TOLERANCE IN THE AGE OF INCREASED INTERDEPENDENCE

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For several reasons, I hope that you will be a relatively tolerant reader. I am not sure that I can offer insights that an experienced psychiatrist or sensitive moral philosopher might lend to a discussion of love, loyalty, nationalism, patriotism, and what most assuredly fosters respect for the dignity of other human beings as opposed to human indignity and its many unacceptable and criminal consequences. In my opinion, a capacity for love and a general tolerance of others are quite important. Thus, I tend to agree with Viet Dinh that when we love, we tend to love locally, and that love within a family can form a base for love, or at least respect and tolerance, of others locally, nationally, and universally. It also seems apparent that “[l]iberal democracy requires a healthy dose of mutual commitment”\(^2\) and sharing. Perhaps these qualities relate even to a liberal being as opposed to one who is withdrawn, isolated, and prone to anger, if not violence.

I hesitate, however, when presented with alleged postulates such as “loving our country . . . allows us (indeed requires us) to love others more”\(^3\) and “[l]oyalty to our nation . . . fosters a commitment to universal principles,”\(^4\) assuming that Professor Dinh means preferable principles—for example, those commonly associated with the advancement of human dignity.\(^5\) What, indeed, is the full meaning of preferable patriotism or love of country?

I wonder, for example, whether Lieutenant William Calley\(^6\) had a normal capacity for love (or even a normal or healthy love of his country). I also wonder whether love of and loyalty to the United States assure that United States soldiers will not murder captured and defenseless

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2. Id.
3. Id.
4. Id. at 879.
Vietnamese women and children,\textsuperscript{7} or that they will not torture\textsuperscript{8} captured Arab or Muslim men in Iraq or elsewhere.\textsuperscript{9} Did patriotism and loyalty to
the United States protect United States citizens of Japanese ancestry from being publicly humiliated, mistreated, and sent to concentration camps by those within our military who acted in the name of patriotism and loyalty, and to whom a compliant majority of the United States Supreme Court deferred? Did love of country contribute to the creation of racist land...
laws in California,\textsuperscript{11} or laws to keep out the “yellow horde”\textsuperscript{12} and stave off the “yellow peril,”\textsuperscript{13} or to the racist immigration laws passed by Congress, in the words of a nationalistic Supreme Court, to exclude the “vast hordes” from our shores?\textsuperscript{14} Are members of the Ku Klux Klan relatively patriotic and conservative, or relatively cosmopolitan and liberal? Would loyalty and patriotism, as understood by Professor Dinh, require deference to President Bush with respect to the forced disappearance of thousands of persons detained at Guantanamo and elsewhere after September 11, in violation of international law? Or would they require deference to “universal principles” enshrined in the Bill of Rights, the 1949 Geneva Conventions, and various human rights treaties?\textsuperscript{15}

relation . . . . This forced exclusion was the result in good measure of . . . racial guilt.” Id. at 235 (Murphy, J., dissenting). He further described the exclusion aimed at individuals “whose ‘racial strains are undiluted,’” as a “blanket condemnation of all persons of Japanese descent.” Id. at 236 (Murphy, J., dissenting). Additionally, Justice Murphy stated that “to infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights.” Id. at 240 (Murphy, J., dissenting).


12. See id. at 661 (Murphy, J., concurring).

13. See id. at 658, 668 (Murphy, J., concurring).

14. See The Chinese Exclusion Case, 130 U.S. 581, 606 (1889) (“If . . . the government . . . , through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion [is permissible].”). In \textit{Fong Yue Ting v. United States}, the Court stated:

large numbers of Chinese laborers, of a distinct race and religion, remaining strangers in the land, residing apart by themselves, tenaciously adhering to the customs and usages of their own country, unfamiliar with our institutions, and apparently incapable of assimilating with our people, might endanger good order, and be injurious to the public interests . . . .


Indeed, should persons within the Administration who participated in a common plan to violate the law deserve the loyalty of any human being? More generally, does patriotic loyalty assure the creation or enhancement of liberal democracy and the liberal being?

Moreover, what if the state is not the United States, but Hitler’s Germany, the Stalinist Soviet Union, the Khmer Rouge in Cambodia, the apartheid regime in South Africa, Milosevic’s Yugoslavia, Saddam Hussein’s Iraq, or the present dictatorships in North Korea and Zimbabwe? Would love of country and loyalty to the state in such settings foster human dignity and degrade terrorism? As an international law professor, I know that such forms of love and loyalty would not be defenses to international crime. From a psychological perspective, however, were those who served or still serve the evils of human indignity in such states “rudderless person[s]? Or, did they have “shared experiences and cooperative activity” that allowed them to participate in “a process of association and mutuality, the ongoing character of which . . . claims to protect against external encroachment” and “have common glories in the past and . . . have a common will[,] . . . a grand solidarity, constituted by the sentiment of sacrifices”? Do many non-state terrorists share experiences and engage in associational processes similar to those of the state actor terrorists noted above? Did non-state Catholics and Protestants in Northern Ireland? Do bin Laden and his associates?

Viet Dinh seems to assume that what clearly distinguishes preferable associational experiences that foster human dignity from those that do not is patriotism that is territorially based, a love and loyalty to a state. Whatever love and loyalty drives bin Laden and a growing number of Islamic extremists across continents who kill infidels without any putative non-religious distinction is admittedly not based in a single state. However, from the few examples of allegedly loyal, nationalistic, and patriotic state

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17. Dinh, supra note 1, at 879.
18. Id. at 876 (quoting MICHAEL WALzer, JUST AND UNJUST WARS 54 (2d ed. 1992)).
19. Id. (quoting Ernest Renan, Qu’est-ce qu’une nation? (Ida Mae Snyder trans.), in NATIONALISM 17, 17 (John Hutchinson & Anthony D. Smith eds., 1994)).
20. Would it be understandable if bin Laden had given the following speech: We have “never been united by blood or birth or soil. We are bound by ideals that move us beyond our backgrounds, lift us above our interests and teach us what it means to be” loyal patriots of Islam? But cf. id. at 876-77 (quoting President George W. Bush, Inaugural Address, 1 PUB. PAPERS 1, 1 (Jan. 20, 2001)).
21. Professor Dinh qualifies this in some indeterminate way, preferring not just absolute loyalty to the state, “[b]ut loyalty there must be, even in dissent.” Id. at 877. Why must there be “loyalty,” and to what extent if less than “absolute,” are not demonstrated.
actor terrorists noted above, it is evident that patriotism with a territorial base provides no assurance of preferred outcomes and effects. Some who follow bin Laden proclaim their love and loyalty to an Islamic nation. Would their terrorist tactics against anyone who disagree be abandoned if the Islamic nation that they prefer had a single territorial base and if they were generally free from outside intervention? Indeed, would use of terrorist tactics disappear if their extremist nation was global and generally in power?

It seems that more than territoriality is involved. In fact, territorial enclaves within a state, region, or global community can also foster unhealthy distinctions between “them” and “us” and can deflate what seems to be at least as important as a capacity for love—a general tolerance of “the others.” Clearly, racist, ideologically intolerant, and religiously intolerant love of groups, loyalty, and patriotism are insufficient. Perhaps a healthy tolerance of others is even a necessary aspect of a healthy capacity for love. I prefer the phrase “general tolerance” because tolerance of intolerance is not always preferable, nor is nonintervention. Lines are sometimes difficult to draw between tolerance that is and is not preferable. The same pertains to preferred commitment and intervention by diplomatic, political, economic, and physical means. Yet, there are often generally shared legal expectations or cores of normative content that provide the legally trained with a basis for choice concerning the legal limits of tolerance and the permissibility of intervention.

The claimed desirability of reactive parochialism, primacy of the supposedly autonomous state, and nonintervention in an age of increased and growing interdependence (what Professor Dinh postulates as an age of terror), raise other issues of concern that pose points of disagreement. Professor Dinh’s argument in this regard confuses “state” with “nation.”

22. See JONATHAN SACKS, THE DIGNITY OF DIFFERENCE 45-46 (2002) (discussing the dangers of differentiating between them and us). International crimes such as forced disappearance, torture, war crimes, genocide, and other crimes against humanity can thrive on labels of “the others” that dehumanize. See, e.g., Jordan J. Paust, My Lai and Vietnam: Norms, Myths and Leader Responsibility, 57 Mil. L. Rev. 99, 163 n.241 (1972) (regarding the 1864 Sand Creek massacre of Cheyenne by Colonel Chivington and his “3rd Colorado volunteers”). Particularly threatening is the label “illegal” alien, because it assumes that a person is illegal beyond what the person supposedly has done in violation of immigration laws. No human being is “illegal.” See Paust, supra note 5, at 191-94 & n.207.

23. Professor Dinh offers the recognition that a preferred loving of “those close to us” “does not mean that we can disrespect” others. Dinh, supra note 1, at 878.

24. See Paust, supra note 5, at 170 n.115 (discussing various theorists who emphasize “a balanced emphasis on liberty and responsibility”). Further, “[h]uman dignity, as a process, is compatible with enlightened self-interest and an affirmative, optimistic involvement, a love, of self and others.” Id. at 225. Love of self coupled with love of others stand in opposition to what is often the arrogant myth of terrorists and totalitarians.

25. A “nation” is not the same as a “state.” A nation is a recognizable group of people that
and it appears to rest on ahistorical assumptions that there exists a supposed “monopoly on force of nation-states” and that a “central lesson of September 11 [is] that nation-states no longer have a monopoly on the motives and means of war.” However, under international law the participants in “war” have long included states, nations, belligerents, and insurgents. Thus, clearly, the state has never had a monopoly on the use of force or the motives and means of war. Additionally, armed violence not amounting to war or even insurgency has often been engaged in by nonstate actors, including nineteenth and twentieth century anarchists unmoored from geography, and transnational terrorists. Moreover, terrorism, whether in times of relative peace or war, certainly is not new.

need not have a territorial base or a governmental structure. See, e.g., J.L. BRIERLY, THE LAW OF NATIONS 118-19 (5th ed. 1955) (recognizing that “a single state . . . may include many nations, or a single nation may be dispersed among many states”); JORDAN J. PAUST ET AL., INTERNATIONAL LAW AND LITIGATION IN THE U.S. 7 (2000); HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 26-27 (George Grafton Wilson ed., Clarendon Press 1936) (1866) (distinguishing between a nation and a state). Further, a nation can have treaty relations and responsibilities even though it is not a state. See, e.g., Jones v. Meehan, 175 U.S. 1, 4, 32 (1899) (granting rights to certain lands to a nation as well as to Chief Moose Dung and other named persons); Mitchel v. United States, 34 U.S. 711, 724-25, 746, 749, 755 (1835) (holding that the Spain-Indian treaty and rights thereunder remained in force when the United States acquired the Floridas); 14 Op. Att’y Gen. 249 (1873) (granting jurisdiction to a military commission regarding convictions of certain Modoc Indians for violations of the laws of war). See generally Siegfried Wiessner, Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis, 12 HARV. HUM. RTS. J. 57 (1999) (discussing the status of indigenous groups within various states).


27. “Belligerents” in a civil war are not the equivalent of “states”; during the American civil war, Great Britain, other European states, and the United States recognized the Confederate States of America, not as a state, but as a belligerent for purposes of trade, laws of neutrality, and the laws of war. See, e.g., The Prize Cases, 67 U.S. 635, 666-67, 669 (1862).

28. Concerning criteria for an insurgency and applicable laws of war during an insurgency, see, for example, PAUST ET AL., supra note 16, at 809, 812-13, 815-16, 819, 831-32.


Why would one conclude, then, that our living generations are in a “new era, the Age of Terror”? And why should September 11 “define our domestic and foreign policy”? Indeed, applying the rhetoric and labels of “war” and “combatant” when international law does not (for example, in contexts where social violence is less than an insurgency), can be policy-thwarting and dangerous.

In any event, acceptance of dangerous “war” rhetoric and a specious need to allow September 11 to “define our domestic and foreign policy” is not necessary in order to address Professor Dinh’s final three recommendations. It is certainly not necessary to accept Professor Dinh’s preferences that states realize their collective interests and obligations to combat terrorism, and that universal jurisdiction pertains, because the international community has already made these recognitions, and did so prior to September 11. Importantly, the international community also

(recognizing that “terrorist activities . . . of individuals or of groups . . . are in clear disregard of human rights”); Eugene Victor Walter, Terror and Resistance: A Study of Political Violence (1969) (discussing the history of terror as a political tool); Jordan J. Paust, An Introduction to and Commentary on Terrorism and the Law, 19 Conn. L. Rev. 697 (1987); Jordan J. Paust, Terrorism and the International Law of War, 64 Mil. L. Rev. 1, 11-17, 32, 36 (1974).

33. See Dinh, supra note 1, at 869.
34. Compare id. at 867 with Paust, supra note 15, at 1336-40.
36. See Dinh, supra note 1, at 880-81 (recommending stronger enforcement of immigration laws, tighter control of borders, and greater international commitments to help weak nations).
recognized legal obligations of states to bring into custody those reasonably accused of committing customary and treaty-based international crimes, including impermissible terrorism, and to initiate prosecution of or extradition of such persons. 38 Obligations already exist to provide opportunities for civil sanctions against such persons with respect to underlying human rights violations, 39 and civil sanctions can aid overall efforts to combat terrorism.

The fallacies of “autonomous” states, a ban on all forms of intervention, and a “world ordered by sovereign states” 40 present other points of disagreement. We live in a time of increasing interdependence and transnational interaction with respect to all sectors of public life, 41 including trade and investment, energy, organized crime, law enforcement, banking, politics, the world wide web, and other forms of access to knowledge and communication, such as news media, intelligence gathering, education, culture, religion, entertainment, transportation, leisure, food and agriculture, the environment, health, employment, human invention, and exploration of space. Each year, tens of millions of United States citizens travel or work abroad, and tens of millions of other persons come to the United States. Among the many other nonstate participants in various geographically unmoored sectors of public life are multinational corporations, 42 organized criminal entities, and religious entities that can sometimes wield more wealth and power than most states, and that might even control some states. Other potentially significant nonstate participants in economic, diplomatic, enlightenment, and political processes include trade organizations, international and regional intergovernmental organizations, nongovernmental organizations, and various media. Most sectors of the practice of law in major cities within the United States are also increasingly unmoored by geography. No first year law school course, and hardly any “bar course” or specialty course, is without its transnational

1991) (finding that the court could decide whether the Palestine Liberation Organization could be sued because, among other things, the Legislative branch had already expressly endorsed the concept of “suing terrorist organizations” in federal court under § 2333).


39. See, e.g., JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 224-29 (2d ed. 2003); Paust, supra note 38, at 50-51, 54.

40. See Dinh, supra note 1, at 874.

41. See, e.g., LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW ix-x, 3-4, 23, 50-81 (2d ed. 2000); MYRES S. MCDougAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER 94-142, 161-248 (1980); Paust, supra note 29, at 601-04.

and international legal elements. This is true regardless of whether law schools adequately prepare, and state bar examiners adequately test, our students for the changing practice of law.

An “absolute right of the sovereign” and “untrammeled” state sovereignty were never real and always faced opposition. Today, they are pipe dreams and are still not preferable, especially with respect to the protection of customary and treaty-based human rights, prohibitions of genocide and other crimes against humanity, and the control of terrorism. Within the United States, the very notion of sovereignty is one associated with the primary authority of the people of the United States, and not the state. This association is increasingly recognized in international law with

43. Dinh, supra note 1, at 871.
45. See, e.g., Paust, supra note 30, at 455-56, 459-62; sources cited supra note 44. Professor Dinh seems to recognize that violations of human rights “fall outside the limits of sovereignty.” Dinh, supra note 1, at 874. Human rights are indeed obligatio erga omnes (owing by and to all humankind), and their violation is of universal concern; but Professor Dinh’s focus on autonomous states, nonintervention and protection against external encroachment, and loyalty to national sovereignty and “nationalism” leave one wondering what the consequences of his preferences might be in terms of a full, rich effectuation of human rights within the United States. The Founders and Framers were certainly attentive to the need for such an effectuation of human rights. See, e.g., PAUST, supra note 39, at 195-203, 208-10, 323-26, 329-33. Professor Dinh’s recognition of the limiting role of human rights and “universal principles” may, however, offer an opening—if “intervention” seems harsh, perhaps an opening for human interconnections and tolerance and a more adequate fulfillment of human rights.
respect to self-determination of peoples (not states) and the legitimacy of governments under human rights law.


The Human Rights Committee created by the ICCPR also has recognized that “denying peoples the right to determine their own political status . . . would be incompatible with the object and purpose of the Covenant.” U.N. GAOR, Hum. Rts. Comm., 52d Sess., General Comment No. 24 para. 9, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994). The Committee also has recognized that “Article 1 . . . imposes on all States parties corresponding obligations” and that “Paragraph 3 . . . imposes specific obligations . . . not only in relation to their own peoples but vis-à-vis all peoples . . . It follows that all States parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination.” U.N. GAOR, Hum. Rts. Comm., 21st Sess., General Comment No. 12 paras. 2, 6 (1984).

The International Military Tribunal at Nuremberg offered another important recognition relevant to notions of state authority or sovereignty. When faced with a claim that those acting on behalf of, with the approval of, or under orders of the state are immune from the reach of international law, and that individuals are answerable only to the state, the Tribunal rightly declared:

The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position. 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.49

As the Tribunal affirmed, acts taken in violation of international law are beyond the lawful authority of any state, are ultra vires, and cannot be covered by claims to immunity.50 Indeed, sovereignty is conditioned on

50. See Decision on Preliminary Motions paras. 26-34, Prosecutor v. Milosevic, IT-99-37-PT (Int’l Trib. for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (2001)) (ruling that President Milosevic of Yugoslavia had no immunity from alleged international crimes as a head of state and that Article 7 of the Statute of the ICTY, which rejects head of state immunity, “reflects a rule of customary international law”); Judgement para. 140, Prosecutor v. Furundzija, IT-95-17/1-T (Int’l Trib. for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (1998)) (stating that state officials who commit torture are personally responsible for violating international law); Judgement and Sentence, Prosecutor v. Kambanda, ICTR 97-23-S (Int’l Trib. for Rwanda 1998) (sentencing the ex-Prime Minister for genocide and other crimes); Decision on the Defence Motion on Jurisdiction para. 42, Prosecutor v. Tadic (Int’l Trib. for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (1995)) (stating that state officials who commit torture are personally responsible for violating international law and that regarding “crimes which are universal

a)When a state is in breach of jus cogens rules, it cannot bona fide expect that it will be granted immunity . . .

b) The acts of a state that violate jus cogens norms do not have the character of sovereign acts. In such cases it is considered that the accused state did not act within the ambit of its capacity as a sovereign.

c) Acts contrary to jus cogens norms are null and void, and cannot constitute a source of legal rights or privileges, such as the claim to immunity . . .

d) The recognition of immunity by a national court for an act that is contrary to jus cogens would be tantamount to collaboration by that national court . . .


In 2000, the Hellenic Supreme Court upheld the decision of nonimmunity granted in Prefecture of Voiotia, noting that the murders in question were crimes against humanity and an abuse of sovereign power that were not protectable acts under customary international law and that, as acts “in breach of rules of peremptory international law . . ., they were not acts jure imperii”’’ (i.e., they were not lawful “public” acts and, as ratione ultra vires, they are unprotectable). Bernard H. Oxman et al., Sovereign Immunity—Tort Exception—Jus Cogens Violations—World War II Reparations—International Humanitarian Law, 95 Am. J. Int’l L. 198, 198, 200 (2001) (quoting Prefecture of Voiotia v. Federal Republic of Germany, Case No. 11/2000 (Hellenic Sup. Ct. 2000)); see E. DE VATTEL, THE LAW OF NATIONS bk. 1, § 54 (special ed. 1993) (1758) (“The Prince . . . who seeks in his violence to deprive an innocent person of life, divests himself of his authority; by his injustice and cruelty he becomes no more than an enemy, against whom it is allowed to defend oneself.”); PAUST, supra note 39, at 236, 422, 435-39; PAUST ET AL., supra note 16, at 27-34, 38, 42, 46-53, 55-70, 73-74, 88-99, 132, 134, 136, 171-73, 621-22 (describing the trials of Conradin von Hohenstafen in 1268 and Peter von Hagenbach in 1474, who were executed for waging an
obedience to international law, the law upon which sovereignty rests. The false conflation of an autonomous state and raw power with sovereignty has been a theoretic association convenient for those alleging the permissibility of oppression of other peoples, or communist and other unjust war and for engaging in the improper and terroristic administration of pledged territories, respectively), 660, 677 (describing the trial of Radovan Karadžić for genocide in Bosnia and Herzegovina), 699-708 (reprinting the indictments of Georges Rutaganda and Jean Paul Akayesu for genocide committed in Rwanda), 717 (describing the detention of Napoleon in 1810 for waging wars against the peace of the world); 741-46 (reprinting the Report of the 1919 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties concerning the German Emperor William II), 747 (reprinting Article 227 of the Treaty of Peace with Germany in Versailles on June 28, 1919, which did “publicly arraign” the German Emperor William II), 821; M. Cherif Bassiouni, Searching for Peace and Achieving Justice: The Need for Accountability, 59 LAW & CONTEMP. PROBS. 9, 17 (1996) (stating that states have the obligation to eliminate immunities of superiors up to and including heads of state); Andrea Bianchi, Denying State Immunity to Violators of Human Rights, 46 AUS. J. PUB. & INT’L L. 195 (1994); Yoram Dinstein, International Criminal Law, 5 ISR. Y.B. ON HUM. RTS. 55 (1975); L.C. Green, International Crimes and the Legal Process, 29 INT’L & COMP. L.Q. 567 (1980); Martin Scheinin et al., Int’l Law Ass’n. Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences 13-14, 21, app. (2000) (discussing jurisdiction over human rights violations and arguing that no government official should be immune from prosecution for human rights violations), available at http://www.ila-hq.org/pdf/Human%20Rights%20Law/HumanRig.pdf (last visited Sept. 26, 2004).

Nonimmunity for human rights violations has also been mandated in treaties. See, e.g., ICCPR, supra note 8, at art. 2 para. 3(a) (stating that each party to the agreement has a duty to “ensure that any person whose rights . . . are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”); American Convention on Human Rights, supra note 48, at art. 25(1); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, arts. 1, 14, U.N. Doc. A/39/51 (1984) (reciting a duty to ensure redress and “fair and adequate compensation”); U.N. GAOR, Hum. Rts. Comm., 47th Sess., General Comment No. 20 para. 2, U.N. Doc. HRI/CN.1/Rev.1 at 30 (1994) (finding that states have a duty to protect against torture “whether inflicted by people acting in their official capacity, or outside their official capacity”); id. at para. 13 (“[W]hether committed by public officials or other persons acting on behalf of the State . . . [t]hose who violate [the Convention Against Torture] . . . must be held responsible.”). Moreover, every modern international criminal law instrument applies to any person or everyone who commits a relevant crime, thus reaching any official as well as any private perpetrator. See, e.g., Rome Statute of the International Criminal Court art. 27(1) (adopted by U.N. Diplomatic Conference July 17, 1998), reprinted in JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW: DOCUMENTS SUPPLEMENT 206, 219 (2000).

51. See Alexander Dallin & George W. Breslauer, Political Terror in Communist Systems (1970); Herbert Marcuse, SOVIET MARXISM 188-93, 198-99, 225-26, 245 (1958); G. I. Tunkin, Theory of International Law 82-83, 137, 431, 435-36, 438 (William E. Butler trans., 1974); id. at 382 (“The subjects of international legal responsibility are the subjects of international law; consequently, they are above all, and primarily, states. . . . In isolated instances there occurs responsibility of physical persons.”); A. P. Mvch, The Human Rights Problem in Present-Day International Law, in CONTEMPORARY INTERNATIONAL LAW 233, 239 (Grigory Tunkin ed. and G. Ivanov-Mumjiev trans., 1969) (quoting Lassa Oppenheim) (“[A]lthough such treaties generally speak of rights which individuals shall have. . . ., this is, as a rule, nothing more
forms of internal and external oppression, and terrorism. Opponents of terrorism would do well to heed the consequences of such claims to control in the name of the state, and claims to a world ordered by sovereign states.

In any event, deference to such claims is not necessary or desirable in order to oppose nonstate actor terrorism. More generally, loyalty, nationalism, and patriotism without tolerance and effective guarantees of human rights can foster impermissible acts of nonstate terrorism. Conversely, the promotion of tolerance and human rights can deflate or defeat various forms of social violence and terrorism. Impermissible terrorism necessarily violates human rights of both direct and indirect victims that are of international concern whether engaged in by state or nonstate actors. Thus, when human rights are protected, terrorism is set back.

than an inaccuracy of language... The Soviet science of international law is unequivocal in its claim that the 'legal position of individuals is determined by national and not international law.'

G.I. Tunkin, Peaceful Coexistence and International Law, in CONTEMPORARY INTERNATIONAL LAW, supra, at 5, 32 (describing “international law as an expression of state will”). Finally, consider:

Sovereignty, [is] a particular feature of the state... The supremacy of the state means subordination to it of all persons and organisations within the bounds of state territory.

The state has supreme power... All these organisations and persons are bound to submit to it.

Only the will of the sovereign state, expressed in state power, becomes a law...

The very concept of state supremacy negates the possibility of formally restricting state power. State power operates on the basis of the law and order it itself creates.


52. See, e.g., Lon L. Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 HARV. L. REV. 630, 658-59 (1958) (stating that positivist-trained German lawyers in the 1930s were so 'prepared to accept as 'law' anything that called itself by that name, was printed at government expense, and seemed to come 'von oben herab'’’ that they were the first to fall in line and to support Hitler’s evil regime); Jordan J. Paust, The Concept of Norm: Toward a Better Understanding of Content, Authority, and Choice, 53 TEMPLE L.Q. 226, 268, 270-72, 274-77 (Fall 1980).

53. See, e.g., Ireland v. United Kingdom, 2 Eur. Ct. H.R. (ser. A) 25, 75 (1978) (recognizing with respect to IRA actions that “terrorist activities... of individuals of groups... are in clear disregard of human rights”); Paust, supra note 38, at 41-42. Concerning the reach of human rights law to nonstate perpetrators, see generally Jordan J. Paust, The Other Side of Right: Private Duties Under Human Rights Law, 5 HARV. HUM. RTS. J. 51 (1992) (discussing duties of private individuals under international human rights law); supra note 42.
These points compel recognition that the Bush Administration’s refusal to follow human rights law and the 1949 Geneva Conventions, and the Administration’s quest for a radically new unreviewable and unchecked executive power with respect to persons detained without trial,\textsuperscript{54} interrogation of detainees,\textsuperscript{55} and prosecution of foreigners accused in ad hoc military commissions,\textsuperscript{56} ultimately do not serve efforts to deflate and defeat transnational terrorism. In some cases, such unlawful and unwise practices can help to foster terrorist ambitions, and they can lead to a general degradation of respect for our government and its influence in the international community. Of course, one should not confuse loyalty to the present Administration with loyalty to this country and to venerable American values, nationalism, or patriotism. This is especially evident when one realizes that human rights have formed the core of our constitutional values since America’s founding\textsuperscript{57} and that, as the Founders and Framers knew, the federal judiciary must play its necessary role in checking presidential violations of human rights and other violations of international law.\textsuperscript{58}


\textsuperscript{55} See, e.g., Paust, Judicial Power, supra note 54, at 504 n.4, 529-31; supra note 9.


\textsuperscript{57} See, e.g., Paust, supra note 39, at 195-203, 208-10, 323-26, 329-33.

\textsuperscript{58} See, e.g., id. at 7-11, 169-73, 179, 489-95; Paust, Judicial Power, supra note 54; Harold Honju Koh, A United States Human Rights Policy for the 21st Century, 46 ST. LOUIS U. L.J. 293, 335-36 (2002).