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RUMINATIONS ON TERRORISM: EXPIATION AND EXPOSITION

*Christopher L. Blakesley**

To paraphrase Richard Falk: Terrorism is political or ideological violence without restraint of law or morality. This article will consider terrorism and reactions to terrorism through a prism of history, philosophy, literature, and law. It is an attempt to show how terrorism is committed by state actors, as well as non-state-actors. I argue that intentional or reckless slaughter of innocents or torturing "enemies" constitutes terrorism and that it ultimately erodes a state's or a group's morality and well-being. Most nations and groups define terrorism in a way that "allows" them to commit atrocity, but condemns "others" who commit the same acts. This ultimately promotes terrorism. Some definitions obscure the line between terrorism as a crime and terrorism as a tactic or strategy of armed conflict. It is important that the law not do this, as I argue that terrorism is criminal conduct. In addition, many, perhaps most, definitions of terrorism, even in criminal statutes and treaties, do not comport with basic principles of criminal law, such as principles of legality, due process, and other human rights and constitutional norms. I will also compare terrorism to other core international concepts, such as war crimes and crimes against humanity. Thus, the article will consider terrorism as a

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crime, noting the conceptual relationship between terrorism and basic domestic and international substantive criminal law. I will present a definition of terrorism as a crime, including its constituent elements. This allows me to study terrorism in the context of basic principles of culpability and innocence. The definition applies to conduct whether performed by state or government actors, by those who attack innocents to get at state government, or who use it against innocent members of factions whom they don't see as adhering to the actor's vision of "good order." Much of the article, however, is aimed at providing context by analyzing historical evidences of terrorism, including torture and other atrocities, designed to promote the power of those committing it. Thus, I will present an historical and comparative excursus, considering terrorism or analogous conduct and its punishment from antiquity, through the Middle Ages, to the present day, to show why such conduct ought to be punished.

I. INTRODUCTION

Violence shall synchronize your movements like a tune,
And Terror like a frost shall halt the flood of thinking.
Barrack and bivouac shall be your friendly refuge,
And racial pride shall tower like a public column
And confiscate for safety every private sorrow.'
Leave Truth to the police and us; we know the Good;
We build the Perfect City time shall never alter;
Our Law shall guard you always like a circue of mountains. . . .[1]

A. Overview

This article shows how the term terrorism and the law that proscribes its forms are appropriated to exclude one's own acts of terrorism. Terrorism and its analogues, war crimes and crimes against humanity, have been committed since antiquity.[2] Systems and theories attempting to check

1. W.H. Auden, The Collected Poetry of W.H. Auden 342 (1945).

2. Exodus 21:24; Yoram Dinstein, International Law As a Primitive Legal System, 19 N.Y.U.J. Int'l. L. & Pol. 1, 11 (1986). See Code of Hammurabi (1728–1686 B.C.); Laws of Eshnunna (2000 B.C.); Code of Ur-Nammu (2100 B.C.).

such atrocities have also occurred since antiquity.[3] More recently, developments since Nuremberg have eviscerated the historical excuses and justifications for war crimes and crimes against humanity.[4] Hope survives, but reality remains gloomy. For example, Curtis LeMay, the Air Force General who oversaw the slaughter of an estimated 900,000 people in firebombings of Japanese cities,[5] admitted that if the United States lost the war, he would have been tried as a war criminal, but claimed that the firebombings were "the right thing to do."[6] As states are expected to enforce war crime laws against their own, one would like to hope that war crimes and like offenses would cease to be something only noticed when enemies

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3. Rules prohibiting what we now call "crimes against humanity" or crimes against some "higher law" have existed from antiquity. See, e.g., Deuteronomy 20:13–17 (King James); Sun Tzu, The Art of War 76 (Samuel B. Griffith, trans., 1963); Code of Manu bk.7, art. 92 ("Let him not strike . . . one who is naked, nor one who is disarmed, nor one who looks on without taking part in the fight."); 1 The Law of War: A Documentary History 3, 59–62 (Leon Friedman, ed., 1972) [hereinafter Documentary History] (discussing *jus in bello*, noting that "[a]ncient Greeks and Romans also followed customary laws of war"). See also Christopher L. Blakesley, Terrorism and Anti-Terrorism: A Normative and Practical Assessment, chs. 7–11 (2006).

4. Articles 7 and 8 of the Charter of the International Military Tribunal (Nuremberg Charter), 59 Stat. 1544, 1546 (1945), eliminated act of state and superior orders as defenses respectively. The International Military Tribunal concluded that "individuals have international duties which transcend the national obligations of obedience imposed by the individual State . . . He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State, if the State in authorizing action moves outside its competence under international law." International Military Tribunal, Judgment, 6 F.R.D. 69, 110 (1946). Also, "[t]he fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility. . . ." Id.

5. Steven Veenema, Note, Willful Ignorance—Contextualizing U.S. Policy Toward the International Criminal Court, 30 Suffolk L. Rev. 167 (2006), referencing Donald R. Davis & David E. Weinstein, Bones, Bombs and Break Points: The Geography of Economic Activity, (Columbia University Department of Economics Discussion Paper Series No. 0102-02, January, 2002), at 19, available at http://www.columbia.edu/cu/economics/discpapr/DP0102.pdf (indicating a number of cities that were firebombed); Gary Jonathan Bass, Stay the Hand of Vengeance: The Politics of War Crimes Tribunals 8–9 (2000) (citing sixty-three instead of sixty-six targeted cities); Robert S. McNamara, We Need Rules for War, L.A. Times, August 3, 2003, at M5 (noting the number of Japanese people killed in firebombing raids).

6. McNamara, supra note 5. But see Bass, supra note 5 (quoting LeMay as referring to the war in the past tense); Veenema, supra note 5, at 167.

commit them.[7] Crimes against humanity appear to have some acceptance and enforceability, although their enforcement tradition remains even weaker than for war crimes.[8] The crime of terrorism has not been as successful. The word "terrorism" has yet to develop a description of universally condemned behavior, and remains a mere epithet to apply to enemies.[9]

B. War Crimes

A war crime is conduct that violates international humanitarian law applicable during armed conflict.[10] Although the Nuremberg and Tokyo charters limited the scope of war crimes to *international* armed conflict,[11]

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7. See infra sections I.B.; IV.A.-C. Although countries occasionally prosecute their own for war crimes and like crimes, the record is not great. See, e.g., Telford Taylor, Nuremberg and Vietnam: An American Tragedy (1970); Blakesley, supra note 3, chs. 8, 10, 11; Jeremy Waldron, Torture and Positive Law: Jurisprudence For the White House, 105 Colum. L. Rev. 1681, 1740–41, & nn.253–54 (2005) (comparing domestic abuse in U.S. prisons to Abu Ghraib); Mark A. Drumbl, Atrocity, Punishment, and International Law, ch. 4 (2007) (challenging basic assumptions of international criminal justice and expressing the need to transcend them for a broad range of responses); Jean R. Sternlight, Is Alternative Dispute Resolution Consistent with the Rule of Law? Lessons from Abroad, 56 DePaul L. Rev. 569 (2007). Still, some prosecution occurs, at least against those at lower ranks. See, e.g., U.S. v. Calley, 48 C.M.R. 19 (CMA 1973); Multiple Proceedings Against U.S. Service Members for Deaths of Iraqi Civilians, in Contemporary Practice of the United States Relating to International Law, 100 Am. J. Int'l. L. 950 (John R. Crook ed., 2006); Navy Investigating Intentional Killings of Civilians in Haditha, Iraq, in Contemporary Practice of the United States Relating to International Law, 100 Am. J. Int'l. L. 713 (John R. Crook ed., 2006); Michael Duffy, The Shame of KILO Company, Time Mag., May 28, 2006, available at http://www.time.com/time/archive/preview/0,10987,1198892,00.html.

8. See sources cited supra note 5.

9. See infra sections I.D and IV, particularly section IV.A, "Propagandistic Appropriation of the Term 'Terrorism'"; Blakesley, supra note 3, chs. 5, 7, 8, 9.

10. Kriangsak Kittichaisaree, International Criminal Law 129 (2001) (providing some history and sources); Leslie C. Green, The Contemporary Law of Armed Conflict 18–19 (1993).

11. Nuremberg Charter, article 6, provided authority to try and punish persons for crimes including: "(b) WAR CRIMES: namely, violations of the laws or customs of war [including but not limited to], murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity."

Geneva Protocol II[12] and customary international law extend these rules to armed conflict not of an international character.[13] The Rome Statute for the International Criminal Court provides an expansive listing of war crimes, in article 8(2),[14] which, for purposes of the statute's jurisdictional threshold, must be part of a plan or policy or part of a large scale commission of such crimes.[15] The ICTY Appeals Chamber in *Prosecutor v. Tadic* categorized war crimes as serious violations that (i) infringe a rule of humanitarian law that is (ii) customary in nature, or meets the conditions of treaty law, (iii) and that protects important values; where the breach involves grave consequences for the victim, (iv) customary or conventional law must establish the individual perpetrator's criminal responsibility.[16]

C. Crimes Against Humanity

A crime against humanity is conduct that violates "humaneness," offending important principles of law to the degree that it concerns the international community; has "repercussions beyond international frontiers"; or "exceeds in magnitude or savagery any limits tolerated by modern civilization."[17] The term "crime against humanity" has been used in a nontechnical sense, at least since the declaration of May 28, 1915, wherein the governments of France, Great Britain, and Russia denounced the massacres (genocide) of the Armenian population by the Turkish government.[18] International

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12. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609.

13. Customary international law on this issue has evolved through international instruments and conventions, such as the ICTR, art. 4; the Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, art. 2(c)-(f), plus customary rules of international law and general principles that these instruments either reflect or have established.

14. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, art. 8(2).

15. Id. art. 8(1).

16. Prosecutor v. Tadic, Appeal on Jurisdiction, No. IT-94-1-AR72, para. 94 (Oct. 2, 1995).

17. Kittichaisaree, supra note 10, at 85, citing Egon Schwelb, Crimes Against Humanity, 23 Brit. Y.B. Int'l L. 178, 195–97 (1946).

18. "The Armenian Memorandum presented by the Greek delegation to the Commission of Fifteen on 14 Mar. 1919." Schwelb, supra note 17, at 181; see also Kittichaisaree, supra note 10, at 85.

agreements have formalized and refined this principle since that time. Article 6(c) of the Nuremberg Charter defined a crime against humanity as

> murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian populations, before or during the war; or persecution on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[19]

The Rome Statute for the International Criminal Court article 7 adds additional conduct including torture, sexual violence, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, group persecution, enforced disappearances of persons, apartheid, and "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."[20] This conduct could also be terrorism.

D. Terrorism

Osama Bin Laden appears to have been the highest profile leader to boast about and exploit "terrorism" to describe actions carried out by his own side.[21] Ironically, others define the word terrorism to exclude their own conduct and favorite justifications and excuses.[22] Modern definitions of terrorism seek to put one's own state terrorism[23] or terrorism by our own or

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19. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, art. 6(c), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

20. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, art. 7.

21. See Liz Sly, New bin Laden Tape Surfaces, Chicago Trib., Dec. 27, 2001, at 1. In a message apparently taped three months after the 9/11 attacks, Bin Laden stated that "[o]ur terrorism against America is a good terrorism." Id. But see Michael Fellman, Book Review, 72 J. S. Hist. 942 (2006) (reviewing Fergus M. Bordewich, Bound for Canaan: The Underground Railroad and the War for the Soul of America (2005), and David S. Reynolds, John Brown, Abolitionist: The Man Who Killed Slavery, Sparked the Civil War, and Seeded Civil Rights (2005).

22. See infra section IV, "The Reign of 'Counterterror.'"

23. For example, a "Special Report of Covert Operations" commissioned by President Eisenhower was adopted as hallowed American policy: "Another important requirement is an aggressive covert psychological, political and paramilitary organization more effective . . . and,

favored "freedom fighters"[24] under erasure, prolonging the problem of terrorism with our hypocrisy. To confront terrorism, which is essentially violence against innocents perpetrated for ideological purposes, we need to define it honestly, unmasking the pious fraud that riddles our justifications and excuses for it.

Terrorism in general terms is political or ideological violence without restraint of law or morality.[25] To prosecute and punish terrorist conduct, we must define terrorism clearly enough that it is not vague so as to violate the principles of legality, due process, and similar constitutional and human rights principles.[26] The following working definition of terrorism provides an opening point: *the use of violence against innocent individuals for the purpose of obtaining thereby some military, political, or philosophical end from a third-party government or group*.[27] An innocent is anyone who is

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if necessary, more ruthless than that employed by the enemy. . . . There are no rules in such a game. Hitherto acceptable norms of human conduct do not apply." Report of the Special Study Group on the Covert Activities of the Central Intelligence Agency (the "Doolittle Report") (Sept. 30, 1954) (declassified Apr. 1, 1976). See Blakesley, supra note 3, chs. 11, 12 (discussing torture since September 11, 2001); Luis Enrique Cuervo, The Alien Tort Statute, Corporate Accountability, and the New Lex Petrolea, 19 Tul. Envtl. L.J. 151, 181 (2006); Tarek F. Maassarani, Four Counts of Corporate Complicity: Alternative Forms of Accomplice Liability under the Alien Tort Claims Act, 38 N.Y.U. J. Int'l. L. & Pol. 39 (2005–2006). Labeling gangs as "terrorists" has provided "cover" or impunity for police torture and murder. See, e.g., Indira A.R. Lakshmanan, Death Squads Said to Target Youths: Slayings of Young Men Go Unsolved in Central America, Boston Globe, April 19, 2006, at A-6; Government Blamed for Mounting Mayhem As UN Rapporteur Sees Little Hope for a Secure Guatemala, NotiCen: Central American & Caribbean Affairs, Sept. 21, 2006 ("Perez Molina has said he simply wants to do for Guatemala what Rudolph Guiliani did for New York. But Albizures hears more of Gen. Efrain Rios Montt, during whose brief de facto presidency the country was made safe from street crime with a wave of extrajudicial killings. . . .").

24. For example, China envisions terrorism as a type of "splittism," to include even peaceful independence movements on behalf of Taiwan and Tibet. See, e.g., Edieth Y. Wu, China Today: Why Its Accession to the World Trade Organization Is Inevitable and Good for the International Community, 5 J. Int'l. Econ. L. 689, 696 (2002).

25. See Richard Falk, Revolutionaries and Functionaries: The Dual Face of Terrorism xiv, 19 (1988).

26. For a comparison of these principles in U.S. and Continental law, see Markus Dirk Dubber, Comparative Criminal Law, in Oxford Handbook of Comparative Law 1287, 1313–22 (Mathias Reimann & Reinhard Zimmermann eds., 2007).

27. The definition of terrorism and the key concepts of "innocents" and motive or purpose are elucidated in Blakesley, supra note 3.

not an actual or imminent aggressor.[28] My definition rejects application of self-defense, because innocents include non-combatants in war and non-attackers in a non-war setting.[29] Self-defense does not apply to using deadly violence against anyone who is not threatening one's life or limb, in either context. Unfortunately, many international jurists have not learned or have forgotten essential and basic criminal law.

Terrorism has always been an instrument of statecraft, domination, oppression, revolution, and rebellion. A very small sampling includes the following. The Salvadoran Army in the 1980s reconstituted its program of mass execution of civilians to intimidate "its enemies."[30] The outrages against *desparacidos*[31] and the depredations of the Khmer Rouge are well known.[32] The United States has a long, sad history of supporting authoritarian governments in Latin America,[33] for example, those in

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28. Id.; Regina v. Dudley and Stephens [1884] 14 Q.B.D. 273, 285–86 (U.K.). Cf. Jefferson D. Reynolds, Collateral Damage On The 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground, 56 A.F.L. Rev. 1, 4–5, n.12 (2005). The common law and the Model Penal Code require that one reasonably believe that she is in imminent danger of significant bodily harm. See People v. Goetz, 497 N.E.2d 41 (N.Y. 1986) (imminent danger serious bodily harm from an aggressor at the time is necessary for a successful claim of self- defense). N.Y. Penal Law § 35.05 (McKinney 2005).

29. Blakelsey, supra note 3, chs. 2, 3.

30. Salvador: dix paysans tués près de la capitale: l'armée reprend ses exécutions collectives, Le Monde, Sept. 22–28, 1988, at 2, cols. 2–5 (Edition Internationale).

31. See, e.g., sources cited in supra notes 23, 30; Nunca Mas: The Report of the Argentine National Commission on the Disappeared (1986); Amnesty International, Disappeared Prisoners in Chile 16–17 (1977); Amnesty International, Report of an Amnesty International Mission to Argentina 6–15 Nov. 1975 (1975); Archdiocese of Sao Paulo, Torture in Brazil: A Report 204. (Jaime Wright, trans., 1986); Matthew Lippman, Disappearances: Towards a Declaration on the Prevention and Punishment of the Crime of Enforced or Involuntary Disappearances, 1 Conn J. Int'l. L. 121, 122, 124 (1988).

32. See, e.g., David P. Chandler, A History of Cambodia (2007); Craig Etcheson, After the Killing Fields: Lessons from the Cambodian Genocide (2005). Other crimes within the jurisdiction of the tribunal include the internationally defined crimes of destruction of cultural property and crimes against internationally protected persons and the domestic crimes of homicide, torture, and religious persecution as defined in the Cambodian Penal Code. Law on the Establishment of Extraordinary Chambers of the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea art. 3–8 (2004), available at http://www.cambodia.gov.kh/krt/english/law%20on%20 establishment.htm.

33. Richard Delgado, Shooting the Messenger, 30 Am. Indian L. Rev. 477, 480–81 (2005–2006) (book review).

"Argentina, Paraguay, and Brazil and outright dictators, like Somoza in Nicaragua, Trujillo in the Dominican Republic, Pinochet in Chile, and Stroessner in Paraguay, who practiced torture and 'disappearance' of their enemies."[34] The United States government used its intelligence agents to assist the coup deposing democratically elected Salvador Allende in Chile, installing Augusto Pinochet whose henchmen tortured and "assassinated thousands of citizens suspected of disloyalty."[35] The United States government directly and indirectly supported the Nicaraguan "Contras," who allegedly killed innocent Americans and Nicaraguans in their guerilla war.[36] Sandinistas killed innocents, including the many of the Miskito indigenous group, to maintain their power.[37] Brazilian, Colombian, and Guatemalan death squads have killed poverty stricken children.[38]

Terrorism has been defined in ways that endanger democracy, erode civil liberties, and actually *promote* terrorism, in that the definition provides immunity for one's own terroristic conduct. The United States and other countries tend to define conduct as terrorism, in ways and at times it finds convenient.[39] The United States, for example, has considered philanthropic organizations providing coloring books to Afghan children to be engaged in terrorist activities.[40]

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34. Id., at 480.

35. Id., at 481.

36. See, e.g., Aryeh Neier, There's a Contra-diction, Sacramento Bee, Apr. 5, 1987, at 1; Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985).

37. Neier, supra note 36.

38. See, e.g., Marc D. Seitles, Effect of the Convention on the Rights of the Child upon Street Children in Latin America: A Study of Brazil, Colombia, and Guatemala, 16 In Pub. Interest 159–60 (1998); Charmaine J. Comprosky, International Law Weekend Proceedings, The Plight of the Street Children of Latin America Who Are Addicted to Sniffing Glue, and the Role and Responsibilities of Transnational Corporations, 8 ILSA J. Int'l. & Comp. L. 599, 602–03, n.39 (2002).

39. See Ryan J. Sydejko, International Influence on Democracy: How Terrorism Exploited a Deteriorating Fourth Amendment, 7 J.L. Soc'y 220, 255, 258 (2006).

40. Id. at 258, citing David Cole & James X. Dempsey, Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security 153 (2002). See Blakesley, supra note 3. These are examples of what Nasser Hussain calls "hyperlegality." Nasser Hussain, Hyperlegality, 10 New Crim. L. Rev. 514 (2007). This "hyperlegality" amounts to terrorism.

Terrorist actions sometimes carry a pseudo-religious purpose that we shall call *expiation*, where the innocent suffer to atone for a wrong and to make the terrorist or his allies whole.[41] Another nearly universal purpose of terrorist actions is what we shall call *exposition*, where the innocent suffer in order to help publicize or emphasize a set of messages to one's enemies and/or allies.[42] In practice, expiation and exposition are closely intertwined. I will discuss the expiatory and expository effects separately in order to explore how they correlate.

II. HISTORICAL EXCURSUS

A. Expiatory Violence

This section will study examples of attempts to expiate through punishment, considering the relationship between the authority or power to punish and the people's need for expiation. Prosecution and punishment developed to punish crimes committed internally. Leaders have been able to exploit this by promoting the idea that the good of the group and the individual were *dependant* on punishment of enemies and wrongdoers.[43] The people needed the wrongdoer to be punished and the wrongdoer needed punishment.[44] If the wrongdoer was a foreigner and had taken refuge abroad, it was necessary to capture him or a proxy to accomplish this expiation, often requiring war.[45] War, terrorism, and punishment thus seem to have been cut of the same cloth. Although redemption and

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41. See infra section II.A, "Expiatory Violence."

42. The word "terrorism" itself emphasizes the effect that the terrorist "message" has on one's enemies, but the effect on one's allies and even on third parties is often much more significant. The terrorist message often "preaches to the choir"; it is often more important to persuade one's reluctant allies that the enemy is afraid than it is to actually terrorize the enemy. See infra section III, "Expository Violence."

43. See Michel Foucault, Discipline and Punish: The Birth of the Prison 1–69 (A. Sheridan, trans., 1979); Lisa Silverman, Tortured Subjects: Pain, Truth, and the Body in Early Modern France (2001).

44. Christopher L. Blakesley, Edwin B. Firmage, Richard F. Scott & Sharon A. Williams, The International Legal System: Cases & Materials, chs. 3, 16 (5th ed., 2001); Silverman, supra note 43.

45. See, e.g., Joshua 6:21; 1 Kings 2: 28–34.

cleansing the soul are good things, the tendency of group leaders to exploit this need or instinct is troublesome.

Punishment has been the means to rid society of crime's perceived taint.[46] In virtually all ancient cultures, metaphysics and law were merged.[47] Society was required to purge itself of the taint of crime, to avoid the wrath of the God or gods. Punishment of the wrongdoer, combined with religious ceremony, cleansed the community, avoiding divine wrath. The Code of Manu provided that rest and happiness for the wrongdoer and society are obtained only by soul-purging punishment of the perpetrator.[48] Metaphysical harm could only be avoided through spilling the blood of the perpetrator or his proxy. If the perpetrator who put the group at metaphysical risk escaped, the group had to seek his return or find a proxy to punish.[49]

The *lex talionis*, or law of exact retaliation, in the Jewish Torah or biblical Pentateuch[50] "requires" an eye for an eye[51] to benefit the punished as much as the punishers. The social cell or group would require vengeance against those who were found to have committed a crime against it or its leader. The punishment for patricide in ancient Rome (specifically including killing your mother or father, but also symbolizing regicide) was to be beaten by rods stained with your blood, put into a bag with a viper, a dog, a cock, and an ape, and thrown into the sea.[52]

Blood atonement applied in ancient Israel for some offenses.[53] When murder, theft, or assault were committed, it was necessary that both society

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46. See Fredrik Strom, On the Sacral Origin of the Germanic Death Penalties 14, 208 (1942); Hans von Hentig, Punishment, Its Origin, Purposes & Psychology 83, 84 (1973).

47. See Christopher L. Blakesley, Terrorism, Drugs, International Law and the Protection of Human Liberty chs. 1, 4 (1992).

48. Code of Manu, bk. VII, 18, 23–24; bk. VIII, 17.

49. See, e.g., Judges chs. 15, 19, 20. When the perpetrator was not found, sometimes his village was utterly destroyed.

50. Deuteronomy 19:21: "Do not look on such a man with pity. Life for life, eye for eye, tooth for tooth, hand for hand, and foot for foot!" See also Exodus, 22:32, 22:1, 22:6; Robert Francis Harper, The Code of Hammurabi, King of Babylon (1999). This code, which applied some 4,000 years ago, applies both the *lex talionis* and compensation. See, e.g., Rule 196: "[i]f a man destroy the eye of another man, they shall destroy his eye." Id. at 73. Cf. William Shakespeare, The Merchant of Venice act 1, sc. 3, ll. 157–67.

51. Exodus 21:24; Dinstein, supra note 2, at 68.

52. 11 The Civil Law 64–66 (S.P. Scott, ed. & trans., 2001).

53. See I Kings 2:28–34.

and the perpetrator purge the "taint." When Jericho fell to Israel, "they utterly destroyed all that was in the city, both man and woman, young and old, and ox, and sheep, and ass, with the edge of the sword."[54] Another example is found in chapters nineteen and twenty of Judges. A concubine of the "Levite sojourning on Mount Ephraim" had been raped and murdered. The Levite believed that certain citizens of Gibeah, Benjamites, had committed the crime. The Levite sent a "diplomatic note" along with a portion of the concubine's cadaver to each of the other tribes of Israel to symbolize the need for solidarity to obtain vengeance for the crime. When the Benjamites failed to deliver the alleged perpetrators, they were virtually annihilated; every man, woman, child, animal, and plant were extirpated from Gibeah, and only six hundred or so men were left in the tribe of Benjamin.[55]

The Cheyenne required purging through punishment, including a "breaking of the arrows" ceremony for tainting the food or water supply.[56] Intra-tribal murder "required the keeper of the arrows to cleanse the tribe of the specter of death" through punishment.[57]

Many societies favored the cleansing qualities of fire for their method of capital punishment. Nero burned people at the stake to propitiate Vulcan, the god of fire.[58] Although these forms of ancient punishment are repugnant to us today, the mystical need to seek retribution, to "cleanse," "heal," and make society whole again after it has been tainted continues.[59]

Throughout history, ancient or more recent memory of crime committed prompts a desire for retaliation. Oppression or perceived oppression is impetus for retaliation and punishment when the chance arises. Any member of the opposing group (family, clan, tribe, people, religion, class, nation-state) becomes the subject of retaliation. The retaliator is not viewed by his or her own group as a criminal or a terrorist because he or

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54. Joshua 6:21.

55. See Judges chs. 19, 20.

56. Robert A. Fairbanks, The Nation State Status of American Indian Tribes: A Case Study of the Cheyenne Nation 31 (1976) (unpublished LL.M. thesis, Columbia University) (on file at the Columbia University Law Library); Karl Llewellyn & Edward Adamson Hoebel, The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence (1941).

57. Numa Denis Foustel de Coulanges, La Cité Antique, bk. III, ch. XIII (1864); Llewellyn & Hoebel, supra note 56.

58. Graeme Newman, The Punishment Response 43 (1985), citing 15 Tacitus 44.

59. See Fyodor Dostoyefsky, Crime and Punishment (Sidney Monas, trans., 1968).

she is an instrument of the group's need to avenge and expiate itself. Once this occurs, the other group feels that a crime has been committed against it and is thus justified in a counter-reprisal. The blood feud—the *vendetta*—rages. No doubt, violence is justified in certain circumstances, but not when intentionally or recklessly applied to non-combatants or innocent civilians. Rape, murder, torture, and maiming innocents are criminal in wartime as in peacetime.[60] They are often terrorism.

B. Other Historical Reigns of Terror

Society, through the ages, has faced dialectical reigns of terror. Some of them tell poignant and valuable stories to provide insight into current reigns of terror and "counterterror."

1. Medieval Abuse: Terror in the French Middle Ages, Through the Seventeenth Century, and the French Revolution: The Rule of Law As Power

Terror and power interrelated in a horrifically emblematic and theatric way, as French medieval theoreticians and technicians of punishment used the symbol of the *bourreau* (the executioner) to represent the king's power.[61] Contemplate the playing card king. His inverted reflection represented the person condemned to be "expiated" for attempted regicide, of which parricide was the functional equivalent, or, at least symbolic enough to receive the same punishment. This is important because society was based on a political and economic structure where the patriarch represented the king in his realm, and was coopted and protected as a mini-king.

60. E.g., Hugo Grotius, De Jure Belli ac Pacis, bk. III, 723, 733 (1625) (Francis W. Kelsey et al. trans., 1925) ("the death of innocent persons must be prevented 'so far as is possible'"); Larry May, Crimes Against Humanity: A Normative Account 99 (2005).

61. Foucault, supra note 43, at 11–13, 28–30, analyzing Ernest H. Kantorowitz, The King's Two Bodies (1959). Before punishment could be inflicted, it was necessary to "establish guilt." This was done by formulary torture, which was intended to find what was called "the objective truth." The only means to obtain truth was out of the accused's mouth, so the inquisitor applied torture to obtain this "truth." See Bernard Gui, Manuel de l'inquisiteur (Guillaume Mollat, ed. & trans., 1926). See also, e.g., Jean Kellaway, The History of Torture and Execution 58–59 (2000) ("water torture"); H.C. Lea, The Inquisition of the Middle Ages (1961).

Throughout Roman history and much of the medieval appropriation of a simplified version of Roman law for feudalistic systems, the patriarch or paterfamilias was coopted to make him a mechanism to foster the king or emperor's power. The legal, economic, and political systems functioned through the paterfamiliae, in a system that can be described as a pyramid with the emperor or king at the top. Each paterfamilias had his own little pyramid. Each had pretty close to absolute power within their pyramid. Hence, parricide or attempted parricide was the functional equivalent of regicide or attempted regicide, in that it threatened the essential authority of the chief patriarch or paterfamilias, the king.

The king's opposite simultaneously represented the powerlessness of the condemned and the people. The omnipotent king held control of life and death over his subjects. One who would challenge that power had to be shown to have absolutely no power or hope. It would not do simply to execute him: the executioner was to take that *régicidaire* up to the very edge of death by torture, then bring her back again, then up to death and back again—up and back, up and back, a thousand times. The *bourreau* was "the man of a thousand deaths."[62] Finally, the individual was "allowed" to die when it suited the king.[63] The traitor and the people were shown not even to have the power to die—demonstrating the king's power over their very soul. The ritual demonstrated a policy of terror to impress the people with the power of the king.[64]

It is natural and right that people revolt against such power. The French *Révolutionaires* did so applying tactics of terror learned from their former masters in the *Ancièn Régime.* They turned on their former masters; the Reign of Terror followed. The king card simply rotated; *régicidaire* became "king," the former king and his supposed supporters became ritual victims. Violence is certainly justified in some circumstances—in rebellion and revolution to escape oppression.[65] Violence and terror against innocents,

62. See Foucault, supra note 43, at 26–31.

63. Id., at 3–6, 12, 26–32.

64. Id., at 48–50; Michael Guest, Beckett and Foucault: Some Affinities, 15 Cent. Japan Eng. Stud. 55–68 (1996). Consider the execution of the regicide, Robert-François Damiens. See Foucault, supra note 43, at 26–31 ("flesh will be torn from his breasts, arms, thighs and calves with red-hot pincers, his right hand, holding the knife with which he committed the said parricide, burnt with sulfur, and, on those places where the flesh will be torn away, melted together and then his body drawn and quartered by four horses and his limbs and body consumed by fire, reduced to ashes and his ashes thrown to the winds . . .").

65. See John Stuart Mill, On Liberty 2 (4th ed., 1869) (justifying specified resistance or general rebellion to establish political liberties and rights).

however, are neither noble nor justified. When revolution takes that turn, it descends to a self-destructive reign of terror. Murder has always been murder, rape, rape, and terror, terror. So it was, under the *Ancièn Régime* and the following Reign of Terror, no matter how it was rhetorically "glorified" or "justified."

When violence explodes with its ferocious and relentless intensity against those who "represent" or "symbolize" the enemy, it often consumes those who wield it. Évariste Gamelin (in Anatole France's novel *Les Dieux Ont Soif*),[66] a sensitive artist interested in rectifying injustice, becomes a paranoid monster as he is consumed with the need and desire to guillotine all who might have been connected in the slightest way with the *Ancièn Régime* and, finally, no real nexus was needed at all. "Righting wrongs," in Gamelin's case, ultimately destroyed not only the original oppressors (who had wielded violence first, to oppress and to maintain power), but also innocent proxies and, finally, those who used it second, to avenge the former evil. Violence and rage, thus, consume the good that prompts them. Gamelin, who was finally decapitated by his beloved guillotine, makes the point when his hatred and self-delusion persuade him that "evil-doers" were everywhere and that they were seeking expiation through the guillotine, "as a right."

> From all sides the victims surrender themselves. Nobles, virgins, soldiers, prostitutes flock to the Tribunal to extract their delayed condemnations from the judges, claiming death as a right, which they are eager to savor.[67]

Perhaps we all have not reached that level of depravity or mental disease, but can we really say that we are much different today, when we condone, acquiesce to, or are willfully blind to massive slaughter of innocents, torture and murder in the name of fighting "terrorism?"[68] Our executive sovereign has tried to keep this sort of atrocity secret but he kidnaps people and tortures

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66. Anatole France, Les Dieux Ont Soif 198 (1978). Madame DeFarge, of Dickens's *Tale of Two Cities*, is also an interesting literary symbol of this. She had good reason to wish to avenge herself and the French people. The Revolution was justified. DeFarge knit and registered all who would be executed to avenge and "free" her people. Once the wave of violence and concomitant power took hold, they consumed her as she embodied them. Charles Dickens, A Tale of Two Cities (1859). See generally Ruth Scurr, Fatal Purity: Robespierre and the French Revolution (2006).

67. Id., at 198.

68. For a shattering allegory on willful blindness, see José Saramago, Blindness (Juan Sager, trans., 1997).

them.[69] When found out, the sovereign pretends that he commits those atrocities "only against terrorists" or "evil-doers." That is not a legal excuse or justification, anyway, and the policy is applicable by "*law*" to anyone whom our executive sovereign signals as "terrorists." Other nations and groups do similarly, so ultimately everyone is subject to attack by groups who kidnap, torture, and murder "their enemies," including innocents, for the "greater good."

In war, revolution, or any situation, when violence is intentionally or wantonly applied to innocents or non-combatants, it is murder, a war crime, a crime against humanity, or terrorism, even if rhetorically glorified. The French revolution overcame the *Ancièn Régime,* but adopted its slaughter of innocents, ultimately giving rise to the *directorat*, a regime that was at least as bad as the *Ancièn Régime*. A balance and relative end to the violence eventually developed as a result of the rule of law. However, the rules of humanity have not changed; violence against innocents remains immoral and criminal and excuses or justifications are meaningless.

2. The Very Early "Modern Era"

Suarez, Vittoria, Jean Bodin, Hugo Grotius, and Emerich de Vattel all called for the rule that each nation has an obligation to "prosecute or extradite."[70] They argued that punishment was necessary for those who commit serious offenses, requiring that there be no sanctuary for the criminal.[71] Later, ascendant "positivism" in the eighteenth, nineteenth, and first half of the twentieth centuries posited the rule that international law was binding only on states and could not impose obligations or punishment directly on individuals.[72]

In 1768, the great criminalist Cesare Beccaria, like natural law jurists Grotius, Jean Bodin, and Vattel, argued that "the conviction of finding

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69. See, e.g., Larisa Alexandrovna & David Dastych, Soviet Era Compound in Northern Poland was Site of Secret CIA Interrogation, Detentions, Raw Story, March 7, 2007, at http://www.rawstory.com/news/2007/Sovietera_compound_in_Poland_was_site_0307.html.

70. See, e.g., Grotius, supra note 60, bk. II, at 526–29; Jean Bodin, The Six Books of a Commonwealth 100–11 (K.D. McRae, ed., 1962); Emerich de Vattel, Le Droit des Gens 311–13 Liv. 2, ch. 6, §§ 76–77 (1916).

71. See, e.g., sources cited in supra note 70.

72. See Christopher L. Blakesley, Albin Eser & Otto Lagodney, The Individual in the Face of International Cooperation in Criminal Matters (2002); Linda E. Carter, Christopher L. Blakesley & Peter J. Henning, Global Issues in Criminal Law 7–17 (2007).

nowhere a span of earth where real crimes were pardoned might be the most efficacious way of preventing their occurrence."[73] Beccaria's *chef d'oeuvre, Dei Delitti e Delle Pene,* has profoundly influenced Western criminal justice. His theory focuses on philosophical utilitarianism and the idea of "just desserts" (retributivism). He believed that punishment for crime should follow directly and surely upon its commission and that the punishment must fit the offense. Yet he insisted on moderation, fairness, and humanitarian values based on law, regardless of the perpetrator. He believed that extradition could play a significant role in diminishing crime.

In a manner reminiscent of current antiterrorism rhetoric, Beccaria wanted to eliminate impunity and sanctuaries for criminals, but considered it crucial that extradition be fair and based on law.[74] No black hole secret prisons or extraordinary renditions for Beccaria. Careful to develop concepts of extradition that promoted humanitarian criminal justice, Beccaria qualified his pro-extradition stance by stating that he would not decide an extradition's ultimate usefulness until the law began to conform to the "needs of humanity."[75] Beccaria's writings influenced extradition law, the rule of speciality,[76] and the idea of dual criminality,[77] but his overarching vision has yet to come to fruition. The blood feud, the *mal du siècle*, which really appears to be eternal, accelerates in the new millennium.

Violence for expiation may begin as an effort to extend or consolidate power or to oppress opposition. Or, it can begin as an effort to throw off oppression, or as an effort to extend or consolidate power or to oppress

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73. Cesare Beccaria, Dei Delitti e Delle Pene, in James Anson Farrer, Crimes and Punishments 193–94 (1880). See also Grotius, supra note 60, at 526–29; Bodin, supra note 70, at 100–111.

74. Beccaria, supra note 73, at 193–94. See generally M. Maestro, Cesare Beccaria and the Origins of Penal Reform (1973) (discussing the alternate, ancient religious rationale for the swift and sure punishment sought by Beccarian penology).

75. Beccaria, supra note 73, at 193–94.

76. The rule of speciality requires that a requesting state not prosecute the returned fugitive for any crime other than that for which he was extradited. See, e.g., United States v. Herbage, 850 F.2d 1463, 1465 (11th Cir. 1988); Christopher L. Blakesley, A Conceptual Framework for Extradition and Jurisdiction over Extraterritorial Crimes, 1984 Utah L. Rev. 685, 731–60; Roger Merle & André Vitu, Traité de Droit Criminel: Problems Généraux de la Science Criminelle § 436–38 (2d ed., 1973).

77. Dual criminality requires refusal to extradite, unless the alleged conduct is criminal in both the requesting and the requested states. See, e.g., United States v. Herbage, 850 F.2d at 1465. Merle & Vitu, supra note 76, at 415–16 (*récipocité d'incrimination*).

opposition. Or, it can begin as the perpetrators see it, to make the world safe for their ideology, their "way of life," or their religion. Other times, the wronged group or state looks to right wrongs or to obtain retribution. Sometimes, it is the nihilist looking to destroy the status quo with terror. Even the nihilist seems to have an almost metaphysical vision of the need to destroy, using violence, war, terrorism, crimes against humanity, and torture to reap vengeance, or, hypocritically, to gain power, becoming a bureaucratic functionary. Once the perpetrators gain power, they use terror to maintain it, and the cycle continues. Today we have developed some mechanisms for legal prosecution. We occasionally use them.

III. EXPOSITORY VIOLENCE

Sometimes violence in its various forms is motivated by a zealot's vision—a radical vision of "truth" or "good order" that must be enunciated, established, and maintained by *any means necessary*, including violence against innocents. Leaders often exploit the zealot's tendencies to promote a favored political order. Almost any ideology, philosophy, or religion may be used to promote murderous fanaticism.[78] Powerful groups and states often use these crimes to maintain that power and wealth.[79] For example, the Dirty Wars in Argentina and in Chile used terror-based offenses to punish dissent and threats to their power and vision of the "good order."[80] The records of Nazi, Stalinist, Maoist, and Khmer Rouge regimes are infamous enough that they need no citation. Members of some "radical" movements continue to slit throats or behead captured civilians, journalists, or soldiers, as pathetic advertisements for their

78. See, e.g., Blakesley et al., supra note 44, at 1117–27 (parallel crimes committed by the Soviet block under the "Brezhnev Doctrine," and those committed by the U.S. under the Reagan Doctrine).

79. Mario Vargas Llosa, La Fiesta del Chivo (2000) (insight on state and non-state terrorism).

80. See generally Argentina Dirty War 1976–1983, http//www.globalsecurity.org/military/world/war/argentina.htm; Mark J. Osiel, Mass Atrocity, Ordinary Evil, and Hannah Arendt: Criminal Consciousness in Argentina's Dirty War (2001); Mark Oisel, The Banality of Good: Aligning Incentives Against Mass Atrocity, 105 Colum. L. Rev. 1751, 1797 n.216 (2005); Diane F. Orentlicher, Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime, 100 Yale L. J. 2537 (1991); Christopher L. Blakesley, Autumn of the Patriarch: The Pinochet Extradition Debacle and Beyond—Human Rights Clauses Compared to Traditional Derivative Protections Such As Double Criminality, 91 J. Crim. L. & Criminology 1 (2000).

pretended cause, while others, including states, continue, in turn, to torture, kidnap people, and kill indiscriminately. Human history provides far too many tragic episodes of innocents sacrificed to "send a message." The "message" may be sent to quash insurgency or rebellion, to embolden allies, to warn citizens or adherents of the consequences for cooperating with the enemy, or to terrorize populations, intimidating them into surrender.

Consider the carpet bombing of London, Dresden, and Tokyo. Consider the effects of dropping a nuclear bomb on Hiroshima and Nagasaki, where the leaflets dropped over Japan prove that the explicit aim was to slaughter innocents to create terror.[81] The warning to the people of Nagasaki was similar to the one used in Hiroshima.

WARNING NAGASAKI

Attention Japanese People. Evacuate your cities.

Because your military leaders have rejected thirteen part surrender declaration, two momentous events have occurred in the last few days.

The Soviet Union, because of this rejection on the part of the military has notified your Ambassador Sato that it has declared war on your nation. Thus, all powerful countries of the world are now at war with you.

Also, because of your leader's refusal to accept the surrender declaration that would enable Japan to honorably end this useless war, we have employed our atomic bomb.

A single one of our developed atomic bombs is actually the equivalent in explosive power to what 2000 of our giant B29s could have carried on a single mission. Radio Tokyo has told you that with the first use if this weapon of total destruction, Hiroshima was virtually destroyed.

Before we use this bomb again and again to destroy every resource of the military by which they are prolonging this useless war, petition the emperor now to end the war. Our president has outlined for you the thirteen consequences of an honorable surrender. We urge that accept these consequences and begin the work of building a new, better, and peace-loving Japan.

EVACUATE YOUR CITIES

81. PBS, American Experience, Truman, http://www.pbs.org/wgbh/amex/truman/psources/ps_leaflets.html. These leaflets were dropped on August 6, 1945.

The use of certain weapons designed to cause massive death or unnecessary suffering constitutes a war crime, a crime against humanity, or terrorism, depending on the context.[82] The Hiroshima and Nagasaki bombings were calculated to terrorize[83] and induce panic among Japan's population and leadership so that they would surrender.[84] The Allies chose Nagasaki *because* it was "undefended" in the legal sense of the Hague Conventions and other international law,[85] to signal to the Japanese that *we will vaporize*

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82. Moral philosophers agree that the Hiroshima and Nagasaki bombings were terroristic and immoral. See, e.g., Michael Walzer, Just and Unjust Wars: A Moral Argument with Historical Illustrations ch. 13 (3d ed., 2000); Michael Walzer, Terrorism: A Critique of Excuses, in Problems of International Justice 237; (Steven Luper-Foy, ed., 1988); John Rawls, Fifty Years after Hiroshima, in Collected Papers 565 (Samuel Freeman, ed., 1999); Igor Primoratz, The Morality of Terrorism, 14 J. Applied Phil. 221, 231 (1997). While accepting the faulty idea that a "supreme emergency" will justify or excuse killing of innocents, Walzer, Rawls, and Primoratz condemn the bombings of Hiroshima and Nagasaki, and the blanket bombing of Dresden and others, because they find that the excuse did not obtain. See C.A.J. Coady, Terrorism, Morality, and Supreme Emergency, 114 Ethics 772, 777 (2004) (finding these bombings to be immoral). Coady rejects the "supreme emergency" excuse as to intentional or reckless killing of innocents. So do I. On the other hand, protecting innocents does not appear to have a clear policy in philosophy and practice. Augustine, Contra Faustum, XXII, at 75 (Philip Schaff, ed., 1956); Reynolds, supra note 28, at 4–5 n.12, 85. Augustine's "punitive model for warfare" made "no distinctions between combatants and civilians . . . because there is no moral difference between the two. St. Augustine's moral emphasis on the guilt of the enemy population could justify violence against it. The premise of guilt as justification for war was also justification to protect those who were not guilty." Id. at 5 n.12.

83. We must distinguish terror in the general sense, as a war tactic, from terrorism, since the latter involves innocent targets. Destroying the enemy's will to fight is often a purpose of a terrorist act, but does not necessarily make a violent act an act of terrorism. Harlan K. Ullman coined the phrase "shock and awe" in a 1996 report calling for a strategy involving massive coordinated precision air attacks that destroy the enemy's will to fight while also destroying the enemy's physical ability to fight. Such a strategy may or may not constitute terrorism, depending on whether innocents are targeted.

84. See Richard A. Falk, The Shimoda Case: A Legal Appraisal of the Atomic Attacks upon Hiroshima and Nagasaki, 59 Am. J. Int'l. L. 759, 761 (1965) (describing victims with "rags of hanging skin, wandering about . . . [and lamenting] among the dead bodies").

85. Herman Reinhold, Target Lists: A 1923 Idea with Applications for the Future, 10 Tulsa J. Comp. & Int'l. L. 1, 11, n.52, nn.20, 26 (2002); Elliot L. Meyrowitz, The Laws of War and Nuclear Weapons, in Nuclear Weapons and Law 19, 32 (Arthur Miller & Martin Feinrider, eds., 1984). Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 27, 36 Stat. 2277, 1 Bevans 631. The Japanese argued in the

even your innocents, unless you capitulate. Many still consider this conduct to be "acceptable," arguing that warnings of the terrible consequences of not surrendering were given to Japan—that the Japanese leadership knew that the United States had the bomb and that it would be used if their government did not submit to all Allied demands by a certain date. Terrorists often emphasize that their acts come as a consequence of governments ignoring their warnings.[86] Warnings, then atrocity, provide a common theme in total war,[87] but warnings and shared fault cannot excuse targeting innocent civilians.

IV. THE REIGN OF "COUNTERTERROR"

We delude ourselves, pretending that we do not commit terrorism, when we are manipulated to believe that we may use terrorism or terrorist tactics, because we have justice, goodness, or God on our side, or when we claim that because others commit terrorism, we may do the same. These delusions are self-destructive. To define or characterize terrorism on the basis of the end sought is misguided and self-defeating. Terrorism must be defined in a manner that does not excuse or exclude one's own conduct.[88] Dashiell Hammett warned, "Play with murder [we can insert torture or terrorism] enough and it gets you one of two ways. It makes you sick, or you get to like it."[89] Camus wrote, "[E]ven if murder is in the nature of

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Shimoda case that Hiroshima and Nagasaki were undefended before the atomic bombs were dropped, so article 25 of Hague IV applied. See Hilaire McCoubrey, International Humanitarian Law: Modern Developments in the Limitation of Warfare 8–17 (2d ed., 1998) (also article 27 shows "[t]he basic principle of limitation of legitimate bombardment to military objectives . . .").

86. See, e.g., John Alan Cohan, Symposium, Necessity, Political Violence and Terrorism, 35 Stetson L. Rev. 903, 951 (2006) (Bin Laden explained that Americans should have "urge[d] their leaders to change their Middle East policies," and that "if the United States had listened to his warnings in the 1990s, the United States might have changed its foreign policy in the Middle East, and the September 11 attacks could have been avoided.").

87. Recall the warning and the terror from the pamphlets dropped and the bombing of Hiroshima and Nagasaki.

88. See Blakesley, supra note 3, at 19–38, 213–24.

89. Dashiell Hammett, Red Harvest 102 (1929).

man, the law is not intended to reproduce that nature.[90] Terrorism is criminal. So are its analogues, torture, war crimes, and crimes against humanity, including indiscriminate bombing of civilians. The danger is as grave for the torturer's, war criminal's, or terrorist's well-being as it is for the nation or group that accommodates him.

A. Propagandistic Appropriation[91] of Law and the Term Terrorism

From the legal and moral justifications to "do whatever it takes" to fight for a just cause to the manifestos and self-righteous calls for vengeance, counter-terrorist measures bear an increasing resemblance to terrorism itself. Legislators, judges, scholars, and people on all sides seem willing to justify, excuse, or ignore conduct that is morally repugnant, illegal, and dangerous to their own interests. Terrorism and counterterrorist overreaction strains the core of democracy. Some professed libertarians argue that abuse, even torture, are appropriate or acceptable under extreme circumstances. Sadly, abusers have the power. Governmental overreaction and abuse at home or abroad, using rhetoric of fighting terrorism, providing security, or protecting "the homeland," erodes security, democracy, and constitutional liberty. People have allowed their leaders to manipulate their fear of terrorism and have acquiesced to the erosion of morals, the constitutional legal system, and any sense of right and wrong. Using terrorism to "fight" terrorism makes us terrorists. We lose our moorings when we descend to the level of simple vengeance or become so fearful and overwrought that we commit or condone atrocity.

B. The United States and Torture

Torture is an example. Michael Ignatieff wrote, "we need to widen out our reflections, think about the moral nihilism of torture and why—this is the most painful question—torture remains a temptation, even a supposed

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90. Albert Camus, Reflections on the Guillotine, in Resistance, Rebellion and Death 174, 198 (Justin O'Brien, trans., 1961).

91. Richard Falk used this term throughout his book *Revolutionaries*. See Falk, supra note 25.

necessity, in a war on terror."[92] Ignatieff continued, "[torture] when committed by a state, expresses the state's ultimate view that human beings are expendable. This view is antithetical to the spirit of any constitutional society whose *raison d'etre* is the control of violence and coercion in the name of human dignity and freedom."[93] The moral nihilism of torture[94] is revolting, yet to the Bush administration, torture is functionally "legalized" by narrow definition and pretended executive power.[95] The law is perverted to accommodate our government's moral nihilism. Those who make the decision to violate our values in the name of "security" or "anti-terrorism" or "democracy" must not be allowed to devalue our law and morals by being given impunity. Law itself is corrupted. We are corrupted.

Professor Dershowitz may be correct that torture will always occur in perceived emergencies. But if we allow Congress or our judiciary to be complicit in torture or terrorism, we enshrine that conduct as "legal." When we do this, it represents what we are. Justice Jackson's dissent in the *Koramatzu* case captured this mechanism with reference to an aphorism by Cardozo: "[a]n enshrined rule" will "expand to the limits of its

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92. Michael Ignatieff, Evil under Interrogation: Is Torture ever Permissible?, Fin. Times (U.K.), May 15, 2004, available at http://www.ksg.harvard.edu/news/opeds/2004/ignatieff_torture_ft_051504.htm. Cf. Michael Ignatieff, Essay: If Torture Works . . ., Prospect Magazine, Apr. 1, 2006, available at http://www.prospectmagazine.co.uk/article_details.php?id=7374. See also Jonathan H. Marks, 9/11 + 3/11 + 7/7 = ? What Counts in Counterterrorism, 37 Colum. Hum. Rts. L. Rev. 559, 560 (2006).

93. Ignatieff, Evil under Interrogation: Is Torture ever Permissible?, supra note 92.

94. Id.

95. See George Monbiot, Routine and Systematic Torture Is at the Heart of America's War on Terror, Guardian, Dec. 12, 2006, at 27; Amy Goodman, Up to Democrats to Investigate Torture, Seattle Post Intelligencer, Jan. 25, 2007, at B6; Helen Thomas, U.S. Torture Tactics Shame Us All, Seattle Post Intelligencer, Oct. 12, 2007, at B7. See also, generally, Jennifer K. Harbury, Truth, Torture, and the American Way: The History and Consequences of U.S. Involvement in Torture (2005); Alan M. Dershowitz, Shouting Fire 477 (2002); Sixty Minutes (CBS television broadcast Sunday, Jan. 20, 2002) (Dershowitz argued that the use of torture by law enforcement officials should be sanctioned in certain cases, such as in relation to acts of terrorism, since torture is "inevitable" in such cases, it would be better to have procedures in place to regulate it); David Luban, Essay, Liberalism, Torture, and the Ticking Time Bomb, 91 Va. L. Rev. 1425 (2005) (criticizing Dershowitz); Blakesley, supra note 3, 279–94; David Luban, The Defense of Torture, N.Y. Rev. Books, March 15, 2007 at 37 (reviewing John Yoo, War by Other Means: An Insider's Account of the War on Terror (2006)); Christopher Kutz, Essay: Torture, Necessity, and Existential Politics, 95 Cal. L. Rev. 235 (2007).

logic."[96] Thus, whether we allow torture is a matter of principle, morality, and legality: it reflects our standards.[97] All torture and terrorism must be treated as criminal.

VI. CONCLUSION

> Behind you swiftly the figure comes softly,
> The spot on your skin is a shocking disease.
> Clutching a little case,
> He walks briskly to infect a city
> Whose terrible future may have just arrived.[98]

Sartre represents many who have justified violence against innocents, arguing that anyone not engaged in fighting the adopted cause were enemies, hence, the equivalent of aggressors or oppressors.[99] Camus correctly rejected this ethic to the extent that it finds virtue in slaughtering innocents even for a supposed just cause.[100] One can defend innocents of the world without destroying other innocents.

The established *clichés* or the "ethic" of order based on terror lead ultimately to a moral and legal abyss. Statists who seek to maintain or expand

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96. Korematsu v. U.S., 323 U.S. 214, 242, 246 (1944) (Jackson, J., dissenting), quoting Benjamin Cardozo, The Nature of the Judicial Process 51 (1921).

97. See The Torture Papers: The Road to Abu Ghraib 172 (Karen J. Greenberg & Joshua L. Dratel, eds., 2005) [hereinafter The Torture Papers], discussed in W. Bradley Wendel, Legal Ethics and the Separation of Law and Morals, 91 Cornell L. Rev. 67, 68, n.1, 114–15, n.173 (2005). State Department sources said that Powell "hit the roof" when he read the analysis prepared by Justice Department lawyers. The Torture Papers, supra. Powell's objections are succinctly presented in a memo to Alberto Gonzales. Memorandum from Colin L. Powell, Secretary of State, to Alberto R. Gonzales, Counsel to the President (Jan. 26, 2002), in The Torture Papers, supra, at 122–25. See M. Cherif Bassiouni, The Institutionalization of Torture under the Bush Administration, 37 Case W. Res. J. Int'l. L. 389 (2006).

98. W.H. Auden, Gare du Midi, in W.H. Auden, Collected Poems 180 (Edward Mendelson, ed., 1991).

99. Ironically or significantly, Sartre mirrors St. Augustine on this point.

100. See Thomas Merton, The Plague of Albert Camus: A Commentary and Introduction, in The Literary Essays of Thomas Merton 181, 185, 194–98 (Patrick Hart, ed., 1981) (revolution and "freedom fighting" are often used as "facile justification of mass murder").

their power, like the power-seeking terrorists, apply ideology based on demonization of others and death. Thus, oppression and exploitation of human beings to accommodate one's material interests, even if disguised in some high-sounding abstraction, are terroristic.[101] In the end, self-justification and self-delusion allow so-called enemies to feel justified in their counter-vengeance and sought expiation. Oppression, terrorism, most states of emergency, and in-kind counter-violence are of a kind. They continue the frightening cycle of tyranny, evil, and death[102] that we passively allow through our government or leaders. Our obligation as human beings is to fight passionately to save the lives of all other human beings.[103]

Sartre correctly but incompletely argued that a war of national liberation "once begun . . . gives no quarter."[104] In any conflict, however, intentional or reckless killing of innocents by states or any group is criminal even if deemed justifiable or acceptable for a "just cause." Sartre's attitude is especially troublesome when groups are manipulated into accepting unending conflict. President Bush has adopted that ethic, calling for a "War against Terrorism," which will be continual and indefinite, requiring all our devotion.[105] Is it really far fetched to compare the "Crusade" against Islam during the Middle Ages with the marketing of a "clash of civilizations?" Policy makers and pundits have cynically used 9/11 as a "battle flag" call for vengeance in their version of "Holy War." If both sides believe in an ongoing, unending war for survival against "evil doers," values, human rights, morals, and civil liberties are at risk. It is becoming clear what we will accommodate when we remain in a state of emergency setting. What are we willing to become? Torturers, killers of innocents, terrorists? A fight for survival, even one for gaining or retaining power, may cause people to do unspeakable things, but the law must not—does not—justify,

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101. See id. at 181.

102. Id. at 182.

103. Id. at 186.

104. Jean-Paul Sartre, Preface to Frantz Fanon, The Wretched of the Earth, 21 (C. Farrington, ed., 1963).

105. David E. Sanger, Domestic Security Spending to Double under Bush Plan, Jan. 25, 2002, N.Y. Times, at A11. "President Bush said . . . that he would propose doubling the amount the government spends on domestic security next year to nearly $38 billion, saying the United States was 'still under attack' and would remain on a war footing for a long time to come." Id.

excuse, or accommodate this. It is not morally or legally justifiable to kill innocents, regardless of how effectively it is perceived to be or how much it intimidates others.[106]

Terrorism and current responses to it are of one cloth. Simone Weil and Thomas Merton were not far off in expressing this, as they described a great beast, which is the urge to collective power, "the grimmest of all the social realities."[107] They said, aptly, that this lust for power is masked by the symbols of "nationalism, fundamentalism, capitalism, fascism, [and] racism."[108] I would add perversions of religion, morality, and values, including sovereignty, self-determination, liberation, revolution, freedom, democracy,[109]and national security. Often, what is represented as morality, religion, values, democracy, freedom, etc., is really "a chimerical state of things in which one would keep for oneself alone the power to make war while all other countries would be unable to do so."[110] By manipulating a people's sense of community, ethnicity, heritage, nationalism, or religion, and by causing fear that these are at risk, insecurity and xenophobia are fostered. Leaders cause their followers to commit or acquiesce to unspeakable acts. It is important to explode the myths used to foment such violence or terrorism and crimes against humanity will be the "norm."

Terrorism poses a vicious threat to peace and human dignity, but the ordinary person may be capable of overcoming the manipulation that prompts participation. There may be a common core of values that allows us to recognize these crimes and to condemn them.[111] We condemn easily when these crimes are committed against us. We need to instill in ourselves

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106. See, e.g., Rollin M. Perkins & Ronald N. Boyce, Criminal Law 46–119 (3d ed., 1982); George Fletcher, Rethinking Criminal Law 235–391 (1978). See also Regina v. Dudley and Stephens [1884] 14 Q.B.D. 273, 285–86 (U.K.); Regina v. Howe [1987] 1 A.C. 417 (H.L.) (U.K.); United States v. Holmes, 26 F. Cas. 360 (C.C.E.D. Pa. 1842).

107. See Thomas Merton, The Answer of Minerva: Pacifism and Resistance in Simone Weil, The Literary Essays of Thomas Merton, supra note 100, at 134, 138 (discussing Simone Weil); see also Simone Weil, The Power of Words, in Simone Weil, Selected Essays 1934–1943, at 154, 156–62; Simone Weil, The Great Beast, in Selected Essays, supra, at 89, 134–40.

108. Merton, supra note 107, at 138.

109. See Ecclesiastes 1:2 (all is vanity).

110. Merton, supra note 107, at 139 (quoting Weil).

111. Cf. Nora V. Demleitner, Combating Legal Ethnocentrism: Comparative Law Sets Boundaries 31 Az. St. L. J. 737 (1999).

the vision and fortitude to recognize and resist when "our leaders," or our compatriots, want to pursue that sort of conduct against "others."

Terrorism is condemned—it is criminal—whether committed by states against their own inhabitants or extraterritorially. It is criminal whether perpetrated by occupiers, insurgents, oppressors, or those struggling for independence or freedom from oppression. Individuals commit these offenses whether as direct actors or as functionaries acting in their official governmental capacity or as functionaries of nongovernmental groups. All of these principals are subject to law and may be punished for committing directly or aiding and abetting the criminal conduct analyzed herein. Impunity must be eliminated.

If prosecution is to occur, the elements of the offenses must be clearly established. Thus, this criminal conduct we call terrorism includes: (1) violence committed by any means; (2) causing death, great bodily harm, or serious psychological harm; (3) to innocent individuals; (4) with the intent to cause those consequences or with wanton disregard for those consequences; (5) for the purpose of coercing or intimidating some specific group, or government, or otherwise to gain some perceived political, military, or other philosophical benefit. Torture is analogous, even when the victim is a captured enemy fighter.

Human rights protections for victims and the accused must be clarified and vigorously maintained. To date, this has not been done well in treaties or statutes. Perhaps customary and *jus cogens* principles, as manifest in the domestic laws of virtually all nations, provide the needed clarity and specificity. The penal codes of all nations and the customary rules of groups everywhere condemn the conduct discussed herein.

The pretentious justifications, excuses, and rationalizations given by apologists for those who commit atrocity ring hollow, and are frighteningly familiar.[112] Care must be taken to ensure that international and domestic action to obtain justice and to prosecute perpetrators does not fall into the same trap that ensnared those who committed the crimes. If we allow ourselves to descend to simple vengeance, terrorism, torture and

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112. John Milton, Paradise Lost, bk. 4, lines 393–94 (Merrut Y. Hughes, ed., 1962). See also Joseph Conrad, Lord Jim 86, 95, 357, 367 (1924); Joseph Conrad, Heart of Darkness, in Heart of Darkness and the Secret Sharer 63 (1950).

similar atrocity, because of our fear or insecurity, or in the name of "fighting terrorism" or fighting for "freedom" or "God," we are lost. We must remind ourselves of John Milton's poignant warning:

> So spake the Fiend, *and with necessity.*
> The tyrant's plea, excus'd his devilish deeds'
> and it is still the shibboleth of the descendants
> of the Prince of Darkness.[113]

113. Milton, supra note 112; see also Conrad, Lord Jim, supra note 112, at 86, 95, 357, 367; Conrad, Heart of Darkness, supra note 112.