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# PASSION AND NATION: WAR, CRIME, AND GUILT IN THE INDIVIDUAL AND THE COLLECTIVE

*Steve Sheppard\**

The United States of America is now at war.<sup>1</sup> The infamous destruction of September 11, 2001, which led to this commitment, was of the form and scope of acts that traditionally have led to war.<sup>2</sup> At the time of this writing, U.S. soldiers guard the recently occupied capital of Afghanistan, and U.S. special operations teams pursue terrorist

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\* Associate Professor, University of Arkansas School of Law. This Essay has benefited, albeit quite indirectly, from my conversations with my friend and teacher, George Fletcher.

1 President George W. Bush enunciated the claim of war on September 12, 2001. The White House describes the articulation of this policy on its web site:

What is the War on Terrorism? Nineteen terrorists hijacked four commercial airplanes on September 11, 2001 and crashed two of the planes into the twin towers of the World Trade Center in New York City, and one into the Pentagon in Washington, D.C. A fourth plane crashed in Pennsylvania. As a result, thousands of innocent individuals from more than 80 nations lost their lives.

.....

These terrorist attacks were an act of war against the United States. In a meeting on September 12 with his National Security Team, President Bush said, "The deliberate and deadly attacks which were carried out yesterday against our country were more than acts of terror. They were acts of war. This will require our country to unite in steadfast determination and resolve. Freedom and democracy are under attack.

The American people need to know that we're facing a different enemy than we have ever faced. This enemy hides in shadows, and has no regard for human life. This is an enemy who preys on innocent and unsuspecting people, then runs for cover. But it won't be able to run for cover forever. This is an enemy that tries to hide. But it won't be able to hide forever. This is an enemy that thinks its harbors are safe. But they won't be safe forever."

The White House, *Frequently Asked Questions*, at <http://www.whitehouse.gov/response/faq-what.html> (last visited Feb. 26, 2003).

2 Numerous works chronicle the takeover of full civilian passenger jets by terrorists, who then flew the jets into the World Trade Center in New York, but were thwarted by passengers from doing so in Washington, D.C. Perhaps the best record thus far is LIFE MAGAZINE STAFF, *ONE NATION: AMERICA REMEMBERS SEPTEMBER 11, 2001* (2002).

cells in a host of countries.<sup>3</sup> We prepare to invade Iraq, over whose skies our bombers are already in combat.<sup>4</sup>

Despite our confidence that we must attack the terrorists, it is unclear who, exactly, our target is. We know all too well that the enemy includes an unknown number of terrorist organizations, particularly al Qaeda, the group responsible for the attacks of September 11, earlier attacks on American civilians, and attacks on military and diplomatic installations and personnel.<sup>5</sup> The enemy also includes a number of states. At least so far, it has included Afghanistan, whose de facto government sheltered al Qaeda,<sup>6</sup> and it may include Iraq and others not yet designated.<sup>7</sup>

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3 Between September 16 and October 11, 2002, the Department of Defense reported 122 incidents of Iraqi anti-aircraft fire against U.S. and allied aircraft, with corresponding return fire by the aircraft. Linda D. Kozaryn, *Iraqi Forces Continue Strikes Against Coalition Aircraft*, Am. Forces Info. Serv., at [http://www.defense.gov/news/Oct2002/n10112002\\_200210115.html](http://www.defense.gov/news/Oct2002/n10112002_200210115.html) (Oct. 11, 2002).

4 Authorization for Use of Military Force Against Iraq Resolution of 2002, H.R.J. Res. 114, 107th Cong. (2002).

5 The initial evidence linking the attacks to al Qaeda was released on November 14, 2001, by the Prime Minister of Great Britain. See 10 Downing Street, *Responsibility for the Terrorist Atrocities in the United States*, Nov. 14, 2001, at <http://www.pm.gov.uk/output/page3863.asp> (last visited Feb. 26, 2003). Many studies of al Qaeda and its operations are now reaching the presses. See, e.g., JANE CORBIN, *AL-QAEDA: IN SEARCH OF THE TERROR NETWORK THAT THREATENS THE WORLD* (2002). For an analysis from the trial of al Qaeda members who attempted to destroy the World Trade Center in 1998, see Peter Bergen, *The Bin Laden Trial: What Did We Learn?*, 24 *STUD. IN CONFLICT & TERRORISM* 429 (2001).

6 The Department of Defense created separate operational names for component efforts of its operations in Afghanistan, under the umbrella designation of Operation Enduring Freedom. The most significant of these at this writing was Operation Anaconda, a combat exercise in Eastern Afghanistan that mopped up al Qaeda forces massing near the Pakistani border.

7 In the 2002 State of the Union Address, President Bush presented the most comprehensive articulation to date of the War on Terrorism, including military operations across the globe and, perhaps, war on North Korea, Iran, and Iraq.

While the most visible military action is in Afghanistan, America is acting elsewhere. We now have troops in the Philippines helping to train that country's armed forces to go after terrorist cells that have executed an American and still hold hostages. Our soldiers, working with the Bosnian Government, seized terrorists who were plotting to bomb our embassy. Our Navy is patrolling the coast of Africa to block the shipment of weapons and the establishment of terrorist camps in Somalia.

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States like these, and their terrorist allies, constitute an axis of evil, arming to threaten the peace of the world. By seeking weapons of mass destruction, these regimes pose a grave and growing danger. They could provide these arms to terrorists, giving them the means to match their hatred. They

Indeed, the indefiniteness of the enemy of this war is underscored by congressional authorization to the President to use the armed forces against “those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”<sup>8</sup> The greater clarity that might have come from the separate authorization to use force in Iraq was diminished by the conditional nature of the grant of discretion.<sup>9</sup>

This is an unusual war, without a clear enemy and without a clear end. It is fair to ask whether this is a war at all.<sup>10</sup> Congress has not

could attack our allies or attempt to blackmail the United States. In any of these cases, the price of indifference would be catastrophic.

George W. Bush, The State of the Union Address by the President of the United States (Jan. 29, 2002), in 148 CONG. REC. H98, H99 (2002). This collectivist approach raised concerns among both allies and adversaries. See David E. Sanger, *Allies Hear Sour Notes in “Axis of Evil” Chorus*, N.Y. TIMES, Feb. 17, 2002, at A18. The concerns of the heads of state and foreign ministers of the Islamic states were expressed through the Organization of Islamic Conference. See Abdelouahed Belkeziz, Press Release, *The Statements Recently Made, Targeting Some Member States, and Describing Them as Belonging to the So-Called “Axis of Evil”*, at <http://www.oic-oci.org> (last visited Mar. 25, 2003).

8 Authorization for Use of Military Force, 50 U.S.C.A. § 1541 (West. Supp. 2002).

9 Authorization for Use of Military Force Against Iraq, Resolution of 2002, H.R.J. Res. 114, 107th Cong. (2002). There is an important issue in this resolution—whether it is so broad a delegation of Congress’s powers to declare war as to be void under Article I of the Constitution. That issue, laden not only with the dubious values of the historical precedents of congressional waffling and presidential over-reaching in this field but also the limits of judicial review of this most political of questions, is beyond the scope of the present Essay. On the balance of these powers generally, see LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* (rev. ed. 1996).

10 The President’s call for a war on terrorists is not new, and even coupled with the use of troops may not alter existing policy. The policy seems to have originated under President Reagan, who often described U.S. counter-terrorism policy as a “war against terrorism.” President Reagan’s request for Congress to pass the Act for the Prevention and Punishment of the Crime of Hostage-Taking, the Aircraft Sabotage Act, Act for Rewards for Information Concerning Terrorist Acts, and Prohibition Against the Training or Support of Terrorist Organizations Act of 1984 were all a single “step in our war against terrorism.” Ronald Reagan, Message to the Congress Transmitting Proposed Legislation To Combat International Terrorism, 1984—I PUB. PAPERS 575, 576 (Apr. 26, 1984). This policy was meant particularly to justify military action and foreign policy. See, e.g., Ronald Reagan, Remarks at a White House Meeting with Members of the American Business Conference, 1986—I PUB. PAPERS 472 (Apr. 15, 1986) (“But let us be clear: Yesterday the United States won but a single engagement in a long battle against terrorism. We will not end that struggle until the free and decent people of this planet unite to eradicate the scourge of terror from the

modern world.” (addressing U.S. missile attacks on Libya)). Secretary of State George Schultz called for an American war against terrorism in 1984, particularly considering state-sponsored terrorist organizations. See George Schultz, *Terrorism and the Modern World*, Address Before the Park Avenue Synagogue in New York City (Oct. 25, 1984), in DEP’T ST. BULL., Dec. 1984, at 12. Then former President Nixon called for an “international declaration of war against terrorism” in 1985. *Washington News Release, Press Release*, UNITED PRESS INT’L, June 26, 1985. Indeed, President Reagan defended his attack on Libya in 1986 as necessary in a war on terrorism, as the first President Bush similarly argued in response to destruction of Flight 103 over Scotland. See Linda Greenhouse, *The War On Terrorism, from Tripoli to Belfast*, N.Y. TIMES, Apr. 30, 1986, at B6; *Pan Am 103: Still a Disgrace*, WASH. TIMES, Dec. 26, 1989, at D2. Among others, Secretary of State Madeleine Albright forecasted the potential of a war on terrorism long before September 11. Dov Waxman, *Terrorism: The War of the Future*, 23 FLETCHER F. WORLD AFF. 201, 204 (1999). The phrase is not unique to American policy but has been employed by other governments, including Great Britain, Turkey, Israel, Chile, and Argentina. Prime Minister Margaret Thatcher called for a war against terrorism in response to the murder of Lord Mountbatten. Leonard Downie, Jr., *IRA Bomb Kills Lord Mountbatten*, WASH. POST, Aug. 28, 1979, at A1 (“The people of the United Kingdom will wage the war against terrorism with relentless determination until it is won.”). Turkey has described certain of its operations—considered by the United States to be an attempt to constrain international terrorism and by others to be a catchphrase for the genocide of the Kurds—as a war on terrorism. Compare George Bush, Remarks at a Departure Ceremony for Prime Minister Suleyman Demirel of Turkey, 1992-93—1 PUB. PAPERS 225 (Feb. 11, 1992) (“The United States will support its friend in its territorial integrity, its sovereignty and stability, particularly in its war against terrorism.”), with Alan Brooke, *Letter: Let Britain Defend the Kurds—Not Turn a Blind Eye to Killing*, THE INDEPENDENT (London), Mar. 24, 1995, at A18 (equating Turkey’s war against terror with a “‘final solution’ to its Kurdish ‘problem’”). Other countries with early proclamations of a war against terrorism include Israel and Argentina. See, e.g., Dan Fisher & Doyle McManus, *Israel Repeats Threat To Retaliate for Raids*, L.A. TIMES, Dec. 30, 1985, at A1 (describing then-Israeli Defense Minister Yitzhak Rabin’s discussion of attacks on El Al in Vienna and Rome, and his declaration that, “[w]e are in a war against terrorists, all the groups of terrorists, including—maybe mainly—the Arafat group. . . . For us, it’s a daily war against terrorism”); Terrence Smith, *Israel After the Slayings: Munich Events Seem To End Prospect of Serious Talks with the Arabs Soon*, N.Y. TIMES, Sept. 14, 1972, at A16 (noting that many in Israel are demanding revenge in the form of an “all-out continuous war against the terrorist organizations”); Terrence Smith, *Israelis Report 60 Arabs Killed as Raid Ended*, N.Y. TIMES, Sept. 18, 1972, at A1 (reporting how Israeli “Lieut. Gen. David Elazar . . . described the operation as part of ‘our continuing war against the terrorists’”); see also Anthony Boadle, *Chile Under State of Siege*, UNITED PRESS INT’L, Nov. 6, 1984, available at LEXIS, News Wires (“The war against terrorism begins today . . . .”); Margaret Grammer, *Ex-Argentine President Accepts Sentence, Professes Innocence*, UNITED PRESS INT’L, Dec. 20, 1985, available at LEXIS, News Wires (describing Jorge Videla, former president of Argentina, defending the war against subversion and terrorism of the 1970s, as a “terrible war” that was necessary to defend the nation, but vaguely apologizing for the perhaps 9000 Argentinian “*desapercidos*”). As a policy term, the war against terrorism has been used broadly for decades. See, e.g., NEIL C. LIVINGSTONE, *THE WAR AGAINST TERRORISM* (1982) (examining the threat of terrorism).

declared war; it has only authorized the President to use force to prevent further attacks. The war on terrorism is neither a civil war nor a war between states, although like the Peloponnesian War two millennia past, it may come to incorporate several of each.

### I. OBSTACLES TO UNDERSTANDING CONTEMPORARY WAR

What tools shall we use to understand such a war, to place it in the context of wars in general, to evaluate its influence on the republic and its culture? Perhaps most importantly, what must we see as its purpose and its limits?

These questions, difficult enough in general, must be seen in the light of three developments regarding war in the twentieth century. First, the sum appreciation of war in our culture has moved from celebrating its glories to rejecting its atrocities. Nations engaged in total war saw too well the effects of massive and unredeemed loss in a century marked in its early years by legions of war memorials, pocked in the 1940s with leveled cities and destroyed peoples, and in its last decades shown in immediate brutality on the televisions of the world's homes.

This is not to say that the twentieth century invented the horror of war, which would ignore the lessons of centuries. The horror of war led to the creation of new commitments on a global scale, not only to end national adventures through war, but also to hold individuals accountable for their initiation, prosecution, and excesses.

These commitments have taken two distinct forms, each of such scale as to risk distracting attention from the other. The first was to forbid states from war, except in genuine self-defense. This prohibition, reflected at first in treaties at the armistice of World War I and then in the Kellogg-Briand Pact of 1928,<sup>11</sup> was enshrined two decades later in the Charter of the United Nations<sup>12</sup> and the Statute of the International Court of Justice,<sup>13</sup> which remains the forum for state accountability for war.<sup>14</sup> The second was to hold not only states ac-

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11 Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

12 U.N. CHARTER art. 2(3), 2(4).

13 Statute of the International Court of Justice, <http://www.icj-cij.org/icjwww/basicdocuments/basictext/basicstatute.htm> (last visited Mar. 5, 2003).

14 For a summary of the development of the prohibition on aggressive war, see Steve Sheppard, *The Laws of War*, in 2 GROUND WARFARE: AN INTERNATIONAL ENCYCLOPEDIA 490-92 (Stanley Sandler ed., 2002). The classic analysis of the prohibition remains IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 235-47 (1963).

countable for war but also, effectively, the individuals whose orders and actions are the means of a state's prosecution of the war.<sup>15</sup> Claiming not only to apply the 1928 treaty but also to enforce a natural law prohibition against crimes against humanity, the International Military Tribunals in Nuremburg and Tokyo prosecuted the surviving leaders of the Axis governments, sentencing nineteen leaders and hundreds of followers to death.<sup>16</sup> The Nuremburg Principle of personal accountability has been reflected in the creation of two ad hoc tribunals and, at century's end, in the Rome Treaty's establishment of the International Criminal Court (I.C.C.).<sup>17</sup>

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15 There were few decrees proclaiming a state's power to enforce the laws of war against its own and enemy soldiers, and there were very few attempts to try such cases, usually for violations of rules governing prisoners of war. See Howard S. Levie, *Penal Sanctions for Maltreatment of Prisoners of War*, 62 AM. J. INT'L L. 433 (1962). The first, a criminal hearing for the abuse of prisoners of war, may have followed the U.S. Civil War, when the federal army tried two former Confederate prison camp officials responsible for abuse of Union prisoners at Andersonville, sentencing one to hang and one to fifteen years of hard labor; another Confederate, tried for abuse at Raleigh, was acquitted. See WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 791-92 (2d ed. 1920). There seem to have been no trials of Union officers operating similarly abusive camps of Confederate prisoners.

The second attempt at trial followed World War I, when the allies sought the trial of German officers under the Treaty of Versailles for their personal conduct in violation of the laws of war. After the initial list of 896 to be tried by national war crimes tribunals, pursuant to Articles 228 and 229, was winnowed to forty-five to be tried by the Supreme Court of Leipzig, the show trials that followed were considered by most observers to be meritless, primarily as the Leipzig court generally accepted reliance on superior orders as a defense. See CLAUDE MULLINS, *THE LEIPZIG TRIALS* 27-32 (1921). But see *Llandovery Castle Case*, 16 AM. J. INT'L L. 708, 721-22 (1922), in which the court refused the defense when the order was a clearly illegal order to kill unarmed people in a lifeboat. One of the great innovations of the tribunals of the 1940s was the rejection of the defense of superior orders.

16 See Steve Sheppard, *War, Laws of*, in *THE DICTIONARY OF AMERICAN HISTORY* (forthcoming 2002). The voluminous record of each tribunal has been published. See *THE TOKYO WAR CRIMES TRIAL* (R. John Pritchard & Sonia Magbanua Zaide eds., 1981); *TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG* (1995). The numbers of lesser officials, soldiers, and civilians sentenced under the various tribunals are considerable. In Europe, tribunals other than those for major criminals led to at least 21,000 persons being tried, of whom at least 990 were sentenced to death, 2051 were acquitted, and most of the rest were sentenced to prison. HOWARD S. LEVIE, *TERRORISM IN WAR: THE LAW OF WAR CRIMES* 136-39 (1993). The International Military Tribunal for the Far East tried 5700 people, condemning 984 to death, acquitting 1027, and giving various lesser sentences than the rest. *Id.* at 184.

17 The records of the War Crimes Tribunal for the Former Yugoslavia and of the War Crimes Tribunal for Rwanda are at <http://www.un.org/icty/index.html> and <http://www.ict.rw>. The Rome Treaty and the records for the formation of the I.C.C. are at <http://www.un.org/law/icc/index.html> (all last visited Jan. 31, 2003).

The third development challenges the conditions from which the first two—repugnance toward war and accountability of individuals for it—arose. They were predicated on the centuries-old model of global governance by a network of state governments. Since the seventeenth century Peace of Westphalia, states have been sovereign—the only true players on the world's fields of combat. Atoms of the physics of war, states were seemingly its least unit of measure, albeit at times combining into alliances or splitting either in civil war or as the divvied spoils of victorious states. States were the only units able to muster the personnel, weapons, and supporting *matériel* needed to threaten other states.

This is no longer true. The peace of the states is increasingly threatened without the need of great armies, navies, and squadrons, mobilized to defeat a state's defenses. Evolution in technology and social organization have allowed small terrorist cells, unaffiliated with any state, to wield deadly force on a scale that once was the province only of states. This evolution challenges the network of states as the basis for individual security that has existed for 350 years.

So we return to these questions: how can we understand war? How can we evaluate war's influence on our republic and our culture? What are war's purposes and its limits?

## II. GEORGE FLETCHER'S TWO VIEWS OF WAR

Some tools, at least, to pursue answers to these questions, have been suggested in the writings of George Fletcher, whose recent projects have challenged Americans to examine not only the legality of the war on terror, but also the meaning of our ideas of punishment and guilt in a climate of renewed zest for military adventure and state retribution. Building upon his recent expansion of his corpus of criminal law theory and comparative law to include a keener study of nationhood's effect upon law, his current work has both deepened our own understanding of Fletcher's prior theories and contributed to our appreciation of the legal implications of war for the person and for the nation. This last enterprise is the focus of this Essay.

Fletcher's argument, presented first in his *Storrs Lectures*<sup>18</sup> and then in his monograph, *Romantics at War*,<sup>19</sup> is a nuanced exploration

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The Rome Treaty came into force on July 1, 2002, with the ratification of its eightieth and eighty-first states, Australia and Honduras. *Id.*

18 George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499 (2002).

19 GEORGE P. FLETCHER, *ROMANTICS AT WAR: GLORY AND GUILT IN THE AGE OF TERRORISM* (2002).



of the meaning of war in the age of terrorism.<sup>20</sup> He finds one key to this meaning in the nature of collective guilt, which is, in turn, both a justification of war itself and a fundamental component in determining responsibility for acts committed through war. In this examination, Fletcher considers the values necessary to these functions of collective guilt, and in them, he discovers the tension between the values of the Enlightenment and Romanticism.<sup>21</sup>

Fletcher invites us to take a robust appraisal of this tension. He invokes it as more than philosophies differing over the role of the individual in society; he presents it as the division between systems of aesthetics, systems of thought, and varieties of political, legal, and military action.<sup>22</sup> The Enlightenment notion of the person—an individual who is independent, rational, and free—is to be judged by that individual's actions and motives, and on no other grounds. The Romantic notion of the person—a member of a nation who is culturally and linguistically interdependent, passionate, and part and parcel of the general will of the people—is to be inextricably judged by engagement in the great projects of humankind.

He is careful to recognize the many definitions of both liberalism and Romanticism, and he locates his preferred models of both concepts as cases among families of contested models.<sup>23</sup> Even so, it is clear that he sees his models both as central to the concepts they stand for, and more importantly, as poles opposed to one another on a host of aesthetic and philosophical grounds.<sup>24</sup>

Fletcher grounds his notion of the liberal Enlightenment in a Kantian idea of the individual.<sup>25</sup> Emphasizing the similarities of each person with another, particularly through Immanuel Kant's view of reason or Adam Smith's view of interests, the Enlightenment model of

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20 See generally *id.*, Fletcher, *supra* note 18.

21 See FLETCHER, *supra* note 19; Fletcher, *supra* note 18.

22 See FLETCHER, *supra* note 19, at 12–25.

23 Fletcher, *supra* note 18, at 1504–13. Indeed, it is the multiplicity of these models that may lead him to depict the Enlightenment model, the model that is much more in use in the current literature, synonymously as a model that is of the Enlightenment, or that is universalist, or that is just plain liberal.

24 *Id.*; see also FLETCHER, *supra* note 19, at 17–22 (addressing Romantic concepts in light of their “opposites”).

25 Fletcher's appraisal of Kant's theory of the individual, and his long-running flirtation with neo-Kantianism, are reflected in George P. Fletcher, *Law and Morality: A Kantian Perspective*, 87 COLUM. L. REV. 533 (1987). There is more than a hint of the autobiographical in the struggle between an attraction to both Enlightenment idealism and Romantic conflict. See FLETCHER, *supra* note 19, at x–xiii. A scholar's personal engagement in the subject, however, need not make the scholarship any less compelling.

the person is best seen in Thomas Jefferson's model of equality.<sup>26</sup> Thus comes the model of the rational free-thinker, a Jeffersonian whose choices one might think would be the same made by others with the same gifts and opportunities. From this view of the person, the Enlightenment view of the collective is to aggregate the view of corporate actions; the act of a state or society is the sum of individual acts or preferences.<sup>27</sup>

Fletcher builds a contrasting model, relying particularly on Isaiah Berlin's essays on the Romanticism of Hamann, Herder, and the transcendentalists.<sup>28</sup> Adopting Berlin's synthesis, Fletcher contrasts the Romantic's particularism with liberal universalism.<sup>29</sup> "the core of Romantic thinking lies in the expressive self insisting on its own distinctiveness and value. The uniqueness of each person, and by analogy, of each national culture, leads to a rejection of the Enlightenment ideal of a universal culture based on reason."<sup>30</sup> This is the model of the passionate idealist, a patriot committed to the cause, a Lord Byron whose actions transcend the ordinary and serve to challenge all others to find their own art. From this view of the individual, Fletcher derives the Romantic view of the collective corporate as the associative model of corporate actions; the act of a state or society is distinct from (and greater than) the sum of individual acts or preferences.<sup>31</sup>

Thus, Fletcher develops a four-fold model of competing views of personal and corporate responsibility.<sup>32</sup> He derives his models of responsibility from his models of action, and he derives his models of collective action from his models of individual action.<sup>33</sup>

The result is similar to that reached by Jean-Jacques Rousseau. Fletcher's contrast between the Romantic and liberal depictions of the corporate will follows Rousseau's contrast between an aggregative sense of popular will, "*la volonté de tous*," as the sum of individual wills, and an associative sense of popular will, "*la volonté generale*," as the will of a single entity in the whole, distinct from any individual.<sup>34</sup>

26 Fletcher, *supra* note 18, at 1507.

27 *Id.* at 1509–10.

28 *Id.* at 1504–07.

29 *Id.*

30 *Id.* at 1505 (citing ISIAH BERLIN, *THE ROOTS OF ROMANTICISM* 95 (Henry Hardy ed., 1999)).

31 *Id.* at 1509.

32 *Id.* at 1554–61.

33 *Id.* at 1555.

34 *Id.* at 1509 (citing JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 72–74 (Maurice Cranston ed., St. Martin's Press 1968) (1762)).

The contrast, once the focus of inquiry is turned from liberal to Romantic and from action to responsibility, is to shift the emphasis from the responsibility of the one to the role of the many. Is the individual the unit of responsibility, or is the state?<sup>35</sup>

Fletcher knows that his audience of readers is trained to respect the idea of the individual, as a free representative of the universal. He also senses the allure and describes the current seduction of our views of the patriot who is at the service of the nation. These notions, opposed and yet both embraced in the popular culture, present for Fletcher, a critical choice that drives our view both of guilt and, ultimately, of war.

For liberals and Romantics at war, this is one of the primary intellectual fields of battle. As the fight over collective guilt is won or lost, so are larger stakes decided: is the individual the ultimate unit of action and responsibility, or are we, as individuals, invariably implicated by the actions of the groups of which we are a part?<sup>36</sup>

What Fletcher sees in these stakes is presented as a tapestry of observations of the influence of the universal and the collectivist in his retelling of the history and significance of collective guilt and the law of war—particularly as it requires individuals to be held responsible for national acts and nations to be held responsible for individual acts.<sup>37</sup>

Fletcher does not resolve the tension between liberal and collectivist notions of responsibility and guilt for crimes or wars. Rather, he shows the conflict that persists as these views are reflected in various degrees throughout municipal and international law, and throughout our underlying notions of the moral claims that these laws ought to reflect. Granted, he rejects certain Romantic notions as they are apparent in the materials. For instance, he rejects the idea of individual responsibility for crimes committed by a nation.<sup>38</sup> To do so, however, somewhat emphasizes another Romantic element; it requires him to accept the nation as an agent capable of moral agency, a notion that is at least potentially as collectivist as the notion of individual responsibility for collective conduct.

Instead, Fletcher illuminates a variety of issues in this tension, focusing on two errors, two “excesses,” that are especially likely as a re-

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35 *Id.* at 1504.

36 *Id.*

37 *Id.* at 1513–37.

38 FLETCHER, *supra* note 19, at 91. (“[I]t is plausible to think of the nation as the entity that bears collective responsibility for the crimes of its subjects and citizens.”); *id.* at 139 (“[W]e concluded that—so far as there is collective guilt for these [war] crimes—it is appropriate to treat the nation as the bearer of that guilt.”).

sult of Romantic thinking in this domain of law and moral understanding.<sup>39</sup> These excesses result from too easily ascribing and denying guilt as a result of national responsibility.<sup>40</sup>

There is a Romantic bias toward “generational guilt,” ascribing guilt for national action to all of the members of the nation, even those born after the act.<sup>41</sup> Fletcher sees nationhood as an appropriate moral agent capable of bearing guilt, and the reflection of this guilt is limited to those who were members at the time of the guilty action.<sup>42</sup>

There is also a Romantic bias in what Fletcher calls “guiltless sincerity,” crediting an authentic commitment by an individual to the premises of a culture or nation, thus allowing the purity of heart of a wrongdoer to mitigate the guilt in the wrong.<sup>43</sup> From this comes a popular form of moral relativism that shirks to judge when an otherwise morally offensive action is based on a cultural or national ethos.<sup>44</sup> In this manner, terrorist attacks on civilians in the genuine belief of religious obligation can be blameless.<sup>45</sup> Fletcher sees guiltless sincerity as part and parcel of ideological justifications for religious violence and the military defense of superior orders, both of which are morally indefensible.<sup>46</sup>

After sounding the tocsin to warn of Romantic excesses, Fletcher returns to vindicate partially a Romantic view of the nation, not only as the agent of guilt following national wrongdoing, but also as a credible moral agent for all of its collective acts, bad or good.<sup>47</sup> Indeed, the nation provides a method for accomplishing what Fletcher considers the distribution of guilt in a manner that both explains and poten-

39 *Id.* at 140.

40 *Id.*

41 *Id.* at 142–43.

42 Fletcher reaches this result by limiting the concept of guilt so that it cannot visit the sins of parents on their children. *Id.* at 141–50. He could, however, also have reached this result by limiting the relationship between the nation and its people in the formation of the general will, so that only the will of those members of the nation at the time of an act can be sufficiently willful, or engaged, in the act to share meaningfully in its guilt.

43 *Id.* at 148–56. This, Fletcher finds to be a dangerous Romantic misreading of Kant’s universalist role of motive in assessing the moral worth of an action. Good motives cannot be the basis of the good will, which depends on the rationality of the whole of the willed action, not merely the integrity of an intention toward an altruistic end. *Id.* at 150–51.

44 *Id.* at 148.

45 *Id.* at 154.

46 *Id.* at 148–56. In this criticism of the Romantic excess of guiltless sincerity, Fletcher has the most unlikely of allies. See CARL SCHMITT, *POLITICAL ROMANTICISM* (Guy Oakes trans., 1986).

47 FLETCHER, *supra* note 19, at 157–58.

tially mitigates the guilt of awful collective acts, such as the Holocaust or mass death.<sup>48</sup> Without a social or national framework of expectations to engage in an act that outside that framework is easily perceived to be evil, the evil in some acts of free will would be, essentially, unexplainable.<sup>49</sup>

It should be noted that Fletcher's focus on the Romantic nature in America's view of war does not require the conflict with the liberalism of the Enlightenment that at least one critic has so quickly found there.<sup>50</sup> Rather, Fletcher has suggested that we as a people appear drawn to both views, as he is. To recognize this tug toward the Romantic, whether it is preferred or not, is necessary not only to study the relationship between Romanticism and liberalism but also to consider the dangers and excesses to which each are prone.

In the end, Fletcher is careful. His effort is one of warning, not of resolution. He finds in the Romantic a will to recognize certain of our passions as we accept an identity that is not fungible and desiccated in its universal rationality, but that is contingent on our nationality, our traditions, and our culture. Romanticism gives us a tool by which we may see more clearly the will that animates our thoughts, our policies, and our army when our nation, if hardly us personally, are threatened or harmed. But he finds in Romanticism also the seeds of excess, of moral failure, and of the dissipation of guilt.

Fletcher's wide-ranging, erudite spelunking in the caves of history, theology, philosophy, art, politics, and law plumbs far too many depths to be mapped here. To embrace, however, at least in part, the rich debate Fletcher seeks to encourage, I will pluck just a few samples from his bag and attempt several lines of further development.

### III. GUILT IN THE INDIVIDUAL, THE COLLECTIVE, THE NATION, AND THE STATE

The first line of development is prompted by Fletcher's exploration of collective guilt. By considering not only the relationship of guilt per se to the notion of guilt in a collective, and by also considering the idea of mitigation, Fletcher has provoked us to reassess our views of how we should perceive the relationship of the individual to a state that commits immoral or illegal acts.

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48 *Id.* at 160-67.

49 In this, Fletcher was drawing on the theologian Harry Frankfurt. *Id.* at 169 (citing HARRY G. FRANKFURT, *Freedom of the Will and the Concept of a Person*, in *THE IMPORTANCE OF WHAT WE CARE ABOUT: PHILOSOPHICAL ESSAYS* 11 (1988)).

50 See generally Peter Berkowitz, *Byron at Ground Zero*, *NEW REPUBLIC*, Nov. 4, 2000, at 31.

### A. *Collective Guilt as a Mitigation of Individual Guilt*

One of the most compelling insights Fletcher derives from his view of war through the Romantic lens is his consideration of the relationship of collective guilt upon individual guilt. Fletcher considers the moves of his predecessors, who consider this relationship in narrower contexts.<sup>51</sup>

The older context is related to the measurement of individual guilt—whether superior orders can excuse the illegal conduct of one who is ordered to commit an illegal act. The answer to this question has evolved over the century. In 1921, the Supreme Court of Leipzig said superior orders were a defense.<sup>52</sup> In the 1940s, the International Tribunals said they were not, although they might be an element for the mitigation of punishment.<sup>53</sup> The 1998 Rome Treaty, governing the new International Criminal Court, also says they are not, although it allows ignorance of the illegality of the conduct ordered to be a

51 FLETCHER, *supra* note 19, at 148–56 (examining others' narrower interpretations of the guilt relationship and how his view differs).

52 See MULLINS, *supra* note 15, at 95–96 (quoting from the court's holding in the trial of Lt.-Capt. Karl Neumann, whose U-67 had sunk a hospital ship: "The accused cannot be held responsible for these events. He was covered by the order of his superior which he was bound to obey"). The Leipzig Supreme Court distinguished Neumann's case from Patzig's case, in which the latter captain fired upon and abandoned the crew of a hospital ship it had torpedoed, after interviewing the crewmen already in lifeboats and ascertaining the absence of combatants. The court noted that in rare instances an order must be disobeyed "[i]f such an order is universally known to everybody, including the accused, to be without doubt whatever against the law." LEVIE, *supra* note 16, at 34. When the captain ordered his subordinates to kill innocent crewmen, "[t]hey could only have gathered, from the order given by Patzig, that he wished to make use of his subordinates to carry out a breach of the law. They should, therefore, have refused to obey. As they did not do so, they must be punished." *Id.*

53 The trials of the International Military Tribunals were held pursuant to Law Number 10 of the Allied Control Council for Germany, entitled Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, incorporating the Moscow Declaration and the London Agreement and Charter of 1945. Article Eight of the London Charter specified that "[t]he fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility," may be considered in mitigation of punishment if the Tribunal determines that "justice so requires." Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 1548, 82 U.N.T.S. 279, 288. The first major test of this article was in the case of the *Peleus*, in the trial of Heinz Eck, captain of U-852, whose crew machine-gunned the survivors of the steamer it had just torpedoed to prevent them disclosing the submarine's location. *In re Eck*, 13 Ann. Dig. 248 (British Military Ct. 1945). All of crewmen involved were convicted, despite claims that they were carrying out Eck's orders. *Id.* at 249.

defense unless the illegality, as in the case of genocide or crimes against humanity, is “manifestly unlawful.”<sup>54</sup>

The later context for relationship between individual and collective guilt is to consider, like Karl Jaspers, whether collective guilt can exist at all. Jaspers considered the nature of guilt in four senses—criminal, moral, political, and metaphysical—and determined, although an individual may have guilt for what that individual’s state does, particularly moral or metaphysical guilt, that guilt is a personal attribute. So, he concluded, it is not possible for groups, or nations, meaningfully to bear guilt, although either may bear political liability.<sup>55</sup>

Fletcher’s consideration of these two contexts of the relationship between the personal and the collective is described briefly above, but it is worth considering again his perception of the Romantic notion of asserting the identify of the self. In the Romantic ethos, the individual is so immersed in the society that the personal submersion of one’s identity in social values is a triumph of the individual. From this, Fletcher sees the nation, as a rough holder of the set of social values, as a suitable agent to be said to have guilt, although only to the extent that the nation includes the generations whose conduct was guilty. However, there is a danger of allowing too much of an excuse to the individual. Thus, the individual and the nation both remain morally responsible, and the values of the Enlightenment are not altogether extinguished by application of the Romantic ethic.

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54 Rome Statute of the International Criminal Court, art. 33, “Superior orders and prescription of law,” specifies

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
  - (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
  - (b) The person did not know that the order was unlawful; and
  - (c) The order was not manifestly unlawful.
2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Statute of the International Criminal Court, art. 33, U.N. Doc. A/CONF. 183/9 (1998), available at <http://www.un.org/law/icc/statute/romeofra.htm> (last visited Oct. 10, 2002).

55 Fletcher, *supra* note 18, at 1506 (citing KARL JASPERS, THE QUESTION OF GERMAN GUILT (E.B. Ashton trans., 1947)).

B. *Moral Ecology as a Tool for Ascertaining the Collective's Influence on the Individual*

Considering Fletcher's view, we might refine our notion of the mitigating effect of collective responsibility on individual responsibility, and so we might see a more general theory of the relationship of collective to individual guilt. To do so, we might consider one idea that arises from current legal theory, Robert George's notion of moral ecology. Moral ecology is a nice shorthand term for the whole set of norms in a community that are the public consequences of private and public actions, from which every person in the community learns what is accepted as moral in that community.<sup>56</sup> Moral ecology is an aspect of culture, and it might be seen as the organization of social capital.<sup>57</sup> Moral ecology is, in essence, the basis of the common sense of a society, the shared understanding of what is to be done in any given situation. George develops his theory for the purposes of justifying laws that develop healthy, rational, and moral sets of rules in a community's ecology,<sup>58</sup> and yet this notion provides a potentially useful tool in considering the collective view as it affects an individual's

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56 See ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW (1999); ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY 1 (1993) (proposing that laws help to "preserve the moral ecology in which people make their morally self-constituting choices"); Robert P. George, *The Concept of Public Morality*, 45 AM. J. JURIS. 17, 25 (2000) (suggesting that legal indifference to private immorality may warp public and private moral analysis) [hereinafter George, *Concept of Public Morality*]; see also MICHAEL NOVAK, ON CULTIVATING LIBERTY: REFLECTIONS ON MORAL ECOLOGY 18–19 (Brian C. Anderson ed., 1999) (asserting that building and preserving a free society requires maintaining a "moral ecology" to prevent the corruption of moral relativism).

57 See Francis Fukuyama, *Social Capital*, in LAWRENCE E. HARRISON & SAMUEL P. HUNTINGTON, CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS 98 (2000).

58 George is explicit in both the extent and purpose of his theory, which is built on Thomist foundations developed by John Finnis. For George, "political authority legitimately extends even to the regulation, within limits, 'of friendships, marriage, families, and religious associations,' as well as all the many organizations and associations which, like the state itself, have only an instrumental . . . common good." George, *Concept of Public Morality*, *supra* note 56, at 29 (quoting John Finnis, *Is Natural Law Theory Compatible with Limited Government?*, in NATURAL LAW, LIBERALISM, AND MORALITY 5 (Robert P. George ed., 1996)). This extent is inherently limited only by the obligation of the state to securing the social conditions of the well-being of individuals and their communities, which for Finnis would limit the state from regulating private and secret relations, a limit George rejects. *Id.* Although I find both views quite compelling, one need not endorse George's, or for that matter, Finnis's views of the proper function of the state as a guarantor of a proper moral ecology to employ the phrase as a useful device for expressing the whole of a normative system in the community.



view of what is immoral. Two applications, at least, may help in understanding this relationship.

### 1. Moral Ecology of a Group as a Mitigating Factor for a Member

In the first application, moral ecology provides a mitigating, but not an exonerating, framework for actions that are compatible with a community's norms. A person whose understanding of right and wrong is derived from the surrounding culture will, in fact, have little chance to see alternatives, to challenge any understanding that is unchallenged by others. It is asking much for someone to know better than all those around him.

#### a. The Moral Ecology of Groups as Mitigation for Individual Acts

The problem, of course, arises when others outside that ecology challenge its values. The outsider might be removed physically or temporally, or, more rarely, he might challenge it from within.

Slavery is the classic example. Today's arguments over the wickedness of eighteenth-century slaveholders can neither exonerate nor utterly condemn this conduct, seen to our eyes as evil but to so many of that age as benign or even beneficial to the slave. The ecology of acceptance was too widespread and too compelling to allow either extreme. Rather, it suggests a mitigation of our sense of guilt in the slaveholder. Who would have told the slaveholder of his evil? Should we demand each one see it for himself?<sup>59</sup> And, when others finally condemned slavery, when ought the condemnation be seen as so compelling that those whose conduct is being condemned must agree?<sup>60</sup>

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59 No number of anecdotes could prove this point, but at least one might illustrate it. William Lloyd Garrison, a child of devout Baptists dedicated to equality, adopted abolitionism from a fellow printer, who was so committed to abolition that he placed his children with foster families to allow his devotion to that mission. See HENRY MAYER, *ALL ON FIRE: WILLIAM LLOYD GARRISON AND THE ABOLITION OF SLAVERY* 52-56 (1998). How likely would Garrison have been to adopt abolition as his cause without such a background and without such a meeting? The influence of each person's acts and statements influences the moral ecology, and from such stimuli change, or stasis, is more likely.

60 In contrast to Garrison's conversion is that of John Newton, the slaver who became a country priest in the Church of England and gradually came to reject his past actions. Ultimately, his rejection took the form of a written hymn that is still popular, *Amazing Grace*. His diaries make clear that, even in his later years when he viewed with repugnance his early life as a slave ship captain, his only sense of mitigation was that no one ever told him this trade was wrong. This was no exonerating of his conduct, but it provided a sense of his lessened responsibility. See generally WILLIAM E. PHIPPS, *AMAZING GRACE IN JOHN NEWTON: SLAVE SHIP CAPTAIN, HYMNWRITER,*

We in the developed countries of the twenty-first century see the slaveholder as morally compromised. But we must, at least in a way, see him as less wicked in the eighteenth century, prior to the cultural ascendance of abolitionist thinking, than we do in the twentieth century, when abolition and respect for the dignity of individual has finally occupied the whole of the moral ecology of the developed world.

Thus, the sense of mitigation that arises from collective guilt may, as it applies to an individual's guilt, operate in the same manner that superior orders operate. That the guilty act was in accord with the moral ecology may mitigate, but it cannot exonerate.

As with the limits of mitigation arising from superior orders, the mitigation arising from collective guilt is also limited. An action, even one held by one's own culture as acceptable, might be so outrageous that it is "manifestly unlawful."<sup>61</sup> In this sense, reference to the members of the culture that accepts the conduct as acceptable is likely to be useless. Effectively, this limit is one that someone who is outside the culture is likely to judge and the judgment will turn on the balance between, on the one hand, the appearance of wickedness of the conduct and, on the other, the strength and basis of the moral ecology that accepts the conduct.

The strength and basis of the moral ecology is an important consideration, and it is still quite vague. The nation is unlikely to define the set of individuals that participate in a particular moral ecology. Jaspers is right to see that individuals in a group, even a national group, hold shared values, and political liability (if not guilt) may attach both to everyone in the group and to the group as a whole as a result of engagement in these values or conduct conforming to them.<sup>62</sup> What then, is the group? Is the nation the group? A political party? A philosophical or religious movement?

Certain groups will have a greater size and so a greater authority over their members owing to size alone. With size, the group is isolated from views or evidence that would challenge ideas or beliefs central to the culture, keeping the group's moral ecology free from challenge. While isolation can be achieved by withdrawal of small groups from an isolated culture, such as the Moravians or Amish in

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AND ABOLITIONIST 173–84 (2001) (describing Newton's moral and ethical evolution, as he went from slave ship captain to abolitionist). Newton's diaries are quoted at length in the video, *THE BILL MOYERS COLLECTION: AMAZING GRACE* (Films for the Humanities 1992).

61 *See supra* note 54.

62 KARL JASPERS, *THE QUESTION OF GERMAN GUILT* 39–43 (E.B. Ashton trans., 1947).

the United States, maintaining a population sufficient to maintain such groups over time may become a problem, although it need not always, as in the case of the American Mormons. Greater size, moreover, can be a cause for pride within the group as proof of the group's success.

Perhaps more compelling than size are two other factors—first, a unity of culture or purpose that is related to authority and, second, an ideological basis for authority. Unity of culture is more likely to occur in a territorial monopoly, although there are many examples of this not being the case, in which a society is riven by sub-groups with diverse, opposed, and strongly held cultural, religious, social, or economic views, with few perceived bases of common purpose. Such a division may well produce stronger groups, with a distinct moral ecology within each group, leading to intense rivalry as each sees the other as a threat to their ability to maintain their own moral ecology. Divisions among groups, at the least, are likely to diminish the probability of the state becoming the most important group for the whole state, although it can of course be captured by one group, acting as a faction toward the state as a whole.<sup>63</sup>

The second factor leading to a group capable of collective responsibility is likely to be ideology. A great social, religious, or nationalist underpinning is prone to yield a greater authority to values, owing to the emotional commitment that can be derived from such claims on individual loyalty. Regrettably, many of these underpinnings have historically been based on the use of intolerance as a mechanism for encouraging loyalty to the group and its ideology.

b. The Moral Ecology of States as a Mitigation for Individual Acts

This discussion of groups possessing a moral ecology in general is a predicate to considering the effect when a state is such a group. Of course, many states are not, and we generally divide the idea of groups with moral ecologies at a state level into the concept of a nation. In other words, nations have largely homogenous moral ecologies, but states may be homogenous or heterogeneous in their moral ecologies.

In many instances, the state and the nation are likely to be sufficiently related that citizenship implies nationality and vice versa. This

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63 Rousseau's famed General Will, the basis for Rousseau's social (but not governmental) contract, is not necessarily active in every state. Rousseau believed that the general will can become subordinate to other wills in the state, especially when a small group deceives the honest populace. See JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT, bk. IV, at 31–32 (Donald A. Cress trans., 1983) (1762).

is increasingly rare in the world, however, and most states have significant populations that think of themselves as less than accepted within the nation of their state. Membership in a state might or might not demarcate the population of a nation. When it does not, as when a state contains a national minority, or multiple nations in opposition to one another, the state is likely to be captured by one group to the expense of the other, as in the case of many of the post-colonial states of Africa.

But the model of states that are the repositories of collective guilt remains the states that were the belligerents of World War II, particularly Germany and Japan, but also the Allied Powers. To consider such states as the basis for a collective guilt, it is fairly plausible to consider each state having a unique moral ecology, relatively comprehensive throughout the state.

We can then finally turn to consider what relationship might exist between the collective guilt that might attend to a state and to its people and the relationship between that collective guilt and individual guilt for personal actions as they relate to the state's policies and actions. There is a wide variance in how this relationship might work, based not only on the state's actions and the contingent political history prior to them but also on the form and content of the state's moral ecology.

We must accept that states with cultures that are likely to be quite illiberal are precisely those that are likely to be the most significant candidates as hosts of a moral ecology that might mitigate guilt. Spain under the Inquisition, Massachusetts Bay during the witch trials, the slave-holding plantations of the American South, Nazi Germany, Stalinist Russia, Taliban-controlled Afghanistan—these are the most influential national moral ecologies.

That these moral ecologies may mitigate the individual guilt of a member of such states also suggests that the effect upon collective guilt is for that reason also greater. In other words, if the authority of culture, the effect of the moral ecology of a group upon an individual, is so strong as to mitigate that individual's guilt, the nature of that ecology is, by that fact, proof that the group supporting that ecology bears a collective guilt for the individual's action. This is not to say that "society is to blame" to the exclusion of the individual, but merely to say that society shares that blame.

From this mitigating relationship between moral ecology and compatible action, it would seem that Jaspers is wrong to say that guilt is so personal an attribute that a group cannot bear guilt.<sup>64</sup> A group

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64 JASPERS, *supra* note 62, at 40–42.

can share a set of beliefs from a common set of norms and can therefore bear responsibility, as a group, for these beliefs. Such a shared notion of responsibility may be more than political; it may be quite personal, and guilt can arise from acts for which the group is responsible owing to the compatibility between the group's moral notions and the act committed. In such a circumstance, the guilt is collective, and upon the group as a group, upon the citizens as a state. Each person bears a shared sense of that guilt for a wicked act for which the group is responsible, and this sense arises strictly from membership in the group. Even if that person had individually rejected the particular norm that would have been most compatible with the given act, the guilt is one of association, not conduct or assent, and that rejection has no bearing in the sharing of the collective guilt.

The circumstances in which this guilt is most clearly collective upon the group of the whole citizenry of a state are when the wicked acts are of a form that requires a state to commit them. States alone can enact laws, enter treaties, and most importantly, engage in most forms of war.

We must here set aside the war-like actions of terrorism, a problem to be revisited in Part V of this discussion, below. For now, it is enough to say that for the last two centuries, the maintenance of wars to effect political change or satisfy other strategic objectives has required the commitment of a permanent or nearly permanent structure capable of mobilizing a sizable portion of a nation's wealth and, often, manpower.<sup>65</sup> The nature of the mobilization of resources that is necessary to engage in war requires that a state be a corporate actor.

The collective responsibility for such actions by a state is accepted by essentially all observers both within and without states that commit themselves to war. This responsibility is one reason for the constant drumbeat of official rhetoric traditionally surrounding the decision to commit to war, to demonstrate that the war is justified.<sup>66</sup>

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65 The first call for what we would now think of as a total mobilization, the *levée en masse*, as the necessary means for warfare was by Guibert, whose book on strategy influenced Napoleon. See FRANÇOIS APOLINNE GUIBERT, STRATEGIQUES 127-476 (Lé Heme ed., 1977) (1803). What was once thought to be the logical conclusion from this approach, the notion of total war, was replaced in turn by the concept of thermonuclear war.

66 The best American example of this remains President Lincoln's justifications of the Union's commitment to war, which evolved from union for its own sake to union for the sake of salvation, freedom, and equality. The study of the effect of this rhetoric on national development is, of course, GEORGE FLETCHER, OUR SECRET CONSTITUTION: HOW LINCOLN REDEFINED AMERICAN DEMOCRACY (2001).

Any American who travels in a foreign nation will understand this phenomenon when the government of the United States announces a policy or commits an act that is unpopular in the nation being visited. The American might personally consider the policy unwise, or even illegal, but the American will still be burdened with responsibility for it, and likely feel some personal investment in its criticism by the locals. This sense of nationalist collective responsibility is held both by the traveler and the locals whom the traveler engages along the way; anyone traveling abroad is an international scapegoat for one's state's policies, particularly its wars.<sup>67</sup>

## 2. Individual Guilt for the Generation of Collective Guilt

There is a second application of the notion of moral ecology to our understanding of the relationship between collective and individual guilt. Different people participate differently in the development and maintenance of a moral ecology. Some individuals have greater influence. Their public actions, or their private actions, have greater significance in causing others in the moral ecosystem to accept their views as moral or their conduct as morally imitable. As Jaspers said of political liability, it is graduated according to the degree of participation in the regime.<sup>68</sup>

Thus, a greater degree of one's individual guilt may arise from one's contribution to a collective guilt, and vice versa. One might, through one's attempts to alter moral ecology or even by attempting to thwart an act by agents of the group, be exonerated from individual guilt for a collective act. Even so, membership in the group is all that is necessary to share in the collective guilt.

Thus far, the sense of collective guilt has been one in which the focus has been upon a group. There is a separate form of question that applies, however, when the group is a state.

The state is a particular form of group in which the sum is often far greater than the parts, particularly when the sum is both the group

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67 It is possible, however, that the member of the group who opposes an action by the group would feel shame and not guilt for the action of the group. The differences between shame and guilt are subtle and variable, and yet in many contexts, such as in the possibility of absolution, the differences can be compelling. See FLETCHER, *supra* note 19, at 188–92; HERBERT MORRIS, *GUILT AND SHAME* 1–5 (Herbert Horns ed., 1971) (posing questions about the potential similarities and differences between guilt and shame). The manner in which Fletcher and Jaspers employ guilt is that shame may be thought of as a contingent result of moral or metaphysical guilt when that guilt is accepted by the guilty party. In that sense, the idea of expecting one to feel guilt may be similar to expecting one to feel shame.

68 JASPERS, *supra* note 62, at 40–42.

that generates laws and enforces them under a threat of violence and the group that fields armies and fleets for war. Membership in a state is, for these reasons, if for no others, qualitatively distinct from membership in other groups.

The state creates a normative system, the system of laws, that is intended to have authority over the individual, in the name of the state.<sup>69</sup> The individual has a choice in obeying or failing to obey a law, although the burdens of disobedience are often harsh, or at least appear prior to disobedience likely to be harsh.

This coercive power of the state in individual decisions can be very influential. Further, the distinct elements of nationalism, patriotism, and conformity echo the commands of the state in the moral ecology of the society ruled by the state. These influences, both direct and indirect from the state on the moral ecology that frames an individual's views of morality, serve to heighten the relationships between individual and collective guilt. The state's endorsement of immoral conduct increases the mitigative role of the state's moral ecology, buttressing the sense of mitigation of the individual's guilt for state-sanctioned, immoral conduct. Likewise, it increases the sense that the state is a group that is capable of both responsibility and guilt for such conduct.

The question, then, is what is the relationship between the subject and the state, in the sense that the subject's relationship to the collective guilt of the state can be ascertained. At the extreme, should a resistance fighter share in the collective guilt for conduct of a state the fighter seeks to overthrow?

One approach to answering this question is to consider Rousseau's answer, the form that the state's myth of sovereignty takes.<sup>70</sup> This approach runs quickly out of steam, though. The collective guilt in the state as a group does not turn upon a state's particular theory of sovereignty. Different theories of sovereignty persist, of course, for different states. One state might consider the person who is a monarch the sovereign, while another considers its people to be sovereign, and yet another declares a figurehead president as its sovereign. In all, however, a relationship between the sovereign and the subject requires the subject to perform or abstain from acts dictated by laws. In

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69 On the relationship of states and officials to norms that bind the citizen, see Steve Sheppard, *Perspectives on Ethics and Justice*, in UNESCO ENCYCLOPEDIA OF LIFE SUPPORT SYSTEMS (forthcoming 2003).

70 See generally ROUSSEAU, *supra* note 63, at 52–66 (discussing the relationship between the form of government, the nature of the country, and the extent that the individual and general wills are expressed in state action).

none are the laws actually made by the sovereign, but the officials of all states set norms by law that must be obeyed by the subjects.

Far more useful is to consider the nature of the state's political organization. A political organization in which the individual has both a greater influence in the decisions of the state is one in which the subject has a greater degree of responsibility for the state action. On the other hand, this greater responsibility may appear offset by the power, usually correlative to the power of political participation by the subject, to abstain from participation from the state's action. This second approach is spurious, as the free choice to abdicate responsibility for a state's action is, from the view of one who is harmed by that action, indistinguishable from an endorsement of that action.

Thus, in general, when a subject is a subject to a state with a political organization in which individual participation in state decisions is great, the subject's mitigation from the collective responsibility of the state ought to be diminished. The converse appears true as well, that a person with little or no opportunity for effective participation in a state decision may derive a greater mitigation for the responsibility for personal actions from the collective responsibility for the states. So a citizen of Russia in 1949 would have a greater degree of mitigation for personal actions in furtherance of a command from Stalin than would a citizen of the United States in 2002 for personal actions in furtherance of a command from President Bush.

### 3. The Responsibility of Officials

Many people have extraordinary influence over a nation's moral ecology, and many might have more influence, depending upon the contingent values that exist in a culture. A highly religious culture will likely put more stock in the statements of a religious leader, and a sophisticated, urbane culture might put more stock in a civilian essayist, artist, or novelist. Each person with influence over the moral ecology of a nation bears the responsibility for acting with such influence, and insofar as the influence exists in one person to a greater degree than in others, each person has that much greater a responsibility for the actions of others that are consonant with that ecology.

These forms of influence, then, vary according to the culture of the nation, and the role of the moral ecology or ecologies in the state. One form of influence tends to be quite strong, regardless of other elements in the culture, and it is the law.

A state's legal officials bear a disproportionate role in the development of the moral ecology in the state. By determining which values to enshrine in the law, the official exercises an authority over the



norms of a culture that may either alter or reinforce preexisting moral notions with great force, immediacy, and geographic scope.

Great concern of late has been brought to bear on the willingness of the mid-century German legal system to embrace the doctrines of National Socialism. Focusing in part on the role of Carl Schmitt, one of the leading law professors of the age, and in part on the judiciary, these studies tend to demonstrate the change that the legal system underwent to coordinate the tools of law with the tools of Nazi policy.<sup>71</sup> Such a transformation demonstrates, as if it is needed, the potential for the legal system to reinforce a moral ecology.<sup>72</sup> The criticisms of this transformation demonstrate at least an expectation that the legal system could curb its excesses. A legal official, particularly one with a wide range of discretion or one whose decisions have considerable influence on junior officials, has a great individual responsibility not only for the legal culture of the state but for the moral ecology of the state as a whole.

An official with such responsibility has a greater degree of personal culpability in the development of a state's moral ecology, and thus bears a greater responsibility for its collective actions. For this reason alone, an official has a lessened opportunity to expect mitigation of personal guilt for individual actions taken as a result of collective action.

#### 4. Individual Responsibility and Guilt for the Causes of Collective Guilt

Thus far, this discussion has yet to deal with the two problems that are, for most observers, the most essential to arguments over collective guilt—the liberal idea that one can be guilty only for one's own acts and not for the acts of others, and the psychological idea that guilt requires a personal knowledge. Fletcher deals with each problem with sensitivity and with fair and thoughtful choices from the literature.<sup>73</sup> He concludes that it is wrong to visit guilt on succeeding generations of a nation for its past acts.<sup>74</sup> And, he recognizes a profound modern shift from an objective to a subjective nature of

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71 Many books on Schmitt have emerged in recent years, the essays in *LAW AS POLITICS: CARL SCHMITT'S CRITIQUE OF LIBERALISM* (David Dyzenhaus ed., 1998) being perhaps the most representative. The most far-ranging study of the Nazi legal system, however, is MICHAEL STOLLEIS, *THE LAW UNDER THE SWASTIKA: STUDIES ON LEGAL HISTORY IN NAZI GERMANY* (1998).

72 See HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 135–50 (1964).

73 See FLETCHER, *supra* note 19, at 117–38, 157–78, 179–95.

74 See *id.* at 208–10.

guilt, and he places, at least it seems to me, a greater emphasis on the objective while remaining aware of the significance of the subjective.<sup>75</sup>

As to the first problem, the liberal, egalitarian view of the autonomous individual has as great a problem in recognizing rights of groups as it does duties in them.<sup>76</sup> The Romantic approach to the group identity of the nation is clearly more widespread in human perception outside the lecture halls. In accord with that identity, it makes perfect sense to speak of nations or states having both rights and duties. Indeed, international law is predicated on this notion, as well.

While one can speak of the state as like a corporation, with an interest and existence separate from any individual, such legal fictions do not make sense outside the narrow bounds of legal liability. A state acts through the arms, legs, words, and bullets of people. It acts to the benefit of people. The relationship between these people and the state is happily acknowledged when the question is benefit, and so it is difficult to determine why it is so hard to find when the relationship turns to blame. Granted, some citizen might refuse to pay lower prices for oil, maintained as a result of governmental policies of alliance and protection of oil-producing states, although few do. Thus, it is difficult to countenance any claim of utter innocence for the state's policy by those who accepted benefits from it in the past and hope to have them in the future, when the same government that provided those benefits commits its troops to war to enforce such policies.

This argument is not convincing to some, who will still reject guilt by association arguing that claims of individual moral responsibility for national acts require an unacceptable ascription of responsibility to the individual who does not personally commit acts supporting the national crime. A person who is a mere subject of the state committing the act, especially one who lacks full knowledge of the conduct of the state and its agents, has a claim against being held responsible for the acts of the state. This claim is strongest for those who resist the acts of the state, those who protest, and those who violate the state's laws requiring them to support the officials in their wrongful acts.

Such a claim however, ignores two aspects of group membership that underpin the nature of citizenship. First, the nature of group action is simply different from personal action; if my rugby club de-

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75 *See id.* at 192–95.

76 *Compare* WILL KYMLICKA, *POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM, AND CITIZENSHIP* 39–45 (2001) (defining liberal nationalism as a nation lacking a unified national identity), *with* BRIAN M. BARRY, *CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM* 308–09 (2001) (criticizing Kymlicka's characterization of multiculturalism as overly simplistic and incapable of being universally applied).

cided to play a club that I think is too strong for us to play, it is still *my* club that will lose, whether I play in that game or not, and whether I argued with the fixtures chair against it or not. The nature of my identity is that of member of the club, whether I agree with its action or not. It is my club, not me, but the club's loss is my loss, just as the club's win would be my win if I were wrong.

If there is collective national guilt, then members of the nation are guilty as well, regardless of their personal neutrality or resistance. In this, then, one can see the tension of Fletcher's rejection of guilt in successive generations of a nation.<sup>77</sup> Fletcher's Enlightenment limitation upon the Romantic nature of national identity is necessary to sustain a limit of guilt at the generational border.<sup>78</sup> Otherwise, the only limits would be those imposed by memory; for so many generations of the nation that has committed a crime remembers it or for so many generations of the people who were harmed by it remembers, the sense of guilt of the national crime would continue.

The second aspect of group membership and responsibility turns upon the psychological nature of guilt in the group. Accepting a notion that all subjects of the state bear some moral relationship to the state's act might still leave room to argue that a subject's guilt ought to be abated for objecting to the act.

For example, as is now being discussed, if the United States invades Iraq, and if I strongly object to such an invasion, or if I had voted against the administration that orders the invasion, or if I were to attempt to influence national policy against such an invasion, or if I were publicly to protest such an invasion, regardless of all such acts, a strong theory of collective guilt would include me as responsible for the invasion as much as any other citizen.

In this, the guilt of the moral agent is a model. It may well be that I do feel a sense of guilt, and that my sense of guilt (or impending guilt for the wrong to come) is the benchmark for the responsibility of all in the state that commits wrongful acts. There is no diminution of the moral agency of those who, on a morally appropriate or objective basis, feel guilt for a national act strictly because they are subjects of that nation. Thus, the moral sense of the guilty may be a basis for the ascription of responsibility to all. In this manner, the idea of national responsibility may instruct all of the people in the nation of the wrong conduct that they have, at least, allowed.

Collective guilt can accrue in a person burdened by it who is personally innocent of any act from which the guilt can arise. The guilt is

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<sup>77</sup> See FLETCHER, *supra* note 19, at 196-214.

<sup>78</sup> *Id.*

strictly one of association. Opposition to the guilty act is, then, no basis for exoneration. Opposition does, however, appear quite rightly as another basis for mitigation of punishment or severity in that guilt, in the same sense that moral ecology does.

#### IV. PASSION, HONOR, AND ROMANCE IN THE WILL TO WAR

Fletcher's two views of war contrast the nature of the individual and the state when perceived as Enlightenment or Romantic actors. He writes with assurance that the Romantic aesthetic of war is one that arises from concern for honor, particularly a rarely spoken but deeply held concern in America for the national honor of the United States.<sup>79</sup>

The notion of Romantic war for the sake of honor contrasts handily with the Enlightenment notion of war to maintain dignity. Honor demands satisfaction, but dignity demands only respect. Honor looks to the past and seeks to balance past indignities; but dignity itself looks to the present and future to prevent them. Romance sees war as the field of honor; Enlightenment sees war as necessary to self-defense.

This contrast is one that is well known in American history. The American experience is that between the Southern and Northern views of the American Civil War. Southerners saw the fight through the lens of honor, in which a threat to one's honor must be avenged; Northerners saw it as one about dignity.<sup>80</sup> Interestingly, many of the conditions that seem likely to increase the influence of moral ecology on individual actions and beliefs appear also to increase the likelihood of honor being a value in that moral ecology. Honor "thrives only in certain kinds of societies, ones that are economically undiversified, localized, explicitly hierarchical—societies where one standard of worth can reign."<sup>81</sup> One of the effects of a culture based on honor is that injury to one's honor must be satisfied only in an honorable manner; money and excuses can never suffice, nor can punishment

79 *Id.* at 13–18.

80 The literature on honor in the antebellum South is substantial. See, e.g., EDWARD L. AYERS, *VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH CENTURY AMERICAN SOUTH* (1984) (examining the South's use of honor to justify the prevalence of violence in Southern society); BERTRAM WYATT-BROWN, *THE SHAPING OF SOUTHERN CULTURE: HONOR, GRACE, AND WAR, 1760S–1890S* (2001) (exploring various aspects of the Southern code of honor in the post-Civil War era); HONOR AND VIOLENCE IN THE OLD SOUTH (1984) (examining how honor shaped culture and community in the South during the era of slavery). The contrast between honor as a Southern ideal and dignity as its Northern opposite is Ayers's.

81 AYERS, *supra* note 80, at 26.

inflicted by intermediaries. In that sense, a criminal justice system is a system for the enforcement of dignity, and dueling is a system for the enforcement of honor.<sup>82</sup>

This concern for honor is, indeed, a Romantic sensibility. It is also a sensibility that is prone to another Romantic excess. The urge to defend one's honor is, in the end, the desire for revenge.

The elements of revenge and of honor, in the state or its moral ecology, which generally ensure excessive military adventure, are its recurrent nature and its survival over time. A reprisal begets a reprisal in a potentially endless cycle. Further, an injury to national honor may be perpetuated in a nation's mythology over many generations.<sup>83</sup> States that pursue military adventure to reconcile affronts to honor cannot hold peace, order, or the well being of individuals as the highest goals of the state.

Furthermore, military action based on revenge is more likely to lead to unnecessary violence and thus to war crimes. In three of the most controversial military operations of the twentieth century, revenge motivated actions that led to allegations of criminality.

In World War II, two of the aerial campaigns that caused the greatest criticism, and indeed the actions by the allies that have consistently been called war crimes, were both depicted, perhaps with some accuracy, as acts of revenge. Over Europe, Sir Arthur Harris's policy of pursuing area bombing against German centers of population, including the firebombing of Dresden, has been recurrently justified as, or attributed to a motive of, revenge for German missile attacks on civilian centers in England.<sup>84</sup> Similar questions of the morality of American bombing over Japan, including both the fire-bomb-

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82 See *id.* at 266–68 (“‘The jingling of the guinea’ never did and never will ‘help the hurt that honor feels’.” (quoting Thomas J. Kernan, *The Jurisprudence of Lawlessness*, 1 A.B.A. REP. 450, 459 (1906))).

83 Revenge may inflame militarism, even when the vengeance is sought for imagined offenses. For example, the myths of Serbia enhanced the sense of historical injustice of a people for whom “history is war by other means.” TIM JUDAH, *KOSOVO: WAR AND REVENGE* 1 (2000).

84 The basic theory is expounded in the popular, if flawed, recent book, MICHAEL COFFEY, *DAYS OF INFAMY: MILITARY BLUNDERS OF THE 20TH CENTURY* (1999). The morality of area bombing was debated at the time and recurrently since. See, e.g., RAYMOND H. WILLCOCKS, *THE ETHICS OF BOMBING DRESDEN* (1998) (suggesting U.S. bombing of Dresden violated just war principles and consisted of terror bombing aimed at people, not military targets). The revenge thesis is not without doubt, and several appraisals of Harris's decision are completely without regard to the argument of revenge. See, e.g., CHARLES MESSENGER, “BOMBER” HARRIS AND THE STRATEGIC BOMBING OFFENSIVE, 1939–1945 (1984) (leaving out any discussion of revenge as a reason for the attack).

ing of Tokyo and the use of atomic weapons, were resolved both by some Air Force generals at the time and by analysts later, as justified revenge for Japanese brutality during their occupations and for the sneak attack on Pearl Harbor.<sup>85</sup>

Despite the horrible scale of such devastation, however, a greater concern may arise from the small scale, personal brutality that comes of ground soldiers acting from a sense of revenge. Perhaps the most well-known war crime by an American force, the massacre at My Lai village in Vietnam, resulted from exactly such a sense of revenge. On March 16, 1968, at My Lai 4 (Son My Village in Quang Ngai Province) C Company of the 11th Brigade, of the famous Americal Division, under the command of Lt. William A. Calley, killed between 200 and 400 civilians, including infants. The recurrent analysis of the cause for massacre was the emotional state of an untrained unit that had recently suffered heavy casualties and sought revenge.<sup>86</sup> After several recent engagements with losses to enemy action and a minefield, C Company was "looking for an excuse and they got it."<sup>87</sup> Perhaps the only saving grace from this sordid passage is that the U.S. military learned a valuable tactical lesson from the debriefings of the troops at My Lai, and it established training regimes to enhance compliance with the laws of land warfare.<sup>88</sup>

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85 See RONALD SCHAFFER, *WINGS OF JUDGMENT* 153–55 (1985).

86 Despite the clear presence of revenge as a motive, it was only one factor leading to the massacre. Perhaps as important was the failure of discipline in the company and leadership by its commander, Captain Ernest Medina. See SEYMOUR M. HERSH, *MY LAI 4: A REPORT ON THE MASSACRE AND ITS AFTERMATH* 26–43 (1970) (citing examples of poor leadership and faulty judgment by members of C Company in the weeks before the massacre).

87 Matthew Lippman, *The My Lai Massacre and the International Law of War*, in *TERRIBLE BEYOND ENDURANCE? THE FOREIGN POLICY OF STATE TERRORISM* 313, 325 (Michael Sthol & George A. Lopez eds., 1988). The revenge motives of C Company were the result of an ongoing process of loss and frustration:

The company also blamed and became angry at the South Vietnamese and Korean troops for allegedly failing to warn them about mines, booby traps, and enemy snipers. . . . On February 25, Charlie Company had six men killed and twelve seriously wounded by a minefield north of Pinkville; and on March 14, Sergeant George Cox, a popular platoon member, was killed. A mood of revenge developed in C Company and My Lai 4 became the end of a vicious cycle.

*Id.*

88 The Department of Defense has established formal training in the law of war for combat units and officers and also incorporated field judge advocates into the command structure for combat deployment. See, e.g., WALTER E. BOOMER ET AL., *FACING MY LAI: MOVING BEYOND THE MASSACRE* 153 (David L. Anderson ed., 1998) (dis-

Each of these stories provides the same lesson; wartime decisions made from revenge tend toward excessive force and inhumane conduct. Thus, the greatest danger of allowing honor, and its correlative instincts, to become a basis for military policy, is the likelihood of cruel and fruitless overreaction.

With that lesson in mind, one might consider the current questions of war before us, as described in Part I, above. One of the essential divisions over the American response to its attack by terrorists is the problem caused by a need to restore lost honor. Self-defense cannot do this, and so force constrained by the principles of the United Nations Charter cannot do this.<sup>89</sup>

In considering whether not only to depart from American commitments to the United Nations but also from American leadership against aggression in international law, it might be well to consider a much more ancient proscription on revenge, or at least its predicates, a war based in anger: “[t]here is no need therefore, to chastise in anger if error and crime are to be repressed.”<sup>90</sup>

## V. THE DIFFERENCE BETWEEN WAR AND CRIME

A recurrent influence on Fletcher’s understanding of guilt in war is his understanding of the nature of guilt in crime. Thus, he too compares the legalistic with the liberal, and the honor-driven with the Romantic. He also takes careful steps to analyze whether the United States is engaged in its War on Terrorism in a military action or a law-enforcement exercise.<sup>91</sup> The implications of this choice, he points out, are the U.S. obligations for the treatment of its enemies.<sup>92</sup> Prisoners accused of crimes receive certain limited protections, but prisoners of war are another matter under the Geneva Conventions and the laws of war.<sup>93</sup> The current pattern of the U.S. government, described by Fletcher in detail, has been to avoid any classification of either the military actions in Afghanistan as a war or the prisoners taken there as prisoners of war or, with the exception of John Walker

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cussing how the U.S. military has studied its involvement in Vietnam and has attempted to draw lessons from those experiences).

89 See U.N. CHARTER art. 2, para. 4; *id.* art. 51.

90 SENECA, *On Anger* (circa 52 A.D.), in *MORAL AND POLITICAL ESSAYS* 17, 33 (John M. Cooper & J.F. Procopé trans., 1995). A wonderful study of anger as a value in classical philosophy and literature, with an emphasis on the stoic rejection of anger as a motive can be found in WILLIAM V. HARRIS, *RESTRAINING RAGE: THE IDEOLOGY OF ANGER CONTROL IN CLASSICAL ANTIQUITY* (2001).

91 FLETCHER, *supra* note 19, at 3–9.

92 *Id.* at 44–70.

93 *Id.*

Lindh and a few others, to designate these prisoners as criminal suspects.<sup>94</sup>

In a last observation from Fletcher's work, I suggest that the attempts by the current administration to blur these distinctions are unnecessary. By considering two precedents from American history, the differences between the use of the military for war and for criminal response become apparent; as do the limits of such use and as does the sufficiency of criminal trials as a means of resolution.

#### A. *Two Precedents*

Although the horror of the destruction wrought by the attacks of September 11th is new, the War on Terrorism has close predicates in American history. The manner in which the United States conducted itself in the wars with the Barbary Pirates and in the Punitive Expedition to Mexico is instructive both for the law and for our foreign and domestic policy.

##### 1. The Tripolitanian War

Ever since the Crusades, when Muslim Corsairs had captured Crusader ships, the Islamic states of the North African coast had raised revenue from piracy, through blackmail, ship and cargo captures, and the taking of slaves from crews. In the sixteenth century, Khair ad Din, known as Barbarossa (or Redbeard), captured Algiers and, in return for recognizing the sovereignty of the Süleyman I, Sultan of the Ottoman Empire, was granted an overlordship of Morocco, Algiers, Tunis, and Tripoli.<sup>95</sup> By the late eighteenth century, the maritime powers of Europe paid annual tribute. Following American independence from the British Empire, American merchant ships ceased to be exempted by British payments, and American ships in Tripolitanian waters were seized.

In 1799, the United States entered into treaties with Tripoli, Morocco, Algiers, and Tunis to pay sums, including settlements and annual tributes, such as \$107,000 in money and supplies to Tunis, and \$18,000 annually to Tripoli, to ensure American ships were not mo-

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94 *Id.* at 92–116; see also George P. Fletcher, *The Military Tribunal Order: On Justice and War: Contradictions in the Proposed Military Tribunals*, 25 HARV. J.L. & PUB. POL'Y 635, 635–39 (2002) (discussing the language of war being used to describe U.S. military action in Afghanistan).

95 See GODFREY FISHER, *BARBARY LEGEND: WAR, TRADE AND PIRACY IN NORTH AFRICA, 1415–1830*, at 42, 54–65 (1957).



lested.<sup>96</sup> The following year, the Pasha of Tripoli raised his price, which in May 1801, the United States refused to pay, and Tripoli declared war. The United States sent naval squadrons into the Mediterranean, blockaded enemy coasts, bombarded Tripolitanian fortresses, and engaged enemy gunboats. Two actions were particularly memorable. In 1803, Tripoli captured the U.S. frigate *Philadelphia*, which was burned in the harbor by Lt. Stephen Decatur and a band of American sailors. In 1805, U.S. Marines stormed and captured the fortress of Derna in Tripoli.

The first Tripolitanian War ended in June 1805, with a settlement negotiated with the Pasha by American agent Tobias Lear, under which prisoners were to be exchanged, and the Americans paid \$60,000 to Tripoli both to compensate for their greater number of prisoners and to be free of future tribute. This arrangement, however, was subject to the vagaries of not only the Pasha of Tripoli, but also the Dey of Algiers, the Bey of Tunis, and the Emperor of Morocco. The decade from 1805 to 1815 saw the capture of numerous American ships, additional demands for tribute, and the threatening of the American consul with slavery unless the exactions were paid.<sup>97</sup>

On March 2, 1815, Congress declared war on Algiers, and President Madison ordered two U.S. naval squadrons returned to the Mediterranean. In June, U.S. forces under then-Commodore Stephen Decatur captured an Algerine frigate and brig, including nearly five hundred prisoners. The Dey of Algiers was forced to release his American prisoners, pay \$10,000 as indemnity, and agree to end all tribute from America. The Bey of Tunis paid \$46,000 as indemnity; Tripoli paid \$25,000.<sup>98</sup> The treaty ending the war was ratified in 1822.<sup>99</sup>

Among the parallels to the War on Terrorism are two that are of particular importance to law. First, the United States treated the seizures of American shipping and property as acts of war, although it considered acts of piracy by other entities not to be acts of war but crimes.<sup>100</sup> The distinction between piratical acts and acts of war was one of the greatest simplicity: piracy committed by or for a state was

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96 See 1 OFFICE OF NAVAL RECORDS AND LIBRARY, U.S. NAVY, NAVAL DOCUMENTS RELATED TO THE UNITED STATES WARS WITH THE BARBARY POWERS 312-30 (1939). [hereinafter DOCUMENTS RELATED TO BARBARY POWERS].

97 See RAY W. IRWIN, THE DIPLOMATIC RELATIONS OF THE UNITED STATES WITH THE BARBARY POWERS: 1776-1816, at 161-75 (1931).

98 *Id.* at 199-206.

99 *Id.*

100 See BARRY HART DUBNER, THE LAW OF INTERNATIONAL SEA PIRACY (1980); PHILIP GOSSE, THE HISTORY OF PIRACY 117 (1932) (discussing Britain's treatment of pirates' acts as crimes).

an act of war, but piracy committed by an agent not acting for a state was piracy.<sup>101</sup> Second, the United States treated the sailors and soldiers taken in combat as prisoners of war and repatriated them at the cessation of hostilities. Moreover, civilians taken into custody during actions were not considered prisoners of war and were immediately repatriated.<sup>102</sup>

## 2. The Punitive Expedition of 1916

On March 9, 1917, at 4:45 A.M., 400 soldiers in Pancho Villa's army of rebellion against the Mexican government crossed the U.S. border and attacked Columbus, Texas. Villa apparently sought to capture the supplies of an army garrison there, to rob the local bank, and to cause sufficient havoc to force the United States to intervene in the Mexican Civil War, leading to an anti-American backlash to the benefit of his cause. He failed in his tactical aims, not only in failing to capture any money or supplies but also in losing a hundred men. Even so, he set fire to the town and killed seventeen Americans, mainly civilians.<sup>103</sup>

The next day, President Wilson declared, "An adequate force will be sent at once in pursuit of Villa with the single object of capturing him and putting a stop to his forays. This can and will be done in entirely friendly aid to the constituted authorities in Mexico and with scrupulous respect for the sovereignty of that republic."<sup>104</sup> The Puni-

101 To be sure, the rich tradition of privateering somewhat complicates this picture. In essence, a private vessel licensed by a state to capture foreign vessels held a letter of marque and reprisal. Reprisal initially entailed only the recovery, for *either* the ship owner *or* the state, of a wrong or a debt, as in the spectacular attacks of Frenchman Jean Anjo against Portugal in the early 1500s. See HENRI CAHINGT, *JEAN ANJO, VICOMTE DE DIEPPE, 1480-1551* (1951). By the nineteenth century, however, letters of marque and reprisal were issued exclusively by states during war to supplement a state's navies, and seizure by privateers had become a *casus belli*. See DONALD A. PETRIE, *THE PRIZE GAME: LAWFUL LOOTING ON THE HIGH SEAS IN THE DAYS OF FIGHTING SAIL* 2-3 (1999). The entire practice ended in the nineteenth century. See FRANCIS R. STARK, *THE ABOLITION OF PRIVATEERING AND THE DECLARATION OF PARIS* 146-60 (Columbia Univ. Press 1896-1898) (describing the influence of the Declaration of Paris and events following that led to its eventual adoption).

102 For an example, see letters detailing the release of David Vallanzino, a Triopolitanian civilian aboard ship only as owner of a cargo, who was captured in 1803. See 2 DOCUMENTS RELATED TO BARBARY POWERS, *supra* note 96, at 455, 461.

103 The story of Villa's raid has received numerous treatments by historians. The monumental history of Villa is that of Friedrich Katz. For information on the raid on Columbus, see FRIEDRICH KATZ, *THE LIFE & TIMES OF PANCHO VILLA* 560-66 (1998). See also JOHN S.D. EISENHOWER, *INTERVENTION! THE UNITED STATES AND THE MEXICAN REVOLUTION 1913-1917*, at 217-27 (1993).

104 KATZ, *supra* note 103, at 567.

tive Expedition to Mexico was originally authorized for 5000 men, although the mobilization grew, as did the rhetoric of war against Villa. An Army recruiting poster printed in San Francisco called for the enlistment of "25,000 Men, necessary to raise the U.S. Army to War Strength: What For?—The United States Government Orders are Capture Villa At Once—To Do So The Army Must Have Men."<sup>105</sup>

John R. Silliman, U.S. consul to Mexico and envoy to the de facto government of Mexico, led by Venustiano Carranza, secured the informal agreement of Carranza's ministers of war and foreign relations that the expedition would be approved by Cancistas, although this permission was later conditioned only to include a response to future raids.<sup>106</sup> Even so, American troops entered Mexico in two columns, under the command of General John Pershing on March 15, 1916, before any news of permission from the local government had reached them.<sup>107</sup>

The Punitive Expedition had some initial success, capturing arms and killing members of Villa's bands, including two of his lieutenants.<sup>108</sup> On the other hand, as a result of the attack, Villa had successfully positioned himself as a popular hero, having stood up to Americans.<sup>109</sup> American forces took casualties and were accused of firing on civilians.<sup>110</sup> Although Pershing was restricted in his scope of operations and ordered not to occupy any towns or cities, as the expedition dragged on, resistance from the Carranza government to the American presence increased to the brink of war. Indeed, on May 22, 1916, the Carranza government demanded that the United States

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105 See PAUL J. VANDERWOOD & FRANK N. SAMPORANO, BORDER FURY: A PICTURE POSTCARD RECORD OF MEXICO'S REVOLUTION AND U.S. WAR PREPAREDNESS, 1910-1917, at 185 (1988), available at <http://aspartametruth.com/pics/gringos/poster.jpg> (last visited Jan. 21, 2003).

106 See PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1916, at 490-93, 497-98 (1925) [hereinafter FOREIGN RELATIONS, 1916].

107 CLARENCE CLEMENS CLENDENEN, THE UNITED STATES AND PANCHO VILLA 396-97 (1959).

108 See George S. Patton, Jr., *Cavalry Work of the Punitive Expedition*, 27 U.S. CAVALRY J. 426-33 (1916).

109 CLENDENEN, *supra* note 107, at 405. Although Villa's popularity rose throughout the nation, in Chihuahua and states in which both Villa and Pershing operated throughout 1916, Pershing appears to have been much more successful in gaining and keeping local loyalties. Cf. KATZ, *supra* note 103, at 595-97, 605-06.

110 Major Frank Tompkins led a patrol lured to Parral, Chihuahua, on April 12, 1916, at which a local mob exchanged fire with the troops. American troops apparently caused a great number of Mexican casualties. Two American soldiers were killed. FRANK TOMPKINS, CHASING VILLA 137-44 (1935).

withdraw the Expedition,<sup>111</sup> and a month later a battle occurred between Pershing's and Carranza's troops, who killed and captured American troops, whom they briefly held before repatriating them.<sup>112</sup> The Punitive Expedition neither ended Villista raids on the United States nor captured Villa. A second raid by Villa's supporters against Glen Springs, Texas, on May 6, 1916, led to the destruction of a store, the kidnapping of two Americans, and the death of three soldiers and an American civilian.<sup>113</sup> As for Villa, he had been wounded before the Americans had arrived in Mexico, and he spent almost the entire time hiding in a cave.<sup>114</sup> He re-emerged after the fight between the Americans and the Carranzistas, waging his campaign full-throttle against Carranza's government, even capturing the governor's palace in Chihuahua City.<sup>115</sup>

The Expedition withdrew, crossing the border the last time on February 5, 1917, and bringing with them twenty-one prisoners accused of taking part in the raid on Columbus.<sup>116</sup> These prisoners were held in the military stockade in Columbus, and then they were transferred to civilian officials.

There were two trials of the Columbus raiders, both in the state courts of New Mexico. The first trial was of six men, all of whom Villa had conscripted on the eve of the raid and who were accused of murdering Charles Miller, one of the civilians who died in Columbus during the attack.<sup>117</sup> The trial was not a model of fairness; the U.S. Departments of Justice and War complained that the inflamed local jury would deny the accused men a fair trial, and they were defended

111 James Brown Scott, *The American-Mexican Joint Commission of 1916*, 10 AM. J. INT'L L. 890, 892 (1916); George A. Finch, *Mexico and the United States*, 11 AM. J. INT'L L. 399 (1917).

112 The fight, at Carrizal, Chihuahua, occurred on June 21, 1916. Eighty-three American soldiers from the African-American Tenth Cavalry and two guides encountered a 400-man garrison, which denied them access to the town, and on whom the Americans advanced. Both Félix Gómez, the general commanding the Mexican garrison, and Captain Charles Boyd, the commander of the American patrol, were killed. Ten U.S. soldiers were killed; twenty-three were taken prisoner. Estimates of Mexican losses range from forty-three to seventy-four. See CLENDENEN, *supra* note 107, at 427-30; EISENHOWER, *supra* note 103, at 288-300. The American prisoners were returned on June 29. FOREIGN RELATIONS, 1916, *supra* note 106, at 597.

113 EISENHOWER, *supra* note 103, at 286-87.

114 KATZ, *supra* note 103, at 573.

115 *Id.* at 583-85.

116 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1917, at 907-08 (1926).

117 See KATZ, *supra* note 103, at 606-08, which is based on the trial transcript, *State v. Rentéria*, No. 664 (N.M. Dist. Ct. 1917), and an apparently contemporaneous report of the trial.

by an attorney patently hostile to their case.<sup>118</sup> Thus, it is perhaps less surprising that they were convicted than that one of their death sentences was commuted by the state's governor to life in prison. All of the second group pled guilty to second-degree murder and were sentenced to eighty years in prison, but they were pardoned in 1921 by then-New Mexico Governor Ambrosio Larrazzolo. Larrazzolo based part of his decision to pardon them on his belief that the Villistas had been soldiers obeying orders.<sup>119</sup>

Villa himself remained in rebellion until 1919, when his attack on the Carranzista garrison at Ciudad Juarez led to fire on the U.S. outpost in El Paso.<sup>120</sup> The local commander, with troops now well prepared thanks to the military buildup for the war in Europe, responded the same night with an artillery bombardment coordinated with cavalry and infantry assaults, destroying most of Villa's army and ending him as a force in Mexico.<sup>121</sup> Villa lived until his assassination in 1923.<sup>122</sup>

One note of particular interest was the effect of the newly enacted Hague Conventions on the Laws of War. Although Villa behaved ruthlessly toward his Mexican opponents and ordered the attack on Columbus, he behaved toward American soldiers according to the recently enacted Hague Conventions, a copy of which he was supplied by the United States.<sup>123</sup> Indeed, the Mexicans were quick to use the conventions as a basis for indicting the Americans. During the conduct of the expedition, Pershing's troops were accused of violating the laws of war, both by using exploding bullets and by allowing Indian scouts to engage in atrocities against civilians. While these allegations were rebutted, it is clear that while Carranza's troops were accorded the benefits of prisoners of war, Villistas were routinely denied medical care when captured, were paraded as a spectacle, both alive and dead, and were not treated as prisoners of war.<sup>124</sup>

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118 *Id.*

119 *Id.* (citing ALBERTO CALZADIAZ BARRERA, *PORQUE VILLA ATACO COLUMBUS: INTRIGA INTERNACIONAL* 290-91 (1972)).

120 *See* CLENDENEN, *supra* note 107, at 310-12.

121 *Id.* at 311-14.

122 *See* KATZ, *supra* note 103, at 766.

123 *See* Geoffrey Best, *Restraints on War by Land Before 1945*, in *RESTRAINTS ON WAR* 17-18 (Michael Howard ed., 1979). The U.S. Supreme Court held, however, that the Hague Conventions did not apply to civil wars but only to international wars. *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 301 (1918).

124 *See generally* FOREIGN RELATIONS, 1916, *supra* note 106, at 597-607 (noting the "outrages" that Pershing's troops committed in Mexico). For an analysis rejecting these claims, see CLENDENEN, *supra* note 107, at 306.

There are several lessons to be learned between the Punitive Expedition and the War on Terrorism. The first is that, despite the rhetoric of war against Villa, and the fervor with which he was sought by military forces, acting under executive orders and with the consent of the Congress, the Punitive Expedition was not a war in any traditional sense under American law. It was conducted with the begrudging acquiescence of the government involved. It was neither declared by Congress nor considered a conflict between states until the skirmish between U.S. and Carranzista troops.

A related matter of particular importance to this discussion is the relationship between the American force and the two forces that ultimately opposed it—Villa's and Carranza's. Although both had been opposed to one another in the civil war that preceded Villa's attack, the United States recognized Carranza as the *de facto* leader of the state, and his troops were ultimately dealt with as an opposing military force. Villa's troops were generally regarded as criminals, subject to arrest and not to repatriation.

Perhaps the most signal lesson is the successful military arrest of suspects for criminal indictment in the state courts. Granted, there are persistent concerns as to the harshness of the treatment of the prisoners by the judge and jury in southern New Mexico. Even so, despite the calls for war on Villa and declarations that the attacks were acts of war, the military left the trials of these matters in civilian hands, where the criminal law was carried out.

At its core, then, the fundamental nature of the Punitive Expedition was to commit U.S. military force to an overseas deployment directed to the arrest or death of foreign nationals not in a military service. These nationals, when captured, were not provided the special protections of the law of war, as were soldiers of the military of the states in which the deployment occurred. These nationals were subject to the ordinary criminal process of a criminal court in a state of the United States. We have found no objection to this practice registered by the governments of other states at the time.

### 3. Drawing the Future from Precedents

Care is needed when considering the manner in which a past event is authority for a later action. Precedents are by their nature selective; that an action has no direct precedent does not prove the action is unjust, unwise, or illegal. Moreover, the mere existence of a precedent is not sufficient to prove an action just or wise. Even in the realm of constitutional law, given the rare but significant occasions on which judicial precedents have been overturned by the very courts

that once wrote them, a precedent is not even proof that later similar conduct is legal. Precedents do, however, demonstrate something of practicality. What was once accomplished will be likely accomplished again under similar circumstances.

#### 4. The Nature of the Choices: War *versus* Crime

The war against terrorism runs the risk of adding stature to the enemy. When the enemy is a criminal, it is entitled to treatment as one. When the criminal is an enemy at war, it is likewise entitled to treatment as one, in the same manner as a sovereign.

Villa devoutly wished to be treated as a head of state. Had the United States done so, the boost he received in his popularity from the American expedition would, quite likely, have been greater and of longer duration.

The leaders of the Tripolitanian states, however, were heads of state, and they deserved such treatment. The acts of the United States in forcing them to abandon a criminal policy of ransom from piracy did not become criminal enforcement, but remained acts of war.

It is a simple division. War, regardless of how difficult it may be to define, is between states, or between forces within a state battling for its control. While this is not always easily defined, owing to the complexities of interstate relations, it is more easily defined in considering who does not engage in it—the stateless.

It is true that the idea of war as a legal concept is not as important for many purposes of international law in recent years as it was in earlier eras; modern treaties are more likely to be concerned with an act of aggression or state of armed conflict than with a *casus belli* or state of war.<sup>125</sup> The Charter of the United Nations is silent on the definition of war, instead outlawing the use of force or threats to use force, while recognizing an inherent right of self-defense.<sup>126</sup> Indeed,

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125 BROWNLIE, *supra* note 14, at 393–94.

126 See U.N. CHARTER, art. 2, para. 4; *id.* art. 51. The prohibition of armed force and the allowance of self-defense by the U.N. Charter is treated particularly in OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 110–13, 141–46 (1991). The Charter does not define what amounts to a threat of force, a concept further defined in the process of adopting the Resolution of the Definition of Aggression. See Secretary General of the United Nations, Report on the Question of Defining Aggression, U.N. Doc. A/2211, at 52 (Oct. 3, 1952). Of course, the Security Council may authorize the use of military force in order to maintain or restore international peace and security. See U.N. CHARTER art. 43.

the definition of war as a matter of international law remains both complex and controversial.<sup>127</sup>

Still, the modern definition of war under law is a state of armed conflict between or among states or groups like states capable of supporting a uniformed military.<sup>128</sup> This definition incorporates the most essential tool of the laws of war, that is, the definition of combatants. Although the laws of war may well apply to conflicts that do not amount to war, at the least, wars must include such conflicts as are defined by combatants capable of waging war. Thus, to the degree the war is waged against private groups that are not controlled in an identifiable military organization, it simply is not war, and calling it war does not make them combatants.

There has been increasing argument, even prior to President Bush's declaration in 2001, to treat the prosecution of counter-terrorism as the prosecution of war.<sup>129</sup> Yet these arguments consistently fail to persuade either why the laws of war should apply to the benefit of terrorists or why the military is best suited to investigate acts of terror and locate their perpetrators. Many of these arguments tend not to be seeking so much a military solution as a diminished standard of care in a legal solution.

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127 See BROWNLIE, *supra* note 14, at 398–401, in which the conditions of a definition are considered but no definition is attempted. See, e.g., INGRID DETTER DE LUPIS, *THE LAW OF WAR* 1–53 (1987) (defining wars by type to include divisions between interstate and internal wars as well as various forms of programmatic war); LOTHAR KUTZSCH, *THE CONCEPT OF WAR IN CONTEMPORARY HISTORY AND INTERNATIONAL LAW* 54–65 (1956) (distinguishing material from formal war).

128 See DE LUPIS, *supra* note 127, at 24.

129 These arguments are based, broadly, on three general premises: that many acts of terror are state-sponsored and acts of war, that the police and courts are inadequate in finding and punishing terrorists, and that the military approach is necessary to ensure a sufficient dedication of resources as a matter of the domestic policy agenda. See Bradley Larschan, *Legal Aspects to the Control of Transnational Terrorism: An Overview*, 13 OHIO N.U. L. REV. 117, 147 (1986) (emphasizing the terrorist attacks on U.S. troops in Lebanon in 1983 and El Salvador in 1985); see also Spencer J. Crona & Neal A. Richardson, *Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism*, 21 OKLA. CITY U. L. REV. 349, 404–07 (1996) (emphasizing the inability of the American justice system to deal with terrorism); Timothy F. Malloy, *Military Responses to Terrorism*, 81 AM. SOC'Y INT'L L. PROC. 287, 287 (1987) (discussing different perspectives on the military response to terrorism); Dave Martella, *Defending the Land of the Free and the Home of the Fearful: The Use of Classified Information To Deport Suspected Terrorists*, 7 AM. U. J. INT'L L. & POL'Y 951, 969 (1992) (arguing that law enforcement officials do not strictly comply with the definition of terrorism as a crime); Abraham D. Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 95 (1989) (arguing for the United States to treat terrorism as a national security threat and not just a crime and to use preemptive military actions against terrorists).



Indeed, given a military force in pursuit of an individual, such as the pursuit of Manuel Noriega in Panama or Osama bin Laden in Afghanistan, a military solution is often not practicable.<sup>130</sup>

There is an important possibility, raised by international law scholar Jordan Paust and others, that merely the designation of actions against terrorists as a war is enough to cloak terrorists such as the members of al Qaeda with the special protections given to combatants under the laws of war.

America has a tradition of segregation of the military from the police functions of state, a tradition enshrined in the *posse comitatus* law.<sup>131</sup> That tradition, however, ought not blind us to the potential use of military force to apprehend terrorists in a manner that does not imply that there is a state of war. In other words, using U.S. soldiers against another state's soldiers may indicate a war, but using soldiers against terrorists does not.<sup>132</sup>

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130 Secretary of Defense Donald Rumsfeld noted during the bin Laden manhunt: . . . What we do know is there has not been any recent evidence that he's alive. That does not mean he's not alive. It simply means that we don't have evidence that he is or isn't. And what we'll learn over time remains to be seen.

I think it's important to recognize that the Department of Defense is clearly looking for him. We're hard at it, and it's important that we find him, and we will find him eventually.

But we're really organized and trained and equipped to fight armies and navies and air forces. We're not organized to do manhunts. That's a law-enforcement-type thing.

Interview by Bob Schieffer & Gloria Borger, Journalists, with Donald H. Rumsfeld, Secretary of Defense (Feb. 24, 2002), in *Face the Nation* (CBS television broadcast, Feb. 24, 2002), available at [http://www.defenselink.mil/news/Feb2002/t02242002\\_t0224cbs.html](http://www.defenselink.mil/news/Feb2002/t02242002_t0224cbs.html) (last visited Mar. 25, 2003).

131 The Posse Comitatus Act provides, "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both." 18 U.S.C. § 1385 (2000). This act does not forbid cooperation between the military and domestic police, nor does it forbid the military from law enforcement abroad. See, e.g., Andrew D. Fallon & Theresa A. Keene, *Closing the Legal Loophole? Practical Implications of the Military Extraterritorial Jurisdiction Act of 2000*, 51 A.F. L. REV. 271, 281 n.71 (2001) (citing Department of Defense Directive 5525.5, Cooperation with Civilian Law Enforcement Officials, enc. 4, ¶ 4.1.2.5 (2000)).

132 See Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT'L L.J. 145, 151-80 (2000) (offering various justifications for using military force against terrorists); Geoffrey S. Corn & Michael L. Smidt, "To Be or Not to Be, That is the Question": *Contemporary Military Operations and the Status of Captured Personnel*, ARMY LAW., June 1999, at 1 (discussing the prisoner of war determinations made by the United States about captured soldiers and their legal implications).

## VI. SOME CONCLUSIONS: A DEMOCRACY AT WAR WITH TERRORISM

We have considered Romanticism in the light of war, and war in the light of Romanticism. Encouraged by Fletcher's scholarly imagination, we have found tools of great force and ingenuity for the current debate. And while the debate is so serious that we must be careful not to ask too much of our rhetoric, it might also be that these tools make us all the more sensitive to the rhetoric of others.

President Bush has recently articulated a formula of American national policy that would promote a more robust reliance upon and support for the comprehensive system of states. In a Romantic echo of earlier goals of war, he argued that America should seize "a great opportunity during this time of war to lead the world toward the values that will bring lasting peace."<sup>133</sup> Accordingly, he underscored an American commitment to support "nonnegotiable demands of human dignity," chief among which are "the rule of law" and limited state power.<sup>134</sup> Here then, is the liberal, legal rhetoric of the Enlightenment, seeking not honor but the protection of dignity.

In one speech, we see the tension of these two philosophies, these two aesthetics.

Indeed, the United States has long been a beacon to the world for the Enlightenment values President Bush articulated, especially the rule of law. This collective term expresses the ideals that the state is governed by law, that no person shall be punished by the state except according to law, and that laws govern the actions of officials. In times of war, the rule of law is threatened as at no other time, and the threat is greater in a democratic republic more than in other states, as political leaders rush to embrace any tool to win the war and bristle at any delay or encumbrance that would limit their powers to do so. And yet, the concept of law limits the power of the official, and many wartime leaders have embraced the allure of governance independent of the statutes, Constitution, or most certainly, international law.<sup>135</sup>

The War on Terrorism appears to present a fundamental contradiction between the Enlightenment and the Romantic, and at stake in their contest is, perhaps not unsurprisingly, the role of American law.

133 Bush, The State of the Union Address, *supra* note 7, at H101.

134 *Id.*

135 See LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 107-09 (1990). For an artful discussion of the necessity but also the limits of the rule of law as a constraint against radical disorder in an all-too-recent context, see Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1246 (2000); and Mark A. Drumbl, *Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials*, 29 COLUM. HUM. RTS. L. REV. 545, 583-86 (1998).

On the one hand, the war is intended to promote a system of stable states and the rule of law. On the other, it challenges the notion of the rule of law itself.

This contradiction is important and its resolution requires a re-evaluation of the commitments of the United States both to international law and to the U.S. Constitution. It is fundamental to our argument that the United States has the power to defend itself, its citizens, and its interests pursuant to these most fundamental laws, and indeed that the bulk of the actions of the United States in the War on Terrorism have been consonant with these laws.

Yet, by calling for America to go to war but failing to limit the war to one or another form of conduct, the President, whether by accident or design, has aggregated a great power to his office, the power of the President as Commander-in-Chief in wartime. This aggregation risks harm to the very values of the rule of law that the President has sought to advance. It is also an aggregation that looks suspiciously like the urge to protect honor, an urge that leads too often to excess.

In times past, the officials of law have been willing, if belated, accomplices in such aggregations of power. Congress and the Supreme Court have several times validated wartime presidential acts that exceeded the authority of the president, and sometimes also of Congress, at the time of the act, although these actions were cause for later regret and their validations cause for national shame.<sup>136</sup>

The desire of wartime presidents to increase their power is both rational and understandable, as is the willingness of legislators and judges to accede to such increases, or at least not to impede them. It may even be that some of these allowances were unavoidable. Yet the costs of these all have been rarely seen, except in retrospect.

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136 During the American Civil War, the Supreme Court accepted an argument that retroactive congressional authorization of the seizure of vessels that violated the Union blockade of Southern ports was valid, although these seizures had been made on President Lincoln's sole authority. The practice of such seizures led, however, to embarrassing conflicts with the nations whose ships were seized, an embarrassment that deepened as the American policy of neutrality grew to reject such practices by other states. See *The Prize Cases*, 67 U.S. 635, 674–82 (1862) (discussing the seizures of several vessels that violated this blockade and determining to whom the vessels would be delivered); Steve Sheppard, *Neutrality*, in 6 *DICTIONARY OF AMERICAN HISTORY* 34 (Stanley I. Kutler ed., 3d ed. 2003). More famous today, the U.S. policy during World War II of interning loyal American citizens of Japanese descent was validated by the U.S. Supreme Court, although it was a source of great shame and regret in later years. See *Korematsu v. United States*, 323 U.S. 214, 217–20 (1944); see also *Civil Liberties Act of 1988*, 50 U.S.C. § 1989(b) (1988) (providing remedies for discriminatory acts committed by the U.S. government during World War II against citizens of Japanese heritage).

The costs of such allowances in the War on Terrorism may be that the apparent novelty of the war and its antagonists will lead the government of the United States to violate some of the most important safeguards of both the U.S. Constitution and international law, safeguards intended to protect the civil liberties of American citizens and the right to respectful treatment by the enemies of American soldiers. These costs are made potentially much greater by the recognition that Operation Enduring Freedom is unlikely to be the last, and the forces that have led to its genesis are themselves regenerative.

Unlike past times of war, a peace in these circumstances might be more than a truce.<sup>137</sup> In the absence of a state as the opponent, the organization that would enforce one side of the peace does not exist. Indeed as opponents in war, terrorist organizations lack both a traditional organization and traditional goals. Further, the small scale at which they may carry out operations and the ideological nature of their recruitment make unlikely their permanent destruction.

In such a case, there will likely be losses to our system of law that will be neither temporary nor reparable. In paying such a price, we will destroy a part of the very freedoms we seek now to protect. Thus, each payment must be made following careful contemplation, both so that it will not be ultimately likely to diminish our peace and safety in the future, as in the weakening of the laws of war, and so that what losses to our civil liberties as must be sacrificed are sacrificed only with care and only to the least extent necessary. Such care is least likely to occur by giving too much weight to actions made in the heat of the moment and in the fog of war, when the urge of the executive will always be to gather the greatest power possible to repel a threat.

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<sup>137</sup> On this point, especially, see CHRISTOPHER DOBSON & ROBERT PAYNE, *THE NEVER-ENDING WAR: TERRORISM IN THE 80's*, at 284–91 (1987).

