Passion and Nation: War, Crime, and Guilt in the Individual and the Collective

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The United States of America is now at war. 1 The infamous destruction of September 11, 2001, which led to this commitment was of the form and scope of acts that have led traditionally to war. 2 At the time of this writing, U.S. soldiers guard the recently occupied capitol of Afghanistan, and U.S. special operations teams pursue
terrorist cells in a host of countries. We prepare to invade Iraq, over whose skies our bombers are already in combat.

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

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

7In the 2002 State of the Union Address, President Bush presented the most comprehensive articulation to date of the War on Terrorism, to include military operations across the globe and, perhaps, war on North Korea, Iran, and Iraq. While the most visible military action is in Afghanistan, America is acting elsewhere. We now have troops in the Philippines helping to train that country’s armed forces to go after terrorist cells that have executed an American and still hold hostages. Our soldiers, working with the Bosnian Government, seized
Indeed, the indefiniteness of the enemy of this war is underscored by the Congressional authorization to the President to use the armed forces against “those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” The greater clarity that might have come from the separate authorization to use force in Iraq is diminished by the conditional nature of the grant of discretion.

terrorists who were plotting to bomb our embassy. Our Navy is patrolling the coast of Africa to block the shipment of weapons and the establishment of terrorist camps in Somalia.

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States like these, and their terrorist allies, constitute an axis of evil, arming to threaten the peace of the world. By seeking weapons of mass destruction, these regimes pose a grave and growing danger. They could provide these arms to terrorists, giving them the means to match their hatred. They could attack our allies or attempt to blackmail the United States. In any of these cases, the price of indifference would be catastrophic.


9Authorization for Iraq, supra, note 8]. There is an important issue in this resolution – whether it is so broad a delegation of Congress’s powers to declare war as to be void under Article I of the Constitution. That issue, laden not only with the dubious values of the historical precedents of Congressional waffling and Presidential over-reaching in this field but also the limits of judicial review of this most political of questions, is beyond the scope of the present article. On the balance of these powers generally, see LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION (rev’d ed., 1996).
This is an unusual war, without a clear enemy, without a clear end. It is fair to ask whether this is a war at all.\textsuperscript{10} Congress has not declared it a war but has

\textsuperscript{10}The President’s call for a war on terrorists is not new, and even coupled with the use of troops may not alter existing policy. American policy under President Reagan often described U.S. counter-terrorism policy as a “war against terrorism.” President Reagan’s request for Congress to pass the Act for the Prevention and Punishment of the Crime of Hostage-Taking, the Aircraft Sabotage Act, Act for Rewards for Information Concerning Terrorist Acts, and Prohibition Against the Training or Support of Terrorist Organizations Act of 1984 were all a single “step in our war against terrorism.” Ronald Reagan Message to the Congress, 1 PUBLIC PAPERS OF THE PRESIDENT, 1984 [	extsuperscript{1}] (Apr. 26, 1984). This policy was meant particularly to justify military action and foreign policy. See, e.g., Ronald W. Reagan, Remarks at a White House Meeting with Members of the American Business Council, 1 PUBLIC PAPERS OF THE PRESIDENT 1986 472 (April 15, 1986). (“But let us be clear: Yesterday the United States won a single engagement in a long battle against terrorism. We will not end that struggle until the free and decent people of this planet unite to eradicate the scourge of terror from the modern world.”) (regarding U.S. missile attacks on Libya).


The phrase is not unique to American policy but has been employed by other governments, including Great Britain, Turkey, Israel, Chile, Argentina. Prime Minister Thatcher called for a war against terrorism in response to the murder of Lord Mountbatten. Leonard Downie Jr., IRA Bomb Kills Lord Mountbatten WASHINGTON POST, Aug. 28, 1979, at A1 (“The people of the United Kingdom will wage the war against terrorism with relentless determination until it is won.”). Turkey has described certain of its operations, considered by the United States to be an attempt to constrain international terrorism and by others to be a catch-phrase for the genocide of the Kurds. Compare George Bush, Remarks at a Departure Ceremony for Prime Minister Suleyman Demirel of Turkey 28 Weekly Comp. Pres. Doc. 242, Public Papers of the Presidents, February 11, 1992 (“The United States will support its friend in its territorial integrity, its sovereignty and stability, particularly in its war against terrorism.”) to Alan Brooke, Letter: Let Britain Defend the Kurds- Not Turn a Blind Eye to Killing, The Independent (London), March 24, 1995, at A18 (equating Turkey’s war against Terror with a “final solution” to its Kurdish problem.”) Other countries with early proclamations of a war against terrorism include Israel and Argentina. See, e.g., Dan Fisher and Doyle Mcmanus, Israel Repeats Threat to Retaliate for Raids, LOS ANGELES TIMES, Dec. 30, 1985, at A1. (then-Israeli Defense Minister Yitzhak Rabin discussing attacks on El Al in Vienna and Rome declared, “We are in a war against terrorists, all the groups of terrorists, including – maybe mainly – the Arafat group. . . . For us, it’s a daily war against terrorism.”); [ ], NEW YORK TIMES, Sept. 18, 1972, at A1; [ ], NEW YORK TIMES, Sept. 14, 1972, at A16. See also Anthony Boadle, Chile under State of Siege, United Press International, Nov. 6, 1984, Tuesday, PM cycle (“The war against terrorism begins
only authorized the President to use force to prevent further attacks. The war on terrorism is neither a civil war nor a war between states, although like the Peloponnesian War two millennia past, it may come to incorporate several of each.

I. Obstacles to Understanding Contemporary War

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

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

This is not to say that the twentieth century invented the horror of war, which would be to ignore the lessons of centuries. But at last, the horror of war led to the creation of new commitments on a global scale not only to end national adventures today...”); Margaret Grammer, Ex-Argentine President Accepts Sentence, Professes Innocence, United Press International December 20, 1985. (Jorge Videla, former President of Argentina, defended the War against Subversion and Terrorism of the 1970's, as a “terrible war” that was necessary for freedom, but vaguely apologized for the perhaps 9,000 Argentinian “desaperacidos”).

As a policy term, the war against terrorism has been used broadly for decades. See, e.g., NEIL C. LIVINGSTON, THE WAR AGAINST TERRORISM (1982).
through war but also to hold individuals accountable for their initiation, prosecution, and excesses.

These commitments have taken two distinct forms, each of such scale as to risk distracting attention from the other. The first was to forbid states from war, except in genuine self-defense. This prohibition, reflected at first in treaties at the armistice of World War I and then in the Kellogg-Briand Pact of 1928, was enshrined two decades later in the Charter of the United Nations and the Statute of the International Court of Justice, which remains the forum for state accountability for war. The second was to hold not only states accountable for war but also, effectively, the individuals whose orders and actions are the means of a state’s prosecution of the war. Claiming not only to apply the 1928 treaty but also to enforce a natural-law prohibition against crimes

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12 There had been a few decrees proclaiming a state’s power to enforce the laws of war against its own and enemy soldiers, and there had been a very few attempts to try such cases, usually for violations of rules governing prisoners of war. See Col. Howard S. Levie, *Penal Sanctions for Maltreatment of Prisoners of War*, Am. J. Int’l L. 433 (1962). The first followed the U.S. Civil War, when the federal army tried two former Confederate prison camp officials responsible for abuse of Union prisoners at Andersonville, sentencing one to hang and one to fifteen years’ hard labor; another Confederate, tried for abuse at Raleigh, was acquitted. See William Winthrop, *Military Law and Precedents* 791-92 (2d ed. 1920). There seem to have been no trials of Union officers operating similarly abusive camps of Confederate prisoners.

The second attempt at trial followed World War I, when the allies sought the trial of German officers under the Treaty of Versailles, for their personal conduct in violation of the laws of war. After the initial list of 896 to be tried by national war crimes tribunals, pursuant to Article 228 and 229 was winnowed to 45 to be tried by the Supreme Court of Leipzig, the show trials that followed were considered by most observers to be meritless, primarily as the Leipzig court generally accepted reliance on superior orders as a defense. See Claude Mullins, *The Leipzig Trials* (1921), but see *Llandovery Castle Case*, 16 Am J. Int’l L. 708 (1922), in which the court refused the defense when the order was the clearly illegal order to kill unarmed people in a lifeboat. One of the great innovations of the tribunals of the 1940s was the rejection of the defense of superior orders.
against humanity, the International Military Tribunals in Nuremburg and Tokyo
prosecuted the surviving leaders of the Axis governments, sentencing nineteen leaders
and hundreds of followers to death.13 The Nuremburg Principle of personal
accountability has been reflected in the creation of two ad hoc tribunals and, at century’s
end, in the Rome Treaty’s establishment of the International Criminal Court.14

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

The voluminous record of each tribunal has been published. See TRIAL OF THE MAJOR WAR
CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG (1995); THE TOKYO
WAR CRIMES TRIAL: INDEX AND GUIDE (R. John Pritchard and Sonia Magbanua Zaide, eds.)
(1981-1987). The numbers of lesser officials, soldiers, and civilians sentenced under the various
tribunals are considerable. In Europe, tribunals other than for major criminals led to at least 21,000
persons being tried, of whom at least 990 were sentenced to death, 2051 were acquitted, and most of
the rest sentenced to prison. HOWARD S. LEVIE: TERRORISM IN WART: THE LAW OF WAR CRIMES
136-39 (1993). The IMTFE tried 5700 people, condemning 984 to death, acquitting 1,027, and giving
various lesser sentences to the rest. Id. at 184.

14The records of the War Crimes Tribunal for the Former Yugoslavia and of the War
Crimes Tribunal for Rwanda are at www.un.org/icty/index.html and www.ictr.org/. The Rome
Treaty, and the records for the formation of the I.C.C. are at www.un.org/law/icc/index.html (all last
visited October 13, 2001). The Rome Treaty came into force on July 1, 2002, with the ratification of
its eightieth and eighty-first states, Australia and Honduras. Id.
This is no longer true. The peace of the states is increasingly threatened without the need of great armies, navies, and squadrons, mobilized to defeat a state’s defenses. Evolution in technology and social organization have allowed small terrorist cells, unaffiliated with any state, to wield deadly force on a scale that once was the province only of states. This evolution challenges the network of states as the basis for individual security that has existed for three hundred and fifty years.

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

II. George Fletcher’s Two Views of War

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

Fletcher’s argument, presented first in his Storrs Lectures and then in his monograph Romantics at War, is a nuanced exploration of the meaning of war in the age
of terrorism.\textsuperscript{15} He finds one key to this meaning in the nature of collective guilt, which is, in turns, both a justification of war itself and a fundamental component in determining responsibility for acts committed through war. In this examination, Fletcher considers the values necessary to these functions of collective guilt, and in them, he discovers the tension between the values of the Enlightenment and of Romanticism.

Fletcher invites us to take a robust appraisal of this tension. He invokes it as more than philosophies differing over the role of the individual in society; he presents it as the division between systems of aesthetics, of systems of thought, and of varieties of political, legal, and military action.\textsuperscript{16} The enlightenment notion of the person – an individual who is independent, rational, and free – is to be judged by that individual’s actions and motives and on no other grounds. The Romantic notion of the person – a member of a nation, who is culturally and linguistically interdependent, passionate, and part and parcel of the general will of the people – is to be inextricably judged by engagement in the great projects of humankind.

He is careful to recognize the many definitions of both liberalism and Romanticism and he locates his preferred models of both concepts as cases among families of contested models.\textsuperscript{17} Even so, it is clear that he sees his models both as


\textsuperscript{16}See FLETCHER, ROMANTICS AT WAR, supra, note [], at 12-25.

\textsuperscript{17}Fletcher, Storrs Lecture, 111 YALE L.J., at 1504. Indeed, it is the multiplicity of these models that may lead him to depict the enlightenment model, the model that is much more in use in the current literature, synonymously as a model that is of the enlightenment, or that is universalist, or that
central to the concepts they stand for and, more importantly, as poles opposed to one another on a host of aesthetic and philosophical grounds.\textsuperscript{18}

Fletcher grounds his notion of the liberal enlightenment in a Kantian idea of the individual.\textsuperscript{19} Emphasizing the similarities of each person with another, particularly through Immanuel Kant’s view of reason or Adam Smith’s view of interests, the enlightenment model of the person is best seen in the Jefferson model of equality.\textsuperscript{20} Thus comes the model of the rational free-thinker, a Jefferson whose choices one might think would be the same made by others with the same gifts and opportunities. From this view of the person, the enlightenment view of the collective is to aggregative view of corporate actions; the act of a state or society is the sum of individual acts or preferences.\textsuperscript{21}

Fletcher builds a contrasting model, relying particularly on Isaiah Berlin’s essays on the Romanticism of Hamann, Herder, and the transcendentalists. Adopting Berlin’s synthesis, Fletcher contrasts the Romantic’s particularism with liberal universalism. “[T]he core of Romantic thinking lies in the expressive self insisting on its own

\textsuperscript{18}Id. See also FLETCHER, ROMANTICS AT WAR, supra, note [], at 17-22.

\textsuperscript{19}Fletcher’s appraisal of Kant’s theory of the individual, and his long-running flirtation with neo-Kantianism, are reflected in George P. Fletcher, \textit{Law and Morality: A Kantian Perspective}, 87 COLUM. L. REV. 533 (1987). There is more than a hint of the autobiographical in the struggle between an attraction to both enlightenment idealism and Romantic conflict. See FLETCHER, ROMANTICS AT WAR, supra, note [], at x-xiii. A scholar’s personal engagement in the subject, however, does not make the scholarship any less compelling.

\textsuperscript{20}Fletcher, \textit{Storrs Lecture}, supra note [], 111 YALE L.J. at 1507.

\textsuperscript{21}Id. at 1509.
distinctiveness and value. The uniqueness of each person, and by analogy, of each national culture, leads to a rejection of the Enlightenment ideal of a universal culture based on reason."\textsuperscript{22} This is the model of the passionate idealist, a patriot committed to the cause, a Lord Byron whose actions transcend the ordinary and serve to challenge all others to find their own art. From this view of the individual, Fletcher derives the Romantic view of the collective corporate as the associative model corporate actions; the act of a state or society is distinct from (and greater than) the sum of individual acts or preferences.

Thus, Fletcher develops a four-fold model of competing views of personal and corporate responsibility. He derives both his models of responsibility from his models of action, and he derives his models of collective action from his models of individual action.

The result is similar to that reached by Jean-Jacques Rousseau. Fletcher’s contrast between the Romantic and liberal depictions of the corporate will follows Rousseau’s contrast between an aggregative sense of popular will, \textit{la volonte de tous}, as the sum of individual wills and an associative sense of popular will, \textit{la volonte generale}, as the will of a single entity in the whole, distinct from any individual.\textsuperscript{23}

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

\textsuperscript{22}Id., \textit{citing\textsuperscript{2} ISAIAH BERLIN, THE ROOTS OF ROMANTICISM }95\textsuperscript{2} (Henry Hardy, ed.)(1999).

\textsuperscript{23}Fletcher, Storrs Lecture, \textit{supra note []}, 111 YALE L.J. at 1509, \textit{citing\textsuperscript{2} JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT }72\textsuperscript{-74}\textsuperscript{2} (Maurice Cranson ed., St. Martin's Press 1968) (1762).
Fletcher knows that his audience of readers is trained to respect the idea of the individual, as a free representative of the universal. He also senses the allure, and describes the current seduction, of our views of the patriot who is at the service of the nation. These notions, opposed and yet both embraced in the popular culture, present, for Fletcher, a critical choice that both drives our view of guilt and, ultimately, of war.

For liberals and Romantics at war, this is one of the primary intellectual fields of battle. As the fight over collective guilt is won or lost, so are larger stakes decided: Is the individual the ultimate unit of action and responsibility, or are we, as individuals, invariably implicated by the actions of the groups of which we are a part?24

What Fletcher sees in these stakes is presented as a tapestry of observations of the influence of the universal and the collectivist in his retelling of the history and significance of collective guilt and the law of war, particularly as it requires individuals to be held responsible for national acts and nations to be held responsible for individual acts.25

Fletcher neither resolves the tension between liberal and collectivist notions of responsibility and guilt for crimes or wars. Rather, he shows the conflict that persists as these views are reflected in various degrees throughout municipal and international law, and throughout our underlying notions of the moral claims that these laws ought to reflect. Granted, he rejects certain Romantic notions as they are apparent in the materials, for instance rejecting the idea of individual responsibility for crimes

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24Fletcher, Storrs Lecture, supra note [], 111 YALE L.J. at 1504.

25Id. at 1513-37.
committed by a nation. But to do so somewhat emphasizes another Romantic element, in that it requires him to accept the nation as an agent capable of moral agency, a notion that is at least potentially as collectivist as the notion of individual responsibility for collective conduct.

Instead, Fletcher illuminates a variety of issues in this tension, focusing on two errors, two excesses, that are especially likely as a result of Romantic thinking in this domain of law and moral understanding. These excesses result from too easily ascribing and denying guilt as a result of national responsibility.

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

There is also a Romantic bias in what Fletcher calls “guiltless sincerity,” crediting an authentic commitment by an individual to the premises of a culture or nation, thus allowing the purity of heart of a wrong-doer to mitigate the guilt in the

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26FLETCHER, ROMANTICS AT WAR, supra, note [], at 91, 139.

27Fletcher reaches this result by limiting the concept of guilt so that it cannot visit the sins of parents on their children. Id. 141-50. He could, however, also have reached this result by limiting the relationship between the nation and its people in the formation of the general will, so that only the will of those members of the nation at the time of an act can be sufficiently willful, or engaged, in the act to share meaningfully in its guilt.
wrong. From this comes a popular form of moral relativism, that shirks to judge when an otherwise morally offensive action is based on a cultural or national ethos. In this manner, terrorist attacks on civilians in the genuine belief of religious obligation can be blameless. Fletcher sees guiltless sincerity as part and parcel of ideological justifications for religious violence and the military defense of superior orders, both of which are morally indefensible.

After sounding the tocsin to warn of Romantic excesses, Fletcher returns to partially vindicate a Romantic view of the nation, not only as the agent of guilt following national wrongdoing, but also as a credible moral agent for all of its collective acts, bad or good. Indeed, the nation provides a method for accomplishing what Fletcher considers the distribution of guilt in a manner that both explains and potentially mitigates the guilt of awful collective acts, such as the Holocaust or mass death. Without a social or national framework of expectations to engage in an act that outside that framework is easily perceived to be evil, the evil in some acts of free will would be, essentially, unexplainable.

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28Id. 148-56. This, Fletcher finds to be a dangerous Romantic misreading of Kant's universalist role of motive in assessing the moral worth of an action. Good motives cannot be the basis of the good will, which depends on the rationality of the whole of the willed action, not merely the integrity of an intention toward an altruistic end. Id. at 150.

29Id. 148-56. In this criticism of the Romantic excess of guiltless sincerity, Fletcher has the most unlikely of allies. See CARL SCHMITT, POLITICAL ROMANTICISM (Guy Oakes, trans.) (1991).

30In this, Fletcher was drawing on the theologian Harry Frankfurt. Id. 168-72, citing Harry Frankfurt, Freedom of Will and the Concept of a Person, in —, THE IMPORTANCE OF WHAT WE CARE ABOUT: PHILOSOPHICAL ESSAYS 11 (1988).
In the end, Fletcher is careful. His effort is one of warning, not of resolution. He finds in the Romantic a will to embrace certain of our passions as we accept an identity that is not fungible and desiccated in its universal rationality but that is contingent on our nationality, our traditions, and our culture. Romanticism gives us a tool to see more clearly the will that animates our thoughts, our policies, our army when our nation, if hardly we personally, are threatened or harmed. But he finds in it also the seeds of excess, of moral failure, and of the dissipation of guilt.

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

III. Guilt in the Individual, the Collective, the Nation, and the State

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

A. Collective Guilt as a Mitigation of Individual Guilt.

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

The older context is related to the measurement of individual guilt, whether superior orders can excuse the illegal conduct of one who is ordered to commit an illegal act. The answer to this question has evolved over the century. In 1921, the Supreme Court of Leipzig said superior orders is generally a defense. In the 1940's the International Tribunals said they are not, although they might be an element for the mitigation of punishment. The 1998 Rome Treaty, governing the new International Criminal Court, says no also, although it allows ignorance of the illegality of the conduct

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31See Mullins, supra note []. Consider, in this context the case of Lt.-Capt. Karl Neumann, whose U-67 had sunk a hospital ship, who was acquitted on the basis of superior orders. Id. The Leipzig Supreme Court distinguished Neumann's case from Patzig's case, when the latter captain abandoned the crew of a hospital ship it had torpedoed to drown, after interviewing crewmen already in a lifeboat and ascertaining the absence of combatants. The court noted that in rare instances an order must be disobeyed. “If such an order is universally known to everybody, including the accused, to be without doubt whatever against the law.” When the captain ordered his subordinates to kill innocent crewmen, “They could only have gathered, from the order given by Patzig, that he wished to make use of his subordinates to carry out a breach of the law. They should, therefore, have refused to obey. As they did not do so, they must be punished.” quoted in HOWARD S. LEVIE: TERRORISM IN WART: THE LAW OF WAR CRIMES 34 (1993).

32The trials of the International Military Tribunals were held pursuant to Law Number 10 of the Allied Control Council for Germany, entitled Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity incorporating the Moscow Declaration and the London Agreement and Charter of 1945. Article eight of the London Charter specified that “The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but it may be considered in mitigation of punishment if the Tribunal determines that justice so requires.” Enacted as the Charter of the International Military Tribunal, 59 Stat. 1544, 82 U.N.T.S. 279 (1945); 1 TRIALS OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 224. The first major test of this article was in the case of The Pelens, in the trial of Heinz Eck, captain of U-852, which machine-gunned the survivors of the steamer it had just torpedoed to prevent them disclosing the submarine's location. All of crewmen involved were convicted, despite claims that they carrying out Eck's orders. 13 Ann. Dig. Rep. Public Int'l L. C. 249.
ordered to be a defense unless the illegality, as in the case of genocide or crimes against humanity, is “manifestly unlawful.”33

The later context for relationship between individual and collective guilt is to consider, like Karl Jaspers, whether collective guilt can exist at all. Jaspers considered the nature of guilt in four senses – criminal, moral, political, and metaphysical – and determined, although an individual may have guilt for what that individual’s state does, particularly moral or metaphysical guilt, that guilt is a personal attribute, and that it is not possible for groups, or nations, to meaningfully bear guilt, although either may bear political liability.34

Fletcher’s consideration of these two contexts of the relationship between the personal and the collective is described briefly above, but it is worth considering again his perception of the Romantic notion of asserting the identity of the self. In the Romantic ethos, the individual is so immersed in the society that the personal submersion of one’s identity in social values is a triumph of the individual. From this

33Rome Treaty Article 33, Superior orders and prescription of law, specifies

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

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.


34Fletcher, Storrs Lecture, supra note [] at n38, citing KARL JASPERS, THE QUESTION OF GERMAN GUILT 41 (E.B. Ashton trans., 1947) [hereinafter, “JASPERS, GERMAN GUILT”].
Fletcher both sees the nation, as a rough holder of the set of social values, as a suitable agent to be said to have guilt, although only to the extent that the nation includes the generations whose conduct was guilty. From this, also, however, there is a danger of allowing too much of an excuse to the individual. Thus, the individual and the nation remain morally responsible, and the values of the enlightenment are not altogether extinguished by application of the Romantic ethic.

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

Considering Fletcher’s view, we might refine our notion of the mitigating effect of collective responsibility on individual responsibility, and so we might see a more general theory of the relationship of collective to individual guilt. To do so, we might consider one idea that arises from current legal theory, Robert George’s notion of moral ecology. Moral ecology is a nice shorthand term for the whole set of norms in a community that are the public consequences of private and public actions, from which every person in the community learns what is accepted as moral in that community.35 Moral ecology is, in essence, the basis of the common sense of a society, the shared understanding of what is to be done in any given situation. George develops his theory for the purposes of justifying laws that develop healthy, rational, and moral sets of rules.

George is explicit in both the extent and purpose of his theory, which is built on the Thomist foundations developed by John Finnis. For George, “political authority legitimately extends even to the regulation, within limits, ‘of friendships, marriage, families, and religious associations, as well as all the many organizations and associations which, like the state itself, have only an instrumental common good.’” This extent is limited inherently only by the obligation of the state to securing the social conditions of the well-being of individuals and their communities, which for Finnis would limit the state from regulating private and secret relations, a limit George rejects. Robert P. George, Forum on Public Morality: The Concept of Public Morality, 45 AM. J. JURIS. 17 (2000), quoting John Finnis, Is Natural Law Theory Compatible with Limited Government?, in ROBERT P. GEORGE, ED., NATURAL LAW, LIBERALISM, AND MORALITY 5 (1996).

One need not endorse George’s, or for that matter, Finnis’s views of the proper function of the state as a guarantor of a proper moral ecology to employ the phrase as a useful device for expressing the whole of a normative system in the community.

in a community’s ecology, and yet this notion provides a potentially useful tool in considering the collective view as it effects an individual’s view of what is immoral. Two applications, at least, may help in understanding this relationship.

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

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

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

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

We in the developed countries of the twenty-first century see the slaver as morally

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37 No number of anecdotes could prove this point, but at least one might illustrate it. William Lloyd Garrison, a child of devout Baptists dedicated to equality, adopted abolitionism from a fellow printer, who was so committed to abolition that he had placed his children with foster families to allow his devotion to that mission. See Henry Mayer, All on Fire: William Lloyd Garrison and the Abolition of Slavery 52-56 (1998). How likely would Garrison have been to adopt abolition as his cause without both such a background and without such a meeting? The influence of each person’s acts and statements influences the moral ecology, and from such stimuli change, or stasis, is more likely.

38 In contrast to Garrison’s conversion, is that of John Newton, the slaver who became a country priest in the Church of England and gradually came to reject his past actions. Ultimately, his rejection took the form of a written hymn, which is still popular, Amazing Grace. His diaries make clear that, even in his later years when he viewed with repugnance his early life as a slaveship captain, his only sense of mitigation was that no one ever told him this trade was wrong. This was no exoneration of his conduct but it provided a sense of his lessened responsibility. See William E. Phipps, Amazing Grace in John Newton: Slave Ship Captain, Hymn Writer, and Abolitionist (1993). The diaries are quoted at length in the video, The Bill Moyers Collection: Amazing Grace (1992).
compromised. But we must, at least in a way, see him less wicked in the eighteenth century, prior to the cultural ascendance of abolitionist thinking, than we do in the twentieth century, when abolition and respect for the dignity of individual has finally occupied the whole of the moral ecology of the developed world.

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

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

The strength and basis of the moral ecology is an important consideration, and it is still quite vague. The nation is unlikely to define the set of individuals that participate in a particular moral ecology. Jaspers is right to see that individuals in a group, even a national group, hold shared values, and political liability (if not guilt) may attach both to everyone in the group and to the group as a whole as a result of engagement in these
values or conduct conforming to them.\textsuperscript{39} What then, is the group? Is the nation the group? a political party? a philosophical or religious movement?

Certain groups will have a greater size and so a greater authority over their members owing to size alone. With size, the group is isolated from views or evidence that would challenge ideas or beliefs central to the culture, keeping the group’s moral ecology free from challenge. While isolation can be achieved by withdrawal of small groups from an isolated culture, such as the Moravians or Amish in the United States, maintaining a population sufficient to maintain such groups over time may become a problem, although it need not always, as in the case of the American Mormons. Greater size, however, can be a cause for pride within the group as proof of the group’s success.

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

\textsuperscript{39}JASPERS, GERMAN GUILT, supra note [], at 40-42.
becoming the most important group for the whole state, although it can of course be captured by one group, acting as a faction toward the state as a whole.40

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

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

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

In many instances, the state and the nation are likely to be sufficiently related that citizenship implies nationality and vice versa. This, is increasingly rare in the world, however, and most states have significant populations that think of themselves as less than accepted within the nation of their state. Membership in a state might or might not demarcate the population of a nation. When it does not, as when a state contains a

40Rousseau’s famed General Will, the basis for Rousseau’s social (but not governmental) contract, is not necessarily active in every state. Rousseau believed that the general will can become subordinate to other wills in the state, especially when a small group deceives the honest populace. See JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT, BK. IV. 80 (Donald A. Cress, trans., Hackett Publishing, 1983)(1762).
national minority, or multiple nations in opposition to one another, the state is likely to be captured by one group to the expense of the other, as in the case of many of the post-colonial states of Africa.

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

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

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

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

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

The circumstances in which this guilt is most clearly collective upon the group
of the whole citizenry of a state are when the wicked acts are of a form that require a
state to commit them. States alone can enact laws, enter treaties, and most importantly,
engage in most forms of war.
We must here set aside the war-like actions of terrorism, a problem to be revisited in the section V of this discussion, below. For now, it is enough to say that for the last two centuries, the maintenance of wars to effect political change or satisfy other strategic objectives has required the commitment of a permanent or nearly permanent structure capable of mobilizing a sizable portion of a nation’s wealth and, often, manpower.\textsuperscript{41} The nature of the mobilization of resources that is necessary to engage in war requires that a state be a corporate actor.

The collective responsibility for such actions by a state is accepted by essentially all observers both within and without states that commit themselves to war. This responsibility is one reason for the constant drumbeat of official rhetoric traditionally surrounding the decision to commit to war, to demonstrate that the war is justified.\textsuperscript{42}

Any American who travels in a foreign nation will understand this phenomenon when the government of the United States announces a policy or commits an act that is unpopular in the nation being visited. The American might personally consider the policy unwise, or even illegal, but the American will still be lumbered with responsibility for it, and likely feel some personal investment in its criticism by the locals. This sense

\textsuperscript{41}The first call for what we would now think of as a total mobilization, the \textit{levée en masse} as the necessary means for warfare was by Guibert, whose book on strategy influenced Napoleon. See François Apolinne, le Comte Guibert, \textit{Essai Général de Tactique} (1770), in --, STRATEGIQUES (1977). What was once thought to be the logical conclusion from this approach, the notion of total war, was replaced in turn by the concept of thermonuclear war.

\textsuperscript{42}The best American example of this remains the Lincoln’s justifications of the Union’s commitment to war, which evolved from union for its own sake to union for the sake of salvation, freedom, and equality. The study of the effect of this rhetoric on national development is, of course, \textsc{George Fletcher}, \textit{Our Secret Constitution: How Lincoln Redefined American Democracy} (2001).
of nationalist collective responsibility is held both by the traveler and the locals whom the traveler engages along the way; anyone travelling abroad is an international scapegoat for one’s state’s policies, particularly its wars. 43

2. Individual Guilt for the Generation of Collective Guilt

There is a second application of the notion of moral ecology to our understanding of the relationship between collective and individual guilt. Different people participate differently in the development and maintenance of a moral ecology. Some individuals have greater influence. Their public actions, or their private actions, have greater significance in causing others in the moral ecosystem to accept their views as moral or their conduct as morally imitable. As Jaspers said of political liability, it is graduated according the degree of participation in the regime. 44

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

43 It is possible, however, that the member of the group who opposes an action by the group would feel shame and not guilt for the action of the group. The differences between shame and guilt are subtle and variable, and yet in many contexts, such as in the possibility of absolution, the differences can be compelling. See FLETCHER, ROMANTICS AT WAR, supra note [], at 188-92; Herbert Morris, Introduction, in –, GUILT AND SHAME (1971). The manner in which Fletcher, and Jaspers, employs guilt, shame may be thought of as a contingent result of moral or metaphysical guilt when that guilt is accepted by the guilty party. In that sense, the idea of expecting one to feel guilt may be similar to expecting one to feel shame.

44 Id., at 43.
Thus far, the sense of collective guilt has been one in which the focus has been upon a group. There is a separate form of question that applies, however, when the group is a state.

The state is a particular form of group in which the sum is often far greater than the parts, particularly when the sum is both the group that generates laws and enforces them under a threat of violence and the group that fields armies and fleets for war. Membership in a state is, for these reasons if for no others, qualitatively distinct from membership in other groups.

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

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

individual’s guilt for state-sanctioned, immoral conduct. Likewise, it increases the sense that the state is a group that is capable of both responsibility and guilt for such conduct.

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

One approach to answering this question is to consider Rousseau’s answer, the form that the state’s myth of sovereignty takes. This approach runs quickly out of steam, though. The collective guilt in the state as a group does not turn upon a state’s particular theory of sovereignty. Different theories of sovereignty persist, of course, for different states. One might consider the person who is a monarch the sovereign while another considers its people to be sovereign. In all, however, a relationship between the sovereign and the subject requires the subject to perform or abstain from acts dictated by laws. In none are the laws actually made by the sovereign, but the officials of all states sets norms by law that must be obeyed by the subjects.

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

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

3. The Responsibility of Officials

Many people have extraordinary influence over a nation’s moral ecology, and
many might have more influence, depending upon the contingent values that exist in a
culture. A highly religious culture will likely put more stock in the statements of a
religious leader, and a sophisticated, urbane culture might put more stock in a civilian
essayist, artist, or novelist. Each person with influence over the moral ecology of a
nation bears the responsibility for acting with such influence, and insofar as the influence
exists in one person to a greater degree than in others, each person has that much greater
a responsibility for the actions of others that are consonant with that ecology.
These forms of influence, then, vary according to the culture of the nation, and the role of the moral ecology or ecologies in the state. One form of influence tends to be quite strong, regardless of other elements in the culture, and it is the law.

A state’s legal officials bear a disproportionate role in the development of the moral ecology in the state. By determining which values to enshrine in the law, the official exercises an authority over the norms of a culture that may either alter or reinforce preexisting moral notions with great force, immediacy, and geographic scope.

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

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46 Many books on Schmitt have emerged in recent years, the essays in David Dyzenhaus Ed., Law As Politics: Carl Schmitt’s Critique of Liberalism (1998) being perhaps the most representative. By far the most far ranging study of the Nazi legal system, however, is Michael Stolleis, The Law Under the Swastika: Studies on Legal History in Nazi Germany (1998).

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

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

Thus far, this discussion has yet to deal with the two problems that are, for most observers, the most essential to arguments over collective guilt – the liberal idea that one can be guilty for only for one’s own acts and not for the acts of others, and the psychological idea that guilt requires a personal knowledge. Fletcher deals with each problem with sensitivity and with fair and thoughtful choices from the literature. He concludes that it is wrong to visit guilt on succeeding generations of a nation for past its acts. And, he recognizes a profound modern shift from an objective to a subjective nature of guilt, and he places, at least it seems to me a greater emphasis on the objective while remaining aware of the significance of the subjective.

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48See FLETCHER, ROMANTICS AT WAR, supra note [], particularly chapters six, eight, and nine.

49Id., particularly chapter ten.

50Id. particularly the latter sections of chapter nine.
As to the first problem, the liberal, egalitarian view of the autonomous individual has as great a problem in recognizing rights of groups as it does duties in them.\textsuperscript{51} The Romantic approach to the group identity of the nation is clearly more widespread in human perception outside the lecture halls. In accord with that identity, it makes perfect sense to speak of nations or states having both rights and duties. Indeed, international law is predicated on this notion, as well.

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

This argument is unconvincing to some, who will still reject guilt by association claiming that claims of individual moral responsibility for national acts, require an

\textsuperscript{51}See, e.g., WILL KYMLICKA, POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM, AND CITIZENSHIP (2001); cf. BRIAN M. BARRY, CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM (2001)
unacceptable ascription of responsibility to the individual who does not personally commit acts supporting the national crime. A person who is a mere subject of the state committing the act, especially one who lacks full knowledge of the conduct of the state and its agents, has a claim against being held responsible for the acts of the state. This claim is strongest for those who resist the acts of the state, those who protest, those who violate the state’s laws requiring them to support the officials in their wrongful acts.

Such a claim however, ignores two aspects of group membership that underpin the nature of citizenship. First, the nature of group action is simply different from personal action; if my rugby club decided to play a club that I think is too strong for us to play, it is still my club that will lose, whether I play in that game or not, and whether I argued with the fixtures chair against it or not. The nature of my identity is that of member of the club, whether I agree with its action or not. It is my club, not me, but the club’s loss is my loss, just as the club’s win would be my win if I were wrong.

If there is collective national guilt, then members of the nation are guilty as well, regardless of their personal neutrality or resistance. In this, then, one can see the tension of Fletcher’s rejection of guilt in successive generations of a nation. Fletcher’s enlightenment limitation upon the Romantic nature of national identity is necessary to sustain a limit of guilt at the generational border. Otherwise, the only limits would be those imposed by memory; for so many generations of the nation that has committed a crime remembers it or for so many generations of the people who were harmed by it remembers, the sense of guilt of the national crime would continue.
The second aspect of group membership and responsibility turns upon the psychological nature of guilt in the group. Accepting a notion that all subjects of the state bear some moral relationship to the state’s act might still leave room to argue that a subject guilt ought to be abated for objecting to the act.

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

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

Collective guilt can accrue in a person burdened by it who is personally innocent of any act from which the guilt can arise. The guilt is strictly one of association. Opposition to the guilty act is, then, no basis for exoneration. Opposition does, however,
appear quite rightly as another basis for mitigation of punishment or severity in that guilt, in the same sense that moral ecology does.

IV. Passion, Honor, and Romance in the Will to War

Fletcher’s two views of war contrasts the nature of the individual and of the state when perceived as enlightenment or Romantic actors. He writes with assurance that the Romantic aesthetic of war is one that arises from concern for honor, particularly a rarely spoken but deeply held concern in America for the national honor of the United States.52

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

This contrast is one that is well known in American history, and it has an ancient lineage. The American experience is that between the Southern and Northern views of the American Civil War. Southerners saw the fight through the lens of honor, in which a threat to one’s honor must be avenged; Northerners saw it as one about dignity.53

52 Fletcher, Romantics at War, supra note [], at 13-18.

53 The literature on honor in the antebellum South is substantial. See, e.g., Edward L. Ayers, Vengeance and Justice: Crime and Punishment in the 19th Century American South (1984); Bertram Wyatt-Brown, The Shaping of Southern Culture: Honor Grace, and War, 1760s-1880s (2001); —, Honor and Violence in the Old South (1984). The contrast between honor as a Southern ideal and dignity as its Northern opposite is Ayers’s.
Interestingly, many of the conditions that seem likely to increase the influence of moral ecology on individual actions and beliefs appear also to increase the likelihood of honor being a value in that moral ecology. “Honor requires a culture in which to thrive, one that is economically undiversified, localized, explicitly hierarchical, societies where one standard of worth can reign.”\(^54\) One of the effects of a culture based on honor is that injury to one’s honor must be satisfied only in an honorable manner; money and excuses can never suffice, nor can punishment inflicted by intermediaries. In that sense, a criminal justice system is a system for the enforcement of dignity, and dueling is a system for the enforcement of honor.\(^55\)

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

The elements of revenge, and of honor, that generally ensure that military adventure driven by it is excessive are its recurrent nature and its survival over time. A reprisal begets a reprisal in a potentially endless cycle. Further, an injury to national honor may be perpetuated in a nation’s mythology over many generations.\(^56\) States that

\(^54\)**AYERS, VENGEANCE, supra note \[\], at 26.**


\(^56\)**Revenge may inflame militarism, even when the vengeance is sought for imagined offenses. For example, the myths of Serbia enhanced the sense of historical injustice of a people for whom, “history is war by other means.” **TIM JUDAH, KOSOVO: WAR AND REVENGE 1** (Yale University Pres, 2000).**
pursue military adventure to reconcile affronts to honor cannot hold peace, order, or the well-being of individuals are the highest goals of the state.

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

In World War II, two of the aerial campaigns that caused the greatest criticism, and indeed the actions by the allies that have consistently been called war crimes, were both depicted, perhaps with some accuracy, as acts of revenge. Over Europe, Sir Arthur Harris’s policy of pursuing area bombing against German centers of population, including the firebombing of Dresden, has been recurrently justified as, or attributed to a motive of, revenge for German missile attacks on civilian centers in England.57 Similar questions of the morality of American bombing over Japan, including both the firebombing of Tokyo and the use of nuclear weapons, were resolved both by some Air Force generals at the time and by analysts later, as justified revenge for Japanese brutality during their occupations and for the sneak attack on Pearl Harbor.58

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57 The basic theory is expounded in the popular, if flawed recent book, MICHAEL COFFEE, DAYS OF INFAMY: MILITARY BLUNDERS OF THE 20TH CENTURY (1999). The morality of area bombing was debated at the time and recurrently since. See, e.g., RAYMOND H. WILLCOCKS, THE ETHICS OF BOMBING DRESDEN (1998); The revenge thesis is not without doubt, and several appraisals of Harris’s decision are completely without regard to the argument of revenge. See, e.g., CHARLES MESSENGER, ‘BOMBER’ HARRIS AND THE STRATEGIC BOMBING OFFENSIVE, 1939-1945 (1984).

Despite the horrible scale of such devastation, however, a greater concern may arise from the small scale, personal brutality that comes of ground soldiers acting from a sense of revenge. Perhaps the most well-known war crime by an American force, the massacre at My Lai village in Viet Nam, resulted from exactly such a sense of revenge. On March 16, 1968, at My Lai 4 (Son My Village in Quang Ngai Province) C Company of the 11th Brigade, Americal Co., under the command of Lt. William A. Calley killed between 200 and 400 civilians including infants. The recurrent analysis of the cause for massacre was the emotional state of an untrained unit that had recently suffered heavy casualties and sought revenge.\textsuperscript{59} After several recent engagements with losses to enemy action and a minefield, “The Company was looking for an excuse and they got it.”\textsuperscript{60} Perhaps the only saving grace from this sordid passage is that the U.S. military learned a

\textsuperscript{59}Despite the clarity of revenge as a motive, it was only one factor leading to the massacre, perhaps as important was the failure of discipline in the company and leadership by its commander, Captain Ernest Medina. See Seymour M. Hersch, \textit{My Lai 4: A Report on the Massacre and Its Aftermath} 26-43 (1970).

\textsuperscript{60}Michael Bernhart, \textit{quoted in} Seymour M. Hersch, \textit{My Lai 4: A Report on the Massacre and Its Aftermath} (1970) quoted in Matthew Lippman, \textit{The My Lai Massacre and the International Law of War}, 314, 325 in \textit{Terrible Beyond Endurance? The Foreign Policy of State Terrorism} (Michael Stohl and George A. Lopez, eds.) (1988) 30-40. “On the day after the mine incident, Charlie Company held a brief funeral for Sergeant George Cox. By all accounts, it was a moving occasion. “The men were hurt real bad, real bad,” Henry Pedrick said. The company was very upset. The company was also very angry. It had revenge on its mind.” Like other members of the company, Pedrick came close to tears as he talked about it.” Sergeant Kenneth Hodges later recalled, “This was a time for us to get even. A time for us to settle the score. A time for revenge – when we can get revenge for our fallen comrades.” Kenneth Hodge in 1989 interview with the authors, \textit{quoted} Michael Bilton and Keven Sim, \textit{Four Hours in My Lai} (1992).
valuable tactical lesson from the debriefings of the troops at My Lai, and it established training regimes to enhance compliance with the laws of land warfare.61

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

With that lesson in mind, one might consider the current questions of war before us, as described in section I, above. One of the essential divisions over the American response to its attack by terrorists is the problem caused by a need to restore lost honor. Self-defense cannot do this, and so force constrained by the principles of the United Nations Charter cannot do this.62 In considering whether not only to depart from American commitments to the United Nations but also from American leadership against aggression in international law, it might be well to consider a much more ancient proscription on revenge, or at least its predicates, a war based in anger. “There is no need to chastise in anger if error and crime are to be repressed.”63

61The Department of Defense has established formal training in the law of war for combat units and officers and also incorporated field judge advocates into the command structure for combat deployment. See, e.g., WALTER E. BOOMER, HENRY L. MASON, HAYS PARKS, HARRY G. SUMMERS, JR., MILITARY LESSONS LEARNED IN FACING MY LAI, MOVING BEYOND THE MASSACRE 153 (1998).

62See United Nations Charter, Articles 2(4) and 51.

V. The Difference Between War and Crime

A recurrent influence on Fletcher’s understanding of guilt in war is his understanding of the nature of guilt in crime. Thus, he, too compares the legalistic with the liberal, and the honor-driven with the Romantic. He also takes careful steps to analyze whether the United States is engaged in its War on Terrorism in a military action or a law enforcement exercise. The implications of this choice, he points out, are the U.S. obligations for the treatment of its enemies. Prisoners accused of crimes receive certain limited protections, but prisoners of war are another matter under the Geneva Conventions and the laws of war. The current pattern of the U.S. government, described by Fletcher in detail, has been to avoid any classification of either the military actions in Afghanistan as a war or the prisoners taken there as prisoners of war or, with the exception of John Walker Lindh and a few others, to designate these prisoners as criminal suspects.64

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

A. Two Precedents

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

1. The Tripolitanian War.

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

In 1799, the United States entered treaties with the Tripoli, Morocco, Algiers, and Tunis to pay sums, including settlements and annual tributes, such as $107,000 in money and supplies to Tunis $18,000 annually to Tripoli, to ensure American ships were

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not molested. The following year, the pasha of Tripoli raised his price, which in May, 1801, the United States refused pay, and Tripoli declared war. The United States sent naval squadrons into the Mediterranean, blockaded enemy coasts, bombarded Tripolitanian fortresses, and engaged enemy gunboats. Two actions were particularly memorable. In 1803, Tripoli captured the U.S. frigate Philadelphia, which was burned in the harbor by Lt. Stephen Decatur and a band of American sailors. In 1805 United States Marines stormed and captured the fortress of Derna in Tripoli.

The first Tripolitanian War ended in June 1805, with a settlement negotiated with the pasha by American agent Tobias Lear, under which prisoners were to be exchanged, and the Americans paid $60,000 to Tripoli both to compensate for their greater number of prisoners and to be free of future tribute. This arrangement, however, was subject to the vagaries of the Dey of Algiers, the Bey of Tunis, the Pasha of Tripoli, and the Emperor of Morocco. The decade from 1805 to 1815, saw the capture of numerous American ships, additional demands for tribute, and the threatening of the American consul with slavery unless the exactions were paid.

On March 2, 1815, Congress declared war on Algiers, and President Madison ordered two U.S. naval squadrons returned to the Mediterranean. In June United States forces under then- Commodore Stephen Decatur captured an Algerine frigate and brig.

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66See OFFICE OF NAVAL RECORDS AND LIBRARY, U. S. NAVY, 1 NAVAL DOCUMENTS RELATED TO THE UNITED STATES WARS WITH THE BARBARY POWERS 312-30. (hereinafter, “DOCUMENTS REL. BARBARY POWERS”).

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

Second, the United States treated the sailors and soldiers taken in combat as prisoners of war, and repatriated them at the cessation of hostilities. Moreover, civilians

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68 Id. at 199-206.

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71 To be sure, the rich tradition of privateering somewhat complicates this picture. In essence, a private vessel licensed by a state to capture foreign vessels held a letter of marque and reprisal. Reprisal initially entailed only the recovery, for either the shipowner or the state, of a wrong or a debt, as in the spectacular attacks of Frenchman Jean Ango against Portugal in the early 1500's. See HENRI CAHINGT, JEAN ANGO, VICOMTE DE DIEPPE, 1480-1551 (1951). By the nineteenth century, however, letters of marque and reprisal were issued exclusively during war, to supplement a state’s navies, and a seizure by a privateers had become a *cassus belli*. See DONALD A. PETRIE, THE PRIZE GAME: LAWFUL LOOTING ON THE HIGH SEAS IN THE DAYS OF FIGHTING SAIL (1999). The entire practice ended in the nineteenth century. See FRANCIS R. STARK, THE ABOLITION OF PRIVATEERING AND THE DECLARATION OF PARIS (Columbia University Press, 1897).
taken into custody during actions were not considered prisoners of war and were immediately repatriated.72

2. The Punitive Expedition of 1916.

On March 9, 1917, at 4:45 a.m., 400 soldiers in Pancho Villa’s army of rebellion against the Mexican government crossed the United States boarder and attacked Columbus, Texas. Villa seems to have intended to capture the supplies of an army garrison there, to rob the local bank, and to cause sufficient havoc to force the United States to intervene in the Mexican Civil War, leading to an anti-American backlash to the benefit of his cause. He failed in his tactical aims, not only in failing to capture any money or supplies but in losing a hundred men. Even so, he fired the town and killed seventeen Americans, mainly civilians.73

The next day, President Wilson declared, “An adequate force will be sent at once in pursuit of Villa with the single object of capturing him and putting a stop to his forays. This can and will be done in entirely friendly aid to the constituted authorities in Mexico and with scrupulous respect for the sovereignty of that republic.” The Punitive Expedition to Mexico was originally authorized for 5,000 men, although the mobilization

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72See, e.g., letters detailing the release of David Vallanzino, a Tripolitanian civilian aboard ship only as owner of a cargo, who was captured in 1803. See 2 DOCUMENTS REL. BARBARY POWERS 455, 461.

73The story of Villa’s raid has received numerous treatments by historians. The monumental history of Villa is that of Frierich Katz. For the raid on Columbus, see FRIEDRICH KATZ: THE LIFE & TIMES OF PANCHO VILLA, 545-566 (1998) [hereinafter “KATZ, VILLA”]. See also JOHN S.D. EISENHOWER, INTERVENTION! THE UNITED STATES AND THE MEXICAN REVOLUTION 1913-1917 217-227(1993).
grew, as did the rhetoric of war against Villa. An Army recruiting poster printed in San Francisco, called for the enlistment of “25,000 men, necessary to raise the U.S. Army to War Strength What For? The United States Government Orders are Capture Villa At Once, To do so The Army Must Have Men.”

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

The Punitive Expedition had some initial success, capturing arms and killing members of Villa’s bands, including two of his lieutenants. On the other hand, as a result of the attack Villa had successfully positioned himself as a popular hero, having


75See PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1916 490-93; 497-98.

76CLARENCE C. CLARENDEN, THE UNITED STATES AND PANCHO VILLA: A STUDY IN UNCONVENTIONAL DIPLOMACY 256 (1961) [hereinafter, “CLARENDEN, VILLA”].

77See George S. Patton, Cavalry Work of the Punitive Expedition, 27 U.S. CAVALRY J. 426 (1916).
stood up to Americans. 78 American forces took casualties and were accused of firing on civilians. 79 Although Pershing was restricted in his scope of operations and ordered not to occupy any towns or cities, as the expedition dragged on, resistance from the Caranza government to the American presence increased to the brink of war. Indeed, on May 22, 1916, the Caranza government demanded the U.S. withdraw the expedition, 80 and a month later a battle between occurred Pershing’s and Carranza’s troops, who killed and captured American troops, whom they held briefly before repatriating them. 81 The Punitive Expedition neither ended Villista raids on the United States nor captured Villa. A second raid by Villa’s supporters, much smaller than the raid on Columbus, against Glen Springs, Texas, on May 6, 1916, led to the destruction of a store, the kidnapping of two Americans, and the death of three soldiers and an American civilian. 82 As for Villa,

78CLENDENEN, VILLA, supra note [], 265. Although Villa’s popularity rose throughout the nation, in Chihuahua and states in which both Villa and Pershing operated throughout 1916, Pershing appears to have been much more successful in gaining and keeping local loyalties. Compare KATZ, VILLA, supra note [], 595-597 to 605-06.

79Major Frank Tompkins led a patrol lured to Parral, Chihuahua, on April 12, 1916, at which a local mob exchanged fire with the troops. American troops apparently caused a great number of Mexican casualties. Two American soldiers were killed. FRANK TOMPKINS, CHASING VILLA 137-44 (1935).

80][10 Am. J. Int'l L. 337, 890 (1916); 11 Am. J. Int'l L. 399 (1917).][

81The fight, at Carrizal, Chihuahua, occurred on June 21, 1916. Eight-two American soldiers, from the African-American 10th Cavalry, and two guides encountered a four-hundred man garrison, which denied them access to the town, and on whom the Americans advanced. Both the Félix Gómez, the general commanding the Mexican garrison, and Captain Charles Boyd, the commander of the American patrol, were killed. Ten U.S. soldiers were killed; twenty-three were taken prisoner. Estimates of Mexican losses range from 43 to 74. See CLENDEDEN, VILLA, supra note [], 279-81. EISENHOWER, INTERVENTION!, supra note [], 288-300. The American prisoners were returned on June 29. FOREIGN RELATIONS, 1916, supra note [], 597.

82EISENHOWER, INTERVENTION!, supra note [], 286-87.
he had been wounded before the Americans had arrived in Mexico, and he spent almost the entire time hiding in a cave. He re-emerged after the fight between the Americans and the Carancistas, waging his campaign full-throttle against Caranza’s government, even capturing the governor’s palace in Chihuahua City.

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

There were two trials of Columbus raiders, both in the state courts of New Mexico. The first trial was of six men, all whom Villa had conscripted on the eve of the raid, who were accused of the murder of Charles Miller, one of the civilians who died in Columbus during the attack. The trial was not a model of fairness; the U.S. departments of justice and war complained that the accused men would be denied a fair trial by the inflamed local jury, and they were defended by an attorney patently hostile to their case. Thus it is perhaps less surprising that they were convicted than that one of their death sentences was commuted by the state’s governor to life in prison. All of the

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83 KATZ, VILLA, supra note [], 573.
84 KATZ, VILLA, supra note [],
85 FOREIGN RELATIONS, 1916, supra note [], 907-08.
86 See KATZ, VILLA, supra note [], 606-608, which is based on the trial transcript, State v. Rentéria, et al., no 664 (N.M. Dist Ct. 6, 1917). and an apparently contemporaneous report of the trial.
87 Id.
second group pled guilty to second-degree murder and were sentenced to eighty years in
prison but were pardoned in 1921 by then-New Mexico Governor Ambrosio Larrazolo.
Larrazolo based part of his decision to pardon them on his belief that the Villistas had
been soldiers obeying orders.88

Villa himself remained in rebellion until 1919, when his attack on the Carancista
garrison at Ciudad Juarez led to fire on the U.S. outpost in El Paso. The local
commander, with troops now well prepared thanks to the military buildup for the war in
Europe, responded the same night with an artillery bombardment coordinated with cavalry
and infantry assaults, destroying most of Villa’s army and ending him as a force in
Mexico.89 Villa lived until his assassination in 1923.90 One note of particular interest is
the effect of the newly enacted Hague Conventions on the Laws of War. Although Villa
behaved ruthlessly toward his Mexican opponents and ordered the attack on Columbus,
he behaved toward American soldiers according to the recently enacted Hague
Conventions, a copy of which he was supplied by the United States.91 Indeed, the
Mexicans were quick to use the conventions as a basis for indicting the Americans.
During the conduct of the expedition, Pershing’s troops were accused of violating the

88Id., citing Kenneth S. Zontek, “Damned if the Did, Damned if they Didn’t”: The Trial of
University).

89CLENDENEN, VILLA, supra note [], 310-314.

90KATZ, VILLA, supra note [], 766.

91See Geoffrey Best, Restraints on War by Land Before 1945, in RESTRAINTS ON WAR 18
(Michael Howard ed., 1979). The U.S. Supreme Court held, however, that the Hague Conventions
did not apply to civil wars but only to international wars. Oetjen v. Central Leather Co., 246 U.S. 297
(1918).
laws of war, both by using exploding bullets and by allowing Indian scouts to engage in atrocities against civilians. While these allegations were rebutted, it is clear that while Caranza’s troops were accorded the benefits of prisoners of war, Villistas were routinely denied medical care when captured, were paraded as a spectacle, both alive and dead, and were not treated as prisoners of war.92

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

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

92 FOREIGN RELATIONS 1916, supra note [], 597-607. For an analysis rejecting these claims, see CLENDENEN, VILLA, supra note [], citing SALINAS CARRANZA, LA EXPEDICIÓN PUNITIVA, 306 [].
Perhaps the most signal lesson is the successful military arrest of suspects for criminal indictment in the state courts. Granted, there are persistent concerns as to the harshness of the treatment of the prisoners by the judge and jury in southern New Mexico. Even so, despite the calls for war on Villa and declarations that the attacks were acts of war, the military left the trials of these matters in civilian hands, where the criminal law was carried out.

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

3. Drawing the Future from Precedents.

Care is needed when considering the manner in which a past event is authority for a later action. Precedents are by their nature selective; that an action has no direct precedent does not prove the action is unjust, unwise, or illegal. Moreover, the mere existence of a precedent is not sufficient to prove an action just or wise. Even in the realm of constitutional law, given the rare but significant occasions on which judicial precedents have been overturned by the very courts that once wrote them, a precedent is
not even proof that later similar conduct is legal. Precedents do, however, demonstrate something of practicality. What was once accomplished will be likely accomplished again under similar circumstances.

4. The Nature of the Choices.

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

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

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

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

It is true that the idea of war as a legal concept is not as important for many purposes of international law in recent years as it was in earlier eras; modern treaties are more likely to be concerned with acts of aggression or states of armed conflict than with
The Charter of the United Nations is silent on the matter, instead outlawing the use of force or threats to use force, while recognizing an inherent right of self-defense. Indeed, the definition of war as a matter of international law remains both complex and controversial.

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

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93IAN BROWNLE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 393 (1963) [hereinafter, BROWNLE, USE OF FORCE].


95See BROWNLE, USE OF FORCE, supra note [], particularly 398-401, in which the conditions of a definition are considered but no definition is attempted. See also, for example, INGRID DETTER DE LUPIS, THE LAW OF WAR 1-55 (1987), defining wars by type to include divisions between interstate and internal wars as well as various forms of programmatic war; LOTHAR KOTSCH, THE CONCEPT OF WAR IN CONTEMPORARY HISTORY AND INTERNATIONAL LAW (1956), distinguishing material from formal war.

96See DE LUPIS, supra note [], at 24.
There has been increasing argument, even prior to President Bush’s declaration in 2001, to treat the prosecution of counter-terrorism as the prosecution of war. Yet these arguments consistently fail to persuade either why the laws of war should apply to the benefit of terrorists or why the military is best suited to investigate acts of terror and locate their perpetrators. Many of these arguments tend not to be seeking so much a military solution as a diminished standard of care in a legal solution.

Indeed, given a military force in pursuit of an individual, such as the pursuit of Norriegea in Panama or bin Laden in Afghanistan, a military solution is often not practicable.

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

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

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

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

Donald H. Rumsfeld, Interview with Bob Schieffer and Gloria Borger, Face the Nation, CBS-TV, Feb.
There is an important possibility, raised by international law scholar Jordan Paust and others, that merely the designation of actions against terrorists as a war is enough to cloak terrorists such as the members of al Qaeda with the special protections given to combatants under the laws of war.

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

VI. Some Conclusions: A Democracy at War with Terrorism

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

President Bush has recently articulated a formula of American national policy that would promote a more robust reliance upon and support for the comprehensive system of states. In a Romantic echo of earlier goals of war, he argued that America should seize “a great opportunity during this time of war to lead the world toward the values that will bring lasting peace.” Accordingly, he underscored an American commitment to support “nonnegotiable demands of human dignity” chief among which are “the rule of law and limited state power.”

Here then, is the liberal, legal rhetoric of the enlightenment, seeking not honor but the protection of dignity. In one speech, we see the tension of these two philosophies, these two aesthetics.

Indeed, the United States has long been a beacon to the world for the enlightenment values articulated, especially the rule of law. This collective term expresses the ideals that the state is governed by law, that no person shall be punished by the state except according to law, and that the actions of officials are governed by laws. In times of war, the rule of law is threatened as at no other time, and the threat is greater in a democratic republic more than in other states, as political leaders rush to embrace

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102Id.
any tool to win the war and bristle at any delay or encumbrance that would limit their powers to do so. And yet, the concept of law limits the power of the official, and many war-time leaders have embraced the allure of governance independent of the statutes, Constitution, or most certainly, international law.103

The War on Terror appears to present a fundamental contradiction between the enlightenment and the Romantic, and at stake in their contest is, perhaps now unsurprisingly, the role of American law. On the one hand, the war is intended to promote a system of stable states and the rule of law. On the other, it challenges the notion of the rule of law itself.

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

Yet, by calling for America to go to war but failing to limit the war to one or another form of conduct, the President, whether by accident or design, has aggregated a

103See LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS (1990). For an artful discussion of the necessity but also the limits of the rule of law as a constraint against radical disorder in an all-too-recent context, see Mark A. Drumbl, Rule of Law amid Lawlessness: Counseling the Accused in Rwanda’s Domestic Genocide Trials, 29 COLUM. HUMAN RIGHTS L. REV. 545 (1998).
great power to his office, the power of the President as Commander in Chief in wartime. This aggregation risks harm to the very values of the rule of law that the President has sought to advance. It is also an aggregation that looks suspiciously like the urge to protect honor, an urge that leads too often to excess.

In times past, the officials of law have been willing, if belated, accomplices in such aggregations of power. The Congress and the Supreme Court have several times validated war-time presidential acts that exceeded the authority of the president, and sometimes also of Congress, at the time of the act, although these actions were cause for later regret and their validations cause for national shame.104

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

The costs of such allowances in the War on Terrorism may be that the apparent novelty of the war and its antagonists will lead the government of the United States to violate some of the most important safeguards of both the U.S. Constitution and

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104 During the American War between the States, the Supreme Court accepted an argument that retroactive Congressional authorization of the seizure of vessels that violated the Union blockade of Southern ports, although these seizures had been made on Abraham Lincoln’s sole authority. The practice of such seizures, led, however, to embarrassing conflicts with the nations whose ships were seized, an embarrassment that deepened as the American policy of neutrality grew to reject such practices by other states. See The Prize Cases, [], The Alabama Arbitration, Steve Sheppard, Neutrality in DICTIONARY OF AMERICAN HISTORY (2002).

More famous today, the U.S. policy during World War II of interning loyal American citizens of Japanese extraction was validated by the U.S. Supreme Court, although it was the source of great shame and regret in later years. See Korematsu; [], [] reparations statute Civil Liberties Act of 1988 (H.R. 442, S. 1009), Public Law 100-383 (1988) (Signed by President Ronald Reagan, Aug. 11, 1988).
international law, safeguards intended to protect the civil liberties of American citizens and the rights to respectful treatment by the enemies of American soldiers. These costs are made potentially much greater by the recognition that Operation Enduring Freedom is unlikely to be the last, and the forces that have led to its genesis are themselves regenerative.

Unlike past times of war, a peace in these circumstances might be more than a truce.\textsuperscript{105} In the absence of a state as the opponent, the organization that would enforce one side of the peace does not exist. Indeed as opponents in war, terrorist organizations lack both a traditional organization and traditional goals. Further, the small scale at which they may carry out operations and the ideological nature of their recruitment make unlikely their permanent destruction.

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

\textsuperscript{105}On this point, especially, see Christopher Dobson & Robert Payne, The Never-Ending War: Terrorism in the 80's (1987).
Addenda

Add cite to Kellogg-Briand Pact:


Edward Corwin, Total War and the Constitution (1947)

Erich Ludendorf, Der Totale Krieg (1935).