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James M Donovan



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CIVILIAN IMMUNITY AND THE REBUTTABLE PRESUMPTION OF INNOCENCE

JAMES M. DONOVAN*

"Terrorist" is a word that at once vilifies and justifies, serving the same function in today's politics and popular imagination as was served by the term "Nazi" a half century ago, or "communist" thereafter, in that it is "always, or even necessarily, wrong."¹ Few appellations today are as effective to ostracize a person, movement, or organization from civilized company, and an astonishing array of actions and reactions can be fully justified when having as their intent a response to the mere threat—much less an actual act—of terrorism.

Terrorism, a problem in international politics that emerged to prominence by the seventies, became obsessional in the American consciousness after September 11, 2001 (hereinafter "9/11"). Where once the United States could have been described as naively optimistic, after that day its national mood changed to one of brooding, even paranoid cynicism. Every foreigner is thereafter viewed as a potential terrorist; every critic a nascent traitor.² The suspected now needs to

* University of Georgia School of Law Library; B.A., University of Tennessee at Chattanooga; M.L.I.S. and M.A., Louisiana State University; J.D., Loyola New Orleans; and Ph.D., Tulane University. The author thanks Jeanne M. Woods for her inspiration and mentorship. Prof. Woods led a stimulating seminar on terrorism in international law, for which an early draft of this essay was written. That experience was made even more rewarding for having been shared with Erin Guruli.

1. G. Wallace, *Terrorism and Argument from Analogy*, 6 J. OF MORAL AND SOCIAL STUDIES 149 (1991).

2. For example, right-winger Ann Coulter received applause, not censure, for labeling Al Gore a traitor when he criticized the White House for leaving the hunt for bin Laden unfinished to turn attention to an unnecessary war with Iraq. See Ann Coulter, *Why We Hate Them*, FRONT PAGE MAGAZINE.COM, Sept. 26, 2002, reprinted in THE IRAQ WAR READER 333 (Micah L. Sifry & Christopher Cerf eds., 2003). The archetype statement in this regard, however, was President Bush's declaration that "Either you are with us or you are with the terrorists." Ken Herman, 'Justice will be done'; Bush vows to vanquish terrorists, their allies, ATLANTA JOURNAL-CONSTITUTION, Sept. 21, 2001, at A1.

prove—in the media if not in court—that he is free of the taint of the terrorist intent to bring down civilization. There seems no liberty that the population is not willing to surrender if it can be promised some security, real or imagined.³ No action proves too extreme, even unto war, if it allows an outlet for the country's outrage, and a catharsis for its collective sense of moral violation and righteous indignation.⁴

This Essay does not defend terrorism, or argue, as others have done, that in specific circumstances terrorism can be morally justified.⁵ It argues that many violent actions are mistakenly labeled "terrorism" because the innocent victims, the sine qua non to find prototypical terrorism, were not really so innocent. In this it seeks to distinguish between the term's use as a tool of political propaganda, and its utility

3. The ongoing case of *Padilla v. Rumsfeld* challenges the Bush administration's belief that it can indefinitely hold an American citizen incommunicado without charging him with a crime, and without allowing him access to a lawyer. See Paula Span, *Enemy Combatant Vanishes into a Legal Black Hole*, WASHINGTON POST, July 30, 2003, at A1. The USA Patriot Act also entails sweeping new governmental powers decried by civil libertarians. See *Muslim Community Ass'n of Ann Arbor v. Ashcroft* (E.D. Mich., No. 03CV72913), filed July 30, 2003. We should here recall Benjamin Franklin's warning that "Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety." RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS FROM THE LIBRARY OF CONGRESS 201 (Suzy Platt ed., 1992).

4. The Bush administration was applauded when, in the pursuit of a minor functionary of Saddam Hussein's fallen regime, the U.S. military resorted to the kidnapping of his wife and child. O'REILLY FACTOR (Fox television broadcast, July 28, 2003). The army left the general a note saying his family would be safely returned only if he first surrendered.

5. Were I to take up that argument, the result would probably be along the lines of the following: Acts that are popularly called "terrorism" can be morally justified, but only because they are not really terrorism. I take it that true terrorism targets innocents. In every case of justified terrorism, the argument can be made that the targets were not innocent, merely noncombatants. Much of this paper is intended to show that these terms are not synonyms. Therefore, "justified" terrorism is not an actual species of terrorism. It is the disjunction between terrorism as popularly understood, and as technically defined that creates the apparent problem of having to "justify terrorism."

as a category of moral and social philosophy. The analysis begins with a description of the phenomenological impact upon the American psyche from terrorist acts. I use that foundation to identify the elements that render an act identifiable as "terrorism," particularly the presumed innocence of the targeted victims. Having isolated the elements of terrorist acts that underlie their psychological impacts, I will be in a better position to critically reexamine the events of 9/11, and to suggest what duties this understanding places upon citizens of a participatory democracy.

I. THE PHILOSOPHICAL INFRASTRUCTURE

A. *The Language of Outrage at Terrorism*

People have a distinctive way of talking about acts of terrorism, one that helps to isolate a source of the associated outrage. Two conclusions emerge from even a cursory reading of contemporaneous news accounts: first, it matters who is victimized, and second, the wrong inflicted is perceived as not simply illegal, but rather immoral.⁶

1. *The Innocent Victim*

The first conclusion follows from the observation that, as used by ordinary speakers, prototypical acts of terrorism target certain kinds of victims. The bombing of the federal building in Oklahoma City by Timothy McVeigh illustrates this point.

The Murrah Building housed an office of the Bureau of Alcohol, Tobacco, and Firearms, whom McVeigh blamed for the annihilating 1995 assault on the Branch Davidians in Waco, Texas. By targeting a

6. Igor Primoratz similarly attempts to construct an understanding of "terrorism" based upon its "ordinary use," such that it "captures the trait, or traits, of terrorism which cause most of us to view it with moral repugnance." Igor Primoratz, *What is Terrorism?*, 7 J. OF APPLIED PHILOSOPHY 129 (1990). Primoratz's proposed definition is that "terrorism is the deliberate use of violence, or threat of its use, against innocent people, with the aim of intimidating them, or other people, into a course of action they otherwise would not take." *Id.*

building of government employees, that building could, from some perspectives, be judged a legitimate target for a protest against the actions of the government. Better objections would be that McVeigh's protest lacked sufficient provocation, or that it was not proportional to the provocation. If both these considerations had been satisfied, however, the bombing could not be criticized as having been misdirected.⁷

Where McVeigh's attack intuitively crossed a line was that his victims were not limited to government actors, but included children attending the day care in the Murrah Building.⁸ While the Oklahoma City bombing was shocking in its scale and toll, the fact that its victims included children compounded its horror. Few reports neglected to remind its readers that the dead and wounded from the bombing did not number just so many *people*, but rather that it included so many *children*.⁹

7. In an important sense the Oklahoma City bombing fails as an instance of terrorism, because its target was the provocateur. Under most definitions of terrorism, the victims are chosen to instill fear and terror in the provocateur, but are not themselves provocateurs. As will be discussed below, this is the basis of their claim to "innocence."

8. McVeigh disclaimed foreknowledge of the day care's presence. GORE VIDAL, *PERPETUAL WAR FOR PERPETUAL PEACE: HOW WE GOT TO BE SO HATED* 107 (2002). It is not immediately clear why our government purposely housed children in a building that could, under foreseeable circumstances, be a legitimate target of armed aggression.

9. E.g., *Terror in Oklahoma City: Statement of President Clinton*, NEW YORK TIMES, Apr. 20, 1995, at B12 ("The bombing in Oklahoma City was an attack of cowardice on innocent children and defenseless citizens."); John Kifner, *Terror in Oklahoma City: The Overview*, NEW YORK TIMES, Apr. 20, 1995, at A1 ("At least twelve children whose parents had just dropped them off at a second-floor day-care center were among those immediately known dead in the deadliest bombing in the United States in 75 years."); David Johnston, *Terror in Oklahoma City: The Investigation*, NEW YORK TIMES, Apr. 20, 1995, at A1 ("Like most Americans,' Mr. McCurry said, 'he was troubled, [especially] by pictures of the children' who had been killed."); Kenneth T. Walsh & Dan McGraw, *A Strike at the Very Heart of America*, U.S. NEWS & WORLD REP., May 1, 1995, at 51 ("It's all a nightmare,' [Robert Buckner, a paramedic] said. 'But the kids? Why would anyone want to do this to a place with a day-care center is beyond comprehension.'").

This tendency to underscore the presence of children among victims of senseless violence was encapsulated in a statement to the press by the police officer in charge of investigating sniper attacks in the Washington D.C. area: "All of our victims have been innocent, have been defenseless, but now they're stepping over the line, because our children don't deserve this."¹⁰ The implication is that while no one deserves to be sniped, children deserve it even less than adults. The problem is to clarify what lies beneath that judgment. If we had a better grasp of what made targeting children so outrageous, we could perhaps generalize that result to other classes of persons, to learn who are generally inappropriate targets of aggressive acts, including, if not especially, terrorism. So we must ask why targeting children is "over the line."¹¹

The same news account relates this problem to that of the "innocent," a category of person who could not be directly targeted in a just war. By extension, it "is terrorism's violation of the alleged rights of the allegedly innocent that seems to matter the most, and perhaps rightly so."¹²

The doctrine that innocents should not be targeted emerged from the rules of war as they have been articulated in international law. The central rule, derived from natural law, forbids the intentional killing of the innocent.¹³ This traditional analysis focused on who should *not* be

10. Francis X. Clines, *Sniper Hits Student at Maryland School*, TIMES-PICAYUNE, Oct. 8, 2002, at A1 (quoting Police Chief Moose).

11. One philosopher examining the presumed innocence of children was Norvin Richards, *Innocence*, 31 AMERICAN PHILOSOPHICAL QUARTERLY 157 (1994). He links innocence to states of knowledge about possible modes of misbehavior. Since children are presumptively incapable of conceiving of various transgressions, they lack the requisite state of mind for culpability, and are in this sense "innocent." Richards' argument differs from my own in that he considers the problem of the children's innocence of deeds they commit themselves, while I am looking at their innocence of deeds committed by third parties (e.g., governments).

12. Burleigh Taylor Wilkins, *Terrorism and Collective Responsibility* 65 (1992).

13. Gerry Wallace disputes this claim that it is a necessary truth that the deliberate targeting of innocents is morally unjustifiable. Gerry Wallace, *Area Bombing, Terrorism and the Death of Innocents*, 6 J. OF APPLIED PHILOSOPHY 3 (1989). He argues that other, equally compelling intuitions can apply, and that only a moral theory that weighs the competing arguments can avoid begging the question.

targeted; anyone who did not fall into the protective sweep of the rule was presumed to be a legitimate target. It was left to the law of nations to clarify who fell into the protected category of the "innocent."¹⁴ Despite earlier attempts to ground this judgment in the moral status of the individual—rooted, perhaps, in the parties' shared Christian religion, placing upon a medieval aggressor a heavier duty to justify killing fellow Christians, a burden he did not shoulder when battling non-Christians, as during the Crusades—the emerging trend in Catholic thought was to look to categories of persons based on their typical objective actions. The most important distinction became that between the soldier/combatant and the civilian/noncombatant. Moral innocence warranting protection during combat, in other words, merged into a determination of whether the target was a noncombatant.¹⁵ The problem would later become whether what was originally a proxy measure of moral innocence emerged as the quality to be protected in itself in Protocol I (discussed below).¹⁶ How the ambiguous cases are resolved will depend in part on whether immunity is a right of the innocent, or of the noncombatant.

When originally drawn, the line between armed combatant and non-combatant was not only arguably rational, it was also practical because soldiering was restricted to a professional class that fought on designated fields in close quarters. The clarity of this distinction blurred

14. RICHARD SHELLY HARTIGAN, *THE FORGOTTEN VICTIM: A HISTORY OF THE CIVILIAN* 89 (1982).

15. See Robert K. Fullinwider, *War and Innocence*, 5 *PHILOSOPHY & PUBLIC AFFAIRS* 90, 90 (1975) ("George Mavrodes... fears, however, that immunity theorists such as [Elizabeth] Anscombe and [Paul] Ramsey are actually using 'innocent' and 'noncombatant' synonymously. He believes that the sense of 'innocence' used in their arguments has no moral content.").

16. See A.J. Coady, *The Morality of Terrorism*, 60 *PHILOSOPHY* 47, 54 (1985):

In traditional and contemporary discussions of the morality of warfare the category of 'the innocent' usually collapses into that of 'non-combatant' partly in order to avoid being sidetracked into a largely fruitless debate about mental states to which attributions of guilt or innocence are to be attached.

over time, however, with the invention of new, less expensive weapons, which made it affordable to involve more persons in actual combat, as well as with the application of nonconventional methods of warfare, such as the guerilla tactics of the American Revolution and the creation of the citizen army under Napoleon. Attacks by and upon entire towns and cities became more feasible and therefore more routine. Further distinctions were therefore necessary after physical distance from the battle no longer adequately served to distinguish the soldier from the civilian.

At this point, then, if not before, the categories of the innocent and the noncombatant diverged. Christian custom explicitly immunized the occupational categories of farmers, laborers, pilgrims, and clergy.¹⁷ The rationale for these exemptions was that "they did not bear arms; [and] they did not actively participate or engage in the unjust aggression."¹⁸

17. This analysis of the tradition of civilian immunity shows how far the Bush administration has taken this country from the mainstream of international law. An excellent example is the role of the farmer, which represents a prototypical case of the kind of civilian who traditionally received protected status during war. For an explanation of why farmers are ordinarily granted immunity, see Jeffrie G. Murphy, *The Killing of the Innocent*, 57 *MONIST* 527, 533-34 (1973). However, President Bush, in response to 9/11, announced to the world that:

We're going to find those evildoers, those barbaric people who attacked our country, Bush said. And we're going to hold them accountable, and we're going to hold the people who house them accountable. The people who think they can provide them safe havens will be held accountable. *The people who feed them will be held accountable.*

Paul Watson & Robin Wright, *Bush Wants Bin Laden 'Dead or Alive' as Taliban Calls In Clerics*, L.A. TIMES, Sept. 18, 2001, at A1 (emphasis added). With this statement Bush displays either an ignorance regarding who may be targeted, or an overt intention to violate international law. In either case, by showing a willingness to target farmers and those who feed people who may be enemies of the United States, Bush has targeted a group much less culpable for violent acts than those who vote to support those policies. Therefore, even if others might object that voters in a participatory democracy are not "responsible" in the sense I will argue below, Bush cannot, consistent with this stated intent, also claim that democratic citizens are innocent.

18. HARTIGAN, *supra* note 14, at 89.

If these occupational categories were customarily protected because they did not *ordinarily* bear arms, then those categories of persons who *could not* bear arms were also protected under a similar blanket presumption of innocence. These included children.

We are able to explain, then, how it is that the death of children by a violent act of terrorism strikes the public as heinous: they are presumptively innocent. But thus far all that that label means is that they do not bear arms, that they are neither combatants nor direct parties to the injustice that provoked the aggression. The public reaction to these deaths goes deeper than that assessment, as evidenced in that claim that although all such victims are "innocent," children are even *more* so, an incremental evaluation that seems incompatible with a nominal armed/unarmed distinction. What else is tied up in the category of the innocent such that (a) it is "crossing the line" to target children over and above other innocent and unarmed persons, and (b) it is a trait such that a certain class of persons—e.g., children—can have more of that shielding trait than others?

2. *The Immoral Act*

The second conclusion from a reading of contemporary news accounts is that the heinousness of acts of terrorism derives from their perceived *immorality*. In some sense such acts violate not merely a rule of civilized life, but its very foundations. To say that the event was "immoral" should not be confused with a claim that it was "illegal." The severability of morality from legality has been highlighted by Judith Thomson, who argues that a law permitting the killing of a person does not equate with a moral right to kill that person, such that I should refrain from interfering in the murder.¹⁹

We can possess the legal right to do something without thereby acquiring the moral right to do that same thing. More pertinently, it can be illegal to do something without it thereby being necessarily also

19. Judith Jarvis Thomson, *THE REALM OF RIGHTS* 75 (1990).

immoral.²⁰ Throughout the debate about whether the United States should invade Iraq, for example, the strongest conflict was arguably between the concession that to do so would be the “right” thing to do, given the brutality of Saddam Hussein’s regime, and the doubt that to do so was actually legal under international law and the U.N. Charter.

When, therefore, the claim is made that the events of 9/11 are perceived as immoral, all that is necessary to the present argument is the concession that those acts are popularly understood as being illegitimate in a way that transcends the question of whether or not they might be illegal. That concession renders it *irrelevant* to argue whether or not the United States is in some technically recognized state of aggression against Moslem powers either formal or informal. Whether 9/11 was perpetrated by state or private actors, as an act of aggression or self-defense, matters only to its legality under international law, but not at all to its provoked visceral emotional reaction. Even if the U.S. were formally at war with al-Qaeda, as it now claims to be after 9/11, in all likelihood it would still be adamant in the conviction that the 9/11 attack was immoral. Had, for example, the Germans perpetrated a similar deed during World War II, the existence of a declared war would not, I suspect, have rendered the act more palatable to the American public as the expected and arguably legal wages of war. The accusation is not that the events on that September day were illegal, but that whatever their legality they were perceived as irredeemably immoral.

We will, for this reason, assume hereafter that the 9/11 attack *was* legal. The issue of the victims’ innocence has been too often conflated with the issue of the government’s innocence. Clearly, if the govern-

20. The disjunction between laws and morals can be illustrated by the following table of how different topics are treated in American law and culture:

	Moral	Immoral
Legal	Care for one’s children	Abortion; Death penalty
Illegal	Steal to save a life	Murder

That law and morality are not synonymous demonstrates the underlying weakness with any natural law approach, which can be relevant to any thorough discussion of the legal implications of a moral status of innocent.

ment is innocent, so too are its citizens. But it does not follow that if the citizens are innocent, so must be the government. This Essay severs the issues of civilian and governmental innocence by assuming for present argument that the government was *not* innocent, that the government has committed acts such that violent response was understandable and perhaps both morally justified and legally permitted—in other words, the argument the United States will frame to justify its invasion of Afghanistan. I do *not* assert that this description in fact pertains to 9/11. But by imagining that to be the case, it becomes possible for this Essay to ask the question: In the context of a guilty government, what then the innocence of the citizens? What implications result for the presumption of civilian innocence and immunity?

To observe that 9/11 is perceived as immoral leaves us just where we were relative to the innocence of children, in that the result is conclusory, not explanatory. While a bald recognition of the immorality may suffice for political purpose, it falls short of any philosophical clarity. What, exactly, made this attack immoral? It cannot be the magnitude of event, nor that it occurred on home soil. Americans applaud killings on a much larger scale than the death toll of the 9/11 attack (such as that they inflicted on Hiroshima),²¹ and it would be a strange morality that made the basis for opprobrium the simple fact that it happened here and not somewhere else.

21. The attack on Hiroshima killed 118,661 persons; the earlier attack on Nagasaki killed 30,000, with an additional 118,900 dying later from injuries. Jared Mitchell, *Survivors of a Living Nightmare*, MACLEAN'S, July 22, 1985. See also Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT. L.J. 49, 94 (1994) ("[The Nuremberg] Tribunal set the clear precedent that international law tolerated massacres of civilians, including those by nuclear weapons.").

Interestingly, some conservative U.S. commentators attempt to exonerate the use of atomics in Japan by invoking the thesis developed here: Because Japanese civilians supported their government, and the nation's involvement in World War II, none of them were "innocent," and thus the use of nuclear weapons killed no innocent civilians. See THE O'REILLY FACTOR (Fox television broadcast, Jan. 31, 2003) (Interview between O'Reilly and Ron Daniels, Executive Director for the Center for Constitutional Rights). While I approve of the theory, O'Reilly misuses it here, because the Japanese citizens had no oversight authority over the government, and therefore had no responsibility for its actions.

The most cogent expectation (but not one that is logically necessary) is that these twin observations from contemporaneous accounts—the singling out of the “innocent” as inappropriate victims of terrorism, and the perception that the heinousness of acts of terrorism is rooted not in their illegality, but instead their immorality—are mutually reinforcing. Terrorism is immoral *because* it targets innocents; otherwise, it is only illegal. If innocents were not targeted, then terrorism would be synonymous with acts of reprisal and aggression that are otherwise acceptable, such as war, for which the primary issue is legality, not morality. Terrorism is what it is because it targets innocents, and this makes it immoral.

Innocence of the victims, then, is a fundamental criterion that distinguishes immoral terrorism from acts of moral violent aggression, and it is into that concept that the next section delves further.²²

B. Responsibility as the Criterion of Innocence

If it is a child’s moral status as innocent that marks a violent act against her as especially outrageous, then the question becomes the means by which that status can be recognized. How do we know when an innocent person has been targeted? Looking again at the prototypical case, what about children makes them universal and permanent claimants to a presumption of innocence? A simple equation between “innocent” and “noncombatant” is too rough, not least because the martial conditions that originally generated the behavioral proxy for a moral status no longer apply.²³ The way people use the concept requires

22. For an opposing view, see Stephen T. Davis, who defines “terrorism” as “intentionally committing a public and violent act against a person or person (whether they be involved or uninvolved, guilty or innocent) in order to achieve a political end.” Stephen T. Davis, *Is Terrorism Ever Morally Justified*, in *TERRORISM, JUSTICE AND SOCIAL VALUES* 385, 385-86 (Creighton Peden & Yeager Hudson eds., 1990). Davis does not require that the target of terrorism be innocent, thus making any act of war fit the definition.

23. See also Brian Johnstone, *Noncombatant Immunity and the Prohibition of the Killing of the Innocent*, in *PEACE IN A NUCLEAR AGE* 305, 307 (Charles Reid, Jr., ed., 1986): “The bishops’ letter does not distinguish between the principle of discrimina-

that we grasp the concept of innocence directly, rather than merely by proxy through task assignments on a battlefield, and in a manner that would allow for incremental rather than categorical determinations.

One answer can be found by contrasting "innocent" with its moral opposite, "guilty."²⁴ I can be guilty of, or liable for, an act only if I am *responsible* for it in some nontrivial sense.²⁵ Richard Hartigan, who has

tion, the prohibition of the direct killing of the innocent, and the principle of noncombatant immunity. However, these are not necessarily identical. The category of the innocent belongs in the moral-theological tradition, and the corresponding principle prohibits the direct, intentional killing of the innocent. The category of noncombatants belongs originally to the legal tradition, and the corresponding principle prohibits the direct, intentional killing of noncombatants and the destruction of civilian targets not immediately connected with military activities." To the extent that the rule against the killing of noncombatants is intended as the equivalent prohibition against the killing of innocents, the rule is a failure, on both philosophical and pragmatic considerations.

24. It should be noted that the grounding of "innocence" in the state of being free from moral guilt is a Western position, and not a universal conviction. As John Kelsay explains, other cultural traditions have reached different conclusions on the issue. John Kelsay, *Islam and the Distinction Combatants and Noncombatants*, in CROSS, CRESCENT, AND SWORD: THE JUSTIFICATION AND LIMITATION OF WAR IN WESTERN AND ISLAMIC TRADITION 197 (1990). Classical Islam, for example, draws the line at one's religious status, at whether or not one has reached an age of decision, and having then rejected Islam. It is the status of being non-Muslim, and not that of "combatant," that marks one as a legitimate target. "Should women and children be killed in pursuit of battle, it is not the fault of the Muslims. 'They are from them.' The leaders of the people of war are at fault for the death of their 'innocents.'" *Id.* at 205. Contemporary Islam draws the line still differently, following lines drawn according to one's ideological attitude toward Zionism. "The just or innocent are those who do not join in supporting Zionism in its 'usurpation' of Palestinian land." *Id.* at 208. These examples show that an international consensus that the "innocent" should have war-time immunity does not necessarily result in agreement about who is thereby protected.

25. Compare Primoratz, *supra* note 6, at 131. An interesting tact that Primoratz imposes, which I do not follow, is that the judgment of innocence and responsibility is to be made from the terrorist's point of view. *Id.* That is, the damnable element of terrorism is that the terrorist himself believes his victims to be innocent, in the sense that they "have not *done* anything the terrorist could adduce as a justification of what he does to them." The standard I employ is not subjective in this way, but objective in the sense that anyone, looking at the public facts of the political system, can ascer-

exhaustively surveyed the development of the idea of civilian immunity, agrees that "[t]he modern classification of the civilian, the noncombatant who should be treated in some special, protective fashion, rests on an assumption of nonresponsibility."²⁶

The perfect relationship between responsibility and guilt is for the person to have actually done the deed: If I killed *A*, then I am responsible for the death of *A*, and hence liable for punishment. But the law also recognizes other kinds of responsibility besides the direct act: Although I did not kill *A* myself, I hired *B* to do it, or incited *C* to do it; I could also have helped *B* escape after he killed *A*. Any of these actions would make me responsible in some meaningful sense for the death of *A*, either because I did the deed, caused the deed to be done by others, or materially made the doing of the deed possible by knowingly providing necessary support. In all these instances I would not be innocent of the death of *A*, but would have responsibility for that act and thereby become a legitimate focus of retributive justice. Yet while all these scenarios incur responsibility for the death of *A*, that responsibility is not uniform, allowing for claims that I am *more or less* responsible depending upon what I actually did. Responsibility, because it is an incremental and not a nominal trait, satisfies the condition desired in a criterion to find innocence.

Responsibility is the stuff that can make noncombatant status a reasonable proxy for innocence warranting immunity during war. The framework linking the three concepts within the traditional approach to civilian immunity is *self-defense*. We may kill those who directly threaten us with imminent harm.²⁷ In war, these are the combatants, armed and ready to kill the opposing soldier. Soldiers may kill each other because they are each directly responsible for the threats to the other. Civilians, however, pose no such threat, and thus are not responsible for anyone's endangerment. They may not, therefore, be attacked.

tain the presumptive moral status of the ordinary citizen for the political acts of his or her government.

26. HARTIGAN, *supra* note 14, at 35.

27. For a discussion of the relationship of self-defense to noncombatants and civilian immunity, see generally Fullinwider, *supra* note 15.

Only when threats are allowed to become so abstract and future-oriented (as opposed to imminent), do civilians become responsible for harm to a soldier via a chain of contingent possibilities. But under that scenario, anyone and everyone is always a potential threat to everyone else because of what they might or could do at some possible future time. So long as self-defense allows attack only on an imminent threat,²⁸ civilians are ordinarily immune because they pose no imminent threat even where they pose an imaginable threat (the child, for example, could grow up to become an armed terrorist, so why not kill him now in a preemptive attack?). As will be argued below, however, civilians can sometimes pose a genuinely imminent threat, even while they remain unarmed combatants.

The link between innocence and responsibility allows us to deepen the understanding concerning the presumptive innocence of children. Children, by definitions both legal and social, lack capacity to be responsible for their own actions, and consequently are guiltless in the sense employed herein. "Legal," because the law treats children differently from adults, as both victims and perpetrators; "social," because our society has an ingrained belief that children are *incapable* of perpetrating heinous acts due to their natural innocence. They are therefore not merely innocent, but the archetypes of innocence, a result in complete accord with common use of the term.

This asserted use of responsibility as the determinant of moral innocence can be tested by another sociological fact. Just as children are illegitimate targets of aggression, it is often the case that women are accorded similar protected status,²⁹ a presumption readily evident in many societies' enduring attitude that women are not suited to perform

28. This is so at least under international law: See *Caroline Dispute*, 29 British Foreign and State Papers 1129 (1841).

29. Grotius explicitly extended wartime immunity to women for the same reasons as to children. See HARTIGAN, *supra* note 14, at 99. Women and children are singled out for special protection in the *Declaration on the Protection of Women and Children in Emergency and Armed Conflict*, G.A. res. 3318 (XXIX) (1974). Children merit this status, according to this document, because they are "the rising generation," and women because they are "mothers."

front line military duties.³⁰ The social disapproval of targeting women can be explained in the same terms as those used to account for the special protection for children. For large segments of sociopolitical history, women have been deemed to be incapable of independent responsible action,³¹ instead being the objects of paternalistic protection by the various males in their lives. They were, in a word, socially and jurally infantilized, and as part of that analogized status they shared in the presumption of innocence of actual children.³² That sentiment survives to the present day in lesser degrees.³³ As paternalistic attitudes change, we should see women judged as acceptable a target of aggression as are men, although children and other protected categories (e.g., the elderly and the mentally disabled) will continue to be regarded as unacceptable targets, based largely on social perceptions of them as presumptively innocent because presumptively lacking capacity to be responsible for any action that would merit a violent response.

Thus, the often conflated terms of civilian, innocent, and noncombatant are made sensible by their relationship to the concept of responsi-

30. As discussed, for example, in *Rostker v. Goldberg*, 453 U.S. 57 (1981) ("Congress and the Executive have decided that women should not serve in combat.")

31. This was the rationale behind Louisiana's former "head and master" legal regime between man and wife. *E.g.*, *Camel v. Waller*, 526 So.2d 1086 (1988) (wife had no interest in the sale of property because notice of judicial separation was not recorded, and thus husband had full power to alienate property). Head and master regime was replaced in 1979 with LA. CIV. CODE ANN. art. 2347 (West 1985), which requires spousal consent for the alienation of community property. Still present in the Civil Code is a provision that expressly requires wives to yield to their husbands. *See* LA. CIV. CODE ANN. art. 216 (West 1993) ("In case of difference between the parents [in matters of the child], the authority of the father prevails.").

32. *Compare* Kelsay, *supra* note 24, at 203, suggesting that in Islamic theory "women are not subject to damage that deprives them of life [because of] a notion of diminished responsibility, as with children."

33. The opinion that women should not be the targets of violence comports with our cultural distaste for exposing women to capital punishment. *See, e.g.*, Thad Rueter, *Why Women Aren't Executed*, 23 HUMAN RIGHTS 1, (1996); *see also* Victor Streib, DEATH PENALTY FOR FEMALE OFFENDERS JANUARY 1, 1973, THROUGH JUNE 30, 2003, at <http://www.law.onu.edu/faculty/streib/femdeath.htm>.

bility. Reference to these other statuses are merely external proxies, sometimes reliable, sometimes not, for the variable that truly determines whether a person has immunity. Where there is responsibility, there cannot be immunity. This result has been reached, however, by examining personal responsibility for personal acts. The larger issue is whether the analysis also holds for collective responsibility for state acts.

C. Civilian Responsibility for State Actions

Personal responsibility is the variable that determines and inversely co-varies with innocence.³⁴ The next step asks whether citizens can be held responsible for the acts of their government, such that they lose the immunizing presumption of innocence, leaving them vulnerable to legitimate aggressive attacks in response to governmental acts.³⁵ J.R. Lucas concluded that, whether or not citizen collective responsibility actually exists, there are good reasons why a healthy nation would encourage the belief that it does:

First, it makes us feel good: instead of feeling outsiders, with "them" always doing things to "us," we can take pride in our

34. Interestingly, Murphy similarly identifies the fact of responsibility as determinative, but links it less to the status of innocence than to the role of combatant. See J. Murphy, *supra* note 17, at 532.

35. The main points of this section have been anticipated by Michael Green, *War, Innocence, and Theories of Sovereignty*, 18 SOCIAL THEORY AND PRACTICE 39 (1992). An interesting claim that diverges from the present thesis is Green's suggestion that, in an ideal democracy, in which the people will be responsible for the acts of their government, "it is not clear that even children, the insane, and the mentally handicapped are innocent." *Id.* at 52. I do assume that these persons remain innocent even in an ideal democracy, since under the law they are not ordinarily culpable. The existence of this prototypical category of the presumptively innocent formed the reasoning that identified responsibility as the key criterion to find innocence. Once that starting point has been removed, however, as it is in Green's formulation, one can only assume responsibility as the necessary variable, rather than derive it. In this way, the present argument, while containing many of the same points as Green's, frames them in a more cohesive manner.

society, identify with it, and feel at one with what is going on around us; corporate responsibility is ego-enhancing. Second, it gives us a good reason for obeying the law. If I feel that the law is our law, and that I am one of us, then I shall feel obliged to go along with it even when we have decided something against my own better judgment. Third, it encourages people to play an active part in their community, and to take initiatives and co-operate actively in carrying out public policy.³⁶

“It is thus of great importance to have institutions which will nonetheless spread responsibility around, so that we do not feel that decisions taken in our name and affecting us all are decisions taken by ‘them’ but are at bottom decisions taken by us.”³⁷

Whatever the philosophical and practical desirability of holding citizens collectively responsible for the actions of their government, it remains a live question whether, in any specific circumstance, they are in fact responsible. Assume, as we are, that the aggressive act at issue is a legitimate response to a provocative act of the government. If the response itself were illegitimate, it can be condemned on that basis alone, without recourse to a consideration of the moral status of the victims. If *B* is responding to the foreign policy of *A* (for example, suppose Country *A* is supporting a revolution against the legitimate government of Country *B*), and were it legitimate for *B* to respond, when, if ever, would *B* be allowed to target citizens of *A*? Or must *B* target only those persons who are directly responsible for the formulation and implementation of the foreign policy at issue? And even in that case, what does it mean to be “directly” responsible?

Recall that the traditional view presumed that someone could be targeted *unless* he or she fell into one of the recognized protected categories. Argument was needed to show why someone could *not* be targeted. In that milieu, standards such as “civilian” and “noncombatant” emerged as shorthand ways of identifying those so protected.

36. J.R. LUCAS, RESPONSIBILITY 233 (1995).

37. *Id.* at 81.

In international law, however, this problem is framed in the converse: The default is no longer that anyone can be targeted, unless articulable reasons are given otherwise; in modern thinking the presumption has become that no one could be targeted unless specific criteria are met. Contemporary jurisprudence has invested greater status onto the proxy of noncombatancy, elevating it to a condition meriting protection in itself, while virtually ignoring the quality it was originally intended to signify: innocence. Thus, according to Protocol I, civilians are a residual category, describing someone who does not fall under one of the identified categories in Article 43.³⁸ A civilian is anyone who is *not* a combatant as defined elsewhere in the Geneva Conventions and Protocol I, that is to say, someone who is not a member of the armed forces party to a conflict.³⁹ Civilians are protected not because of what they are (innocent), but because of what they are not (armed combatants). Their innocence has, under international law, become irrelevant.

Hartigan concludes his own overview of this matter with the observation that "the simple classification of 'civilian' is too broad and ill-defined suitably to describe who these innocent are," and thus who merit immunity during war.⁴⁰ Indeed, it is not difficult to show that the equation in international law between noncombatant and "innocent civilian" is too narrow, and in practice observed by no one. If the military combatant is the "implementer" of A's foreign policy, strict application of the prevailing standard would render it illegitimate to target the noncombatant civilian "formulators." Yet the politicians are equally culpable with the soldiers, if not more so. It would be a perverse logic that allowed you to shoot the armed foot soldier, but

38. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts [hereinafter "Protocol I"] 1979, 1125 U.N.T.S. 447.

39. Art. 50 defines a civilian as "any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3) and (6) of the Third [Geneva] Convention and in Article 43 of this Protocol." In other words, "civilian," is a negative category.

40. Richard Shelly Hartigan, *Noncombatant Immunity: Reflections on Its Origins and Present Status*, 29 REVIEW OF POLITICS 204, 219-220 (1967).

protected the unarmed superior officer who ordered him to shoot you. Moreover the political formulators may be a more effective target than the military implementers, since the latter are more easily replaced. A change in political office holders could immediately effect a reversal in the injurious policy by a new administration. Thus, for example, Israeli officials expect that many of their problems would be solved by removing—by death or exile—Yasser Arafat, a result achievable via the killing of no number of Palestinian bombers.⁴¹ To the extent the legitimate response seeks to minimize casualties on both sides, unarmed civilian politicians would be the *preferred* target. “If the politicians can be shown to be in a chain of agency directing the tyrannical behaviour which justifies the revolution [or terrorism] then they seem to be legitimate targets.”⁴² Just as the U.S. insisted that Saddam Hussein was a legitimate military target during its war in Iraq,⁴³ so too would George W. Bush be a legitimate target for any military aggression against the U.S., despite Bush’s status as an unarmed civilian.

If, however, it is legitimate to follow the chain of responsibility from the armed combatant to the unarmed civilian politician, there exists no obvious justification to stop there. Reason demands that we continue to proceed down the line of true responsibility to include other civilians, if the line so extends. Ultimately, if civilians are responsible for selecting the government, and the true authority of the government originates in the people and, importantly, the people retain ongoing oversight powers, the people cannot be innocent relative to the actions of that government.

Historically, the prohibition against targeting the innocent is the deeper rule than is the modern extension of immunity to the noncom-

41. Edith M. Lederer, *Arafat Measure Vetoed by U.S.*, ATLANTA JOURNAL-CONSTITUTION, Sept. 17, 2003, at A12 (quoting Israeli Vice Prime Minister Ehud Olmert as saying that “killing Arafat was an option”).

42. Coady, *supra* note 16, at 62.

43. *Saddam Fair Game in War, Official Says*, TIMES-PICAYUNE, Feb. 26, 2003, at A10.

batant.⁴⁴ Whether they pass the traditional test because they are innocent, or fail the modern test because they are not combatants, in neither case have civilians been protected *per se*. They are always protected because they, as a class, possess some other trait, innocence or lack of arms. Whatever test is applied, therefore, it is never enough to identify victims as civilians. Nothing follows necessarily from that status. The determinative issue is whether, being civilians, they were also innocent, or unarmed.

The rules against killing the innocent and against killing noncombatants are not equivalent. Philosophically, these are two different rules, and not the same rule differently phrased. However, because the rule protecting noncombatants has not in practice been strictly construed, the results of the two rules converge to the same outcome. By even that standard civilians can be held responsible for the acts of governments, and targeted, if they share responsibility (or in traditional terminology, lack innocence), despite the fact that they are not combatants in the conflict.

This conclusion has been conceded, sometimes with discernable hesitation, by sundry philosophers. Gabriel Palmer-Fernández admits that "Only in a failed democracy, or [in a] totalitarian regime, would citizens share no responsibility for their government's action. When at war, citizens of a successful democracy will have to accept a measure of responsibility. And if the war is unjust, they are guilty of a grave injustice," and on this basis may be intentionally killed. If they should be spared this fate, he goes on to argue, it would be on other grounds, and not by appeal to their "innocence."⁴⁵

The only remaining issues concern what actions connote responsibility that would incur this liability, and what kinds of reprisals would be appropriate to that liability. Philosophical insight into the first problem was offered by existentialist philosopher Karl Jaspers, who

44. Hartigan, *supra* note 40, at 219.

45. Gabriel Palmer-Fernández, *Innocence in War*, 14 INTERNATIONAL JOURNAL OF APPLIED PHILOSOPHY 161, 171 (2000). He attempts to preserve the rule of civilian immunity by basing it not on innocence, but on the social functions performed by civilians.

examined the guilt Germans should bear for the actions of their country during World War II. He identified four kinds of guilt: *Criminal guilt*, which is incurred by individuals for their own acts; *political guilt*, which is shared by all citizens by virtue of that status; *moral guilt*, which is a personal liability contingent on specific acts of support; and *metaphysical guilt*, which arises from a lack of empathy with the suffering of others.⁴⁶ According to Jaspers, criminal and political guilt are to be judged by others, moral guilt by ourselves, and metaphysical guilt only by God.

Our attention is limited to political and moral guilt, between which Jaspers warned there is to be “no radical separation.”⁴⁷ Political guilt is strict liability: “A people answers for its polity.” Jasper’s political guilt is in most ways synonymous with Joel Feinberg’s collective responsibility,⁴⁸ which emerges out of group solidarity, which in turn arises from three dimensions: (1) a large community of interest; (2) a community associated with “bonds of sentiment directed toward common objects;” and (3) the degree to which the parties share a common lot.⁴⁹ Moral guilt, on the other hand, inheres in “conveniently closing their eyes to events, or permitting themselves to be intoxicated, seduced or bought with personal advantages, or obeying from fear.” Individuals who wallow in the “unconditionality of a blind nationalism” are guilty in a sense beyond that attached to mere political status, a judgment requiring knowledge of a person’s specific actions in relation to the government acts.

In Jaspers’s terms, although all citizens share political guilt for the acts of their governments, the outrage over terrorism suggests that the victims are deemed morally innocent, despite whatever political guilt they may bear. It is also necessary to recall that we are concerned with the *presumed* innocence or guilt of the victims. The question, therefore,

46. KARL JASPERS, *THE QUESTION OF GERMAN GUILT* 31-32, 61-73 (1947).

47. *Id.* at 77.

48. Joel Feinberg, *Collective Responsibility*, in *RESPONSIBILITY* 222 (Ellen Frankel Paul, Fred D. Miller, Jr., & Jeffrey Paul eds., 1999).

49. *Id.* at 234.

is whether any group of persons can be presumed to have incurred *moral*, as opposed to political guilt, an issue that can run contrary to expectations that moral guilt is ordinarily a personal, and not a collective failing.⁵⁰ The presumptive moral innocence of the citizen must depend upon what support, if any, can be inferred solely from the status of citizen, without recourse to the particular acts of any specific person (which would go to the issue of actual innocence, not presumptive innocence).⁵¹

Support that incurs responsibility can be located on a sliding scale. An early progression in the law of war saw the following development:

Air power enabled military commanders to attack the industrial base that supported the war effort. These attacks extended to the workers themselves, who arguably contributed no less than uniformed soldiers. Next on the target list was a nation's "will" to fight. To the extent that civilian support bolstered the vigor of an enemy's war effort, a belligerent could justify direct civilian attacks, so-called "morale" bombings, on the grounds of military

50. It must be conceded that some philosophers disagree with the effort to ground the legitimacy of targeting someone with their moral guilt. According to Lawrence Alexander, the "right to kill in self-defense requires only that the person killed be a necessary or sufficient cause of a danger, not that he be morally guilty." Lawrence A. Alexander, *Self-Defense and the Killing of Noncombatants: A Reply to Fullinwider*, 5 PHILOSOPHY & PUBLIC AFFAIRS 409, 415 (1976). Under the present analysis, however, Alexander's dichotomy collapses. One cannot be the "cause" without incurring some responsibility, which in turn makes one, to some degree at least, morally guilty.

51. Because I am concerned only with presumptive, and not actual innocence, I can set to one side the problem of the dissenting citizen, one who has vocally taken a public stand against the policies of the government. A good argument can be made that such a person is actually innocent, and thus should not be targeted. But because that citizen has stayed within the system, and enjoyed the benefits derived from its acts, he or she may be deemed to lack a presumption of innocence. Combatants have never been required to determine the actual moral status of its targeted victims, but only to act according to the most reasonable presumption that the circumstances warrant. Therefore, even the dissenting citizen can be targeted if the aggressor has no actual knowledge that he or she is in fact an innocent.

necessity. Under such an expansive view of military necessity, no one was immune from legally justifiable attacks.⁵²

To the extent that war is viewed as a solidarity effort by a population, this progression does not seem wholly unreasonable. But civilian support will not always “bolster the vigor of an enemy’s war effort” in the same way. Implicit in the image of the quoted section is a direct line between the “will” of the civilian and the “war effort” that is prosecuted by the government, such that breaking the former must terminate the latter. That reasoning presupposes that the government is necessarily responsive to the wishes and travails of its citizens. Where that is not the case, where the government acts independently and without regard for its citizens, morale bombing would be pointless.

All citizens in all countries will necessarily—by virtue of being “citizens”—have some articulable relationship to their governments; and it is the actions of governments as provocateurs on the one hand, and the innocence of civilians as victims on the other, that frames the problem of this discussion. According to Jaspers, the necessary connection between citizen support and moral guilt would be very difficult to establish, and perhaps even impossible. But his may be too strong a claim. While political liability is strict, moral guilt is personal. The guilty must have offered some show of support that not merely allied the person with the censured acts by collective association, but indicates that the person adopted those acts as his or her own. The guilt incurring responsibility, in other words, must be not merely technical, but personal, and it must still be true of all citizens: a universal, personal responsibility for government action.

While all citizens incur political guilt, the argument made here is that citizens in some political systems also incur personal responsibility through the mechanism legitimating the government committing the offensive actions. Citizens can be held liable if they had the power to prevent the atrocities, power which they failed to exercise either willfully—agreeing with the policies—or negligently—failing to exercise adequate oversight of the government in order to become aware of the policies. If the citizens have that responsibility, they are not “innocent”

52. af Jochnick & Normand, *supra* note 21, at 78-79.

as outlined earlier, and thus are not illegitimate targets of retaliatory aggressive reaction. Therefore the determinative question is whether the government acts as the recognized *agent* of the citizenry, or simply as its *ruler*: "Responsibility goes with effective authority."⁵³

Within some political systems it is electoral participation that betokens the legitimacy of the government, such that the government acts as the agent of the citizenry. If any specific action lies within the legitimate scope of the mandate of the government's authority, then the principal, under ordinary agency theory, can be held responsible for that action.⁵⁴ Under political systems such as participatory democracy, the citizen who votes is not innocent of the acts of the government legitimated by that vote, contrary to Per Bauhn's claim that a "citizen does not support a political system . . . by just voting and thus participating in the election process."⁵⁵ On the contrary, the disqualifying participation

53. LUCAS, *supra* note 36, at 83.

54. "A master is liable for torts committed by a servant within the scope of his employment... When an agent acts within the scope of her authority, she is not personally liable to the third person on the obligation so created." ROBERT W. HAMILTON, *CORPORATIONS* 1195-97 (7th ed., 2001).

55. PER BAUHN, *ETHICAL ASPECTS OF POLITICAL TERRORISM: THE SACRIFICING OF THE INNOCENT* 66 (1989). Similarly, one can ask whether paying a tax explicitly intended to fund a war marks the civilian as having supported the war.

Possible support for the position that the right to vote renders civilians morally responsible comes from Alvin Goldman. He argues that voting confers "a certain (quasi-) moral status, whether or not anybody else knows about this status or does anything about it." Alvin I. Goldman, *Why Citizens Should Vote: A Causal Responsibility Approach*, in *RESPONSIBILITY* 201, 214 (Ellen Frankel Paul et al. eds., 1999). This moral status has its roots in the fact that voters "bear partial responsibility for the electoral outcome." *Id.* at 217. Wilkins also agrees that voting can itself constitute sufficient participation to "widen considerably the net of responsibility." WILKINS, *supra* note 12, at 68; *see also* Richard Wasserstrom, *On the Morality of War: A Preliminary Inquiry*, in *WAR AND MORALITY* 78, 95 (Richard A. Wasserstrom ed., 1970) ("a person's voting behavior, or the degree of his political opposition to the government, or his financial contributions to the war effort might all be deemed to be equally relevant to his status as an innocent.").

Note that for all commentators, voting *per se* is the determinative criterion, not voting in the winning majority. Each citizen is bound by the outcome, and benefits from participation in the collectivity, recalling also the Lockean principle that

can be “remarkably passive,” the only limitation being that the political participation “cannot be completely and necessarily passive, or it ceases to be participation.”⁵⁶

The American system is replete with understandings of this kind.⁵⁷ Government rules with the “consent of the governed;”⁵⁸ it is a “government of the people, by the people, and for the people.”⁵⁹ Any power and authority the U.S. government has, it has from the people through its federal constitution solely by delegation through the Lockean social contract that is at the heart of American political ideology.⁶⁰ At any moment the government’s powers can be withdrawn if there amasses popular dissatisfaction with policies the government hopes to imple-

“residence gives consent.” So voting in the minority on any particular issue does nothing to mitigate the citizen’s responsibility for the electorate’s will as expressed by the majority.

56. LUCAS, *supra* note 36, at 213.

57. The American system represented a significant break with its English predecessor:

Blackstone, recording the aftermath of Britain’s Glorious Revolution, recognized the transference of English sovereignty from the Crown to Parliament. Americans, following the Radical English Whigs, cut the middlemen out and placed sovereignty in the people. Rejecting Blackstone, Americans maintained instead that sovereignty derived from the people’s continuous assent.

Lucas A. Powe, Jr., *The Fourth Estate and the Constitution: Freedom of the Press in America* 27 (1991).

58. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

59. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863).

60. “[T]hough in some ways the Declaration of Independence was a peculiarly American product, there can be little doubt that it owed its main inspiration much more to the doctrines of Locke than to the indigenous principles of the New England colonies.” J.W. Gough, *Introduction to JOHN LOCKE’S THE SECOND TREATISE OF GOVERNMENT* vii, xxxvii (1966).

ment. Any law can be revoked, the Constitution can be amended, or a president impeached, if there exists sufficient public will.

Other theories of government legitimation exist alongside the agency principle. Not all citizens possess the power that makes them responsible for their government. A transitional political form can be discerned in Roman law. Although most agreed that the ultimate source of power was the people, at least a few reckoned this transfer to be irrevocable, rendering the people no longer responsible.⁶¹ Power can also be held by "divine right," whereby the ruler claims authority from above in the name of the god worshiped by the society, and not from the people below.⁶² Legitimacy in that circumstance will consist of whatever markers are accepted as substantiating this claim, perhaps certification by a priesthood (i.e., requiring the ruler to be crowned by the church, as was the Holy Roman Emperor),⁶³ or descent from an ancestral figure onto whom legitimate authority was originally bestowed (e.g., the royal lineages of China, or the descendents of Mohammed). Another possible mechanism of legitimation is force of arms, whereby power belongs to whomever can take it.⁶⁴ To this category might belong the military dictatorships common in today's world, such as Cuba and Iraq. Hybrid forms are also to be expected. One can succeed

61. See PETER STEIN, *ROMAN LAW IN EUROPEAN HISTORY* 60, 72, 95 (1999). See also Gilbert Bagnani, *Divine Right and Roman Law*, 3 *PHOENIX* 51 (1949) (rejecting the idea of "divine right" of the king in Roman law).

62. WESTEL W. WILLOUGHBY, *THE ETHICAL BASIS OF POLITICAL AUTHORITY* 83 (1930) ("The [divine right theory] has also included the doctrine that those persons who exercise the powers of government . . . are either themselves super-human or divine beings, or viceregents of God with a directly divine mission to exercise supreme political authority over their subjects.")

63. *Charlemagne*, *THE NEW ENCYCLOPEDIA BRITANNICA*, VOL. 15, 741-42 (2002) (describing how, on Christmas Day in 800, Pope Leo crowned Charlemagne emperor). According to some reports, Charlemagne resented being "surprised" by the Pope's placing the crown on his head, because that act symbolized that he was emperor only by authority of the Pope.

64. WILLOUGHBY, *supra* note 62, at 33-39. The author cites Machiavelli as a theorist in this school.

in force of arms because one is divinely chosen to rule (Constantine comes to mind as a particularly vivid example in the Western tradition);⁶⁵ the causal connections can flow in the opposite direction as well, so that one is divinely chosen because one has already proven successful as a warrior (this was the path taken by early Roman emperors, whose path to their own godhood often began with a display of martial prowess).⁶⁶

In none of these additional scenarios do the ordinary citizens legitimate the government, although the government can nonetheless be legitimate according to its own standards. Rather, the citizen "tolerates the political reality as an alien fact,"⁶⁷ and, therefore, is morally innocent to a much greater extent of the acts of that government than where governments act self-consciously as designated agents.⁶⁸ This contrast between citizens who are or are not innocent by virtue of their role in legitimating the government can be read as a variation of the one discussed in the previous section, which found persons who are chronically non-responsible, and, therefore, morally innocent, to be children either literally or figuratively. Whereas citizens in participatory democracies can be conceptualized as autonomous principals who have delegated their powers to governmental representatives, citizens in totalitarian systems have been infantilized by their governments, who at best act paternalistically for the citizens' good.

In the final analysis, "civilian immunity," which is reflexively invoked to argue the outrageousness of terrorism, is a misnomer. Civilians have no inherent claim to immunity by any understanding; it

65. *Constantine the Great*, THE NEW ENCYCLOPEDIA BRITANNICA, VOL. 16, 687 (2002) (describing how Constantine won the battle at Milvian Bridge after taking the Christian "rho chi," which appeared to him in a dream with the legend "In this sign, conquer," as his military banner).

66. A related example would be the "trial by challenge" in which divine favor was presumed to evidence itself through success on the field.

67. JASPERS, *supra* note 46, at 35.

68. The citizens may not wholly enjoy support-innocence, even for playing no role in legitimating the government, as they can still support the government in other ways.

has always been the innocent that are immune. For significant spans of political history civilians have been actually innocent, and, therefore, deemed immune. But civilian status per se has never been the true basis of that immunity; civilian status, along with noncombatant status, has always been shorthand for something else. That something else is innocence, which is a function of political responsibility. Citizens of a participatory democracy are not innocent. This has always been their virtue, and their burden.

D. The Liability Incurred by Civilian Collective Responsibility

Although the theory holding citizens collectively responsible for their governments has been well known, its application to the problem of terrorism "has been entirely neglected."⁶⁹ According to one explanation for this lacuna, the rules of war were initially formulated before the rise of participatory democracy, and thus civilians have remained presumptively innocent of their governments' acts even when the grounds for that presumption no longer applied. Another explanation looks not at domestic politics but at international law.

The doctrine of civilian immunity emerged at a very early stage in the development of international law, which at that time was concerned solely with the relations between states. The individual person, if recognized at all by international law, was only an object, and much more frequently an uninvolved bystander. Under those circumstances, it may have seemed only charitable that the powerless be protected from the consequences of state actors.

After World War II the individual finally emerged as a subject of international law, with both rights and duties. On the one hand, individuals now expected to have their rights protected by international law, under the emerging rubric of human rights law; on the other, persons could be held personally liable for the actions undertaken in the name of states. That, at least, was the lesson of the Nuremberg trials. From this new position, the individual played a role that was not always consistent with the vision of the individual when earlier rules were formalized. A principle of blanket protection for civilians—concretized

69. Wilkins, *supra* note 12, at 19.

when civilians were only objects of international law—could not be assumed to be wholly compatible with a modern international law that perceives the individual as a subject. If this heightened status carries advantages in increased protections of recognized human rights, it may also be the case that it carries burdens in the form of duties and liabilities also cognizable under international law.

Even if civilians in some societies, for whatever reason, share collective responsibility for the acts of their governments, it is still unclear whether this is the kind of responsibility that would make it appropriate to target them for violent reprisal. Merely having responsibility does not necessarily leave one liable for the harshest of penalties; the objection to targeting civilians need not be their alleged innocence, but rather the disproportionality of the violence relative to the extent of their admitted culpability. Death by terrorism is tantamount to the severest of criminal penalties, but the degree of liability that a civilian would incur might rise only to the level of tort.

Burleigh Taylor Wilkins identifies the situations when he believes terrorism can be justified:

[T]errorism is justified as a form of self-defense when: (1) all political and legal remedies have been exhausted or are inapplicable (as in emergencies where ‘time is of the essence’); and (2) the terrorism will be directed against members of a community or group which is collectively guilty of violence aimed at those individuals who are now considering the use of terrorism as an instrument of self-defense, or at the community or group of which they are members.⁷⁰

70. *Id.* at 28. Wallace, *supra* note 1, at 155, outlines his own criteria by which an act of terrorism can be justified:

- (1) It was a measure of last resort, there being no effective military alternatives and appeasement having failed.
- (2) it was an act of collective self-defence.
- (3) It was a reply in kind against a genocidal, racist aggressor.
- (4) It had some chance of success.

Wallace considers it unlikely that a terrorist act can satisfy these conditions, largely because he believes that (1) and (4) cannot be simultaneously satisfied. However, an implication of his analysis is that terrorism is not necessarily immoral, but only

By this standard, terrorism by the Jews against the German people during World War II "would have been a morally appropriate response."⁷¹ A second example of justified terrorism might be the suicide bombings of the Palestinians. On the one hand, it was Israel that arguably first used terrorism in the 1940s in an effort to expel the Palestinians from the newly-formed state of Israel,⁷² so in this sense the Palestinians are now justified in self-defense. On the other hand, the Israelis can deploy tanks and armies against the inhabitants of the occupied territories, unlike the Palestinians, who must use whatever they literally have at hand.⁷³ As Palestinians have no lesser means available to them, short of capitulation, terrorism might for them be a legitimate alternative.⁷⁴ Even Gandhi, the patron saint of nonviolence,

contingently so, in that every actual example has failed to meet the required standard for legitimacy.

71. Wilkins, *supra* note 12, at 27.

72. John Quigley, *Displaced Palestinians and a Right of Return*, 39 HARV. INT'L L.J. 171, 173 (1998).

73. See Margaret Coker, *Israel Convicts Jews in School Bomb Try*, ATLANTA JOURNAL-CONSTITUTION, Sept. 17, 2003, at A7 ("Israeli army action is the main cause of Palestinian civilian casualties, while suicide bombings and similar attacks account for the bulk of Israeli dead and wounded. In the past three years, more than 2,400 Palestinians and 850 Israelis have been killed.")

74. It has been said that to throw a bomb is terrorism; to drop a bomb is war. This maxim suggests that only those in a position to do the latter—that is, the technologically advanced states—can ever be justified in violent attack. R. George Wright, however, claims that it would be "dubious" to "condemn the government of a Third World country for the use of primitive technology if that country was systematically denied access to more precise, discriminant technology." R. George Wright, *Noncombatant Immunity: A Case Study in the Relation between International Law and Morality*, 67 NOTRE DAME LAW REVIEW 335, 358 (1991). He uses this claim to buttress his argument that, in order to increase civilian immunity, "international law should require the sellers [of arms] to actually subsidize the price of sophisticated weaponry that can be used with greater likelihood of distinguishing between combatants and noncombatants." *Id.* at 337. Wright's thesis goes to the present observation that a party cannot be condemned for using the only resources available to it. As

admitted that “if he were limited to a choice between engaging in violence and accepting what he called ‘emasculat[i]on’ he would opt for violence.”⁷⁵

This debate need not be resolved in any absolute manner. Instead, Americans should be satisfied to be judged by the standards we have applied to others. What degree of responsibility has our nation found sufficient to justify a lethal retaliation?

A first step in U.S. law toward finding citizens liable for the acts of their government in the context of terrorism came in *Boim v. Quranic Literacy Institute*.⁷⁶ In *Boim*, the parents of a victim of Hamas, a foreign terrorist group, sought to hold civilly liable an organization that allegedly aided and abetted that group through monetary donations. The plaintiffs argued that because that support made the act of terrorism possible, that support itself “constitutes an act of international terrorism.”⁷⁷ The court agreed that the plaintiffs had a cause of action.⁷⁸ Persons, in other words, who provide “material support or resources” to terrorists, themselves are liable—at least civilly—for those acts of terrorism. By this logic, if the terrorist is the state itself, and that terrorist has been knowingly enabled by “material support or resources” from the citizens, then the citizens can be categorized and treated as if terrorists themselves.

asked rhetorically by Ross Glover, “Did Palestinians start using suicide bombings because they like blowing themselves up? No, they did so because there was no other military alternative to Israel’s dominant force.” Ross Glover, in *COLLATERAL LANGUAGE* 207, 220 (John Collins et al. eds., 2002). In contrast to the possibility that the Palestinians present a case of justifiable terrorism, David A. George argues that the IRA fails that analysis. David A. George, *The Ethics of IRA Terrorism*, in *ETHICS IN INTERNATIONAL AFFAIRS* 81 (Andrew Valls ed., 2000).

75. Wilkins, *supra* note 12, at 144.

76. 127 F.Supp.2d 1002 (N.D. Ill. 2001).

77. *Id.* at 1013. Statutory support for the claim is found in 18 U.S.C. §2339(b) (2003).

78. *Id.* at 1018.

Another rationale to extend the liability for terrorism beyond the actual terrorist is found in the sweeping arguments used to hold the Taliban government of Afghanistan responsible for the acts of al-Qaeda—and thus to justify the U.S. bombing of that nation in order to depose its leaders. “[V]icarious state responsibility” for the terrorist acts of others, “is limited to the duty to exercise reasonable care to prevent the commission of illegal acts against foreign states, and, if committed, to punish the wrongdoers and compel them to make whatever reparation possible.”⁷⁹ Applying this standard:

It is not difficult to make a respectable argument that the incidents of September 11 are imputable to the *de facto* government of Afghanistan. . . . Depending on the facts, one might find the *de facto* government responsible [1] because of the omissions of its organs or officials in allowing Al Qaeda to operate from Afghanistan even after its known involvement in terrorist acts prior to the September 11 incidents. . . ., [2] because the *de facto* government by default essentially allowed Al Qaeda to exercise governmental functions in projecting force abroad . . ., or [3] because after September 11 incidents the *de facto* government declined to extradite Al Qaeda operatives and thus, in effect, adopted Al Qaeda’s conduct as its own.⁸⁰

It takes little imagination to see how this reasoning could hold citizens responsible for the acts of its government, if they (1) allowed the government to commit the act; (2) allowed the government to represent that policy abroad; and (3) failed to remove the government after the act was committed, thus adopting that policy “as its own.” The legitimacy of having attacked the Taliban for the acts of al-Qaeda, therefore, rises or falls with the legitimacy of holding citizens responsible for the acts of their government. Those who applauded the incursion into Afghanistan cannot, with intellectual consistency, now deny that this

79. Michael Lacey, *Self-Defense or Self-Denial: The Proliferation of Weapons of Mass Destruction*, 10 IND. INT’L & COMP. L. REV. 293, 306 (2000).

80. Sean D. Murphy, *Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter*, 43 HARV. INT’L L.J. 41, 50-51 (2002).

same rationale just as effectively holds some citizens responsible for the terrorist acts of their government.⁸¹

Third parties, then, can be held responsible for the acts of terrorists, and this clearly includes civilians who support terrorist states, or states that have committed a terrorist act. It is only a minor step to amend this result to hold civilians responsible for governmental acts that are not terrorism but which legitimate a violent response. Recent practice has shown an explicit willingness to target those persons with *lethal* force; Taliban officials were overtly targeted for death.

Less clear is the degree of liability of citizens who support governments whose acts are not terrorist per se, but which have provoked a justifiable terrorist response, at least in Wilkins's sense. As Wilkins recognizes, "while liability for collective wrongdoing or injustice falls upon an entire group, the distribution of liability in the form of penalties may affect some of its members more than others."⁸² Therefore, the prudent terrorists who wish not merely to retaliate but to positively change the status quo, "will take care to be highly selective in their choice of targets. From both the moral and the prudential point of view, they should target only those individuals who can be shown to be directly at fault for the injustices done by the group the terrorists condemn."⁸³ Should such restricted targeting fail to effect the desired results, however, "eventually terrorists might be justified in striking out at members of the 'silent majority' of a nation which had repeatedly

81. Specifically, Bush said that "By aiding and abetting murder, the Taliban regime is committing murder," George W. Bush, *The Complete Text of President Bush's Address to Congress*, PITTSBURGH POST-GAZETTE, Sept. 23, 2001, at B1. The point is not that he was wrong, but that the logic must cut both ways. When the U.S. aids and abets murders (as when it supports despotic regimes and incites civil wars), it can itself be held accountable for those murders. The justification to invade Afghanistan, if valid, opens the door for similar calling to accounts from the United States, even if not necessarily in the form of 9/11-type attacks.

82. Wilkins, *supra* note 12, at 145-147.

83. *Id.*

ignored their demands for justice.”⁸⁴ The accrued liability for government acts, therefore, can, in certain restricted circumstances, leave the civilian vulnerable to lethal reprisal.

Finally, in this context we must hear President Bush’s promise to treat as full terrorists those who do nothing more than feed the actual actors: “The people who feed them will be held accountable.”⁸⁵ If this act of humanity leaves one, under declared U.S. policy, open to death by military reprisal, it is difficult indeed to argue that political ratification, which is far more clearly a form of specific and necessary support, would not also meet the U.S. standard to apply lethal force. Thus, if the U.S. is to be judged by its own standards, U.S. citizens’ political support of their government can result in liability that will merit capital retribution.

E. Summary

Contemporaneous reports of terrorist events revealed that the primary evaluative criterion centers on the presumed moral innocence of the civilian victims. Historical and philosophical dissection of that standard concluded that a presumption of civilian immunity does not extend to all political systems: “A morally innocent victim of a political terrorist act must not have performed acts of supporting or resisting a political state of affairs which the political terrorist aims to destroy or preserve, respectively.”⁸⁶ Citizens in a participatory democracy, by their own understanding, do offer such support, at least in the sense that the government exercises powers given it through popular elections. By this process the government functions as the agent of the people, who remain ultimately responsible for the actions of that government.

84. *Id.* If Wilkins’ theory seems to disadvantage U.S. policy, this is not always the case. Using his analysis, Wilkins is able to conclude that the U.S. nuclear bombing of Hiroshima and Nagasaki was not an act of political terrorism. *Id.* at 17. This exoneration is at odds with other approaches to political terrorism, which would conclude that these bombings were terrorism by definition.

85. Watson & Wright, *supra* note 17.

86. PER BAUHN, *supra* note 55, at 66.

Given this result, these citizens cannot claim to be innocent of the policies of their governments, and to the extent that those governmental policies have provoked a justified response from foreign agents, even one of terrorism, citizens cannot claim to be illegitimate targets of aggressive retaliation on the grounds of being innocent. There may, of course, be other grounds on which such retaliation would be immoral, such as a lack of proportionality. However, by definition these civilians will lack the moral innocence presumed of true terrorist victims, leaving it a technical matter whether such acts are "terrorism" at all.

On the other hand, citizens whose governments are legitimated by other means do not share responsibility for their governments' actions to this same extent, and thus they have a more defensible claim to innocence for those policies, and a higher expectation of immunity from targeting during even justified aggression provoked by those policies.

Two objections should be recognized. First, when I talk about whether voting provides support for government, I am concerned with substance and not form. The mere appearance of voting is insufficient to deprive citizens of innocence for governmental policies if that vote is recognized to be valueless. A recent example was the election in Iraq that gave Saddam Hussein 100% of the vote in a race in which he was the only candidate.⁸⁷ Voting in that election, because it was understood by observers to be irrelevant to the legitimacy of the government, did not deprive Iraqi citizens of the shield of presumptive innocence.

Second, it could be asserted that citizens share responsibility for their government's acts whenever they have not revolted to depose the leaders. Silence apparently implies consent. This rebuttal argument echoes the earlier discussion that found failure to react as tantamount to adopting an act "as your own."⁸⁸ By doing nothing, they have allowed the status quo to continue, and therefore bear responsibility for what occurs thereafter. Jaspers, however, addressed this point, and concluded

87. Kevin Whitelaw, *Saddam's Charade*, U.S. NEWS & WORLD REP., Oct. 28, 2002, at 18-19 ("[A]mong the 11.5 million votes, 100 percent [chose] 'Yes' to extending Saddam's 23 years of absolute power for seven more years.").

88. See accompanying text, *supra* notes 80-81.

that, "[t]o ask a people to rise even against a terrorist state is to ask the impossible."⁸⁹

A more telling criticism, perhaps, is that the moral guilt discussed here arises from the way citizens exercise the powers their political system gives them *ordinarily*: how they vote, who they select, and how they monitor the persons to whom they have delegated powers. What matters is the moral liability that accrues through the *routine* workings of a political system. We have not considered what extraordinary duties might exist to *exit* or dismantle an undesirable system, or what rights and duties an individual may possess regardless of their embedding sociocultural context. Yet were a duty to revolt imposed, that duty would not make anyone uniquely guilty, but it would instead render moral guilt as universal as political guilt because everyone, in every system, could revolt to change any status quo if he or she chose. There would be no need to make an attempt to separate the civilians from their government since any government would then be understood to be the necessary reflection of its citizens' desires—otherwise they would revolt and change it. A guilty government would necessarily entail a guilty citizenry and render self-contradictory the very notion of an "innocent civilian." That outcome, however, is a result more extreme than I offer here. Only *some* citizens, in some situations, should be held responsible for their governments' acts, not every citizen, everywhere, as would be demanded by an assumed duty to revolt.

We should instead ask only what a system demands of its members, nothing more. Rebellion is stupid and pointless if you genuinely believe that the current government has the form desired by divine will; the contrary could only be suggested by someone who did not believe that explanation and saw it only as a self-serving gloss. If authority is not theirs to give, it cannot be theirs to take away. To argue that such alternative systems are ridiculous, and that all people should assert the power to establish their governments, is to deny the validity of other cultural solutions to the problems of social living. As even Rawls

89. JASPERS, *supra* note 46, at 83. See also Robert L. Holmes, *State-Legitimacy and the Obligation to Obey the Law*, 67 VA. L. REV. 133 (1981) (arguing that opposition to an illegitimate government does not necessitate disobedience to its laws).

recognized, social contractualism is not an exportable commodity but must arise in each setting as an indigenous choice⁹⁰—which it has not.

II. REEVALUATING 9/11

It matters whether a particular aggressive act is labeled “terrorism.”⁹¹ Acts deemed terrorist trigger reactions and penalties not normally available for mere criminal deeds. Of even greater value are the rhetorical benefits that accrue when the speaker can claim to be the victim of terrorism, or a champion against it.

Unfortunately, the precise definitional parameters that qualify a specific act as *political terrorism* are contentious.⁹² Some believe, with justification, that the term lacks all substantive content, functioning only as, “a pejorative term that governments and others apply to acts of enemies and opponents, while applauding or condoning similar acts by approved groups and states.”⁹³ As has been argued above, this standard is too general to capture a technical use of the term “terrorism,” which is based not on the combatant/noncombatant distinction, but on that between innocent/responsible. The two approaches do share a conclusion that it will always be legitimate to target the military, whose

90. See JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* (2001); see also Peter Jones, *Global Distributive Justice*, in *ETHICS IN INTERNATIONAL AFFAIRS* 169 (2000).

91. For example, an act of civil disobedience would become punishable with life imprisonment under a proposed Oregon bill, if that act could be categorized as “terrorism.” O'REILLY FACTOR (Fox television broadcast, Mar. 26, 2003 interview with Oregon State Senator Charlie Ringo and radio host Lars Larson). Lars Larson, a supporter of the bill, conceded that if a person blocked a busy road, he has committed an act of terrorism under the bill.

92. For some literature addressing the issue of the definition of “terrorism,” see Louis Renê Beres, *The Meaning of Terrorism—Jurisprudential and Definitional Clarifications*, 28 VAND. J. TRANSNAT'L L. 239 (1995); Michael P. Scharf, *Defining Terrorism as the Peace Time Equivalent of War Crimes*, 7 ILSA J. INT'L & COMP. L. 54 (2001).

93. Paul J. Magnarella, *The What and Why of Terrorism?* 44(5) ANTHROPOLOGY NEWS 6 (May 2003).

members are both combatants and responsible for presenting an imminent threat. If that were not true, every act of political violence, including all war, would be impermissible terrorism. Some may argue that that outcome is correct, but it would be contrary to the ordinary extension of the term. This limitation on the use of the term means that, although "there are lots of acts we call terrorist that specifically target military facilities and personnel,"⁹⁴ such as the attack on the *U.S.S. Cole*, these uses of the word are careless.⁹⁵

94. Andrew Valls, *Can Terrorism be Justified?*, in *ETHICS IN INTERNATIONAL AFFAIRS: THEORIES AND CASES* 65, 67 (Andrew Valls ed., 2000).

95. The *U.S.S. Cole* was attacked in port at Yemen when a 20-foot fiberglass vessel approached and exploded, killing 17. Rod Nordland, *A Sneak Attack*, *NEWSWEEK*, Oct. 23, 2000, at 27. This report describes the attack as one committed by "Yemeni terrorists." *Id.* The "mastermind" of the attack has been identified as an al-Qaeda leader, and since been arrested. *Top al Qaeda Operative Arrested*, *CNN.COM*, Nov. 21, 2002, at <http://www.cnn.com/2002/US/11/21/alqaeda.capture/index.html>.

Wallace recognizes that such attacks on military targets are often labeled as "terrorist." Wallace, *supra* note 13, at 151. However, he uses this fact to inform the category of terrorism (he calls such attacks "soft terrorism") rather than, as I have done, to analyze the concept of innocence. For Wallace such uses of the term are legitimate, if atypical instances of terrorism, while I argue that because the attacks are directed at legitimate military targets, they do not belong in the class of terrorism at all.

The example of the *U.S.S. Cole* further illustrates the disjunction between morality and law, and how innocence by one standard cannot be equated to innocence under the other.

Those who have written on the topic of protecting innocents in war would not want to regard the killing of an enemy soldier engaged in an attack against a fortified position as a case of killing the innocent. He is surely, in the right sense (whatever that is), among the guilty (or, at least, among the noninnocent) and is thus a fitting object for violent death. But he is in no sense *legally* guilty. . . . Thus the legal notions of guilt and innocence do not serve us well here.

J. Murphy, *supra* note 17, at 531.

Another incident provides instructive insight on America's misplaced priorities when using language to characterize attacks against itself and its allies. On the one hand, during the U.S. attacks in Afghanistan and Iraq, civilian casualties were blithely dismissed by the Bush administration as

The two approaches differ, however, in their conclusions about civilians: the modern approach of Protocol I holds that civilians are always illegitimate targets; the traditional approach, based on innocence, allows civilians to be targeted if they are actually responsible. That the latter standard is the one people intuitively apply is supported by the earlier observation that terrorism is perceived as an act of immorality, and not illegality. However, noncombatancy is a legal status, not a moral one, while the opposite applies to innocence. From this we can conclude that Protocol I does not embody the rule people apply to discern illegitimate targets; far more has occurred in an act of true terrorism than a breach of the Principle of Discrimination.

Presumptive innocence, therefore, requires that the victims neither designed nor implemented the challenged policy or government, nor did anything to substantively facilitate or support it. However, as previously argued, citizens of participatory democracies have less claim to innocence on that basis, since the government receives power from them and acts as their agent. It then follows that there is an important sense in which citizens in participatory democracies necessarily lack the presumptive status of moral innocence relative to governmental policies required to find a true case of terrorism.

collateral damage. Yet two U.S. pilots faced criminal charges when they mistakenly bombed and killed other soldiers. See David M. Halbfinger, *General Testifies against Pilots*, TIMES-PICAYUNE (New Orleans), Jan. 22, 2003, at A5. Were the principle of civilian inviolability in play, one would expect the opposite.

For further examples of the inappropriate use of "terrorist" to describe attacks against military targets, see Bradley Graham, *U.S. Troops Told to Use Tougher Tactics; Weeding Out Militiamen From Civilians Is Goal*, WASHINGTON POST, Apr. 1, 2003, at A1 (quoting Jim Wilkinson, a spokesman for U.S. Central Command, as referring to "The Iraqi regime's endorsement of terrorist tactics on the battlefield"); Dianna Elias, *Kuwait Arrests 3 on Terror Suspicions*, ST. PAUL PIONEER PRESS, Feb. 25, 2003, at A8 (reporting the arrest of men "planning terrorist attacks on American forces based in Kuwait ahead of a possible U.S.-led attack on neighboring Iraq"); Nicholas Blanford, *US Civilian Killed in Kuwait Ambush*, BOSTON GLOBE, Jan. 22, 2003, at A1 (quoting Richard Jones, U.S. Ambassador to Kuwait, as calling a "terrorist incident" a fatal attack on a man "contracted to train soldiers in logistical software programs").

The foregoing discussion equips us with conceptual tools to re-evaluate the 9/11 attacks from a more critical perspective.

A. Distinguishing between the WTC and the Pentagon

Assume that al-Qaeda was justified in retaliating against U.S. policies relative to the Middle East.⁹⁶ If this assumption fails, then the attack on 9/11 can be condemned for lacking provocation, without need to consider the moral innocence of any victims, or for lacking proportionality relative to any provocation there may have been. Set aside for the moment also the issue of the means that were used to effect the attack on the Pentagon and the World Trade Center ("WTC") - the hijacked civilian passenger airlines. The question asked first is whether, looking only at the victims on the ground, these attacks qualify as political terrorism.

At a minimum, the attack on the Pentagon would not qualify as terrorism since those persons, as military personnel, were armed combatants at worst, and the legitimate proxy of the government at best. This result is easy. As argued above, both approaches to the problem of the legitimate target—the traditional and modern formulations—allow attacks on military personnel.

96. This assumption is not as preposterous as it might sound. At the least, U.S. actions have for decades been sufficiently provocative to the rest of the world that something, sometime, was bound to happen. Gore Vidal, for one, argues that 9/11 was the regrettable result of provocations by the U.S. government.

Although we regularly stigmatize other societies as rogue states, we ourselves have become the largest rogue state of all. We honor no treaties. We spurn international courts. We strike unilaterally wherever we choose. We give orders to the United Nations but do not pay our dues. We complain of terrorism, yet our empire is now the greatest terrorist of all. We bomb, invade, subvert other states.

VIDAL, *supra* note 8, at 158-159. See also R. Danielle Egan, *Anthrax*, in COLLATERAL LANGUAGE 15, 23-24 (John Collins & Ross Glover eds., 2002) ("We only need to scratch the surface to see the ways in which the United States has violated human rights in the name of protecting its hegemonic interests."); see also Ziauddin Sardar & Merryl Wyn Davies, *Why Do People Hate America?* (2002).

A more difficult question is whether the attack on the WTC also meets the definitional criterion of terrorism outlined here, again setting aside the use of civilian airlines as weapons. Unlike the Oklahoma City case, there was no day care center containing persons in the class of the permanently presumptively innocent (i.e. children). However, because the WTC contained many foreign nationals who were also presumptively support-innocent relative to the policies of the U.S. government, that part of the attack does satisfy the criterion of political terrorism without needing to ascertain the status of the U.S. citizens therein. Again, this result is easy: neither of the formulations of the targeting problem would permit targeting of these persons, either because they were noncombatants, or because, as nonvoting aliens, they were innocent of any actions of the U.S. government that could have warranted such a response. It is worth noting, however, that while the attack of the WTC remains correctly described as an act of terrorism, the traditional standard does not allow claims that there were over 3,000 innocent victims. Since it is often this latter statement that has fueled the subsequent national debate, and not the more general claim that an act of terrorism has taken place,⁹⁷ this difference matters.

The third prong of the 9/11 attack allows us to isolate how the use of civilian passenger aircraft as flying bombs impacts the present discussion. The crash in Pennsylvania involved no ground victims, and therefore its categorization as a terrorist act, if appropriate, must depend entirely on the status of the plane passengers and crew (all of whom I will assume were American citizens). Two analyses of the problem are possible, both arriving at the same conclusion that the use of the planes alone is insufficient to qualify the crash as an act of terrorism. First, if

97. See, for example, the following exchange:

When asked at an Armed Services Committee hearing about what is now compelling us to “take precipitous actions” against Iraq, [Defense Secretary Donald] Rumsfeld barked: “What’s different? What’s different is 3,000 people were killed.”

Arianna Huffington, *We Don’t Need no Stinkin’ Proof!*, in *THE IRAQ WAR READER* 344, 345 (Micah L. Sifry & Christopher Cerf eds., 2003). From the context, we are meant to read “3,000 innocent people.”

the passengers lacked support-innocence relative to the challenged policies, then that part of the 9/11 attack was not an act of political terrorism, but was simply murder. Given the structure of our national government, the presumption must be that the passengers were *not* support-innocent, and therefore that the use of the aircraft was not technically an act of terrorism, although we may still judge it to have been illegitimate on other grounds, such as a disproportionate response.⁹⁸ To make that determination, we would have to know whether lesser actions, more strictly targeted to those who have been immediately responsible for the provocative acts, had failed to alter government policy. For example, if the attack on the *U.S.S. Cole* had been executed by al-Qaeda, but failed to cure whatever situation it sought to address. The failure of lesser means can arguably legitimate recourse to more extreme measures that target not only military personnel with direct responsibility, but also the silent majority of civilians who endorsed the protested policies.

In the second analysis, the passengers on the plane could reasonably be argued to fall outside the scope of what is usually meant by terrorism since they were not the *target* of the attack, either primary or secondary. They were merely the weapons used by the hijackers to attack the true targets, the Pentagon and the WTC (and whatever target the crashed plane was intended to strike). In this respect, the passengers were collateral damage, not terrorist targets, because we have no indication that the hijackers would not have caused the planes to crash into the WTC had they been empty of passengers.⁹⁹ Because the U.S. frequently asserts a "collateral damage" defense to its own killing of civilians, it must be wary when refusing to accept the same argument from others.¹⁰⁰

98. This conclusion would be reversed if the plane included foreign nationals, under the same logic outlined in the preceding paragraph.

99. What little evidence there is on this point in fact shows the opposite. Osama bin Laden claims that "The 11 September attacks were not targeted at women and children. The real targets were America's icons of military and economic power." Osama bin Laden, quoted in Andrew D. Van Alstyne, *Freedom, in COLLATERAL LANGUAGE* 79, 83 (John Collins & Ross Glover eds., 2002).

100. See Esther Schrader, *RESPONSE TO TERROR; Pentagon Defends Strikes as*

For these reasons, the plane crash in Pennsylvania was not a terrorist attack, as that term is most usefully delimited. The conclusions reached earlier about the Pentagon and the WTC are therefore not complicated by the use of passenger airlines as weapons. Of the events on 9/11, only the attack on the WTC fulfills the ordinary criteria for classification as a terrorist attack. Only that aspect of the day's tragedies targeted presumptively morally innocent persons - foreign nationals.

B. U.S. Actions in Afghanistan

The primary reason why the attacks of 9/11 are problematic instances of terrorism is because most of the victims were not sufficiently innocent to be entitled to presumptive immunity. They might appear otherwise only because of the unreflective response of an understandably angry public.

In contrast, the retaliatory strategy of Americans to invade Afghanistan—with its concomitant killing of civilians¹⁰¹—probably does qualify as a classic case of state political terrorism.¹⁰² This

Civilian Toll Rises, LOS ANGELES TIMES, Oct. 30, 2001, at A6.

101. The number of civilians killed during the American attack on Afghanistan range from 1,200 to 3,000. Laura King, *Baghdad's Death Toll Assessed; A Times hospital survey finds that at least 1,700 civilians were killed and more than 8,000 injured in Iraq's capital during the war and aftermath*, LOS ANGELES TIMES, May 18, 2003, at A1. It does not help any U.S. argument that the civilian casualties it inflicts are in principle different from those of terrorists when it finds those civilian casualties unworthy of recording. See Steven R. Hurst, *Mistaken Killings Burden U.S. in Iraq*, ATLANTA JOURNAL-CONSTITUTION, Sept. 21, 2003, at A7 ("The military keeps no record of Iraqis who have been killed either intentionally or as innocent bystanders in the primarily urban combat").

102. Global Exchange, *Afghan Portraits of Grief: The Civilian/Innocent Victims of U.S. Bombing in Afghanistan*, Sept. 2002, at <http://globalexchange.org/september11/apogreport.pdf>.

The United States bristles at the suggestion that the civilian casualties it inflicts in Afghanistan are comparable to terrorist acts. However, it is on record as stating that "[i]n a war to the bone like this one, where the enemy's immorality is publicly proven, if they involve their noncombatants then they become legitimate targets, no matter how

judgment is unaffected by the assumed legitimacy of the justification in principle for the attack, to persuade the Taliban to abdicate and to surrender bin Laden. Wilkins suggests that while it can be appropriate to strike back at terrorists themselves, "it is less clear whether striking out against the larger groups which terrorist organizations claim to represent, or their 'host' communities, would be morally warranted." His concern is that while "terrorists are desperate . . . their enemies . . . are more frustrated than desperate; this difference should seriously affect the range of options available morally to the respective parties."¹⁰³ Americans have become so intent on capturing bin Laden that it targeted Afghani civilians who were support-innocent relative to the Taliban government due to the dictatorship that regime practiced. So while I would apply here to the Taliban the same theoretical assumption of guilt I earlier stipulated for the United States—in other words, it was not wrong to target the government of Afghanistan for its actions—it does not follow from that concession that we were free to inflict whatever civilian casualties may have been necessary to effect

regrettably." Wilkins, *supra* note 12, at 148. This claim is false. No matter what the opponent may do, nothing renders otherwise illegitimate targets "legitimate," although there are limits to what an attacker must do to avoid inflicting casualties "collaterally" on the (still) illegitimate targets.

That the U.S. has no problem adopting terrorism when it is advantageous to its own goals was proven in the 2003 war in Iraq. The U.S. employed a strategy of "shock and awe." See HARLAN K. ULLMAN & JAMES P. WADE, *SHOCK AND AWE: ACHIEVING RAPID DOMINANCE* (1996). By explicit design, this strategy required a show of technological and military superiority that would psychologically devastate the populace that the government would capitulate to U.S. demands. Its author, Harlan Ullman, expressly modeled his strategy after "the German blitzkrieg of World War II; and the atomic bombing of Japan." *Creator of 'Shock and Awe,'* N.Y. TIMES, March 23, 2003, at D2. This use of secondary targets, the Iraqi civilians, to extract concessions from a primary target, the Iraqi government, is a straightforward application of terrorism. This fact was openly recognized by the Pentagon: "As a weapon, [shock and awe] is literally 'terrorist.' The concept, openly avowed by Pentagon spokesmen, clearly lay behind the pulverization of Baghdad on Day Three of this war." Simon Jenkins, *Baghdad Will be Near Impossible to Conquer*, TIMESONLINE, March 28, 2003, at <http://www.timesonline.co.uk>.

103. Wilkins, *supra* note 12, at 148.

that result. Having not exercised the level of caution required by the heightened degree of civilian innocence, the U.S.'s tally of "innocent victims" easily surpasses that of al-Qaeda's.

III. CONCLUSION

Given today's charged environment, it is prudent to explicitly clarify what I have not said. I do not argue that the 9/11 hijackers were right to do what they did. However, I do believe that the reason their act was wrong has been poorly considered and glossed with inflammatory catchphrases and unreflective clichés. The weakest basis for the condemnation of 9/11 may be that the victims were "innocent." Further, to the extent that a meaningful use of the term "terrorism" requires that the victims be *innocent* and *targeted*, then most of the 9/11 victims lacked one or the other of these qualities. Of the many adjectives that might be applicable to that day's events—criminal, disproportionate, unprovoked, unjustified—"terrorism" is probably the least sustainable. One could, of course, define terrorism so as to avoid this outcome, but not without calling into question much of America's ordinary military strategy. If terrorism does not require targeting the innocent, but only their killing, then America's war in Afghanistan was unabashedly an act of state terrorism. Moreover, the sanctions the U.S. demanded against Iraq purportedly led to the deaths of half a million children, who fall into the class of the permanently presumptively innocent.¹⁰⁴ Or, as an alternative evasive strategy, if "innocent" were forcibly construed to mean only "noncombatant"—along the lines of Protocol I—then many of our military's targets, including perhaps Saddam Hussein, are immoral if not illegal. If U.S. citizens wish to continue to believe these policies are legitimate, they must also accept that the grounds that sustain that judgment—specifically, that no responsible party qualifies as innocent, and that collateral deaths do not

104. See David Rieff, *Were Sanctions Right?*, N.Y. TIMES, July 27, 2003, at E41 ("These observations do not answer the question of whether any policy, no matter how strategically sound, is worth the deaths of 500,000 Iraqi children -- a figure that originated in a Unicef [sic] report on infant mortality in sanctions-era Iraq and became the rallying cry of anti-sanctions campaigners").

amount to targeting—apply to other acts, including 9/11. Even if the specific application of these results to the events of 9/11 is erroneous, the larger point is that innocence is a rebuttable status, and the presumptions in this context ultimately work against American civilians.

Americans justifiably take great pride in their system of government. However, too often they look only to its advantages and ignore that those privileges exact an equivalent measure in moral responsibility. It is foolish to simultaneously demand participation in and accountability from the government, while also pleading ignorance about and innocence of that same government's acts. A choice must be made between authority and culpability, or powerlessness and innocence. The U.S. has chosen the former for its citizens. This Essay seeks only to underscore one implication of that choice: because every act of alleged terrorism has as its primary objective to influence a government in its actions, anyone who can influence the actions of that government is a reasonable target; because, in a participatory democracy, the list of those empowered to influence the government includes everyone who can vote, no enfranchised person can claim to be innocent of governmental decisions; and because in a time of war civilian immunity extends only to those who are innocent, its application in the context of terrorism means that citizens of participatory democracies lack a presumption of civilian immunity. Acts against them will be either criminal or war, but to call them "terrorism" is to stretch the term into meaninglessness.

This realization is not without implications. At times, U.S. citizens hold a cavalier belief that "might makes right." No one can disagree with the U.S. without becoming its enemy. Canada and France particularly have become the focus of severe criticism solely because they did not reflexively fall into line behind the United States's demand for war against Iraq. Attorney General Ashcroft even claimed during congressional testimony that anyone who criticizes the U.S. government is a supporter of terrorism.¹⁰⁵ To a large extent the nation does have the

105. "[I]n Senate testimony in late 2001, Attorney General John Ashcroft said that 'to those ... who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish

sheer power to manage its affairs with such arrogance. So why should it care if it rides roughshod over other countries? More tellingly, why should American citizens even be motivated to find out whether their government's policies are in fact riding roughshod over other countries?

U.S. citizens should care because they hold ultimate responsibility for the actions of the government. Ignorance will not be an excuse, especially when, as has been argued by others, Americans' knowledge of their impact on other societies is "essentially willful."¹⁰⁶ It is regrettable to think that most Americans will not think deeply enough into the subject to realize that sometimes it is possible for this country to act wrongly, and shortsightedly, thus provoking legitimate violent reaction, or "blowback."¹⁰⁷ The Taliban held power because of American manipulations in the region in its struggle against the Russians.¹⁰⁸ The biological and chemical weapons Saddam Hussein was demonized for possessing had been sold to him by the United States government for use in his war against Iran.¹⁰⁹ Worse, Hussein invaded Kuwait only

our resolve. They give ammunition to America's enemies and pause to America's friends. They encourage people of good will to remain silent in the face of evil." Morton M. Kondracke, *GOP Could Make 2004 Campaign Nastiest Ever*, ROLL CALL, Sept. 15, 2003.

106. Sardar & Davies, *supra* note 96, at 135.

107. *Blowback* "is shorthand for saying that a nation reaps what it sows, even if it does not fully know or understand what it has sown." Patricia M. Thornton & Thomas F. Thornton, *Blowback*, in *COLLATERAL LANGUAGE* 27, 31 (John Collins & Ross Glover eds., 2002) (quoting Chalmers Johnson). It is possible that the United States, even acting with the best of intentions, has so blundered in its strategies that it has inadvertently initiated sequences of events that end in tragedies such as the 9/11 attacks, and necessitate wars such as that with Iraq.

108. See Richard Bernstein, *How the Taliban Got Their Way in Afghanistan*, N.Y. TIMES, Apr. 26, 2000, at E8 ("Mr. Rashid also covers what has been given the name blowback, now a general term but originally one referring to the perverse way in which American support for anti-Soviet Afghan guerrillas in the 1980's paved the way for the new terrorist and drug menaces of today").

109. Murray Waas, *What Washington Gave Saddam for Christmas*, THE VILLAGE VOICE, Dec. 18, 1990, reprinted in THE IRAQ WAR READER 30, 35 (Micah L. Sifry &

after the United States gave him assurances that the Americans would not intervene.¹¹⁰

Where American citizens are unmoved to respond out of the sheer ethics of international relations, they may be sufficiently motivated by an enlightened self-interest to encourage the government to craft wise and cross-culturally sensitive policies if for no other reason than because they could be held personally liable for those policies. To the extent that an attack against the U.S. government would be justified, directing that attack toward the civilians of the U.S. would also be justified under some circumstances. Just as a person exercises more financial responsibility when he knows that he will have to pay the bill out of his own pocket, so too, if she realizes that she can be called to task for the acts of her mandatory, the civilian principal will exercise better management over the government she authorizes to act on her behalf.

Christopher Cerf eds., 2003) ("According to confidential Pentagon documents, between 1985 and 1990 the Commerce Department ignored explicit Pentagon objections and approved more than a dozen exports to Iraq—including precursor chemicals necessary for the manufacture of nerve gas—that would be used by Saddam Hussein to enhance his ability to make chemical and nuclear war").

110. See *The Gaspie Transcript: Saddam Meets the U.S. Ambassador*, in THE IRAQ WAR READER 61, 68 (Micah L. Sifry & Christopher Cerf eds., 2003) ("[W]e have no opinion on the Arab-Arab conflicts, like your border disagreement with Kuwait").