at 12, 13 (1984).

18. Expanding upon Boire's definition, the Foreign Intelligence Surveillance Act defines "international terrorism" as those activities that:

> (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State;
>
> (2) appear to be intended
>
> (A) to intimidate or coerce a civilian population;
>
> (B) to influence the policy of a government by intimidation or coercion; or
>
> (C) to affect the conduct of a government by assassination or kidnapping; and
>
> (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear in-

Nor has the Reagan Administration successfully grappled with the problem of definition. Inconsistencies abound in public pronouncements about the nature of the enemy—the problem—and cannot but complicate efforts to think clearly about remedies.

For example, President Reagan, in a national radio address on terrorism, called for international action "against those who deliberately slaughter innocent people."[19] Did he mean to exempt from the category assassins those whose targets are not "innocent"? The King of Yugoslavia? Porfiry, the police commissioner? Javanese settlers in illegally occupied East Timor? Note that the President's introduction of the qualifying concept of innocence in connection with the choice of victims alters the definitional focus from a single-minded concern with the terrorist's *act* to an additional focus on the terrorist's choice of *victim*. The definition, in other words, compels a departure from Porfiry's proposition because the guilt or innocence of the *victim* becomes a crucial legal factor in determining the guilt or innocence of a Raskolnikov.

The recent decision by the United States Government not to ratify Protocol I of 1977, supplementing the 1949 Geneva Conventions,[20] similarly signifies definitional ambiguity,[21] especially when one reads it in conjunction with other initiatives of the same administration in Central America. The Administration's reason for rejecting the agreement its predecessors had negotiated and signed is that it would "internationalize" a domestic armed conflict involving a racist, colonial or alien regime

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tended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

50 U.S.C.A. § 1801(c) (West Supp. 1986). *See also* Rewards for Information Concerning Terrorist Acts Act, 18 U.S.C.A. § 3077(1) (West 1985). Under this statutory language, motive does enter the analysis—not to exculpate activity but to parse terrorism from ordinary crime. This definition parallels prior international efforts. Article 1(2) of the 1937 Convention, *supra* note 16, focused upon "criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public." Similarly, the unsuccessful 1972 Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism, which the United States proposed, targeted acts "intended to damage the interests of or obtain concessions from a State or an international organization." Article 1(d), *Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism*, 67 DEP'T ST. BULL. No. 431 (1972).

19. *The New Network of Terrorist States*, *supra* note 2, at 7.

20. *Protocol I to the Geneva Convention*, U.N. Doc. A/32/144, Annex I (1977), *reprinted in* 72 AM. J. INT'L L. 457 (1978) [hereinafter *Protocol I*].

21. *President's Message to the Senate Transmitting the Protocol*, 23 WEEKLY COMP. PRES. DOC. 91 (1987) [hereinafer *President's Message*]. The President has also requested that the Senate approve his action by a nonbinding vote.

and thus extend combat status to the forces engaged. "Internationalize," in this context, means that the law would extend combatant status to forces engaged in antigovernment activity.[22] In his message to the Senate President Reagan explained: "The repudiation of Protocol I is one additional step, at the ideological level so important to terrorist organizations, to deny these groups legitimacy as international actors."[23] Sofaer also characterizes the Protocol as a "significant success" for "radical groups [seeking] to acquire legal legitimacy."[24] But is it? The Protocol actually seeks to circumscribe insurgent tactics. Article 51(2) prohibits "[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population."[25] Furthermore, Protocol I imposes sanctions on those who violate its provisions. Failure to carry arms openly during military engagement and during deployment prior to engagement expressly deprives a combatant of his right to be treated as a prisoner of war.[26] The combatant would thus face common criminal charges.

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22. *Protocol I, supra* note 20, art. 1(4), at 458, definitionally expands "international armed conflicts" to include "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."

23. *President's Message, supra* note 21, at 91.

24. Sofaer, *supra* note 4, at 912.

25. *Protocol I, supra* note 20, at art. 51(2). Sofaer complains that terrorist groups are both unwilling and unable to abide by the terms of the Protocol. Sofaer, *supra* note 4, at 913. Because no insurgent group has accepted Protocol I, see *infra* note 28, that claim is empirically unverifiable. Surely the analogous failure of individual nation states to comply with the terms of the Geneva Conventions does not mean its norms should be scrapped. The obligations of governments, after all, are only reciprocal ones.

Sofaer also criticizes article 44(2), which provides: "While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war." For Sofaer, this means article 1(4) terrorist groups will blithely violate the Protocol yet retain the protection it affords combatants. Sofaer, *supra* note 4, at 913-14. In fact, article 44 was the result of "decisive participation of the United States delegation." Gasser, *A Brief Analysis of the 1977 Geneva Protocols,* 19 AKRON L. REV. 525, 526 (1986). According to Ambassador Aldrich, the American chief negotiator, it grew out of the United States experience in Korea and Vietnam during which American prisoners of war were punished for the misdeeds of their compatriots. Aldrich, *Progressive Development of the Laws of War: A Reply to Criticism of the 1977 Geneva Protocol I,* 26 VA. J. INT'L L. 693, 697-98 (1985). The article may create as many problems as it solves, but at least it addresses actual problems growing out of recent practice and giving rise to justified, specifically American, concerns. Judge Sofaer's concerns, on the other hand, remain, as yet, purely conjectural.

26. *Protocol I, supra* note 20, arts. 44(3), (4), at 475. This requirement, as a realistic effort to regulate guerrilla warfare, is less strict than the 1949 Geneva Convention on

"[M]aking the civilian population or individual citizens the object of attack" is a grave breach of the Protocol and, thus, constitutes a war crime.[27] Finally, one should note that the Protocol would apply only to subscribing governments and only in respect of antigovernment forces that, likewise, have accepted these constraints.[28]

The Reagan Administration's rejection of Protocol I thus appears to proceed from the belief that all irregular forces fighting any regime are—by that circumstance alone—terrorists. Only on the bases of such a definition can one make sense of the refusal to ratify.[29] But does the Administration really mean that? Does it accept that such a view would thereby define all Contras in Nicaragua as terrorists? Does it not care how an insurgent movement fights? Who it attacks? Whether the regime it seeks to overthrow is democratic or totalitarian? While the Reagan Administration may not like the categories of rebels that receive privileged combatant status under the Protocol, does it not have some pre-

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Prisoners of War standard that all combatants bear a "fixed distinctive sign recognizable at a distance." Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4(A)(2)(b), 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135. The Protocol standard only applies to irregular forces, not regular army troops. *Protocol I, supra* note 20, art. 44(7), at 476.

27. *Protocol I, supra* note 20, arts. 85(3)(a), (5), at 495.

28. The United Nations predicates implementation of Protocol I via article 1(4) on both target state ratification and insurgent group acceptance of Protocol I (the latter achieved by filing a unilateral declaration with the Red Cross pursuant to article 96). While fifty-five states have accepted Protocol I, the two paradigmatic target states, Israel and South Africa, have not ratified the Protocol. For that matter, neither has Afghanistan nor Kampuchea. INT'L COMM. RED CROSS, ANNUAL REPORT 1985, 93-96 (1986). No insurgent group has filed an article 96 declaration. Aldrich, *supra* note 25, at 702-03. *Cf.* U.N. Doc. A/35/710 (Annex) (1980) (African National Congress acceptance of "general principles of humanitarian law applicable in armed conflicts"). Furthermore, because the target state would be administering the Protocol, it would be loathe to agree with the assessment that it was a racist, colonialist or alien regime, and would act accordingly. For these reasons, the Red Cross Legal Adviser has termed the controversy surrounding article 1(4) "mainly academic." Gasser, *supra* note 25, at 529. The head of the United States delegation to the conference that adopted the 1977 Protocols bluntly calls the clause a "dead letter." Aldrich, *supra* note 25, at 703. An additional prerequisite for Protocol implementation is that the armed forces involved be ruled under a system of command of a party and be subject to an internal disciplinary system. *Protocol I, supra* note 20, art. 43(1), at 475. Few insurgent groups and fewer terrorists would meet that standard.

29. Other criticisms of the Protocol have been lodged. *See, e.g.,* Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I,* 26 VA. J. INT'L L. 109 (1985). Nevertheless, the Reagan administration has premised its rejection of Protocol I on its alleged legitimization of terrorism. *See supra* notes 21-24 and accompanying text.

ferred categories of its own in mind? Or does Washington truly believe that all rebellion is to be put down and all authority is to be upheld by a new Holy Alliance applying the harshest sanctions of international law?

The answer to these questions is that the United States has no answer, or that it has many topical, opportunistic answers, but no general theory. The babble of explicit definitions and implied principles makes it superficially attractive to attack the problem by a plea for simplicity: Porfiry's proposition. As Sofaer would have it, not only do exceptions based on *why* and *to whom* let too many terrorists slip through the enforcement net, they also make it inevitable that victim states such as the United States, whose citizens have become prime targets, will employ unilateral "antiterrorist actions more primitive and dangerous than cooperation among sovereign states."[30] Sofaer, like Porfiry, would say: pity if you will the person who is driven to assassinate a dictator, or sympathize with the hijacker who thereby escapes from and embarrasses a ruthlessly oppressive regime, but do not immunize such acts of terrorism by creating a legal exemption for terrorists based on why and against whom they are driven to kill, take hostages, or blow up buildings. One must exclude such *why* and *to whom* factors from definitions of terrorism if the law is to be effective.

Sofaer is critical of the aforementioned article 1(4) of Protocol I precisely because it considers such factors when it extends the Conventions' humanitarian provisions, which have traditionally protected military prisoners in international wars, to insurgents in internal wars in which "peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of the right of self-determination."[31] Sofaer objects to this because radical groups, in the United States or elsewhere, that engage in acts of violence against the state may thereby become entitled to prisoner of war status. He particularly deplores the introduction of the *why* factor. "Never before," he complains, "has the applicability of the laws of war been made to turn on the purported aims of a conflict." Furthermore, "this provision obliterated the traditional distinction between international and noninternational armed conflict."[32] In other words, the law of war which had previously applied in a clearly defined *what*—armed, uniformed soldiers in a conflict between two or more states—is extended to civil war guerrillas who are

30. Sofaer, *supra* note 4, at 922.

31. *Protocol I*, *supra* note 20, art. 1(4), at 458. The Protocol achieves this extension of coverage by appellating these internal wars "international armed conflicts." *See supra* note 22.

32. Sofaer, *supra* note 4, at 913.

fighting for the "good" of self-determination—the *why* factor—against the "bad" of racists, colonialists or alien dominators—the *to whom* factor. The United States decision not to ratify this protocol manifests a refusal to accept such a shift from a law of war that is *what* based to one that *why* and *to whom* considerations modify.

Sofaer is not the only individual to infuse Porfiry into international law. To return to assassinating Adolf Hitler: A leading representative of a Third World country at the United Nations, Ambassador Kishore Mahbubani, recently noted that faced with a draft treaty which would make it an international crime to assassinate a head of state, one could expect every nation in the General Assembly "except perhaps Israel" to vote against any attempt to make a textual distinction between killing Adolf Hitler and Olof Palme.[33] Article 2(4) of the United Nations Charter, which flatly prohibits all use of force by one state against another, condoning neither *why* nor *to whom* exculpations, provides another example of the refusal to make distinctions.

Despite these postures, international actors—including the Reagan Administration—have quickly abandoned Porfiry when convenient. For example, the most persuasive explanations for such acts as the United States invasion of Grenada in 1983 turn on a synthetic international law modified by humanitarian pity.[34] The invasion reflected a belief that the

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33. Interview with Kishore Mahbubani, U.N. Ambassador, in New York City (January 21, 1987). Heads of State might simply be more ready to take a strict Porfirian view when it comes to looking after their own interests, as diplomats have done in another treaty, the Convention on the Prevention and Punishment of Crimes against International Protected Persons, including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8432, 1035 U.N.T.S. 167. Note, however, that the resolution by which the General Assembly adopted the Convention contains the following ritualistic formula recognizing that: "[T]he provision of the annexed Convention could not in any way prejudice the exercise of the legitimate right to self-determination and independence . . . by peoples struggling against colonialism, alien domination, foreign occupation, racial discrimination and apartheid. . . ." G.A. Res. A/3166, 28 U.N. GAOR Supp. (No. 30), at 147, U.N. Doc. A/9030 (1973). While the resolution maintains that it should always be published in tandem with the Convention, its provisions are not part of the treaty. Nor, significantly, do the quoted words say that the very specific duties to extradite or prosecute contained in the Convention are in any way less applicable to terrorists who act against diplomats of colonial, alien, or racist regimes. If the United Nations had intended that effect, it would have had to make it explicit and include it in the treaty itself. The above quoted provision in the Assembly's resolution is essentially meaningless window dressing.

34. The United States adduced several humanitarian grounds for the Grenada invasion: (1) "to protect innocent lives, including up to a thousand Americans," (2) "to restore order and democracy on the island of Grenada" at the request of its Governor General, and (3) to end "an unprecedented threat to the peace and security of the re-

international system should exculpate military takeover of a sovereign state because of, among other considerations, the inhuman conditions its government had created and dangers to the lives of United States citizens on the island. Such a belief is hardly consistent with Porfiry's proposition.

However, at the same time, states that regularly insist on introducing *why* and *to whom* exculpations into any international agreements for the suppression of terrorism chided the United States[35] for violating the rule of the United Nations Charter prohibiting the use of force against sovereign states while privately acknowledging the evident fact that the action had afforded Grenadans and visitors welcome relief from a murderous regime. Following Porfiry's analysis, these states pointed out that article 2(4) does not—and should not—distinguish between expansionist aggression and swift, surgical humanitarian intervention.[36] To introduce *why* and *to whom* exculpations, as the United States sought to do in defending its action, was unacceptable to many governments because they felt it would start the world down the slippery slope towards unbridled aggression. This is the same fear of the slippery slope, of conceptual complexity, that makes it unpalatable to distinguish between Adolf Hitler and Olof Palme in an anti-assassination treaty. But nations that profess to fear the slippery slope effect were they to recognize the obvious benefits accruing from the United States invasion of Grenada seem to have no trace of vertigo when they vote to permit or even encourage states to aid insurrectionist movements fighting racist or colonialist regimes.

What we have, then, is a gaggle of self-contradictory, topical and op-

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gion" at the joint request of the Organization of Eastern Caribbean States, Barbados and Jamaica. *Situation in Grenada,* 19 WEEKLY COMP. PRES. DOC. 1487 (Oct. 25, 1983); *United States Forces in Grenada, id.* at 1493 (Oct. 25, 1983). State Department officials have been adamant that the invasion comported with human rights. *See, e.g., Grenada: Collective Action by the Caribbean Peace Force,* 83 DEP'T ST. BULL. No. 2081, at 74 (1983) (statement of Jeane Kirkpatrick); *Human Rights Implications for U.S. Action in Grenada,* 84 DEPT. ST. BULL. No. 2083, at 24 (1984) (address by Elliot Abrams).

35. G.A. Res. 38/7, 38 U.N. GAOR Supp. (No. 470), at 19, U.N. Doc. A/38/P.V. 43 (1983). The resolution "deeply deplore[d] the armed intervention in Grenada, which constitutes a flagrant violation of international law and of the independence, sovereignty and territorial integrity of that state." The White House responded: "We find it sad that the United Nations sees fit to 'deplore' actions taken for humanitarian reasons, to save innocent lives, and protect human rights, in full accord with the principles of the U.N. Charter." *Grenada: Collective Action by the Caribbean Peace Force, supra* note 34, at 78.

36. For an excellent discussion of this question, see Schachter, *In Defense of International Rules on the Use of Force,* 53 U. CHI. L. REV. 113 (1986).

portunistic reasons—excuses—for positions taken, a shadowplay about a basic conceptual dilemma. Porfiry does not tell us why we should divorce pity from law. A justification for his proposition is not self-evident. Cannibalism, the treatment of prisoners in civil wars and Raskolnikov's crime all raise the same profound issue. We have tended to base the answers, however, on momentary self-interest and implicit assumptions rather than on principled discourse.[37]

Justifications that commentators have proferred fail to withstand scrutiny. Sofaer suggests that the tendency to include *why* and *to whom* factors in recent lawmaking regulating terrorism has cut too many holes in the net we use to catch terrorists. Yet a reason is not a theory of choice. He tells us of his preference for a *what*-based definition of terrorism because it catches more terrorists. But a different definition of terrorism, one that also takes exculpatory *why* and *to whom* factors into account, allows through its net only those who by definition are not terrorists. The Sofaer justification for simple *what* law really does not get beyond a preference for catching more violent persons by expanding the definition of terrorism to include more actors. Similarly, those who, fearing the slippery slope, argue for a strict construction of article 2(4) of the United Nations Charter to prohibit every use of force, are merely expressing their preference for sovereignty as the highest global value even at the cost of sacrificing such other values as life and liberty. They believe it of utmost importance to catch more violent states. That value choice makes it unnecessary to distinguish between Tanzania's liberation of Uganda from Idi Amin, the Soviet invasion of Czechoslovakia or Afghanistan, the Indian Army's entry into what is now Bangladesh, the United States role in Grenada, Israel's rescue of the hostages at Entebbe, and so forth. The "slippery slope" theory argues that the law is incapable of making such distinctions even if they are evident to the naked moral eye. Yet, as our statutes pertaining to murder and manslaughter illustrate, laws can and sometimes *do* make such distinctions. If they are not, or should not be,

37. John Rawls has endeavored to construct a principled discourse. *See* J. RAWLS, A THEORY OF JUSTICE (1971). His "veil of ignorance" model posits an individual who has knowledge of society but does not know his position within that society. This individual, fearing the worst, will try to maximize the minimum position, i.e., to establish the highest social floor as possible. The result, according to Rawls, is: (1) strictly egalitarian political rights; and (2) unequal economic distribution only to the extent that incentive-created wealth that results from inequality improves the worst-off position.

Rawls, however, presupposes an advanced community, one socially cohesive and economically advanced. While he generally approves of modern international law principles, such as the right to self-determination, how Rawls would respond to the legal problems of terrorism is open to speculation. *See id.* at 377-82.

made in reference to terrorism, it is not because of any structural disabilities inherent in law itself. It would only be because the system will have chosen Porfiry's simplicity to a more calibrated way of defining and regulating the problem.

To choose a definitional strategy that one can only justify on the ground that it catches more people than does a competing one, however, is far from satisfactory. Professor Christopher H. Pyle has recently condemned that sort of reasoning in an article in *Foreign Policy*. He charges that the 1986 amendment to the United States-United Kingdom Extradition Treaty,[38] by focusing only on what the person being sought for extradition had done, ignoring why it was done and to whom,

> is both simplistic and crude. It does not ask whether an uprising was in progress, whether the uprising was popular, whether the regime had been oppressive or whether the alleged conduct of the accused was vicious, wanton, odious, cruel or unauthorized. Rather, it pretends to preserve the political crimes defense—but only for people who write letters to the newspapers—while categorically declaring that all persons who engage in shootings and bombings as part of an uprising are not "political" and thus cannot be shielded from extradition.
>
> This categorical approach purports to seek a humanitarian objective: the punishment of people accused of murder, bombing, hijacking, hostage-taking and similar acts. In so doing, however, it denies that Americans might sometimes refuse to condemn such actions—for example when used in attempts to escape from police states such as the Soviet Union.[39]

To choose between Sofaer and Pyle thus seems to have immediate practical implications for the definition of, and thus the choice of remedies for, terrorism. Should the law protect a captured Provisional Irish Republican Army gunman and entitle him to the treatment of a protected combatant?[40] If he reaches the United States, should he have political sanctuary, or should the Attorney General extradite him to stand trial for murder in Britain? Whether Britain tries him for armed insurrection and treason could depend on whether Geneva Protocol I of 1977 applies. Whether he is extraditable depends on whether the new parts of the 1986 United States-United Kingdom Extradition Treaty apply. The 1977 Protocol, as we have observed, includes a *why* and *to whom* factor in its definition of the act being regulated; the United States and the United Kingdom negotiated their treaty, however, precisely in order to

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38. Supplementary Treaty Concerning the Extradition Treaty, June 25, 1985, United States-United Kingdom-Northern Ireland, 24 I.L.M. 1105.

39. Pyle, *Defining Terrorism*, FOREIGN POL'Y No. 64, at 63, 75 (1986).

40. *See supra* notes 25-28 and accompanying text.

ensure that the *what* factor, alone, is determinative.

It seems that we must choose, as a first step in the fight against terrorism, either to embrace or to reject Porfiry's proposition. That, at least, is what his champions and detractors seem to be saying. As rational beings, however, we must do more than choose between authors of competing definitions of terrorism. Our task is no less than to develop a coherent theory for choice. In doing so, however, we will discover that neither Sofaer nor Pyle are categorically right or wrong. Rather, they have taken us on an intellectual wild goose chase toward an unanswerable, and thus operationally irrelevant, question. We will then be ready to formulate the right question, to which we may be able to devise an answer capable of validation. That answer may even help us to begin to conceive an effective strategy for dealing with terrorism.

But first things first. Before making or refusing to make the choice for or against Porfiry's proposition—or before formulating the quite different proposition we will insinuate in its place—we must first consider the basis for choice. That brings us to the matter of legitimacy. One must remember that we are seeking an effective legal strategy to combat widely perceived social disorder. The problem of defining the disorder, at least initially, is the same as that of fashioning a remedy: i.e., what are we trying to prevent? One can pose that problem somewhat more precisely by looking at the definitional question—understood as a first step toward devising an effective remedy—from the operational perspective. We would then ask: what kinds of remedies against the perceived social problem of terrorism are likely to be regarded as *legitimate* and by whom. Legitimacy, in this context, is not solely an abstract moral principle but has direct operational consequences to any effort to contain the problem.

IV. LEGITIMACY

Once one understands that a wide-open field for choice exists, with no single, self-evident or easily justifiable answer, one reaches the proper starting point for any critical analysis of Porfiry's proposition. What is one to make of those who engage in violence for good causes against pernicious forces? Should one pity the criminal, or should one, by taking those *why* and *to whom* factors into account, sometimes redefine "evil" as "good"?

To approach that seemingly insoluble but ineluctable problem of choice, one must posit, examine, and in due course, validate in a principled, reasoned manner that is generally perceived to be convincing, the intellectual process by which one exercises the choice. As Max Weber explains, authority, norms, institutions and social action are legitimate

only when the preponderance of those affected subjectively endorse and accept them.[41] More broadly, Jurgen Habermas identifies a sociocultural historic consensus for determining the principles of governance and distribution of "goods" as the essence of a legitimating system. Norms, Habermas points out, are rooted in "structures of linguistically produced inter-subjectivity."[42] They interpret needs and they license or mandate actions. A process of justification in which validity claims are "redeemed discursively" legitimizes them.[43] This discursive redemption takes the form of claims of "correctness or appropriateness"[44] that move away from particularist opinion—wants, pleasure, pain—towards propositions "with a claim to generality."[45]

Habermas' analysis has been useful in directing our inquiry into the phenomenon of legitimacy as it impinges on efforts to regulate terrorism. Legitimacy, as we will use it in this discourse, is the quality that attaches to a choice of conduct—for our purposes, specifically, law-making and law-enforcing conduct—when it is justified discursively and the community generally recognizes its claim of correctness or appropriateness, raised in empirical statements, as a basis for action. While communities can also achieve the generality and intersubjectivity that underpins nor-

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41. 1 M. WEBER, ECONOMY AND SOCIETY 217 (G. Roth and C. Wittich eds. 1968).

42. J. HABERMAS, LEGITIMATION CRISIS 10 (T. McCarthy, Jr. trans. 1975).

43. *Id.*

44. *Id.*

45. *Id.* One could proffer alternative definitions of legitimacy. *See generally* Richards, *Terror and the Law,* 5 HUM. RTS. Q. 171 (1983). Habermas' stress on discursive redemption, a concept rooted to collective action, is analytically akin to the notions of legitimacy that Hans Kelsen and H.L.A. Hart have advanced. For Kelsen, the norms upheld by the legal culture of academic and bureaucratic lawyers become the metric of legitimacy. *See* H. KELSEN, GENERAL THEORY OF LAW AND STATE (A. Wedberg, trans. 1945); THE PURE THEORY OF LAW (Knight, trans. 1967). In Hart's recalibration, he equates norms to behavioral conformity and critical attitudes, collectively defined. *See* H.L.A. HART, THE CONCEPT OF LAW (1961).

In contrast, natural law theorists argue legitimacy in terms of overarching substantive principles. The vigor of their arguments range from Lon Fuller to John Locke. Under Fuller's theory of the internal morality of the law, eight characteristics are intrinsic to a system of law: generality, publication, prospectivity, intelligibility, consistency, adjustment to human capacity, stability sufficient to orient behavior and congruity between the rule as announced and as applied. *See* L. FULLER, THE MORALITY OF LAW (1963). Fuller's theory aims to preclude legal arbitrariness; it manifestly does not prevent a regime of unjust laws. More assertive, John Locke demands that countries not only apply the law evenhandedly but that the law conforms to fundamental human rights, underpinned by the individual right to conscience. *See* J. LOCKE, TWO TREATISES OF GOVERNMENT (P. Laslett ed. 1960) (3d ed. 1698); *see also* Richards, *Conscience, Human Rights, and the Anarchist Challenge to Obey the Law,* 18 GA. L. REV. 771 (1984).

mative legitimacy by sociocultural conditioning or received religious revelation, in the modern world they most often achieve it by general consent tested and tempered in open discourse. This does not necessarily imply that legitimacy is synonymous with enactment by parliamentary democracy, both in the sense that the community may widely perceive some laws made that way—for example, by lobbying tactics or on the basis of data later proven false—to be outside the legitimating consensus and, also, because means other than parliamentary means, ranging from a plebescite to leadership of a community by an effective prophet or teacher or by respected elites such as tribal elders can produce a consensus.[46] Rather, we use legitimacy to denote a widespread sense of a law's appropriateness and fairness. It should be obvious that anyone advocating a law is well-advised to pursue a norm that is also widely perceived to be legitimate, since the law's effectiveness will generally depend on an appropriate quotient of acknowledged legitimacy. Let us attempt to illustrate.

One of the authors has a house in a small village sixty miles from New York City which he reaches by the Long Island Expressway. At one mile intervals, New York State has posted 55-mile maximum and 35-mile minimum speed limit signs along both sides of the roadbed and on overhead electronic billboards. The law, as thus stated, concerns only the *what,* which takes the form of miles per hour. This law is clear, requires no sophisticated formulation and, surely, features ease of application. Some legislature must have voted for it. Everyone understands it the same way and everyone knows, quite precisely, whether their vehicles are, or are not, in compliance. Yet many drivers perceive the law as illegitimate. Its illegitimacy appears in a number of illustrative contexts. Almost all motorists flagrantly disobey the law's upper limit. Most cars travel at speeds substantially in excess of the posted limit. The failure of the vast preponderance of the society to respond to the law's clear stricture indicates that it has lost whatever legitimacy it may once have enjoyed during the gasoline shortage when the government enacted it as a conservation measure. Also, habitual non-enforcement has weakened the social compact underpinning the law, thereby releasing those who are normally law-abiding from the law's social (but not its legal) strictures. That condition of conflict between social and legal stricture also undermines the law's legitimacy. Laws that the community perceives to be partially enforced—in either sense of the word, i.e., only partially ap-

46. For an analysis of the role of ritual and culture in establishing the legitimacy of authority and its exercise, see H. WECHSLER, OFFERINGS OF JADE AND SILK: RITUAL AND SYMBOL IN THE LEGITIMATION OF THE T'ANG DYNASTY (1985).

plied or applied with partiality—become illegitimate.

Second, as to the law's prohibition against dawdling, it is clear to everyone that almost any car travelling at less than 35 miles per hour must in some way be seriously disabled and should, therefore, be free to travel at any speed prudent under the circumstances. The Long Island Expressway is no haven for "Sunday drivers," who appear to be the object of the lower limit. Consequently, that limit—perfectly appropriate to other roads that attract dawdlers—would be ludicrous if the state were to apply it, for example, on the expressway to a car with a flat tire. A law that the community generally perceives as ridiculous—that is, logically absurd in the light of any reasonably predictable set of contingencies—incurs some legitimacy costs.

The example illustrates three factors relevant to determining popular perception of a law's legitimacy: (1) general adherence; (2) rationality; and (3) generality and consistency of implementation. Other elements relevant to the sense of law's legitimacy exist—we have already noted the depth of the law's cultural roots and the procedural openness of the process by which societies enact laws—but these can be subsumed under our three basic factors.

V. IDIOTS' LAW AND SOPHISTS' LAW

Beyond the tautological reasons for Porfiry's, Sofaer's or Pyle's proposition, we believe lie unenunciated value decisions. Porfiry prefers simplicity, in law, while Pyle prefers legal sophistication. Porfiry, to bolden our point, has a value attachment to "idiots' law" while Pyle has an equally determinative attachment to "sophists' law." Both terms, which are central markers in the ensuing analysis, are meant to be neutral. The term "idiots' law" is intended to conjure up the qualities of another of Dostoyevsky's characters: Prince Myshkin, the Christ-like figure in *The Idiot*, whose characteristics include his single-minded passion for arrow-like truths, simple principles and comprehensive mastery of self and others in accordance with these invariable verities regardless of dangerous, even absurd, consequences. We use the term "sophist" not in the pejorative sense in which Plato used it, but rather, in its original meaning of intense scrutiny of simple ideas to plumb their multilayered complexity. This process of skeptical analysis of simple "truths," which fifth century B.C. Greek philosophers evolved, is the one which led to a more textured understanding of ideas and of reality.[47] We use "sophist" to convey the same approach to legal conceptualization, one tailored with a

47. G. KERFERD, THE SOPHISTIC MOVEMENT 59-67 (1981).

careful eye to detail.

It is our contention that one cannot make a principled choice between these propositions, no matter how passionate the clash between the partisan advocates of each. Both idiot and sophist preferences are defensible, but no one has examined, let alone justified, either preference systematically. As theoretical constructs, which the waves of advocacy for or against particular regulatory systems have submerged—as with the 1977 Geneva Protocol and the United States-United Kingdom Extradition Treaty—the preference for simple, or for sophisticated, legal norms may be just one indication of the advocate's larger hierarchy of values.

Porfiry's proposition is an implied plea for simplicity. Pyle, on the contrary, opts for sophisticated complexity. Sofaer, on Porfiry's side, prefers laws (such as the United States-United Kingdom Extradition Treaty) that define terrorist offenses in terms of simple, inclusive *what* categories of activity. Pyle proposes instead a complex, exculpatory, judicially-determined case-by-case approach. This sophists' law, for example, mandates that the act of killing a British constable in Northern Ireland might be exculpable if the killer were fighting for social justice rather than promoting a leftist or rightist autocracy (or personal gain) and if the dead British constable were a collaborator in an oppressive, unjust regime rather than an innocent servant of an open, progressive democracy.

In extradition proceedings, instead of flatly ruling out the possibility of a legitimate uprising against a certain foreign government, Pyle argues that a judge should "consider the alleged inhumanity of the actions of the accused in light of the general nature of the conflict—which is determined in part by the opposing side's tactics."[48] Similarly, Martin C. Boire concludes that "the use of community terrorism" against oppressive regimes should be deemed lawful "when it remains the only effective tool for the restoration or maintenance of a representative democratic form of government."[49]

It is worth noting that Pyle's and Boire's sophisticated, exculpatory complexity, summoning the law to distinguish between good or bad motives for acts and good or bad victims of actions, has both an historic pedigree and a contemporary counterpart. Historically, the "just war" doctrine struggled to make those distinctions from the time of Constantine. Early Church theologians, having to reconcile Christian pacifist theology with Imperial military needs, reworked older Greek and Ro-

48. Pyle, *supra* note 39, at 75.
49. Boire, *supra* note 14, at 133.

man principles to arrive at a Christian norm.[50] At first, people equated the just war with campaigns to save the Roman Empire, which they perceived as a divine institution.[51] In the wake of the Empire's fall, Augustine anchored the just war doctrine to the need for resisting both internal and external challenges to Christian unity.[52] The Augustinian concept foreshadowed the just war doctrine as Thomas Aquinas formulated it, which held that a war, to be just, must be: (1) waged on valid authority; (2) just with regard to its cause; and (3) animated by a right intention.[53] Grotius, the last great pre-modern expositor of the just war doctrine, while attempting to ground it in natural law rather than in Christian theology, basically accepted Aquinas' approach.[54]

After Grotius, a new view gained ascendancy: that "any state could at any time and for any reason go to war without committing an international delinquency."[55] Contemporary political theory and *realpolitik* favored this approach. Under positivism, lack of a structuralized higher (papal or divine) authority meant that only state-accepted treaties and practice could bind a sovereign's international actions. Likewise, the politics of the day embraced war as an extension of politics, a view tinged in the 19th century by social Darwinism.

In the 20th century, some commentators have viewed various multilateral treaties, notably the United Nations Charter, as reestablishing a just war doctrine.[56] To the extent these commentators base their arguments

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50. One should distinguish the just war from the holy war. The latter is fought for faith (and when ecclesiastically sponsored becomes a crusade). The former is fought for secular goals such as defense of territory, persons and rights. F. RUSSELL, THE JUST WAR IN THE MIDDLE AGES 2 (1975). A holy war countenances the utter destruction of the adversary and the use of unorthodox military tactics. *See, e.g,* the Israelite ambushes against the people of Ai, JOSHUA 8.

51. F. RUSSELL, *supra* note 50, at 12.

52. *Id.* at 18-20.

53. T. AQUINAS, SUMMA THEOLOGIAE, SECUNDA SECUNDAE, Q. 40 (article 1) (T. Heath trans. 1972).

54. *See* H. GROTIUS, ON THE LAW OF WAR AND PEACE (L. Loomis trans. 1949); Edwards, *The Law of War in the Thought of Hugo Grotius,* 19 J. PUB. L. 371 (1970). Grotius expressly contemplated a third state intervening to protect the natural law rights of the citizens of another state. *See* Book II, Chapter XXV of ON THE LAW OF WAR AND PEACE, *supra,* entitled "On the Causes of Undertaking War on Behalf of Others."

55. Kunz, *Sanctions in International Law,* 54 AM. J. INT'L L. 324, 325 (1960).

56. Shaw, *Revival of the Just War Doctrine?,* 3 AUCKLAND U. L. REV. 156, 164-67 (1977). Other treaties thought to re-establish the doctrine include: The Versailles Peace Treaty, June 28, 1919, 5 UNPERFECTED TREATIES OF THE UNITED STATES OF AMERICA 1 (C. Wiktor ed. 1980) (art. 231: German reparations to the Allies for their injuries sustained as a "consequence of the war imposed upon them by the aggression of Germany and its allies"); The Convention of the League of Nations (art. 10: "The

on the article 51 right to self-defense, they overstate their case. Article 51 establishes a formal, procedural requirement (self-defense against an armed attack), rather than substantive norms that might constitute a just war doctrine. The Security Council, however, utilizing Chapter VII could—but did not—develop a just war theory to enforce certain Charter-based rights of peoples (as in South Africa) by deploying collective force to remove a government guilty of unjust behavior toward its own population insofar as the Council judges that regime to have created a threat to the peace by its wrongful policies.

A modern theory, which has become known as the Reagan Doctrine,[57] has contemporarily revived the "just war" theory. This policy advocates one law for good freedom fighters combating evil regimes (the Contras of Nicaragua, the Mujahedeen of Afghanistan and Jonas Savimbi in Angola are preferred examples) and quite another for evil insurgents fighting good democratic regimes (the Irish Republican Army in Northern Ireland, the Palestine Liberation Organization in Israel and the rebels in El Salvador).[58]

Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League"); Geneva Treaty for the Renunciation of War of 1928 (the "Kellogg Pact"), 46 Stat. 2343, T.I.A.S. No. 796, 94 L.N.T.S. 57 (art. I: The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another"); Charter of the International Military Tribunal, August 8, 1945, 59 Stat. 1544, 1546 (art. 6, para. a: defining a "crime against peace" as the "planning, preparation, initiation or waging of a war of aggression").

57. Address by Ambassador Kirkpatrick, National Press Club (May 30, 1985). The Reagan Doctrine is not the only twentieth century attempt to revive the just war doctrine. The Soviet Union has long maintained that "[j]ust wars . . . are not wars of conquest but wars of liberation, waged to defend the people from foreign attack and from attempts to enslave them, or to liberate the people from capitalist slavery, or, lastly, to liberate colonies and dependent countries from the yoke of imperialism." COMMISSION OF THE CENTRAL COMMITTEE OF THE C.P.S.U., HISTORY OF THE COMMUNIST PARTY OF THE SOVIET UNION (BOLSHEVIKS) 167-68 (1939). The modern Non-Aligned Movement has also upheld the just war doctrine, one result being the provisions of Protocol I, discussed *supra* note 22 and accompanying text. A 1973 General Assembly resolution dramatically put forth this position: "Colonial peoples have the inherent right to struggle by all necessary means at their disposal against colonial Powers and alien domination in exercise of their right of self-determination. . . ." G.A. Res. 3103, 28 U.N. GAOR Supp. (No. 30), at 142, U.N. Doc. A/9030 (1973). *See also* G.A. Res. 2105, 20 U.N. GAOR Supp. (No. 14), at 3, U.N. Doc. A/6104 (1965). For a case study see Dugard, *SWAPO: The Jus Ad Bellum and The Jus In Bello*, 93 S. AFR. L.J. 144 (1976).

58. It may strike some as odd to see Pyle intellectually ranged on the side of Aquinas and Ronald Reagan, while Judge Sofaer, with Porfiry, firmly opposes the effort to rein-

One can square the Reagan Doctrine with Aquinas but not with Porfiry's proposition. Even within the State Department's antiterrorism team, occasional hints of doubts about Porfiry emerge. Robert B. Oakley, then Acting Ambassador-at-Large for Counterterrorism, explained in a 1986 speech to the Conference of United States Mayors that terrorism is largely absent in the United States "in good part, due to the deep-rooted belief of Americans that there are peaceful means of political change and for improving one's economic situation, that our system is ultimately responsive."[59] It would follow that other governments' unresponsiveness is a contributing factor in generating terrorism. Why should a legal norm be blind to that?

It is evident that law based on *what*—the definition of conduct by the actor purely in terms of externalized acts—is much simpler to write, understand and apply than a law that takes the quality of the motive and of the victim into account. One can state the simplistic common law against cannibalism in the sentence set to music by Donald Swann, "Eating people is wrong."[60] The sophisticated German law permitting the eating of people in certain enumerated circumstances could well run to several paragraphs in an effort to be neither over- nor under-inclusive and requires tough judgment calls on a case-by-case basis. The English passenger in a lifeboat would know exactly what the common law requires of him. The German passenger might be in some doubt. The Englishman, however, would probably consider his country's law distinctly unreasonable—perhaps illegitimate—under the circumstances, a feeling the German probably would not have about his country's code.

The characteristics of legal simplicity and complexity suggest structural concomitants. One of these is that idiots' law more or less applies itself, while sophists' law requires an effective judiciary or some other credible institutionalized and legitimate interpreter of the law's meaning in each instance of its application. The "just war" doctrine was sophists' law, and during the Middle Ages the papacy assumed the role of legitimate and legitimating determiner of which wars qualified as just.[61]

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troduce the muddle between pitying those who are driven to violence and making their acts legal. At this early stage of our analysis, however, the consistency of the adversaries is only of marginal interest. Our first objective must be to understand the basic jurisprudential theories that underpin Porfiry's proposition and Pyle's counterproposition.

59. 86 DEP'T ST. BULL. No. 2113, at 1, 2 (1986).

60. D. Swann and M. Flanders, At the Drop of a Hat (1957) (stage show).

61. Even during the Middle Ages, papal neutrality was questioned. This skepticism finds expression in the demand that combatants, including those serving in a nominally just war, serve penance for inflicting injury on the enemy. F. RUSSELL, *supra* note 50, at 32.

Gregory VII taught that only wars pursuant to papal command were just and that participants in other combat courted perdition.[62] As the papacy declined, however, monarchs became the self-serving judges of whether their cause was just, and papal approval became merely "a useful adjunct, if not an absolutely necessary one."[63] With that, the sophists' rule withered and gave way to idiots' law: first, that all war was legal, and, later, that all war-making (except in self-defense) is illegal. To take another of our examples: if the law punishes alike all cannibalism, one need only establish a straightforward fact for the law's structures to become applicable. Likewise, in the case of the Provisional Irish Republican Army gunman apprehended in the United States, as Pyle indignantly points out, almost the only thing the new extradition treaty allows the American court to determine is whether probable cause exists to believe that the defendant shot someone. In cases involving sophists' law, however, the courts become far more important. In dealing with cannibalism, judges need to determine not only whether someone was eaten and by whom, but also whether the hungry people in the lifeboat would have died had they not resorted to cannibalism, whether they had reason to believe they would not soon be rescued, whether they followed a fair procedure in determining which of them must die to save the rest and myriad other *why* and *to whom* issues. Judges of a high level of probity would be necessary were Pyle to have his way in having extradition requests referred to "judicial inquiries into the capacity of foreign regimes to do justice"[64] as well as into the appropriateness of the victim's murder in light of the aims of the killers and the repressiveness of the regime, not to mention the victim's actual role as a cog in the wheel of authority.

Let us put these instrumental and institutional concomitants of the choice between idiots' and sophists' law into still a different international context. We have already noted in connection with the United States invasion of Grenada that article 2(4) of the United Nations Charter states what looks like a simple idiots' norm. It prohibits a clearly defined activity: the use of force by one state against the independence or terri-

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62. *Id.*, at 34-35; Shaw, *supra* note 56, at 163.

63. Muldoon, *The Remonstrance of the Irish Princes and the Canon Law Tradition of the Just War*, 22 AM. J. LEGAL HIST. 309, 313 (1978). Muldoon chronicles the unsuccessful Irish attempt to persuade the Pope to revoke his bill authorizing the English invasion of Ireland. The need to strengthen England as a political counterweight to France determined the papal position. *Id.* at 323. Muldoon concludes: "The Irish were the first in what proved to be a long line of people on the edges of European society who looked to the papacy for justice against their conquerors. Like all the others, the Irish were doomed to frustration." *Id.* at 325.

64. Pyle, *supra* note 39, at 78.

tory of another. This provision is related to article 51 of the Charter, which is also cast in straight-arrow-like *what* language. It permits the use of force in self-defense in response to an armed attack. The simplicity of these two formulations is due to several factors. For one, it is sometimes easier in a world of diverse states to agree on a simple *what* formula to regulate activity deemed aberrant. After the world's experience with Nazi aggression, in the mood prevailing at the end of World War II, it was easy to get states to agree, in principle, to prohibit all use of force except in defense against an armed attack. At San Francisco there was little support[65] for trying to draft a more complex set of exculpatory exceptions distinguishing between permissible and impermissible uses of force, in part because the parties realized that this might fail and cause the unravelling of the apparent agreement already achieved. At this time it was also thought that collective use of force by the United Nations acting under chapter 7 of the Charter would make spelling out the circumstances in which states would remain entitled to defend themselves, either alone or in small alliances, less important. To put this proposition another way: sophists' law is an attainable option primarily when rooted in a high level of socialization. Perhaps a time existed when, with papal guidance, the handful of fledgling nations of the Holy Roman Empire held commonly shared notions of what constituted a just or an unjust war. Even then, the Arab world or the Chinese would not have shared these notions. In the modern world of 170 states with vastly diverse history and aculturation, it is far less likely that the international community could reach a general agreement as to whether the Palestine Liberation Organization, the Irish Republican Army, Savimbi's UNITA or the Contras were "justified" in killing a particular soldier, civil servant, banker or bus driver.

That the world is not ready for a sophists' code on most highly politicized problems, of which terrorism is an example, may suggest that Sofaer is right to point to idiots' law as all that the international legal community could reasonably achieve in a world insufficiently socialized to support anything more sophisticated. Certainly one might conclude that if there is not even sufficient socialization—commonality of purpose—in the international community to facilitate such an idiots' law approach, axiomatically it would be a waste of time to seek to overcome that obstacle by trying to draft a sophists' law on the same subject.

Yet this is exactly what the United Nations General Assembly ven-

65. Rather, debate concentrated on efforts to broaden the definition of impermissible use of force, for example, to include economic sanctions. *See, e.g.*, Doc. 784, I/1/27, 6 U.N.C.I.O. Docs. 331, 334-35 (1945).

tured to do in 1972 at the initiative of Secretary-General Kurt Waldheim.[66] For two years, negotiations demonstrated the futility of this pursuit. Numerous governments made efforts to overcome resistance to any law on terrorism by trying to include exculpatory *why* and *to whom* language.[67] The Government of Senegal, for example, proposed on behalf of the Non-Aligned Group that the prohibition of terrorism should not only include "Acts of Violence and other repressive acts by colonial, racist and alien regimes against peoples struggling for liberation, for their legitimate right to self-determination, independence and other human rights and fundamental freedoms" but should specifically exculpate those acting on "the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination" in recognition of "the legitimacy of their struggle, in particular the struggle of national liberation movements."[68] The Soviet Union demanded exemption for "acts committed in resisting an aggressor in territories occupied by the latter, and action by workers to secure their rights against the yoke of exploiters."[69] This effort demonstrates the international system's infinite capacity for the wild goose chase. By including sophisticated exculpatory clauses that the General Assembly meant to give privileges to various client movements, but which they necessarily drafted with such generality that they could mean anything to anyone, the sponsors signalled their preference for a law that, intended or not, would allow anyone to do almost anything. Judge Sofaer is not the first United States Government official to reject an agreement based on such evident nonmeeting of minds.

Even so, this does not demonstrate that an international idiots' law on terrorism is structurally preferable to sophists' law. The contrary might well be true if sufficient agreement on content existed, because idiots' law has other built-in problems. Let us look again at the United Nations Charter's provisions prohibiting use of force by states. Most nations will

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66. *Request for Inclusion of an Additional Item in the Agenda of the Twenty-Seventh Session*, 27 U.N. GAOR, U.N. Doc. A/8791 (1972); U.N. Doc. A/8791/Add.1 (1972).

67. *See, e.g., Observations of States Submitted in Accordance with General Assembly Res. 3034 (XXVII)*, U.N. Doc. A/AC.160/1 (1973); U.N. Doc. A/AC.160/1/Add.1 (1973); U.N. Doc. A/AC.160/1/Add.2 (1973).

68. U.N. Doc. A/AC.160/3/Add.2, at 3 (1973).

69. U.N. Doc. A/AC.160/2, at 7 (1973). However, Ambassador Oakley has reported a new Soviet "awareness that distinctions must be made between so-called liberation movements and groups whose objectives and operations are primarily directed toward producing terror, and whose targets are often unrelated to their putative 'liberation' goals." Oakley, *supra* note 1, at 628.

agree that articles 2(4) and 51, while relatively clear and appropriate as far as they go, are not sufficient to meet even a simple test of rationality, let alone appropriateness, once one approaches the margins. For example, a literal reading of the law clearly compels a threatened state to wait until a nuclear warhead has actually hit it ("armed attack") before the law authorizes the state to deploy its own forces in self-defense.[70] Such a law lacks essential legitimacy because it is evidently absurd. One could expect no nation to carry out that rule, so what nation would impose it on itself? Nor does our awareness that it would be virtually impossible for nations to agree on a more sophisticated formulation that would codify a set of normative propositions bringing the *why* and *to whom* factors to bear on a new definition of lawful first use of military force mitigate its absurdity. The idiots' rule, as almost everyone knows, is unreasonable, at least at the margins, and on even lesser provocation than a threat of nuclear obliteration, many governments have widely disobeyed it with virtual impunity. Yet a sophists' rule, which in theory could be much more reasonable, more humane and more likely to accord with preponderant conduct—in short, more *legitimate*—is beyond our consensual reach.

Idiots' laws, it seems, are unsophisticated in their lack of fine tuning and, thus, the international community is likely to perceive them—at the margins—as unreasonable or illegitimate. Sophists' laws, on the other hand, may (but need not) be more rational, fair and sensible; but, they may also be a chimera, an invitation to endless negotiations in pursuit of an agreed legal formula that, even if achieved, would be incapable of legitimate practical application. The contorted, essentially incomprehensible United Nations General Assembly definition of aggression, especially with its convoluted loopholes in article 7, provides a good example.[71]

It thus becomes apparent that two structural implications of choosing to regulate through idiots' law are that countries may reach agreement more readily and that the law will be easier to apply. But there will probably be legitimacy costs at the margins. The companion structural implication of choosing to regulate through sophists' law is that, while states will often see such law as more closely in accord with popular reason and with actual behavior than idiots' law, agreement on its content may be delayed, impossible, or illusory. Furthermore, its application

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70. *See* Franck, *Who Killed Article 2(4)?*, 64 AM. J. INT'L L. 809, 820-22 (1970).

71. G.A. Res. 3314(XXIX), 29 U.N. GAOR Supp. (No. 31), at 142, U.N. Doc. A/9631 (1974); *see* Stone, *Hopes and Loopholes in the 1974 Definition of Aggression*, 71 AM. J. INT'L L. 224 (1977).

in practice will lead to further intense controversy and legitimacy crises.

The illusory quality of much sophists' law stems from the difficulty of achieving general perceptive confluence, in actual cases, with regard to such complex phenomena as motive or provocation. That difficulty permeates the law's drafting and, particularly, its implementation. The previously noted rule in Geneva Protocol I of 1977, which requires prisoner of war treatment for guerrillas fighting "colonialism, racism or alien domination" was difficult to formulate, but its application to an actual civil conflict is sure to be more difficult, even as between parties that accept it. Which rebellions qualify? Is Jonas Savimbi's army fighting for self-determination against the "domination" of "alien" Cubans? What is the implication of the exculpatory *to whom*—"colonialism, racism or alien domination"—for those fighting the Governments of Israel and Britain or, for that matter, for persons thinking of shooting officers of the United States Department of the Interior on Indian reservations or in Puerto Rico?

Structurally, unilateral, self-serving applications of those rules, interpretations made by interested parties in a manner which carries little conviction and less legitimacy, tend to dissipate, in practice, the gains in conceptual legitimacy made by recourse to sophists' law. For example, applying the proposed international norms known as the Reagan Doctrine, Ambassador Jeane Kirkpatrick has argued that United States support for the Nicaraguan Contras is permissible, while Soviet and Cuban support for the Sandinistas is not because the Contras are democrats fighting a totalitarian regime while the Sandinistas are totalitarians that Russians and Cubans are using to colonize Nicaragua.[72] Even if one accepts the sophists' norms of the Reagan Doctrine, any auto-application that an interested party arbitrarily makes in an actual dispute is bound to arouse the widespread skepticism that bespeaks lack of legitimacy. This is not necessarily a matter of bad norms or of lying actors. Wittgenstein has charged that no "course of action could be determined by a rule because every course of action can be made out to accord with the rule."[73] Even if this overstates the case, it is undoubtedly true that as a rule become more complex, the legitimacy of the rule's application and, ultimately, of the rule itself, becomes increasingly dependent not only on the degree of common community understanding of the rule's content but also on the perceived legitimacy of the process by which the community applies the rule.

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72. Kirkpatrick, *supra* note 57.

73. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 81, para. 201 (G.E. Anscombe trans. 1953).

Were it not for the lack of global agreement on sophisticated legal principles incorporating *why* and *to whom* factors and, even more, the absence of credible institutions to apply such inevitably complex formulations, most of us would probably reject Porfiry's proposition and opt for sophists' law whenever possible. Under the circumstances, however, the choice between idiots' law and sophists' law becomes much more difficult as one understands the structural implications of each. Certainly on its face sophists' law usually sounds more reasonable than does idiots' law because, logically, the reasonableness of a general principle must survive its application at the margins. If a patent absurdity results from the only possible application of the evident meaning of a simple rule in circumstances requiring a more calibrated response, then that law has suffered *reductio ad absurdum,* a condition that may also, to some extent, delegitimize its application even in other, perfectly appropriate circumstances not at its margin. Mr. Bumble's conclusion that "if the law supposes that, the law is a ass —a idiot" is the most human of reactions, a demonstration of the legitimacy costs inherent in idiots' law.

However, a rule finely calibrated to reflect sophisticated *why* and *to whom* considerations also fails to escape *reductio ad absurdum,* albeit because of a different structural deficiency. The flaw of the idiots' rule is the obverse of its merit: it provides a simple, easily understood and readily applicable principle of regulation, but one which, because of its simplicity, is unable to bend or to avoid occasional patently unacceptable results. The flaw of the sophists' law is that while in the abstract it embodies a carefully calibrated system of regulatory and exculpatory principles, the text's very complexity, like the Internal Revenue Code, invites dispute as to whether the law is applicable in any particular case.

In the domestic context the system provides the opportunity to have any particular application of the law litigated before a tribunal that the society generally trusts to be fair and principled, which tends to ameliorate the problem. In the international community, a shortage exists of comparable, legitimate institutions capable of legitimating the law's application. As a result, sophists' laws are delegitimized by their illegitimate application, which usually takes the form of self-serving assertions by an interested party in the course of an action of disputed legality.

VI. The Right Question

We have seen that Porfiry's proposition is not self-evidently justified. Instead, we confront what turns out to be a Hobbesian choice forcing us to choose between regulating a social problem by laws that are simple and straightforward but lack rationality and cannot command general adherence at their margins and regulating a social problem by laws that

are complex and sophisticated, but as to which general consensus and general adherence are hard to achieve and which require an impartial system of application that is not readily available in the international community. Both choices have advantages and disadvantages. Both have potential—and different—legitimacy costs and benefits. To prefer, in general, on the basis of functional and theoretical analysis, either idiots' law or sophists' law as a tool for social control is impossible. Porfiry's proposition provides neither the wrong nor the right answer to terrorism. It is merely one of two polar possibilities for confronting terrorism normatively. The energetic claims of functional and moral superiority that the champions of both kinds of law make do not stand up to rational analysis.

Despite the spirited advocacies of a Sofaer or a Pyle, no theoretical basis exists for choosing between the two polarities nor among the various middle positions that we have not examined for reasons of economy. This does not, however, leave the jurisprudential analyst stranded in the intellectual equivalent of Death Valley. In setting aside a theoretically irresolvable question, we have encountered a different, but related quandary from which conceptual theory *can* provide an epistemologically justifiable exit. The right question is this: what is necessary to make *either* legal tool—the idiots' law or the sophists' law—effective in the regulation of terrorism? The answer to that question leads directly back to the concept of legitimacy. We have argued that if a law is to effect social control it must elicit general adherence, be perceived to operate rationally in relation to the desired objective and be fairly, consistently and generally applied. As we have observed, both simple *what*-based law and more complex law that embraces exculpatory *why* and *to whom* factors have different structural characteristics that tend to create legitimacy deficits. An appropriate task for the lawyer is to see whether, and how, those deficits can be transformed into legitimacy surpluses by the functional transformation of each structural system.

VII. Functional Restructuring

Sophist law could make the clearly superior claim to legitimacy if: (1) one could draft such a law on the basis of a genuine, shared set of community values underpinning agreed norms; and (2) general agreement existed to have the law uniformly applied in controversial cases by a binding system of decision-making that the affected community deems fair and the decisions of which are ordinarily respected and obeyed.

Those who advocate the deployment of sophists' law to make their system viable thus have an obligation not only to come up with a draft of meaningful, rationally-defensible norms that the preponderance of the

affected community will likely deem acceptable—itself a formidable quest—but they must also propose a system for applying those norms impartially and consistently to difficult cases. Sophist normative proposals lacking this latter ingredient tend to be mere applications for hunting licenses.

Third World efforts to make the prohibition and punishment of terrorist acts inapplicable to forces fighting colonialism, racism and alien domination are rightly suspect on that count, and one cannot allay the suspicion until the advocates of such exculpatory caveats demonstrate how the case-by-case application of their proposed sophist norm can be made by a process bestowing legitimacy on the outcome.

The Reagan Doctrine is another good example of this obligation not being adequately discharged. The Doctrine proposes the following norms for regulating the use of violence in the conduct of states during insurgency:

> 1. Any state may aid a democratic regime fighting an undemocratic rebellion.
> 2. Any state may aid a democratic rebellion fighting against an undemocratic regime.
> 3. No state may aid an undemocratic regime fighting a democratic rebellion.
> 4. No state may aid an undemocratic rebellion fighting a democratic regime.[74]

There is no doubt that the Reagan Doctrine, thus stated as a set of norms, has intellectual appeal. It is highly sophisticated, with a complex blueprint to regulate and exculpate state conduct and to distinguish between state terrorism and state altruism. It takes a value position squarely on behalf of freedom, according rights to those who fight to retain or establish it superior to those the law proposes to accord totalitarian regimes or guerrillas. Unfortunately, in a world governed by a preponderance of regimes that, to varying degrees, exhibit totalitarian tendencies, it is very unlikely that anyone can draft such a sophisticated blueprint around a meaningful convergence of intentionality. That we could expect those norms to be manifested consistently in preponderant state conduct is even less likely. At a minimum, however, those who champion the adoption of such a formula have an obligation to devise and demonstrate their commitment to a process by which the proposed

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74. Kirkpatrick, *supra* note 57. *See also* Cutler, *The Right to Intervene*, 64 FOREIGN AFF. 96 (1985); Reisman, *Coercion and Self-Determination: Constructing Charter Article 2(4)*, 78 AM. J. INT'L L. 642 (1984).

norms would be applied in a consistent, principled manner by a process of credible legitimacy. In other words, if one wants to resuscitate the just war doctrine, one must also resuscitate the legitimizing role of a papacy.

Pyle, one should recall, advocates sophists' law to regulate extradition of persons accused of terrorist acts, replete with various complex exculpatory *why* and *to whom* factors. But Pyle has a legitimizing system of application in mind—the United States federal judiciary, whose legitimacy the national community widely accepts and which we could expect to apply his proposed norms with reasoned, principled decisions.

The champions of the Reagan Doctrine, it is all too evident, have proposed no comparable means to raise the legitimacy quotient of their sophisticated normative proposal. On the contrary, the Reagan Administration has concurrently taken the United States out of the general mandatory jurisdiction of the International Court of Justice (article 36(2) of its Statute) without advancing any alternative. When the United States claims a right to aid such governments fighting rebellion as those of Chad or El Salvador, but also the right to aid rebels such as those fighting in Nicaragua, Afghanistan, Angola and Kampuchea, the contention that these particular regimes and these designated rebels represent the forces of democratic light fighting against totalitarian darkness has no more credibility than any self-interested assertion by a party seeking to justify an opportunistic act the normativity of which, even by the Reagan Administration's own proposed sophist rules, is widely doubted. Thus, the doctrine fails the test of efficacy because it lacks perceived legitimacy.

The capacity of the United States to persuade other states that it is acting within its own proclaimed normative framework is virtually nil. The Reagan Doctrine fails even at the hortatory level of reasoned discourse: other governments see it as, quite starkly, a plea for universal acceptance of America's right to do as it pleases in support of what it perceives to be democratic forces around the world while calling on other nations to demonstrate their faith in our good sense by a selfless gesture of suspended disbelief. But if that is what one *hears* the Reagan Doctrine to be about, it is not what the Doctrine *says*. The gulf between text and conduct thus further widens the legitimacy gap. The Doctrine purports to propose a new system of rules, but the proposers' failure to deal with its elementary structural—as distinct from conceptual—defects makes perfectly evident that its principal purpose is not to establish a new norm but only to repeal existing restraints such as those in articles

2(4) and 51 of the United Nations Charter.[75]

Idiots' law starts with a legitimacy advantage. It usually expresses a real, as opposed to a chimeric, agreement—at least at the time governments propounded it. It is easily understood. By denying any exculpatory exceptions it assures that fewer loopholes will exist. It almost applies itself. Its legitimacy costs derive from a structural failure to overcome problems of absurdity at the margins, which makes it appear unreasonable and thus undermines the prediction of general adherence. When United States lawyers argue in favor of our right to support a Contra insurgency in Nicaragua while Judge Sofaer deplores all exculpatory departures from a simple *what*-based prohibition on anti-state violence, the resultant cognitive dissonance demonstrates the weakness of Porfiry's proposition: to keep all one's ducks marching in orderly fashion behind a simple concept's linear projection into an infinity of hypothetical situations is almost impossible. Idiots' law invites *reductio ad absurdum.*

The advocate of the idiots' law approach to the regulation of a generally recognized societal disorder is thus obliged—like the advocate of a sophists' law—to seek the amelioration of this potentially delegitimizing structural defect. One way is to deconstruct the category of activity being regulated. Often other good reasons exist for doing this. Narrowing the subject matter of a proposed norm can help create the consensus lacking for a broader rule. Thus, terrorism, as a category of regulated activity, has sensibly given way to such subsidiary regulatory categories as hostage-taking,[76] violence directed against diplomats[77] and aerial hi-

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75. *See* Schachter, *supra* note 36; Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620 (1984).

76. International Convention Against the Taking of Hostages, *supra* note 7. The negotiations for the Hostages Convention reveal the opposition that an idiots' rule, even one for a compartmentalized activity, faces. Attempts at a reformulation of the Convention ranged in sophistication. Several delegations suggested the Convention should only protect "innocent" hostages. *See, e.g., Report of the Ad Hoc Committee on the Drafting of an International Convention Against the Taking of Hostages*, 32 U.N. GAOR Supp. (No. 39), at 38, U.N. Doc. A/32/39 (1977) (statement of Egypt), at 40 (statement of Guinea, using Ian Smith as an illustrative guilty hostage). The Tanzanian delegate proposed an exculpatory clause and provided an umpire: "For the purposes of the Convention, the term 'taking of hostages' shall not include any act or acts carried out in the process of national liberation against colonial rule, racist and foreign regimes, by liberation movements recognized by the United Nations or regional organizations." U.N. Doc. A/AC.188/L.5 (1977). The Pakistani delegate wished to condition invocation of the Hostages Convention against national liberation movements on the target state's acceptance of both the Geneva Conventions and the 1977 Protocols. U.N. Doc. A/C.6/34/SR.62 at 2 (1979). *See supra* note 28. In response, the French delegate argued: "[The]

jacking.[78] As to these, at least, the preponderance of the global community appears genuinely willing to accept a common rule. The international community can do more along such micro-legal lines with collective remedies directed toward violence against children, or more generally against civilians not in government service, or even against persons not owing allegiance to the targeted government. The 1977 Geneva Protocols already pursue some of these regulatory objectives. If that treaty proves unacceptable for other reasons, then perhaps the United States could work with other states to ensure that specialized conventions could protect the same categories of persons.

Although the principal purpose of such deconstruction is to widen the ambit of social acceptance for a regulatory scheme, an equally important effect is to regulate activities which are unacceptable under any circumstances while leaving unregulated most of those as to which a broader idiot's law would encounter trouble at the margins. For example, the United States has met the test of legitimation by agreeing to carry out its obligation to prosecute or extradite, which the Hague Convention imposes,[79] even in cases involving hijackers who have fled East bloc oppression.[80] While the dissident hijackers may have our sympathy, most

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taking of hostages was an act which must be condemned absolutely and which no circumstance or grounds could justify, regardless of the nobility of the cause for which it might have been committed." *Report of the Ad Hoc Committee on the Drafting of an International Convention Against the Taking of Hostages*, 33 U.N. GAOR Supp. (No. 39), at 64, U.N. Doc. A/33/39 (1978). The French position ultimately prevailed. *See supra* note 7.

77. Convention on the Prevention and Punishment of Crimes Against International Protected Persons, *supra* note 33. *See also* Convention to Prevent and Punish Acts of Terrorism, Feb. 2, 1971, 27 U.S.T. 3949, T.I.A.S. No. 8413. The latter, an OAS version of the International Protected Persons Convention, specifically condemns all physical attacks on diplomats, "regardless of motive." (art. 2). One can analogize this protection afforded diplomats to the eleventh century Peace of God doctrine that declared certain classes, especially the clergy, exempt from all violence. F. RUSSELL, *supra* note 50, at 34.

78. Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219; Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192 [hereinafter Hague Convention]; Montreal 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.

79. Hague Convention, *supra* note 78, arts. 7, 8.

80. This scenario most notably occurred when an East German hijacked a Polish airliner to West Berlin. As an outgrowth of the historical and jurisdictional freak that is Berlin, the hijacker was charged with crimes under West German law, but the United States prosecuted and tried him in an American court. The United States ambassador to West Germany appointed a New Jersey federal district judge, Hon. Herbert Stern, to

Americans probably do not regard that their punishment reduces the law to an absurdity, because Americans widely believe hijacking and bombing of airplanes is an unacceptable practice no matter what the *why* or *to whom* factors. Americans do not deem these factors exculpatory in respect of hijacking, an activity we deem, invariably, beyond the pale. Similarly, even Islamic and Soviet diplomats, whatever their sympathies for the Ayatollah Khomeini's revolution or their animosity to America, were relieved when the Security Council[81] and the International Court of Justice[82] resisted efforts to interpolate exculpatory *why* and *to whom* factors into the rule protecting diplomats at the time of the seizure of United States embassy officials by Iranian revolutionary guards. In both these instances, the general consensus, even at the margins, supported the idiots' rule applied to a relatively narrow segment of terrorist activity, thereby escaping the delegitimation problem of *reductio ad absurdum.*

Another way to narrow the field in order to base normative regulation on manifest common intent and thus avoid the delegitimizing effect of *reductio ad absurdum* is to seek the law's application to a smaller community. The United States-United Kingdom Extradition Treaty illustrates this second form of deconstruction. Both parties *inter se* are ready to accept a far broader, simpler rule to deal harshly with those who use violence against the authorities than they would vis-à-vis the international community as a whole. The idiots' law that the United States-United Kingdom Extradition Treaty sets out is less vulnerable to *reductio ad absurdum* precisely because the United States has not repealed the legal concept of sanctuary for all political offenders, but only for those from Britain, which we believe to have a relatively open legal-

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preside over the trial. *See* H. STERN, JUDGMENT IN BERLIN (1984). Judge Stern, applying United States constitutional law, determined that the defendant was entitled to a jury trial (despite the anomaly that juries generally do not exist under German law). United States v. Tiede, 86 F.R.D. 227 (U.S. Ct. Berlin 1979). Impanelling a jury of West Berliners to judge an East German "refugee" raised the spectre that the jury would refuse to convict the defendant in the American tradition of jury nullification. *See* Lowenfeld, *Hijacking, Freedom, and the "American Way,"* 83 MICH. L. REV. 1000, 1005 (1985). In other words, the jury would in effect graft a sophist clause upon the idiots' law of the Hague Convention. In the end, the jury did acquit the defendant of hijacking but convicted him of hostage-taking. Stern, *supra*, at 350. Judge Stern, affronted throughout the trial by the American prosecutor's stance that the Constitution was inapplicable to West Berlin and skeptical that parole (which he thought appropriate) would be granted, sentenced the hostage-taker to time served (nine months) and released him from custody. Stern, *supra* at 369-70.

81. S.C. Res. 461, U.N. Doc. S/13711/Rev. 1 (1979).

82. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3.

political system capable of accommodating legitimate dissent and change supervised by a legitimate judiciary.

Judge Sofaer spelled this out in his statement in support of the treaty before the Senate Foreign Relations Committee on August 1, 1985. He said that the "political offenses exception has no place in extradition treaties between stable democracies in which the political system is available to redress legitimate grievances and the judicial process provides fair treatment. . . . [W]e fully intend to negotiate. . . similar agreements with other nations that meet these criteria."[83] But what of states that do not? Is Sofaer admitting that the United States should grant political asylum to terrorists who commit the offenses listed in the United States-United Kingdom treaty against more venal regimes or that such terrorists should at least be exempt from mandatory extradition? If so, Sofaer is not, after all, totally committed to Porfiry's proposition. He knows that the Congress, the public and, no doubt, his own conscience would preclude establishing the same extradition relationship with, for instance, East Germany.[84]

Obviously, Judge Sofaer would not extradite Hitler's assassins. Even when he does draw upon an idiots' law, such as the United States-United Kingdom treaty, closer examination reveals that the law indirectly incorporates the sophists' elements of *why* and *to whom* by careful choice of treaty partners. How could it be otherwise, without paying exorbitant legitimacy costs?

VIII. CONCLUSIONS

We have engaged in this rather tortuous exploration of an issue of legal theory because we believe that action against terrorism by states will be effective to the degree that the international community widely perceives it to be not merely lawful (i.e., permitted by treaty or customary law or both) but also legitimate. To the extent civilized states seek

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83. Sofaer, *The Political Offense Exception and Terrorism*, 85 DEP'T ST. BULL. No. 2105, at 61 (1985). *But see* Note, *Extradition in an Era of Terrorism: The Need to Abolish the Political Offense Exception*, 61 N.Y.U. L. REV. 654, 684-86 (1986) (criticizing such agreements for creating an unnecessary and possibly politically inflammatory double standard).

84. *See also* European Convention on the Suppression of Terrorism, Jan. 27, 1977, *reprinted in* 15 I.L.M. 1272 (1976). Upon signing, the French delegation noted: "It is also clear that such a high degree of solidarity as is provided for in the Council of Europe Convention can only apply between States sharing the same ideals of freedom and democracy." 16 I.L.M. 1329 (1977). Nevertheless, article 13 of the Convention allows for far-reaching reservations. *See* Wood, *The European Convention on the Suppression of Terrorism*, 1981 Y.B. EUR. L. 307 (F.G. Jacobs ed. 1982).

redress against the threat of terrorism and, in particular, state terrorism, they should endeavor to obtain redress in circumstances where the legitimacy costs are relatively low. This is equally true whether the redress takes the form of unilateral or multilateral acts and applies even when those acts are strictly legal.

In practical application this suggests the following propositions:

1) If states seek redress against terrorist acts and state sponsorship of such acts by achieving agreement on what we have called idiots' law propositions, then we should narrowly define those norms in terms of the activity to be criminalized. The purpose of this narrowness is to achieve genuinely universal—or nearly universal—consent to a normative proposition that avoids *reductio ad absurdum* at its margins. Attacks on children, attacks on citizens of third parties, hostage-taking, attacks on diplomats and hijacking are examples. There is more to do along these lines.

2) In other instances we can narrow idiot's law to avoid the *reductio ad absurdum* problem by narrowing the constituency. Bilateral treaties making all violent acts against governments nonpolitical and thus extraditable offenses are legitimate if made with states that are liberal democracies living under a rule of law and offering its citizens means of peaceful change. They are illegitimate if made with authoritarian regimes that lack those characteristics. It is equally important to seek to implement such treaty reform with non-Western as with Western democracies, India being an important example of a regime plagued by terrorism to which we should offer the same consideration as we do to the United Kingdom.

3) If states pursue a sophist law approach—and no inherent reason exists, as we have seen, why states should not implement both idiots' law and sophists' law simultaneously in the effort to deal with so serious a societal disorder—then the proposing states should seek to lower the legitimacy costs by building a legitimizing process of decision-making into each sophist legal regime. That process, rather than the party claiming to have been wronged, should determine whether a wrong was committed, by whom, and whether there were exculpatory circumstances. The same process should also determine the appropriate remedy or response.

Ideally, this would suggest to international lawyers a vision of nations solemnly filing charges before the International Court of Justice. In practice, for many reasons, this is not now a realistic scenario, if only because of the limited number of states party to the general mandatory jurisdiction of that tribunal under article 36(2) of its Statute.

We must explore alternatives, however, if sophist approaches to terrorism are to be taken seriously. This suggests the need to multilaterial-

ize, regularize and perhaps institutionalize a process by which states implement any proposed sophists' law. That task is not as impossible as it sounds. For example, an agreement between even ten or fifteen democratic states to use various coercive measures, including but not limited to military force, against states that commit, support or condone terrorist acts aimed at a party to the agreement or harbor such terrorists could also include a process for collectively deciding, on the basis of evidence, whether an accused state had committed the acts alleged, whether extenuating circumstances applied and what countermeasures were permissible. Such a multilateral determination could legitimate either a collective response or merely legitimize a unilateral one by the injured complaint state.[85]

It is time to end the shadow-boxing between the supporters and the opponents of Porfiry's proposition, for nothing productive can come of that irresolvable, essentially useless conflict. Instead, proponents of legal remedies of all kinds should concentrate their critical and creative faculties on the more constructive task of devising means to make proposed remedies legitimacy-effective.

85. For a proposal along these lines see Address by Lowenfeld, "Some Suggestions for Attaching Meaning to the International Responsibility of States for Terrorism," Institute of Air and Space Law, State U. of Leiden (Jan. 1987).