

MORALITY IN THE AGE OF TERROR:  
RECLAIMING THE “JUST WAR”

by

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# MORALITY IN THE AGE OF TERROR: RECLAIMING THE “JUST WAR”

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## INTRODUCTION

Despite the fact that terrorism has done significantly less damage than conventional warfare over the past two decades, terrorist attacks have received near-constant coverage and politicians have harnessed the resulting fear to propel their agendas. Many parts of the world – particularly the Middle East, the center of the US’s War on Terror – seem to be embroiled in unending terrorist violence since the September 11<sup>th</sup> attacks. And the violence seems to be intensifying: state and non-state actors alike have used tactics in the last decade that had been widely condemned by the early 20<sup>th</sup> century, arguing that the new challenges today’s conflicts present warrant methods that couldn’t be justified in earlier interstate warfare. For non-state groups fighting for a cause they perceive to be just, options are limited; terrorism seems to be the only way to make themselves heard in a world where state powers dominate with tremendous wealth and military might. For state actors, terrorism – whatever the group’s cause – seems to be an affront to the values they hold most dearly; beyond security concerns, defeating terrorist groups takes on a symbolic significance, and states’ thirst for victory fuels leniency towards practices they themselves had banned.

By the early 20<sup>th</sup> century, the Humanitarian Revolution had created and popularized widely agreed upon human rights norms that prohibited torture and the murder of innocents. Beginning with the so-called Age of Reason and European Enlightenment in the 17<sup>th</sup> and 18<sup>th</sup> centuries, religious wars, torture, slavery, corporal and sadistic punishment, and cruelty to animals and children

decreased, not only because of state involvement, but because of changing values.<sup>1</sup> Torture – once a public spectacle – was nearly vanquished with the rise of empathy and the increased value placed on human life. And anti-terrorist movements that began in 19<sup>th</sup> century Europe in response to the acts of young radicals against the Russian Czar received international support by early 20<sup>th</sup> century when the League of Nations created a convention to prevent and punish terrorism.<sup>2</sup>

Since the mid-20<sup>th</sup> century, the United Nations has created nine core international human rights instruments, each of which is monitored by an expert committee to ensure correct and consistent implementation by state parties. In total there are 18 core human rights treaties and optional protocols, each of which has widespread acceptance worldwide.<sup>3</sup> Since 1965, at least one human rights treaty has been ratified by every country in the world; all but five countries have ratified five or more out of 18.<sup>4</sup> In addition, 159 countries are state parties and an additional 11 countries are signatories to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

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<sup>1</sup> Steven Pinker, *The Better Angels of Our Nature: Why Violence Has Declined* (New York: Viking, 2011), 129-188.

<sup>2</sup> Lyal S. Sunga, *The Emerging System of International Criminal Law: Developments in Codification and Implementation* (Boston: Brill Publishers, 1997), 191-203.

<sup>3</sup> Office of the United Nations High Commissioner for Human Rights (OHCHR), “The Core International Human Rights Instruments and Their Monitoring Bodies,” *OHCHR*, accessed April 6, 2016, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>.

<sup>4</sup> United Nations, “Status of Ratification of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” *United Nations*, March 29, 2016, accessed April 6, 2016, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en).

Punishment written in 1984<sup>5</sup> and the international community has created 14 legal instruments to prevent terrorism.<sup>6</sup>

## THE TERRORIST THREAT

In spite of popular perceptions created by sensationalist media, the post-Cold War period has seen drops in genocide and terrorism in addition to interstate and civil wars.<sup>7</sup> With the rise of the Internet and the decrease of interstate conflicts to focus media attention on, coverage of terrorist attacks has increased exponentially, as has the belief that terrorism is a serious and imminent threat to national security. The perception that terrorism is a major threat is intentional: terrorists tend to strike symbolic targets so the attacks will garner significant publicity because terrorists want to provoke a reaction. This manufactured fear propels democratic states into asymmetric conflicts against terrorist groups — despite the low threat they actually pose. Conventional warfare devastated entire continents; nuclear warfare in the Cold War would have devastated our entire species; today, as Joshua Goldstein writes, our biggest concern is “terrorist attacks that could destroy a city.”<sup>8</sup> From 2000 to 2007, less than .15 per 100,000 people per year have died from terrorism,

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<sup>5</sup> Ibid.

<sup>6</sup> United Nations, “United Nations Action to Counter Terrorism,” *United Nations*, accessed April 6, 2016, <http://www.un.org/en/terrorism/instruments.shtml>.

<sup>7</sup> Ibid., 295-376.

<sup>8</sup> Joshua Goldstein, *Winning the War on War: The Decline of Armed Conflict Worldwide* (New York: Dutton, 2011), 4.

worldwide (excluding Afghanistan and Iraq).<sup>9</sup> And from the September 11<sup>th</sup> attacks through October 2015, only 3,066 Americans have been killed in terrorist attacks, with all but 105 of these deaths occurring in the September 11<sup>th</sup> attacks.<sup>10</sup>

## ASYMMETRIC WARFARE

With the decline in interstate wars since the mid-20<sup>th</sup> century, most warfare has taken the form of asymmetric conflict in which a (usually) strong and organized state actor is pitted against a comparatively weak non-state actor, typically a guerrilla organization, nationalist militia, or terrorist group. In interstate warfare, it is common for one actor to be more powerful materially than its adversary, though differences among states are more differences of degree than of kind. In his book on new forms of warfare, Michael Gross notes, “in asymmetric war the material asymmetry is glaring, indeed monopolistic, as the weaker side often lacks sophisticated weaponry, tanks, a navy, an air force or air defense system,”<sup>11</sup> while the state actor boasts money, manpower, and established armed forces. Since states, unlike non-state groups, control organized and (usually) well-armed military forces, they “have always been able to inflict far more damage than non-state groups when they resort to the use of

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<sup>9</sup> National Consortium for the Study of Terrorism and Responses to Terrorism, “Global Terrorism Database,” *START* (University of Maryland), 2010, accessed April 6, 2016, <http://www.start.umd.edu/gtd/>.

<sup>10</sup> National Consortium for the Study of Terrorism and Responses to Terrorism, “American Deaths in Terrorist Attacks,” *START* (University of Maryland), October 20, 2015, accessed April 6, 2016, [https://www.start.umd.edu/pubs/START\\_AmericanTerrorismDeaths\\_FactSheet\\_Oct2015.pdf](https://www.start.umd.edu/pubs/START_AmericanTerrorismDeaths_FactSheet_Oct2015.pdf).

<sup>11</sup> Michael Gross, *Moral Dilemmas of Modern War: Torture, Assassination, and Blackmail in an Age of Asymmetric Conflict* (New York: Cambridge University Press, 2010), 14.

military force.”<sup>12</sup> Ordinary states have these advantages, but the US’s unprecedented concentration of military power in the 21<sup>st</sup> century has made non-state actors increasingly unable to respond to American attacks in kind. In 2002, the US accounted for over one-third of the world’s total military expenditure; since then its share has increased.<sup>13</sup> Using conventional means, weak or non-state actors have no hope of militarily defeating the US or its allies, regardless of the justness of their cause. It should thus be unsurprising that the use of nonconventional methods of waging war (e.g., terrorism) has increased in the face of US military hegemony<sup>14</sup>: non-state actors are materially incapable of doing to their adversaries what state actors may do to them and so are driven to explore other options for furthering their cause.

Given the lack of military might on the non-state side of asymmetric conflict, state actors suffer far fewer fatalities than do non-state groups. In Iraq from 2003 to 2011, studies have found that between 500,000 and 1,033,000 Iraqis died as a result of the conflict<sup>15</sup> while 4,496 American service members have been killed in Iraq from 2003 to 2014.<sup>16</sup> Since 2001, over 91,000 Afghans have been killed in the war in Afghanistan, and an additional 360,000 may

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<sup>12</sup> Jessica Wolfendale, *New Wars and New Soldiers: Military Ethics in the Contemporary World* (Surrey: Ashgate Publishing, 2011), 19.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> Amy Hagopian et al, “Mortality in Iraq Associated with the 2003–2011 War and Occupation: Findings from a National Cluster Sample Survey by the University Collaborative Iraq Mortality Study,” *PLoS Medicine* 10, no. 10 (October 2013): e1001533. doi: 10.1371/journal.pmed.1001533.

<sup>16</sup> iCasualties, “Operation Iraqi Freedom | Iraq,” *iCasualties*, May 28, 2010, accessed April 6, 2016, <http://icasualties.org/IRAQ/index.aspx>.



have died through indirect causes related to the war.<sup>17</sup> In the same time period, 2,326 American service members<sup>18</sup> and 1,173 American civilian contractors have been killed in the conflict.<sup>19</sup>

Material differences between asymmetric and conventional warfare extend beyond differing levels of military might. A crucial difference is that states control territory and non-state actors typically do not; unlike military differences, this fact makes state actors vulnerable in ways that non-state actors often are not. States, unlike non-state groups, bear the responsibility of protecting their citizens and controlling territory, and so are more vulnerable in important ways. However, controlling territory also means that states have citizens who can be taxed and conscripted. The uniqueness of each side's strengths and vulnerabilities sets asymmetric and conventional warfare apart; each side thus adopts tactics that may be banned or unnecessary in conventional war that take advantage of their strengths and exploit their opponent's weaknesses.

While the material distinctions are the most obvious differences between conventional and asymmetric conflicts, modern warfare is also distinct legally and morally; it is in part the legal and moral dimensions of asymmetric conflict that explain why state actors have begun to use tactics since September 11<sup>th</sup> that they had largely refused to consider during conventional conflicts, even in

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<sup>17</sup> Neta Crawford, "War-related Death, Injury, and Displacement in Afghanistan and Pakistan 2001-2014," *Costs of War* (Brown University), May 2015, 20.

<sup>18</sup> U.S. Defense Department, "Casualty Report," *Department of Defense*, March 29, 2016, accessed April 6, 2016, <http://www.defense.gov/casualty.pdf>.

<sup>19</sup> Dave Tobin, "Iraq/Afghanistan Military Casualties Update," *Syracuse.com*, July 20, 2012, accessed April 6, 2016, [http://www.syracuse.com/news/index.ssf/2012/07/iraqafghanistan\\_military\\_casua.html](http://www.syracuse.com/news/index.ssf/2012/07/iraqafghanistan_military_casua.html).

response to human rights violations in World War II. According to international law, state and non-state actors have different rights in armed conflict, namely that only sovereign nation-states are permitted the legitimate use of force.<sup>20</sup> Since states established the organization of the international order, it unsurprisingly gives states the legal upper hand regardless of the justness of a non-state actor's cause.<sup>21</sup> These legal distinctions give way to moral norms: since non-state actors cannot legally wage war, they are not considered moral equals but rather unjust combatants. Gross calls our attention to this moral shift in asymmetric conflict that strips combatants of legal and moral equality:

Asymmetric war ... upsets this tradition and criminalizes adversaries. This affects the conventions of war in very important ways and undermines a great many rights that prisoners of war usually enjoy. Without some element of moral equality, adversaries find it much easier to torture, assassinate, and blackmail their enemies.<sup>22</sup>

This legal and moral distinction paves the way for the state use of torture: captive non-state combatants are not prisoners of war and thus do not have the rights spelled out in the third Geneva Convention that states are obliged to honor when they have captured soldiers from another state. We see in the material, legal, and moral distinctions of asymmetric conflict the reasons for the use of tactics abandoned or forbidden in conventional interstate warfare: the

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<sup>20</sup> Gross, *Moral Dilemmas of Modern War*, 14.

<sup>21</sup> According to Gross, this is a shortcoming of international law and just war theory: state actors should not win simply by virtue of being recognized states, but rather restrictions on both sides must change so that non-state actors with a just cause are able to use force as a means of achieving their goals.

<sup>22</sup> Gross, *Moral Dilemmas of Modern War*, 21.

material shortcomings of non-state actors (particularly when compared to the United States) requires the use of tactics that make the most of their weakness, and the pro-state bias of the international system and its language of “unjust combatants” has propelled the use of morally questionable tactics by state actors.

Gross delineates four kinds of asymmetric conflict: guerrilla wars; proxy guerrilla wars; wars of intervention; and most relevantly here, the war on terror.<sup>23</sup> The terrorist groups he describes are distinct from nationalist guerrilla organizations as they “do not have a nationalist agenda nor are their operatives confined to a particular geographic locale” nor do they “represent any particular political constituency or territory.”<sup>24</sup> In the few years since Gross published his book in 2010, though, the world has seen a new terrorist threat that doesn’t fit the same mold as loosely organized transnational terrorist organizations like al Qaeda. The Islamic State in Iraq and Syria (also known as the Islamic State in Iraq and the Levant, referred to henceforth as ISIS) not only controls territory but has established communities comprised of fighters’ families and those who inhabited captured towns prior to ISIS takeover. This new variety of terrorist threat is more state-like than the groups Gross references, and poses somewhat different problems for counterterrorism. Regardless, ISIS’s weakness in relation to state actors means other observations on asymmetric conflict generally hold true of it.

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<sup>23</sup> Gross, *Moral Dilemmas of Modern War*, 15.

<sup>24</sup> *Ibid.*

## NEW MORALITY: REVISING JUST WAR THEORY

The human species has been fighting since its inception. Humans, though, have made significant strides with just war theory and human rights norms; as Goldstein writes, “In making these imperfect steps forward, we are not falling back on our true selves, but rather redefining ourselves and making new rules.”<sup>25</sup> The impressive decline of violence since the Middle Ages<sup>26</sup> demonstrates this desire to improve. Contrary to the general trend of progress, though, the use of tactics such as terrorism and torture in modern warfare represent a leap backward into barbarity. This thesis will explore moral questions created by the evolution of armed conflict from conventional state warfare to asymmetric conflict between state and non-state groups: Are the principles developed to limit violence in interstate warfare still applicable in modern conflicts? Revisionist accounts of how conflicts should be conducted seek to change the principles of just war theory and human rights conventions, arguing that the current conditions of armed conflict necessitate new rules. Some revisionists find tactics such as torture excusable (if not justifiable) for state actors but would not allow non-state actors to violate long-held prohibitions against killing civilians. Others argue that the rules must change for both sides so that weak non-state groups have a method through which they can advance potentially just claims that does not criminalize them as unjust

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<sup>25</sup> Goldstein, *Winning the War on War*, 6.

<sup>26</sup> Pinker extends this argument back to the transition from hunter-gatherer societies to agricultural “cities”. His methodology for this time period – murky body counts from excavated sites – leaves much to guesswork. Written history shows a clear decline in violence – particularly in sadistic violence for the sake of entertainment – from the Middle Ages.

combatants as do traditional versions of just war theory; these revisionists see terrorism as being potentially justifiable since just non-state groups may have no other options for making themselves heard. In both cases, the revisionist accounts call for the reexamination of previously denounced tactics. But are these accounts persuasive?

This thesis will examine the accounts from both sides. First, it considers the perspective of the non-state actor, using terrorism as a case study for the claim that a revisionist model of just war theory is required in modern, asymmetric conflicts. I consider the reasons a non-state group chooses to attack civilians, and what ends the strategy seeks. I then consider whether, as one of the few options available to weak non-state actors through which they can advance their claims in the face of the financial and military strength of their state adversaries, terrorism could (ever) be considered morally excusable.

Then, I will examine torture as a case study in parallel to terrorism in which state actors have a reason for deviating from just war principles in response to deviation by non-state actors. Are state actors morally justified in using tactics that violate previously agreed upon principles because their enemy did so?

While terrorism and torture are the only topics examined in depth here, it is crucial to note that these subjects are only case studies: the same logic regarding the tactics' moral (and legal) permissibility extends to other tactics employed by state and non-state actors in asymmetric conflict that violate human rights but would be permitted by a revisionist account of just war theory.

Though the morality of other tactics in normal circumstances largely follows the moral theory discussed in Chapters 1 and 2, certain tactics employed in asymmetric conflict may be permissible in extreme situations. Morality in instances of supreme emergency is considered in the “Conclusion”: Are tactics deemed unjustifiable for general use in asymmetric conflict permissible in moral disasters? In the case of terrorism, there may well be circumstances in which non-state actors have a just cause, but the greater efficacy of civil resistance as opposed to terrorism makes it difficult to justify the choice of terrorism over nonviolence. And in the case of torture, it is difficult to see how supreme emergency could ever function as a plausible excuse or justification considering its ineffectiveness and the unlikelihood of such a ticking time bomb scenario.

## CHAPTER 1: NON-STATE ACTORS

### PART 1: THE TERRORISTS: WHAT THEY DO AND WHY THEY DO IT

#### DEFINING TERRORISM

The definition of terrorism varies from scholar to scholar, state to state, and even from one government agency to another. Since “terrorism” is a pejorative term, most people do not refer to acts they support (or at the least find morally justified or acceptable) as terrorism; we agree that terrorism is wrong, but this does not mean we agree on what we are condemning. Jeff McMahan explains that it is nearly impossible to find a universally accepted definition for terrorism “[b]ecause the term ‘terrorism’ is normatively loaded and therefore tends to be used by people to describe their enemies whatever their enemies may do, there is no definition that can capture all the many ways in which the term is ordinarily used.<sup>27</sup> While developing a definition that is agreeable to all actors at all times is beyond the scope of this project (if not impossible), the tactics of the groups discussed here share certain characteristics that are commonly labeled as forms of terrorism.

While terrorism is not always the “weapon of the weak” and has been employed countless times by state actors either directly or through their sponsorship of terrorist groups during proxy wars, only terrorist tactics by non-

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<sup>27</sup> Jeff McMahan, “War, Terrorism, and the ‘War on Terror,’” in *War on Terror: The Oxford Amnesty Lectures 2006*, ed. Christopher Miller (Manchester: Manchester University Press, 2009), 159.

state actors are examined in this work.<sup>28</sup> Force employed against civilians by states for political ends, be it internationally as an act of war or domestically as “law enforcement, state terror, oppression, or civil war,”<sup>29</sup> is arguably terrorism, but not of the sort considered here. States usually have many other options available to them in warfare, so their motivations for engaging in terrorist acts differ dramatically from those of small, underfinanced, non-state actors. It thus makes little sense to try to explain both state and non-state choices to use or desist from using such tactics in a single framework.

At its most basic, an act of terrorism is an “intentional [effort] to kill or seriously harm innocent people as a means of affecting other members of a group with which the immediate victims are identified.”<sup>30</sup> In a traditional application of just war theory, “innocent people” here refers to noncombatants. However, this interpretation implies that civilians are always immune from attacks, even if they are in some way morally culpable for violence inflicted on a state’s enemies. For example, under this definition, those working on the Manhattan Project would not be considered just targets for attack, though soldiers on the battlefield would be legitimate targets even though they individually cause far less damage than those constructing nuclear bombs. Just war theory’s distinction between combatants and noncombatants is thus

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<sup>28</sup> While the restriction of terrorism to nonstate actors is very likely politically motivated—it arguably “conveniently [rules] out even the conceptual possibility that states can be guilty of terrorism,” and is distorted by the “dominant state-centered paradigm of international relations”—the restriction described here is solely for the ease of analysis, and is not meant to excuse state acts from the terrorism label, as Jeff McMahan writes in “War, Terrorism, and the ‘War on Terror,’” 159.

<sup>29</sup> Audrey Kurth Cronin, “Behind the Curve: Globalization and International Terrorism,” *International Security* 27, no. 3 (Winter 2002/03): 30–33.

<sup>30</sup> McMahan, “War, Terrorism, and the ‘War on Terror,’” 159.



problematic even in traditional warfare, and becomes even more so in asymmetric conflict wherein combatants and noncombatants are extremely difficult to distinguish because non-state combatants are not organized into an obvious military unit. Because of this, McMahan's redefinition of terrorism as violence one directs against those "not morally responsible for a wrong in a way that makes one morally liable to attack as a means of preventing or correcting that wrong"<sup>31</sup> is more fitting. Under this criterion, workers in munitions factories and the scientists who developed the atomic bomb *are* morally liable to be attacked because their actions contributed to a threat against the attackers. This liability does not extend to taxpayers who finance the war nor the farmers who feed the soldiers, though they likewise make vital contributions to the war effort:<sup>32</sup> an individual does not lose their innocence in the relevant sense if their contribution does not contribute directly to the mounting of armed attacks. As Thomas Nagel writes, "Contributions to ... arms and logistics are contributions to this threat; contributions to [combatants'] mere existence as men are not. It is therefore wrong to direct an attack against those who merely serve the combatants' needs as human beings...."<sup>33</sup>

It is crucial to note that terrorists themselves do not have to believe those targeted to be innocent, as they may believe all members of the attacked group to be guilty through some doctrine of collective guilt.<sup>34</sup> If an outside observer

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<sup>31</sup> Ibid., 160.

<sup>32</sup> Kai Draper, *War and Individual Rights: The Foundations of Just War Theory* (New York: Oxford University Press, 2015), 203-205.

<sup>33</sup> Thomas Nagel, "War and Massacre," *Philosophy & Public Affairs* 1, no. 2 (Winter, 1972): 140.

<sup>34</sup> McMahan, "War, Terrorism, and the 'War on Terror,'" 160.

does not see those attacked as guilty of some crime that made them liable for the attack, the act could be considered terrorism regardless of whether the attacker believes the victims to have been guilty. Terrorist recruitment literature often suggests that, for instance, every citizen of a country is collectively guilty for the state's foreign policy. The definition of "innocence" set out above demonstrates the moral problem inherent to the notion of collective guilt: while most members of a society may contribute in some way to violence against or a policy unfavorable to the terrorist group, only those who contribute most directly to the threat are liable to be attacked as this liability is born out of the attacker's right to self-defense: one becomes liable to attack when one becomes a threat to others, either directly by wielding arms or indirectly by supplying arms, which roots the right to use force in a general notion of self-defense.

Another key aspect of the definition described thus far is that terrorism involves *intentionally* targeting the innocent. While other acts may inadvertently kill civilians, such force is still different from terrorism though no less tragic.<sup>35</sup> When civilians die in a planned attack as "collateral damage," even if the attacker knew the risk of civilian death, the attack is not defined as terrorism so long as it was not intended to kill non-combatants nor meant to influence political decisions by instilling terror, but rather to destroy a military target.

Terrorist attacks – though frequently in symbolic locations – are random. Terrorists do not aim for specific people, but rather attempt to instill fear by

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<sup>35</sup> Cronin, "Behind the Curve," 33.

giving the impression that no one is safe from harm, regardless of their own actions. Thus the true aim of terrorist attacks is not to affect “the victims who are killed or maimed in the attack, but rather the governments, publics, or constituents among whom the terrorists hope to engender a reaction – such as fear, repulsion, intimidation, overreaction, or radicalization.”<sup>36</sup> Acts that are defensive (i.e. acts meant to prevent a person from harming someone) are not terrorist attacks, even if the attacker was mistaken about the victim’s intention to commit harm and the victim was therefore innocent.<sup>37</sup> Terrorist attacks are meant to affect others besides the immediate targets, to generate a reaction from a group (normally a political entity) or to “[manipulate] political attitudes,”<sup>38</sup> *not* to physically defeat the enemy. Thus, if the victim of the attack was the ultimate target of the attack, the attack is not terrorism. Indeed, since the terrorist acts considered here are the weapon of the weak, the goal of terrorist acts “is psychological and symbolic, not material,”<sup>39</sup> since the group is incapable of doing enough physical damage to defeat its opponent.

Because terrorist acts are not primarily targeted at the victims themselves but rather at the larger group to which the victims belong, the location of the attack tends to have symbolic significance in order to heighten the attack’s psychological impact on the larger group.<sup>40</sup> Since non-state actors use terrorist tactics primarily because their shortage of weapons and manpower limits their

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<sup>36</sup> Ibid., 32.

<sup>37</sup> McMahan, “War, Terrorism, and the ‘War on Terror,’” 160-161.

<sup>38</sup> Martha Crenshaw, *Terrorism, Legitimacy and Power: The Consequences of Political Violence* (Middletown, CT: Wesleyan University Press, 1983), 5-9.

<sup>39</sup> Ibid., 2.

<sup>40</sup> Louise Richardson, *What Terrorists Want: Understanding the Enemy, Containing the Threat* (New York: Random House, 2006), 4-5.

options, attacks need to be as dramatic as possible to make the most of the relatively weak physical impact terrorist groups are able to cause; symbolic targets allow terrorists to “gain more attention than any objective assessment of their capabilities would suggest that they warrant.”<sup>41</sup> Terrorist groups in the last few decades have also increased their impact by capitalizing on modern media: people have constant access to the news and are unable to resist the sensationalist coverage that inevitably follows terrorist attacks, and since people pay attention to stories on terrorism, news outlets cover the attacks disproportionately to the damage they yield.<sup>42</sup>

Last, while perhaps a small addendum, an act is only considered terrorism if it is political in nature. Other acts that target the innocent are simply crimes, not terrorism.<sup>43</sup> At its root, terrorism involves “the commission of outrageous acts designed to precipitate political change.... [T]errorism is about justice, or at least someone’s perception of it, whether man-made or divine.”<sup>44</sup> While the goals of a political (or terrorist) group may not be immediately clear to the victims or to the group they represent, an act is terrorism only if it can be understood as intended to alter the political landscape.

Two distinctions frequently used in definitions of terrorism may be problematic: the distinction between terrorism and guerrilla warfare, and the distinction between nationalist terrorism and transnational/millennial

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<sup>41</sup> Ibid.

<sup>42</sup> Michelle Sloan, “Responses to Media Coverage of Terrorism,” *Journal of Conflict Resolution* 44, no. 4 (2000): 519-522.

<sup>43</sup> Louise Richardson, *What Terrorists Want*, 4.

<sup>44</sup> Cronin, “Behind the Curve,” 33.

terrorism. Louise Richardson's definition of terrorism makes the first questionable distinction. She writes, the "most important defining characteristic of terrorism is the deliberate targeting of civilians. This is what sets terrorism apart from other forms of political violence, even the most proximate form, guerrilla warfare."<sup>45</sup> Gross writes that this understanding of terrorism as distinct from guerrilla warfare, in which "irregular combatants ... wear identifying insignia and attack military targets while observing some modicum of the law of armed conflict,"<sup>46</sup> is impractical when trying to differentiate between real guerrilla and terrorist groups (especially since some guerrilla groups do target civilians) and "ignores both the historical development of twentieth-century guerrilla warfare" and the fact that some (though not all) guerilla groups used terrorist tactics.<sup>47</sup> The vilification of terrorists as opposed to guerrilla "freedom fighters" is thus perhaps fueled more by a moral judgment of the justice of a fighter's cause than by an objective moral evaluation of the fighter's tactics.

Gross himself differentiates between nationalist terrorist groups (e.g., Hamas) and transnational terrorist groups (e.g., al Qaeda):

Nationalist terrorism is a carryover from anti-colonial warfare and is among the violent means that guerrilla organizations use against the reigning political power to achieve independence or self-determination.... Transnational terrorism, in contrast, does not usually speak to any national goal but, instead, to a pan-religious or pan-national ideal that looks beyond the boundaries of the traditional nation-state.... National guerrilla movements strive for a just cause.... Transnational movements, on the other hand, are about subjugation, not freedom. They thrive on discord and disruption and seem to seek nothing more than the ruin of

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<sup>45</sup> Louise Richardson, *What Terrorists Want*, 6.

<sup>46</sup> Gross, *Moral Dilemmas of Modern War*, 7.

<sup>47</sup> *Ibid.*

Western interests. Without just cause of any kind, there is certainly no room to express understanding of their methods.<sup>48</sup>

While the distinction between group types is valid when considering a group's motivation and thus the appropriate counterterrorism strategy, the moral judgments that only nationalist groups may employ immoral tactics imposes a dangerous Western viewpoint. While the goals of nationalist groups may make significantly more logical sense in a state-centered framework, the idea that transnational terrorist organizations are not also working towards goals (though we may never understand them nor be able to reconcile the goals with our own moral agendas) falsely represents these groups as impossible to understand and the conflict unsolvable except by killing all members of the organization. Gross makes no convincing argument as to why nationalist groups have a more just cause than transnational groups, nor does his argument convincingly show that a just cause (e.g., a nationalist cause) makes it permissible to target innocent people. Though we may judge a particular group's goals as morally wrong or evil, the insinuation that these groups lack an underlying logic pits "us" against "them" in a blind, uncomprehending clash of civilizations. If we claim terrorists' have no logical basis for resorting to terrorism, then the groups are portrayed as innately evil, and peace with them therefore impossible. To a large extent, the terrorist strategy of all non-state groups (nationalist and transnationalist alike) can be understood in the same way, as the next section will demonstrate.

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<sup>48</sup> Ibid., 181.

## WHY TERRORISM? KILLING THE INNOCENT AS STRATEGY

Though specific goals have changed over time, the primary objectives of terrorist groups in the last two centuries have been “regime change, territorial change, policy change, social control, and status quo maintenance.”<sup>49</sup> However, non-state groups are too weak for states to take notice of their demands for serious changes such as these. To understand why non-state groups choose terrorism to influence change, two questions must be answered: first, why do both state and non-state groups in asymmetric conflicts tend to use tactics widely considered to be immoral, though these tactics tend not to be used in conventional warfare? and second, of all possible strategies, why do these groups choose to target noncombatants, and how do they hope their enemies will respond?

In the conventional warfare that just war theory was designed to address, adversaries typically have similar resources at their disposal and thus employ similar tactics with comparable levels of destructive power. It is this equality that “often forms the basis for mutual restraint and the impetus for agreements and long-standing conventions that regulate the development, manufacture, and use of various weapons ... and protect the rights of combatants and noncombatants alike.”<sup>50</sup> In today’s asymmetric conflicts, state actors are matched against non-state adversaries with vastly unequal resources; the sides choose different tactics to maximize the effect of their resources and because,

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<sup>49</sup> Andrew H. Kydd and Barbara F. Walter, “The Strategies of Terrorism,” *International Security* 31, no. 1 (Summer, 2006): 52.

<sup>50</sup> Gross, *Moral Dilemmas of Modern War*, 8-9.

given how unequal the resources are, it would be impossible to fight in the same way as their adversaries. There is no incentive for opponents to change the way they fight: each side already employs tactics that utilize their unique resources, and altering their methods would mean giving their adversaries the advantage.<sup>51</sup> As Michael Gross explains, “It is not that [asymmetric adversaries] do not wish to follow reciprocal rules, but they cannot.”<sup>52</sup> He sees the use of tactics like torture by the state actor and terrorism by the weak as the emergence of “new rules ... that balance the interests of the participants in a different way,”<sup>53</sup> rather than a simple relaxation of the moral norms regulating the use of force in wartime. Non-state actors use terrorism because it is one of the only tactics available to them that exploits their adversary’s weakness: the state must protect its people in order to maintain their support, thus states may give non-state groups what they want in order to stop violence and maintain their citizens’ goodwill. In response, state actors deem non-state actors unjust combatants, using this distinction (and claims of national security) to justify using morally questionable tactics in return.

In a different understanding of asymmetric warfare outlined by A.P.V. Rogers, tactics such as terrorism don’t emerge in modern warfare as a response to unequal resources, but rather because non-state actors simply don’t care about international law: “[in asymmetric conflict] well-armed and well-trained

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<sup>51</sup> It is not only non-state groups who employ morally questionable tactics meant to take advantage of their unique strengths; state actors in asymmetric conflict use torture, blackmail, and assassination.

<sup>52</sup> Ibid., 9.

<sup>53</sup> Ibid.



and disciplined forces, duty bound to act lawfully, are opposed by irregular forces that are lightly armed, more loosely structured and for whom respect for the law is not important.”<sup>54</sup> This point is observed by David Rodin, who views the weaker, non-state adversary as an “asymmetric actor” that is likely to employ “non-conventional tactics to counter the overwhelming conventional military superiority of an adversary.”<sup>55</sup> He defines asymmetric tactics as those employed by the weaker side in order to obtain “a strategic advantage from a position of conventional military weakness by subverting the paradigm of war which has become accepted, particularly in the developed Western countries.”<sup>56</sup> This understanding frames asymmetric conflict as warfare in which one actor – the weak actor – employs morally questionable tactics to gain an advantage against a conventional state actor. Perhaps non-state actors *do* employ such tactics because respect for the law isn’t important to weak adversaries in a disadvantaged position. Regardless, this definition of asymmetric conflict is flawed. Such an understanding ignores the methods condemned by just war theory that are employed by the stronger state actor in conditions of unequal warfare. Tactics such as torture, assassination, and blackmail are embraced by so-called conventional adversaries as a way of using the inequality of resources to their advantage, despite the tactics’ violations of just war theory. Rodin and Rogers might be right in arguing that the abandonment of just war theory

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<sup>54</sup> A.P.V. Rogers, “Unequal Combat and the Rule of Law,” *Yearbook of International Humanitarian Law* 7 (2004): 4.

<sup>55</sup> David Rodin, *The Ethics Of War: Shared Problems In Different Traditions* (Surrey: Ashgate, 2006), 154.

<sup>56</sup> *Ibid.*

begins with the non-state actors' refusal to adhere to a doctrine that favors their adversaries. However, this refusal in asymmetric conflict leads to the employment of unconventional tactics by state actors, as well, oftentimes because they claim that non-state actors do not have the right to fight.

Since the weakness of non-state actors limits their options, terrorism is chosen as a group strategy largely on instrumental grounds. As Martha Crenshaw writes:

The argument that terrorist behavior should be analyzed as "rational" is based on the assumption that terrorist organizations possess internally consistent sets of values, beliefs, and images of the environment. Terrorism is seen collectively as a logical means to advance desired ends. The terrorist organization engages in decision-making calculations that an analyst can approximate. In short, the terrorist group's reasons for resorting to terrorism constitute an important factor in the process of causation.<sup>57</sup>

This is not to discount psychological motivations that drive individuals to participate in terrorist organizations, but merely to demonstrate the importance of logic in the decision to use terrorism; if terrorism were no longer strategically beneficial for groups because state actors stopped playing into terrorists' hands (e.g., by fearfully refusing to allow refugees to enter a state, thereby forcing them to return to the area controlled by a more state-like terrorist group such as ISIS), groups would be much less likely to employ terrorist tactics (though the small number of extremists who are psychologically motivated to commit these evils may continue to act in this way).

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<sup>57</sup> Martha Crenshaw, "The Causes of Terrorism," *Comparative Politics* 13, no. 4 (July 1981): 379-385.

While some terrorists are certainly motivated by psychopathology, others see terrorism as rational not simply out of means-ends calculations but because of their overriding collectivistic moral values. In other words, terrorism is dangerous and individuals do not necessarily participate because they believe their lives are likely to be bettered by participating; rather, individuals participate because they privilege the goals and future of the group over their own safety. Though terrorism has a high cost and low reward for the individual, rational individuals nonetheless choose terrorism because of *collective* rationality. Crenshaw argues, “People realize that their participation is important because group size and cohesion matter. [Members of terrorist groups] are sensitive to the implications of free-riding and perceive their personal influence on the provision of public goods to be high.”<sup>58</sup> Individuals can be aware that their action on its own will not change the status quo, but that the power of the group depends on them sacrificing their needs for the good of the organization. In a piece that influenced Crenshaw’s theory of terrorist logic, Muller and Opp wrote:

Average citizens may adopt a collectivist conception of rationality because they recognize that what is individually rational is collectively irrational – that if people like themselves were individually rational free riders, the likelihood of the success of rebellious collective action would be very small, and that, therefore, it is collectively rational for all to participate, even though the objective probability of a single individual influencing the outcome is negligible.<sup>59</sup>

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<sup>58</sup> Martha Crenshaw, “The Logic of Terrorism: Terrorism Behavior as a Product of Strategic Choice,” in *Origins of Terrorism: Psychologies, Ideologies, Theologies, States of Mind*, ed. Walter Reich (Washington, DC: Woodrow Wilson Center Press, 1998), 8-9.

<sup>59</sup> Edward N. Muller and Karl-Dieter Opp, “Rational Choice and Rebellious Collective Action,” *The American Political Science Review* 80, no. 2 (June 1986): 484.

In their study on collective rebellious action, Muller and Opp paradoxically found that individuals who believed their participation was likely to be costly were somewhat more likely to participate than those who did not believe there to be a high risk in their participation.<sup>60</sup> While the study doesn't make any attempt to explain this, this conclusion confirms the hypothesis that individuals are more likely to join terrorist groups if they believe the enemy is truly evil and therefore the group is more deserving of their participation in spite of the risks to them personally. (As will be elaborated in Chapter 2 Part 2, this is part of how torture plays into the hands of terrorist organizations: individuals who know the enemy employs cruel tactics will be more likely to join groups whose goal is to destroy this enemy, though in the process individuals will themselves risk being tortured.) Individual terrorists may also consider how their actions – and, possibly, their self-sacrifice – will inspire future resistance; they find that which will help the group in the long-term more important than either what is good for the individual or in the short-term.<sup>61</sup> Thus we see that terrorists are often motivated by a sense of duty or responsibility and by the ideals they hold, which gives rise to reasons for action that do not conform to the typical economic model, in which people act rationally and are motivated only by self-interest. Even though the individual terrorist knows they are likely to be repressed due to the superior power of state actors in the conflict, they do not believe this makes their action pointless.

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<sup>60</sup> Ibid., 488.

<sup>61</sup> Crenshaw, "The Logic of Terrorism," 17.

When deciding what tactics to use, non-state groups must take into account that they are not only weak in terms of weaponry, but they are small in number (possibly because of government repression or possibly because their extreme demands attract few supporters). While other strategies may have been tried before terrorism, their weakness makes it unlikely that most other tactics will be effective, especially if the government is repressive. Terrorists may also be working against time constraints,<sup>62</sup> and other tactics available to them that would be equally effective may require more time than is available or than the terrorists would like to spare.

But why do these groups believe terrorism will work, and what is terrorism strategically meant to accomplish if terrorist decision-making truly is based on more than pathological impulses? While a terrorist attack (or even a series of attacks) may not immediately achieve all the goals of a group, terrorism can be effective in several crucial ways. First, terrorism gets attention and thus can put the political changes the group demands on the public agenda; since the group is relatively powerless, the group's goals likely weren't a widespread topic of conversation before an attack.<sup>63</sup> Terrorists tend to target symbolic locations so that attacks will be heavily publicized, both in order to gain attention for the group's political goals, and to make the group seem more powerful than it is. In reality, terrorist groups are far too weak to defeat their enemy through fighting alone,<sup>64</sup> but they "are sometimes strong enough ... to persuade audiences to do

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<sup>62</sup> Crenshaw, "The Logic of Terrorism," 13.

<sup>63</sup> *Ibid.*, 17.

<sup>64</sup> Kydd and Walter, "The Strategies of Terrorism," 50.

as they wish by altering the audience's beliefs about ... the terrorist's ability to impose costs and their degree of commitment to their cause.”<sup>65</sup>

Since non-state groups operate from a place of weakness, they cannot achieve their goals through normal negotiation with a state actor without scaring the state into making concessions. Terrorism is often seen as the only tactic available to convince state actors to make the political changes the group demands.<sup>66</sup> Given their weakness, it is difficult for non-state groups to make threats that will be taken seriously; thus non-state groups use terrorism to show the state and its citizens how far they will go to obtain their goals.<sup>67</sup> This strategy, known as attrition, is meant to persuade the enemy through highly publicized attacks that the group is strong enough to do considerable damage if their political demands are ignored.<sup>68</sup> In this way, terrorists hope to “shift the balance of power in their favor and, over time, to shift the bargaining range closer to their ideals.... The object is not to bargain over what is acceptable today, but to change the range of what is acceptable tomorrow.”<sup>69</sup> In other words, a singular terrorist attack is not expected to achieve the group’s goals; through repeated violence, though, terrorists hope that their adversaries will eventually start making concessions until the group’s long-term goals – once impossibly far-fetched – come into view.

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<sup>65</sup> Ibid., 50-51.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> David A. Lake, “Rational Extremism: Understanding Terrorism in the Twenty-First Century,” *Dialogue IO* 1, no. 1 (January 2002): 19.

Since terrorist groups aren't strong enough to defeat their adversary by only attacking targets that just war theory deems legitimate, they seek instead to "prepare the ground for active mass revolt by undermining the government's authority, and demoralizing its administrative cadres—its courts, police, and military,"<sup>70</sup> thus creating a sense of insecurity in the people. If citizens do not feel safe and do not trust their government to protect them, the country becomes virtually ungovernable; terrorist groups hope that this will force the regime to make concessions.<sup>71</sup> But how do small, radical groups garner enough support to wage a campaign that will undermine governmental authority?

Before making concessions to the group, the government may increase repression to try to contain the terrorist threat and to re-exert control in the eyes of those who have lost faith in the government's ability to provide security. Increased repression, perhaps counter-intuitively, is often an immediate goal of terrorist attacks because the government presents itself as abusive and therefore deserving of terrorist opposition: "Terrorists often think that by provoking indiscriminate repression against the population, terrorism will heighten popular disaffection, demonstrate the justice of terrorist claims, and enhance the attractiveness of the political alternative the terrorists represent."<sup>72</sup> Thus by creating chaos, terrorists hope to increase governmental repression which will in turn increase recruitment; after enough people have joined the group and the group has successfully completed enough attacks, it may be seen as threatening

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<sup>70</sup> Crenshaw, "The Logic of Terrorism," 18.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid., 19.

enough to the state's ability to maintain control for that the still will make concessions.

There are two competing strategies at play here, both meant to increase recruitment: intimidation (in which the people fear the terrorists and thus feel pressured to join the terrorist group) and provocation (in which people *want* to join the terrorist group because they are angry at the government and are attracted to the terrorists' goals). Through intimidation, groups persuade the people (rather than the state) that the group is strong, that it will punish disobedience, and that it cannot be stopped by the government. Likewise, terrorists aim is to dissuade people from cooperating with the government and thus weaken its power. Provocation, on the other hand, "is an attempt to induce the enemy to respond to terrorism with indiscriminate violence, which radicalizes the population and moves them to support the terrorists"<sup>73</sup> not just physically (as with intimidation) but mentally. Both techniques are meant to persuade the people to follow the terrorists' wishes and thus strengthen the group to the point that the government cannot ignore its demands.<sup>74</sup>

Andrew Kydd and Barbara Walter's study of the goals of terrorist groups and the strategies they use to achieve them revealed two final strategies of terrorist groups: spoiling and outbidding.<sup>75</sup> Spoiling (a strategy employed by Hamas when it carried out attacks to end negotiations between Israel and Fatah) is "an effort to persuade the enemy that moderates on the terrorists' side

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<sup>73</sup> Ibid.

<sup>74</sup> Kydd and Walter, "The Strategies of Terrorism," 50-51.

<sup>75</sup> Ibid., 49-80.



are weak and untrustworthy, thus undermining attempts to reach a peace settlement.”<sup>76</sup> Outbidding occurs when multiple groups are fighting the state with different views of how the state should be governed or who should hold power, and a group wants to demonstrate to the public that it is stronger and better able to destroy the enemy than its rivals.<sup>77</sup>

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<sup>76</sup> Ibid., 50-51.

<sup>77</sup> Ibid., 51.

## PART 2: THE MORALITY OF TERRORISM

Particularly after September 11<sup>th</sup>, terrorism has come to be a morally loaded concept. Some revisionists have argued, though, that terrorism can be morally justified and that it isn't as distinctive from acts of war that just war theory considers to be permissible. Terrorists are seen as evil by definition, but questions of non-combatant immunity (particularly in light of state violations of the same principle) and of whether prohibited acts are permissible when the cause is just (e.g. overthrowing an abusive regime) must be answered without merely appealing to the pro-state definition of terrorism as absolute evil in an age of asymmetric conflict.

Given Gross' understanding of asymmetric conflict, the use of morally questionable, non-conventional tactics by both sides seems inevitable in modern warfare due to the unequal distribution of resources between state and non-state adversaries. In this view, the inevitability of non-conventional methods necessitates the reinterpretation of the ethical doctrine of warfare; without a revisionist theory, even non-state groups with just causes are criminalized because the current rules were established to benefit state actors. In the absence of a world political authority, there is no lawful procedure to change practices that have come to be seen as unjust, thus non-state actors must be able to wage war to change these practices. Revisionists such as Gross argues that if we accept that there are instances in which non-state actors could have a just cause for war, we must regulate war so that these groups can try to address their

grievances without being criminalized as unlawful combatants. If the rules of war are not changed to allow non-state groups to fight then, in effect, whatever unjust situation the non-state group hoped to change – likely an unjust situation being imposed by violence or force in the form of the military might of the existing regime – will continue to exist since non-state groups that take up arms to address the injustice will have no effective tactics available to them. Given these assumptions, Gross finds that tactics that are wrong under traditional just war theory may be morally right under revised just war theory; since all groups with just causes have the right to have their grievances heard, certain terrorist tactics undertaken by groups with just causes are, possibly, morally right (or at least permissible) given the asymmetric nature of the conflict.<sup>78</sup> It is these revisionist claims that must be morally considered in today's asymmetric conflict.

From a Kantian viewpoint, terrorism can never be justifiable because it uses people as a means to an end: terrorists use those killed in attacks as a tool to send a message to politicians or to frighten the population at large into submission. Thomas Nagel writes,

The core moral idea is a prohibition against *aiming* at the death of a harmless person. Everyone is presumed to be inviolable in this way until he himself becomes a danger to others; so we are permitted to kill in self-defense, and to attack enemy combatants in war. But this is an exception to a general and strict requirement of respect for human life. So long as we are not doing any harm, no one may kill us just because it would be useful to do so. This

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<sup>78</sup> Gross, *Moral Dilemmas of Modern War*, 182-198.

basic respect is owed to *every* individual, and it may not be violated even to achieve valuable long-term goals.<sup>79</sup>

It does not matter how just the terrorist's cause; terrorists fail morally by not considering humans as ends in themselves. Those targeted are not treated as people with feelings, needs, and rights but rather as instruments through which the terrorists can satisfy their own needs or find respect for their rights.

While the Kantian position condemns terrorism unconditionally, not all find it entirely convincing. According to consequentialism, terrorism can be justified if and only a group can show that terrorism will successfully achieve the group's goal; that the goal is "so valuable as to justify all that the terrorist does on the way to achieving it"; and that no other, more morally acceptable methods could achieve the same goal.<sup>80</sup> To determine whether consequentialism can be used to justify terrorism in normal circumstances (i.e. not in a supreme emergency), we must examine each of these requirements. The first requirement for terrorist groups is likelihood of success. Can terrorist groups achieve their goals through attacks on noncombatants? Igor Primoratz writes,

Terrorists do not always have at their disposal the option of *attacking* military targets of the enemy, rather than innocent people. But this does not mean that they can always *achieve* their objectives by doing so. And it is the achievement of the objective that, for a consequentialist, constitutes the moral justification for terrorism.<sup>81</sup>

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<sup>79</sup> Thomas Nagel, "What is Wrong with Terrorism?" in *Contemporary Moral Problems*, ed. James E. White (Boston: Wadsworth Publishing, 1999): 39.

<sup>80</sup> Igor Primoratz, "The Morality of Terrorism," *Journal of Applied Philosophy* 14, no 3 (1997): 223.

<sup>81</sup> *Ibid.*

Is terrorism likely to be successful? If not, the consequentialist justification fails. After arguing that some terrorism is justifiable, Kai Nielsen points to successful terrorist operations in Algeria and Northern Ireland, contrasting these with the failures of the Red Brigades and the Bader-Meinhof group.<sup>82</sup> However, these carefully selected examples make terrorism seem more effective than it really is. Audrey Kurth Cronin conducted a study of how terrorist campaigns have ended in the last century. While she found that groups do sometimes disband or abandon terrorist tactics because they have achieved their aims, only a small minority of terrorist groups do so. Most of the groups that have succeeded have either had narrow, clearly defined objectives that could be obtained without too great a cost that are much more limited than those of today's terrorist groups (such as in industrial disputes<sup>83</sup>) or were facing colonial powers that were no longer willing to expend sufficient resources to maintain the colony (as was the case with Algeria).<sup>84</sup> Of the 29 groups she studied in depth, only two fully achieved their goals through terrorism. Max Abrahms' study of every foreign terrorist organization as defined by the US State Department revealed even more damning evidence of the inefficacy of terrorism: it is increasingly rare for contemporary terrorist groups to achieve their policy aims *regardless of* the nature of their goals.<sup>85</sup> Groups like ISIS with broad, vaguely defined goals that would be incredibly costly for powers in the region to accept are extremely

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<sup>82</sup> Kai Nielsen, "On the Moral Justifiability of Terrorism (State and Otherwise)," *Osgoode Hall Law Journal* 41, no. 2/3 (2003): 442.

<sup>83</sup> Walter Laqueur, *Terrorism* (Boston: Little Brown, 1977), 118.

<sup>84</sup> Audrey Kurth Cronin, "How al-Qaida Ends: The Decline and Demise of Terrorist Groups," *International Security* 31, no. 1 (Summer 2006): 24-25.

<sup>85</sup> Max Abrahms, "Why Terrorism Does Not Work," *International Security* 31, no. 2 (2006), 75-78.

unlikely to be successful, and thus the consequentialist justification is unlikely to apply – regardless of whether the cause is just – because terrorist attacks will do more harm than good.

The second requirement for terrorism to be justified on consequentialist grounds speaks to a problem within consequentialism itself: the goal must be valuable enough to justify violence against innocent people, but it is difficult (if not impossible) to establish a universally accepted theory of value that will determine if this is the case. Because consequentialism lacks a theory of value, many different and conflicting interpretations of “so valuable as to justify all that the terrorist does” are possible. What to one group seems impossible to live without could very well be seen to another group as a violation of its rights.

Isaiah Berlin wrote,

[H]uman goals are many, not all of them commensurable, and in perpetual rivalry with one another. To assume that all values can be graded on one scale, so that it is a mere matter of inspection to determine the highest, seems to me to falsify our knowledge that men are free agents, to represent moral decision as an operation which a slide-rule could, in principle, perform.<sup>86</sup>

While his theory that value is plural and no group of people can determine the correct value to maximize is controversial and likely impossible to prove, there is reasonable disagreement among humans as to what singular value (or ordering of values) is correct. Because of this, it is unlikely that there will be agreement among rational persons on a theory of value that could be used to determine whether a goal has sufficient value to override individual rights. I analyze this problem further in the next chapter, but it is crucial to note that this failure

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<sup>86</sup> Isaiah Berlin, *Four Essays on Liberty* (New York: Oxford University Press, 1969), 171

demolishes the consequentialist's attempt to justify terrorist attacks as necessary to attain some subjective "good" that is more important than the violation of human rights.

The third requirement for a consequentialist justification is that the group couldn't achieve its goals through methods that did not encroach on the human rights of innocents. Terrorists have few – if any – other options due to lack of advanced weaponry and manpower. Their ability to target legitimate (i.e. military) targets is low. But are there no other options? While the following argument will be made more fully in the "Conclusion," Erica Chenoweth and Maria Stephan found through a statistical analysis of resistance movements from 1900 to 2006 that nonviolent campaigns were more than twice as effective as violent ones in achieving their goals.<sup>87</sup> Because nonviolent resistance movements are more attractive to those morally opposed to or afraid of joining violent groups, the movements tended to be larger and more diverse, and thus able to put more effective pressure on the state. In light of this analysis, while not impossible for terrorist groups to effectively force change, there are likely very few situations in which terrorism is the only option and in which terrorism has reasonable prospects of success.<sup>88</sup> The situations in which terrorism has potential to work – situations with very limited goals or nationalist movements where resistance has widespread support – are the very situations in which

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<sup>87</sup> Erica Chenoweth and Maria J. Stephan, *Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict* (New York: Columbia University Press, 2012), 7-10.

<sup>88</sup> The next chapter on torture more completely addresses problems with the theory of consequentialism itself, and thus shows that even if a group can meet all the requirements proposed by consequentialism to justify a terrorist attack, the deficiency of the moral theory makes its justification of the attack inconsequential.

nonviolent resistance has proven the most effective. Since terrorism can only be justified on consequentialist grounds when it is a last resort, i.e., after less harmful tactics have been tried and failed, it is highly unlikely that terrorism will be successful in situations in which nonviolent resistance was unable to effect change.

While most justifications of terrorism are consequentialist in form, some who see terrorism as morally indistinct from other acts of violence have pursued other justifications. Virginia Held combines consequentialism with deontological ethics and the ethics of care to argue that the limited use of terrorism can be justified if and only if it is the only way for securing the effective respect of basic human rights of all in a society (essentially the consequentialist requirement) *and* the terrorist attack by those whose rights had been violated was directed only towards those whose rights had been respected originally.<sup>89</sup> In essence, Held adds a sort of distributive justice requirement to consequentialism: terrorism must not only create an overall better outcome for the society, but its justification also requires that harm not befall those whose rights have already been systematically abused. She writes,

It is reasonable to conclude that, on grounds of justice, it is better to equalize rights violations in a transition to bring an end to rights violations than it is to subject a given group that has already suffered extensive rights violations to continued ... violations, if the degree of severity of the two violations is similar.... If we must have rights violations, a more equitable distribution of such violations is better than a less equitable one.<sup>90</sup>

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<sup>89</sup> Virginia Held, *How Terrorism Is Wrong: Morality and Political Violence* (New York: Oxford University Press, 2008), 84.

<sup>90</sup> *Ibid.*, 88.



Even disregarding the moral issues her argument brings up, the situation Held presents in which a persecuted group is presented with two strategies that would lead to the same just world, one that would further injure the persecuted and one that would equally injure people outside of the persecuted group, is difficult to imagine playing out in reality. However, since the other flaws in her logic are commonly found in terrorist justifications, as well, it is useful to fully explore her reasoning.

Unfortunately for non-state groups fighting oppression, such a justification does not stand using the human rights framework Held hopes to uphold. Human rights apply to individuals, and as such, individual human rights cannot be sacrificed in favor of a more just distribution of rights for a group. As Igor Primoratz writes,

[Am I not] a person in my own right, that my life is the only life I have and all I have, and that nobody may take it away, nor ruin it by making me a cripple, for the sake of a more just distribution of, and subsequently more general respect for, the rights to life and bodily security within a group of people? My life and at least some of my basic human rights amount to more than mere membership in a group of holders of rights. The value and significance of my life is not derived from my membership in a group. Nobody may sacrifice it to the group.<sup>91</sup>

While Held's argument may stand in terms of certain rights, the right not to be killed or seriously injured when one does not pose a threat and has not done anything to warrant such treatment is absolute; these human rights –rights that protect each individual person – cannot be traded for the good of society. She responds to this by writing, “Arguments for achieving a just distribution of

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<sup>91</sup> Primoratz, “The Morality of Terrorism,” 231.

rights violations need not be arguments ... that are more than incidentally about groups. They can be arguments about individuals' rights to basic fairness."<sup>92</sup> But when rights come into conflict with each other, the most important and inalienable must be privileged above all else; in this case, individuals' right to life must come before the right to basic fairness.

Due to her failure to acknowledge rights of the individual, Held opens the door to indiscriminate violation: just war theory's distinctions between combatants and noncombatants vanish in her argument, and all citizens are incriminated in a wave of collective guilt. She justifies eliminating non-combatant immunity by arguing that oftentimes "civilians may have demanded of their governments the very policies that opponents are resisting."<sup>93</sup> She is particularly critical of those residing in abusive democracies "where citizens elect their leaders and are ultimately responsible for their government's policies," claiming that "it is not clear that citizens should be exempt from the violence those policies lead to while the members of their armed services are legitimate targets."<sup>94</sup> Terrorist groups frequently use this defense of terrorism: "innocent" people were not targeted, because every citizen of a country is seen as guilty of, at the very least, supporting or permitting the actions of the government if not actively participating in the government's oppression of the group. But even if a person became guilty for human rights violations for at one time voting for a politician who supported abusive policies, not everyone in a democracy voted for

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<sup>92</sup> Ibid., 89-90.

<sup>93</sup> Ibid., 20.

<sup>94</sup> Ibid.

that politician. Even among those who voted for the politician in question, the voter could have been misled by false promises before the election. Collective guilt of the portion of the population whose rights are respected means that merely participating in democratic processes whose outcomes are unjust policies implicates citizens in those unjust policies, even though they may have opposed them. This idea of collective guilt renders citizens who have opposed unjust policies liable to be harmed to the same degree as those who have enabled the policies to be enacted. There is no logical nor moral basis for such a claim (though terrorist groups may applaud Held's flawed logic).

Held's purported justification of terrorism holds that innocent people are legitimate targets. But people only become morally legitimate targets because of others' right to self-defense. By definition, innocent people are not putting the attacker at risk of bodily harm or death. Coady writes that

we can only be justified in killing someone (leaving aside the difficult case of capital punishment) if they are actually engaged in prosecuting an attack upon us or others or engaged in some similar project involving the infliction of gross injustice. They then become legitimate targets for our essentially defensive violence.<sup>95</sup>

Members of the armed forces are not the only legitimate targets: those working at munitions factories or otherwise actively helping to oppress or endanger the attacking group can justifiably be targeted. Individuals who can be implicated in a chain of agency leading to the attack are legitimate targets, regardless of whether they fall into the strict category of "combatants." To target innocents, though, means violating fundamental rights; even if a terrorist group has a just

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<sup>95</sup> C. A. J. Coady, "The Morality of Terrorism," *Philosophy* 60, no. 231 (1985): 59.

cause, they cannot deprive innocent people of human rights. This critical distinction between legitimate and illegitimate targets and the failure of terrorists to respect individual rights, is the heart of why terrorism, as a general rule, is not justifiable.<sup>96</sup>

Terrorism is wrong, but how can states engaged in counterterrorism condemn groups for a practice that they also engage in? As Held notes, “one cannot effectively criticize the terrorism of those Third World revolutionaries who consider various terrorist acts to be admirable unless one also criticizes the terrorist acts of counterterrorism campaigns carried out by one’s government.”<sup>97</sup> In order to condemn terrorism in a principled way, it is necessary to also condemn morally equivalent acts by state actors. Terrorist attacks, unlike attacks against legitimate targets that result in the death of innocent people as “collateral damage,” are defined by the intention of the perpetrators to strike or attack noncombatants to send a message and provoke fear. But if a state attack aimed at a legitimate target also kills civilians and the deaths are used as tools to incentivize the enemy, typically an insurgent group, to give up the fight or at least to reduce its scale, is the attack morally distinct from terrorism? Gross notes that “conventional armies often acknowledge the benefits of collateral damage and, in fact, may depend upon them to effectively deter their enemy from future aggression.”<sup>98</sup> Indeed, it is arguable that such indirect harm – however useful it might be – is permitted under the just war doctrine of double

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<sup>96</sup> Whether terrorism and the overriding of human rights can be justified in a supreme emergency is examined in the “Conclusion.”

<sup>97</sup> Held, *How Terrorism Is Wrong*, 77.

<sup>98</sup> Gross, *Moral Dilemmas of Modern War*, 188.

effect, to be discussed below. If terrorism is to be effectively condemned and countered, state actors engaging in counterterrorism cannot fall prey to the same flawed moral reasoning.

A discussion of the doctrine of double effect is necessary in order to understand the moral gymnastics states undertake to justify their acts while condemning their adversaries' and to illustrate the importance of evaluating intentions in warfare. The doctrine of double effect permits the performance of an act likely to have evil consequences (primarily the deaths of noncombatants) as long as the goal of the action is only to destroy or disable a proper military target; in sum, an act that is good or neutral in itself and thus a legitimate act of war can be permitted even if noncombatants are likely to die. In war, it is nearly impossible to ensure that noncombatants will not be killed in legitimate military operations. The doctrine of double effect morally justifies these horrible outcomes provided the actor intends only for the good outcome to occur and not the evil one, and the good effect is sufficiently good to override the evil effect.<sup>99</sup> According to this principle, strategic bombing (such as the bombing of a munitions plant to destroy enemy weapons and thus weaken its military capabilities) could be permissible even though we foresee that it will inevitably kill some innocent people – people in the area who do not work at the munitions plant and pose no threat to the attacker. However, under the doctrine of double effect, *intentionally* killing any noncombatants in an effort to terrorize and

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<sup>99</sup> Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 2006), 153.

provoke surrender is impermissible.<sup>100</sup> But this fails to fully consider the state actor's motivation. Can it really be said that one does not intend consequences that one foresees will (almost) surely result from one's actions? In general, so-called collateral damage is likely to be advantageous to the state (usually for the same reasons that terrorism is employed by non-state groups): "Collateral harm that backs up a deterrent capability or brings other military benefits is no longer unintended harm. Civilian casualties may be a by-product of a legitimate and necessary military operation, but it is an intended by-product that serves a military purpose."<sup>101</sup>

State actors' abuse of the latitude provided by the doctrine of double effect allows them to condemn only those (terrorist) tactics employed by the weaker side in asymmetric conflict. Coady writes,

For one's own State a utilitarian standard is adopted which morally legitimates the intentional killing of non-combatants so that such acts of State terrorism as the bombing of Dresden are deemed to be morally sanctioned by the good ends they supposedly serve. The same people, however, make the move to higher ground when considering the activities of the rebel or the revolutionary and judge his killing of non-combatants by the internal standard. In the case of the revolutionary, the thought is that even if his cause is just and his revolution legitimate, his methods are morally wrong because of what they are or involve. In the case of the State or its instrumentalities this thought is quietly abandoned and replaced by those utilitarian considerations which are denied to the revolutionaries.<sup>102</sup>

The exploitation of the doctrine of double effect and the acceptance of relatively indiscriminate counterterrorism tactics create an artificial and hypocritical

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<sup>100</sup> Frances Kamm, "Failures of Just War Theory: Terror, Harm, and Justice," *Ethics* 114, no. 4 (2004): 653-654.

<sup>101</sup> Gross, *Moral Dilemmas of Modern War*, 188.

<sup>102</sup> Coady, "The Morality of Terrorism," 57-58.

moral boundary between the acceptable and the reprehensible which, unsurprisingly, favors the conventional actor. The inclusion of the principle of proportionality as a condition of the doctrine of double effect implies that if few noncombatants die relative to the value of enemy targets destroyed then the act would be permissible; morally, however, it should not be enough to balance civilian casualties with those of legitimate targets without making a serious effort to minimize civilian casualties, especially when this consequentialist justification is denied to terrorist groups. Conventional actors, in order to retain the moral high ground on which they depend in the fight against terrorism, must denounce the killing of illegitimate targets and act accordingly. Accidents happen and humans make mistakes, but it is essential for states to require the highest degree of care and the utmost respect for human rights from those administering lethal force.

Walzer accounts for the misuse of the doctrine of double effect through a necessary correction: an action that will foreseeably result in the death of noncombatants (or some other evil outcome) is permissible only if “the evil affect is not one of his ends, nor is it a means to his ends, and, aware of the evil involved, he seeks to minimize it, accepting costs to himself.”<sup>103</sup> Only after accepting extra risk to combatants to ensure the safety of civilians can an actor believably claim that the predictable death of civilians was unintentional and, therefore, excusable. Extra measures *must* be taken by the military to ensure that they do not commit the same injustices through their counterterrorism

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<sup>103</sup> Walzer, *Just and Unjust Wars*, 155.

measures as their adversaries do; a military cannot claim not to have intended foreseen and preventable civilian deaths. The moral line between intentionally targeting civilians and targeting only combatants knowing full well that civilians will die is not as bright as many militaries would like to claim.

The US force protection measures during the Iraq War provide examples in which the doctrine of double effect was misused; because the measures were not ill-intended, the damage they did to civilians was considered to be justifiable. Force protection measures required that soldiers at checkpoints throughout Iraq should signal to drivers to stop; fire a warning shot if the driver did not slow; then, if need be, resort to direct fire to disable a driver once the car was a few hundred yards away. In doing so, soldiers at checkpoints killed many unarmed Iraqis out of fear of suicide bombs and rocket-propelled grenades.<sup>104</sup> Similarly, soldiers interviewed reported that convoys “leapt meridians in traffic jams, ignored traffic signals, swerved without warning onto sidewalks, scattering pedestrians, and slammed into civilian vehicles, shoving them off the road.”<sup>105</sup> Because of the convoy drivers’ erratic behavior, “Iraqi civilians, including children, were frequently run over and killed. Veterans said they sometimes shot drivers of civilian cars that moved into convoy formations or attempted to pass convoys as a warning to other drivers to get out of the way.”<sup>106</sup> Soldiers claimed to have used the same tactics such as driving excessively fast

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<sup>104</sup> Jonathan Steele, “Iraq War Logs: Civilians Gunned Down at Checkpoints,” *The Guardian*, October 22, 2010, accessed April 6, 2016, <http://www.theguardian.com/world/2010/oct/22/iraq-checkpoint-killings-american-troops>.

<sup>105</sup> Chris Hedges and Laila Al-Arian, “The Other War: Iraq Vets Bear Witness,” *The Nation*, July 10, 2007, accessed April 6, 2016, <http://www.thenation.com/article/other-war-iraq-vets-bear-witness-0/>.

<sup>106</sup> *Ibid.*



and firing aggressively while on neighborhood patrols to reduce their likelihood of being ambushed.<sup>107</sup> Through these measures, the military maximized the risks to civilians in order to minimize risks to combatants, and in doing so, committed moral wrongs similar to those of terrorist groups. Tactics such as these demonstrate the blurred line of intentionality in force protection measures, and the necessity for Walzer's amended version of the doctrine of double effect under which they would not be permitted.

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<sup>107</sup> Ibid.

## CHAPTER 2: STATE ACTORS

### PART 1: THE TACTICS

#### TORTURE AS A CASE STUDY

Torture is examined here as a case study in parallel to terrorism in which state actors have a reason for deviating from just war theory and human rights norms, just like non-state actors in asymmetric conflict. Torture is just one tactic proposed by just war theory revisionists for use in asymmetric conflict, but it is used here to illustrate why human rights-violating tactics are neither morally permissible nor pragmatic. In some ways torture is unique: there are few other acts, if any, capable of ripping apart a person's very humanity, separating them mind from body. The lasting damage torture leaves touches victims in a much more profound way than any physical scar could, because humans can adapt to life without a limb or with an enduring ache, but we cannot learn to live without knowing what is real, without knowing who we are, and without feeling whole. If we understand human rights to be those protections to which every human is entitled, regardless of race, citizenship, or criminal past, torture is the apex of human rights violations because it deprives the victim of the very things that distinguish us as human. And yet over the course of history, torture has appeared to those in power as excusable or even justifiable.

Torture is used here as a case study in part because its particularly horrifying nature makes its prohibition of a special importance for our civilization. But beyond that, torture must be considered because the scenarios in which we must determine its morality (e.g., the ticking time bomb scenario, which is outlined below) are presented as moral emergencies whose danger and imminence allow tactics to be used that otherwise would not be considered. This imminence makes the argument that torture is moral (or at the very least necessary and excusable) more appealing – and thus all the more important to examine.

Torture is examined here because the way that it functions to destroy a victim's humanity allows it to serve as a sort of metaphor for other tactics that violate human rights. When a government chooses to use airstrikes likely to kill civilians, to arm drones without sufficient information about their targets, to cut off a community's access to information so that it is utterly isolated, and to profile and then deprive those detained of due process, the government chooses to undermine the very things that tie humans together. Trust deteriorates, and humans live in constant fear of violence or of being watched. Through continued repression, states in the War on Terror have worked to destroy communities and everything that makes life worth living for those in affected areas, so that citizens of intervening states feel comfortable in their "national security." It is through the study of torture that we can understand how tactics that violate inalienable rights not only undermine the values their perpetrators claim to protect – the very values on which our society was built – but also are self-

defeating because these tactics will never destroy terrorism, no matter how many terrorists they kill.

## WHAT CONSTITUTES TORTURE?

In his book on the problem of the ticking bomb, Bob Brecher writes that defining torture is dangerous and counter-productive: “Consider the infamous Bybee memorandum, for example, which allows those who advocate the use of torture under other names to manipulate definitions so as to pretend to themselves, and to persuade others, that torture is not torture.”<sup>108</sup> This justification for leaving torture as a “know-it-when-I-see-it” phenomenon, though, is cowardly; rather than refusing to define torture out of fear that the definition will be twisted, we must be explicit about what torture is and hold firm to this definition. Torture advocates are much more likely to get away with immoral techniques if the definition is left ambiguous so that each would-be torturer can define torture for themselves as those tactics that are more brutal than their own. So, in order to develop any convincing argument against torture, we must start by defining the terms in question, and by specifying as much as possible the threshold for judging whether a technique is a form of torture.

As of May 2015, the UN Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (herein referred to as CAT)

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<sup>108</sup> Bob Brecher, *Torture and the Ticking Bomb* (Hoboken, NJ: Wiley-Blackwell, 2007), 4.

has 158 state parties.<sup>109</sup> And yet, neither moral philosophers nor the legal realm have yet to agree on what exactly torture is. The treaty defines torture as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>110</sup>

The definition laid out in the Convention contains four elements: torture includes only those acts which do not arise from lawful sanctions; which cause *severe* mental or physical pain or suffering; which are intentionally inflicted by or at the order of a public official; and which are inflicted for the purposes of punishment, intelligence gathering, coercion, or in practicing discrimination.<sup>111</sup>

Because the treaty is absolutist in nature, its definition of torture must be precisely defined in order to make the Convention acceptable and thus meaningful. The main restriction limiting the scope of the Convention is that the word “torture” is applied only to acts undertaken for a few specific purposes by public officials, and by those acting in an official capacity.<sup>112</sup> The first restriction is arbitrary, meant simply to make the Convention (and an absolute

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<sup>109</sup> United Nations, “Status of Ratification of Convention against Torture.”

<sup>110</sup> Office of the United Nations High Commissioner for Human Rights (OHCHR), “UN Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment,” *OHCHR*, accessed April 6, 2016, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>.

<sup>111</sup> Louis Michael Seidman, “Torture’s Truth,” *University of Chicago Law Review* 72, no. 3 (2005): 888.

<sup>112</sup> *Ibid.*, 889.

prohibition on torture) palatable and practical: countries are excused for prison rape so long as they agree not to torture detainees during interrogations. The second restriction not only absolves states from liability for torture by non-state officials within their borders, but also serves to exclude the state from liability for failures to act (e.g. if the state could prevent the torture of many people by torturing one person, the state is not liable for the torture it could have prevented).<sup>113</sup> In this way, the Convention avoids the dilemma that “respecting the right of one person might be the violation of the right of another person.”<sup>114</sup>

While some find that the Convention’s definition arbitrarily limits what is considered torture, political commentator Heather MacDonald has argued instead that the Convention imposes excessively difficult restrictions on interrogators. She claims that the tactics they are forced to resort to in order to respect their obligations under the treaty are at best ineffective. Under the Geneva Conventions and CAT, she argues, interrogators have had to abandon effective tactics that come nowhere near torture (such as yelling at prisoners), and in doing so they have lost the ability to “create the uncertainty vital to getting terrorist information.”<sup>115</sup> Interrogators in Kandahar, Afghanistan argued – and MacDonald agrees – that “if a type of behavior toward a prisoner was no worse than the way the army treated its own members, it could not be

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<sup>113</sup> Ibid., 890.

<sup>114</sup> Ibid.

<sup>115</sup> Heather MacDonald, “How to Interrogate Terrorists,” in *The Torture Debate in America*, ed. Karen Greenberg (New York: Cambridge University Press, 2005), 94.

considered torture or a violation of the conventions,”<sup>116</sup> regardless of the Pentagon’s “arbitrary” rules after the “public relations disaster” at Abu Ghraib.<sup>117</sup>

MacDonald, writing in 2005, was clearly not privy to the extent of torture as is detailed in the Senate Report on CIA Interrogation and Detention; even so, her logic demonstrates a common flaw in the American conceptualization of torture and why torture is so horrific. Torture’s power comes from the relationship between torturer and captive: “victims of torture see themselves as being completely at the mercy of their tormentors. A victim of torture must be unable to shield herself in any significant way, and must be unable to effectively evade or fight back against her tormenter.”<sup>118</sup> The meaning or significance of an action depends on the context, so superficially similar practices that apply to soldiers and captives are not the same because *the soldiers are not captives*. They consent to their treatment, and they know that there is an end in sight. Thus while there is a logic to MacDonald’s reasoning that practices such as sleep deprivation cannot amount to torture if they are practices that the army would impose on its own members, it ignores the unique relationship between a captive and their torturer and the incredible effects of experiencing utter helplessness.

When Richard Posner, a judge on the United States Seventh Circuit Court of Appeals, defines torture, he is unusually harsh on physical techniques but disregards the effects of psychological torture, in spite of the fact that

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<sup>116</sup> Ibid., 87.

<sup>117</sup> Ibid., 94.

<sup>118</sup> David Sussman, “Defining Torture,” *Case Western Reserve Journal of International Law* 37, no. 2 (2006): 227.

aftereffects of the latter can have physical manifestations more severe than some of the actual physical techniques he calls torture. He writes,

[A]s we move up the pressure curve we encounter a kink, an inflection point, when the coercion changes from the psychological to the physical. After that point is reached, the affixing of the term “torture” to describe the interrogation is, I am inclined to believe, mandatory, even if the physical contact is not painful, provided it is deeply offensive; before the point is reached, however, the use of the term is optional, unless the psychological methods employed are mild, in which event the label of “torture” would clearly be inappropriate.<sup>119</sup>

He argues that interrogators should rely on psychological techniques and only cross the line into the physical realm in extreme cases.<sup>120</sup> Alan Dershowitz is unfortunately correct when he writes, “[American] courts routinely refuse to apply the Convention to ‘mental’ or ‘psychological’ torture, which is commonplace.”<sup>121</sup> However, the distinction between psychological and physical torture is hardly accidental. David Luban and Henry Shue write that the materialist bias in American law recognizes physical torture while ignoring mental torture, but they insist that this is not merely a misunderstanding of the effects of mental torture, but rather a knowingly designed loophole so that the government can legally use appalling tactics.<sup>122</sup>

The distinction between physical and psychological torture is at best arbitrary and at worst an attempt to legalize and institutionalize techniques that do as much, if not more, harm than physical torture. Psychological torture

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<sup>119</sup> Richard Posner, “Torture, Terrorism, and Interrogation,” in *Torture: A Collection*, ed. Sanford Levinson (New York: Oxford University Press, 2006), 292.

<sup>120</sup> *Ibid.*, 293.

<sup>121</sup> Alan Dershowitz, *Why Terrorism Works* (New Haven, CT: Yale University Press, 2003), 136.

<sup>122</sup> David Luban and Henry Shue, “Mental Torture: A Critique of Erasures in U.S. Law,” *Georgetown University*. Georgetown Public Law and Legal Theory Research Paper No. 11-31 (2011): 1.



includes verbal abuses; threats against family, friends and loved ones; false accusations; forced choices; mock executions; and being forced to witness torture, mutilation and murder of others. According to the Center for Victims Against Torture, psychological torture “can be more damaging and cause more severe and long-lasting damage than the pain of physical torture.”<sup>123</sup> A Red Cross report noted that

Even psychological methods which do not amount to ill-treatment when considered in isolation, amount to inhuman or degrading treatment or torture, when applied in conjunction with other techniques, cumulatively and/or over a long time. Often they are part and parcel of the whole torture process and constitute a ‘background environment’ of harassment and duress. The ‘cumulation over time’ factor must thus be considered as part of a system of psychological torture.<sup>124</sup>

After reports emerged of human rights abuses at Guantanamo Bay and American prisons in Iraq and Afghanistan, researchers at the University of London’s Department of Trauma Studies attempted to distinguish between the relative psychological impact of different abuses experienced by captives. Researchers interviewed and administered PTSD tests to 279 torture survivors from Bosnia and Herzegovina, Croatia, and Serbia, finding that “psychological manipulations, humiliating treatment, exposure to aversive environmental conditions, and forced stress positions showed considerable overlap with physical torture stressors in terms of associated distress and

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<sup>123</sup> Center for Victims of Torture, “Effects of Psychological Torture,” *Center for Victims of Torture* (August 2011).

<sup>124</sup> Hernàn Reyes, “The Worst Scars Are in the Mind: Psychological Torture,” *International Review of the Red Cross* 89, no. 867 (2007): 591.

uncontrollability.”<sup>125</sup> Tests also showed that physical torture, in contrast to psychological torture, was not significantly associated with PTSD; the traumatic stress impact, rather than being determined by the severity of physical abuse, was determined by how out of control, powerless, and distressed captives felt, which occurred equally if not more with psychological as opposed to physical torture techniques.<sup>126</sup> The study concludes that

[i]ll treatment during captivity, such as psychological manipulations, humiliating treatment, and forced stress positions, does not seem to be substantially different from physical torture in terms of the severity of mental suffering they cause, the underlying mechanism of traumatic stress, and their long-term psychological outcome. Thus, these procedures do amount to torture, thereby lending support to their prohibition by international law.<sup>127</sup>

Researchers also concluded that the narrow definition of torture put forth by the Defense Department<sup>128</sup> and Justice Department<sup>129</sup> is extremely problematic as it fails to consider “the psychological mechanisms by which these stressors exert their traumatic impact.”<sup>130</sup>

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<sup>125</sup> Metin Başoğlu, Maria Livanou, and Cvetana Crnobaric, “Torture vs Other Cruel, Inhuman, and Degrading Treatment: Is the Distinction Real or Apparent?” *Archives of General Psychiatry* 64, no. 3 (2007): doi:10.1001/archpsyc.64.3.277.

<sup>126</sup> Ibid.

<sup>127</sup> Ibid.

<sup>128</sup> U.S. Defense Department, “Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations,” *Department of Defense*, April 4, 2003, accessed April 6, 2016, <http://nsarchive.gwu.edu/NSAEBB/NSAEBB127/03.04.04.pdf>.

<sup>129</sup> Daniel Levin, “Memorandum for James B. Comey, Deputy Attorney General, RE: Legal Standards Applicable Under 18 U.S.C §§ 2340-2340A,” *Department of Justice*, December 30, 2004, accessed April 6, 2016, <https://www.aclu.org/files/torturefoia/released/082409/olcremand/2004olc96.pdf>.

<sup>130</sup> Başoğlu, Livanou, and Crnobaric, “Torture vs Other Cruel, Inhuman, and Degrading Treatment,” 277.

In its report “Effects of Psychological Torture,” the Center for Victims of Torture sets out the long-term psychological effects of commonly practiced psychological torture techniques:

- 1) Threats of death or injury: “Survivors say mock executions left them feeling they were already dead. Survivors relive these near-death experiences in their nightmares or flashbacks. CVT clients have told us that they pleaded with their torturers to kill them, preferring real death over the constant threat and intolerable pain it caused.”<sup>131</sup>
- 2) Sexual humiliation: “Sexual humiliation leads to symptoms of post-traumatic stress disorder (PTSD) and major depression; victims often have flashbacks or nightmares about their experiences; male and female victims feel shame, grief and fear. Forced nakedness creates a power differential, stripping the victims of their identity, inducing immediate shame and creating an environment where the threat of sexual and physical assault is always present.... Muslim women clients say sexual humiliation is so shaming, they cannot admit it to their communities or families without fearing rejection. Male victims feel degraded in their manhood, especially if the perpetrator was female.”<sup>132</sup>
- 3) Sensory deprivation including solitary confinement: “The prisoners reported that they no longer trusted their own perceptions. They went through psychotic states with delusions and hallucinations and experienced a total loss of cognitive function.”<sup>133</sup> (Physicians for Human Rights has reported similar findings, and noted that prisoners also suffered from “irritability, exhaustion, sleep disturbance, chronic fatigue, trembling, sweating, loss of sense of reality, memory loss, lack of concentration, dizziness, walking difficulties, chronic headache and generalized body pain, depression, and claustrophobia.”<sup>134</sup>)

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<sup>131</sup> Center for Victims of Torture, “Effects of Psychological Torture.”

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

<sup>134</sup> Gretchen Borchelt, “Break Them Down: Systematic Use of Psychological Torture by U.S. Forces,” *Physicians for Human Rights*, May 2005, accessed April 6, 2016, [https://s3.amazonaws.com/PHR\\_Reports/break-them-down.pdf](https://s3.amazonaws.com/PHR_Reports/break-them-down.pdf), 63.

Physicians for Human Rights also found that, while sleep deprivation is not necessarily associated with long-term psychological damage, it can cause health problems including hypertension and other cardiovascular disease.<sup>135</sup>

The distinction between psychological and physical torture in the American legal system is hardly a misunderstanding of the damage of psychological torture. On the contrary, the distinction seems to be purposeful and malicious, meant to encourage the use of psychologically damaging tactics (or, at the very least, to excuse interrogators who engage in such practices). Bush Administration memos provide overwhelming evidence to this end, as Luban and Shue detail in their article “Mental Torture: A Critique of Erasures in US Law.” One of the most pertinent examples of the government permitting psychological torture and attempting not to define it as such was, unsurprisingly, in the notorious Bybee-Yoo Techniques Memo. In it, Jay S. Bybee, the Assistant Attorney General for the US Justice Department Office of Legal Counsel under George W. Bush, writes about cramped confinement boxes in which captives were placed. He writes, “[CIA counsel John Rizzo] informed us that your purpose in using these boxes is not to interfere with his senses or his personality, but to cause him physical discomfort.”<sup>136</sup> Cramped confinement boxes do not cause physical discomfort; the suffering experienced by captives in such boxes is obviously entirely psychological, as one is not physically pained

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<sup>135</sup> Ibid., 11.

<sup>136</sup> Jay S. Bybee, “Memorandum to John Rizzo: Interrogation of Al Qaeda Operative,” August 1, 2002, accessed April 6, 2016, <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-bybee2002.pdf>.

from lying in a small space any more than in an open one.<sup>137</sup> And yet the lawyers appeared desperate to classify the technique as physically “uncomfortable” because admitting the technique was meant to psychologically terrorize the captive would show the baselessness of the legal definition of torture as severe *physical* pain or suffering; if the lawyers acknowledged that some tactics were undertaken just to mentally harm captives, the legal definition of torture that allows the use of psychological techniques would be unjustifiable.

Though government lawyers clearly grasped the gravity of psychological interrogation techniques, the materialist definition of torture had been codified a decade earlier. When the Senate ratified CAT in 1994, it stipulated that

[t]he Senate’s advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Convention: (1) (a) That with reference to article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.<sup>138</sup>

Thus when ratifying CAT, the Senate committed to the ban on torture only so far as the definition of torture was limited to “prolonged harm caused by

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<sup>137</sup> Luban and Shue, “Mental Torture: A Critique of Erasures in U.S. Law,” 16.

<sup>138</sup> Office of the United Nations High Commissioner for Human Rights (OHCHR), “UN Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment,” *OHCHR*, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>.

physical torture, threats of death or physical torture, mind-altering drugs or their equivalent, and threats to another of death, physical torture, or mind alteration,”<sup>139</sup> thereby leaving dozens of psychologically damaging tactics legally available.

But what exactly is so bad about torture that it causes extreme, sometimes-debilitating long-term mental problems? If torture only involved inflicting physical pain, it would make sense why torture is sometimes effective in interrogations: someone experiencing intense pain will likely do anything they can to make it stop. But suffering intense pain does not explain why torture survivors experience debilitating psychological problems. People are severely injured in countless other ways without long-term aftereffects. While CAT may not make it clear why pain inflicted during interrogations is worse than pain inflicted in the context of battle,<sup>140</sup> the distinction lies in the way torture works.

Torture is uniquely terrible because it

is not just that the victim's will is commandeered but that it is commandeered by the dehumanizing realization that all that we associate with being human is an illusion. Threats to the body uniquely carry this consequence because they alone lead us to forsake the version of ourselves that is not simply a corporeal machine.... It is not the pain itself that is the essence of torture's evil. It is rather what the pain produces – the terrible betrayal of our self-understanding of human life.<sup>141</sup>

Pain is inflicted as a means to an end, with the end being the complete suppression of the victim's will. This understanding of torture leads Louis Michael Seidman to correctly conclude that physical pain — severe or not — is

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<sup>139</sup> Luban and Shue, “Mental Torture: A Critique of Erasures in U.S. Law,” 22.

<sup>140</sup> Seidman, “Torture's Truth,” 896.

<sup>141</sup> *Ibid.*, 907.

torture when it is used to exert control over someone by alienating mind from body.<sup>142</sup> While Seidman's understanding of torture here aligns with evidence shown regarding the lasting mental effects of physical torture, his final conclusion runs into the same problems evident in Posner's definition of torture. Seidman writes, "Torture is about the body, not the mind — or, more precisely, it is about what happens to the mind when we realize that we are only body."<sup>143</sup> He is correct to conclude that psychological torture functions differently on some level than physical torture, but he assumes that psychological tactics are not included as forms of "torture" because they do not work by gaining control over another's body so that their mind breaks away from its physical encasement.

Luban and Shue summarize well why psychological torture is equally destructive and dehumanizing, and what Seidman and Posner fail to grasp:

Psychological torture, in contrast, undermines the structure of the personality — it literally breaks apart the self, unhinging its parts from each other. The victim is reduced to a quivering bundle of fears, driven to try to please, that is, to try to fulfill the wishes of others, with few wishes of her own, except release from the awful psychological stresses that are being systematically and relentlessly imposed by all-powerful others.<sup>144</sup>

Humans are comprised of mind and body, and we strive for unity between the two. Physical torture and psychological torture both break this unity, one from the outside in, and the other from the inside out. As Sussman writes,

We are our bodies, insofar as the body is the substance in which we express our emotional responses to the world in our actions.

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<sup>142</sup> Ibid., 907-908.

<sup>143</sup> Ibid., 910.

<sup>144</sup> Luban and Shue, "Mental Torture: A Critique of Erasures in U.S. Law," 47.

But the normal context of torture systematically negates this primitive expressive unity of mind and body. Unable to investigate or strive against the world, the torture victim instead confronts his own feelings, and his own body, as the primary source of threats and resources. Living agency is thus turned on itself, struggling not with its world through its feelings, but with its feelings as its world. Body and emotion are no longer integral parts of the victim's agency, but instead become what the victim, insofar as he can be perceptive or active at all, must exert himself against.<sup>145</sup>

Both forms of torture function this way. And as such, physical torture and psychological torture are not so separate: mental torture has physical manifestations and physical torture would be powerless without the mind of the victim splitting apart from its body. And both derive power from the relationship between torturer and victim in which the victim is completely at the mercy of their torturer, unable to shield themselves physically or mentally from the torturer.<sup>146</sup>

Thus when defining torture we cannot only consider, as the Bush administration did, the intensity of physical pain inflicted; we must also take into consideration “the alienation of the victim from his own bodily and emotional life that forced passivity before pain and fear can engender.”<sup>147</sup> This requires considering both physical and psychological tactics as torture and considering the way torture functions when determining whether a technique is “sufficiently horrible” to be considered torture.

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<sup>145</sup> Sussman, “Defining Torture,” 229.

<sup>146</sup> *Ibid.*, 227.

<sup>147</sup> *Ibid.*



## THE USE OF TORTURE

In ancient, medieval, and early modern times, governments and their militaries used torture for four purposes widely condemned today. First, until the Enlightenment Era, torture was considered a form of entertainment. Though this frequently overlaps with torture as punishment – it was, after all, the torture of criminals specifically that people enjoyed watching – the predominant use of torture for entertainment did not involve criminals but rather vanquished armies.<sup>148</sup> Though the torture of captured soldiers after a victory often had religious significance in medieval wars, its underlying purpose was for the victor revel in their glory all over again, to prove their power to the loser, and to humiliate the loser by requiring them to beg for mercy.<sup>149</sup> While it may be argued that the horrors of war desensitize soldiers to others' suffering, torture was a popular form of entertainment in towns and villages in peacetime. Executions which Pinker describes as “orgies of sadism,” for instance, attracted “throng[s] of jubilant spectators who watched the victim struggle and scream.”<sup>150</sup> While torture meted out by legal systems was primarily for punishment (and, possibly, deterrence), it was not necessarily the sense of justice that attracted spectators; since torture was used as punishment for minor crimes,<sup>151</sup> it seems as though spectators truly “*enjoyed*” cruelty, even when it served no judicial

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<sup>148</sup> David Luban, “Liberalism, Torture, and the Ticking Bomb,” *Virginia Law Review* 91 (2005): 1432.

<sup>149</sup> *Ibid.*

<sup>150</sup> Pinker, *The Better Angels of Our Nature*, 132.

<sup>151</sup> *Ibid.*

purpose”<sup>152</sup> as was the case with ancient Roman gladiatorial exhibitions<sup>153</sup> not to mention bear-baitings patronized extensively by aristocracy and common people alike in the Middle Ages.<sup>154</sup>

Though torture has not been widely practiced as a form of criminal punishment for the last two centuries,<sup>155</sup> it was widely used from ancient times through the early modern period.<sup>156</sup> In Christian countries, stories of saints being tortured were immensely popular not because they “evoke[d] outrage against torture” but because they “inspire[d] reverence for the bravery of the martyrs.”<sup>157</sup> Pinker writes, “As in the story of Jesus, torture was an excellent thing. The saints welcomed their torments, because suffering in this life would be rewarded with bliss in the next one.”<sup>158</sup> The religious stories – and the frequency of corporal punishments<sup>159</sup> – helped torture to maintain its legitimacy as a form of punishment through the early modern period until it was displaced by human rights norms.

More recently, torture has been used to terrorize populations into submission. Dictators within the last century from Pinochet to Hitler to Saddam Hussein have tortured political prisoners in order to decrease the likelihood that political adversaries would be willing to voice their opposition.<sup>160</sup> Torturing political opponents allowed dictators with relatively small but loyal security

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<sup>152</sup> Ibid., 143.

<sup>153</sup> George Ryley Scott, *A History of Torture* (London: Luxor Press, 1959), 50.

<sup>154</sup> Ibid., 250.

<sup>155</sup> Luban, “Liberalism, Torture, and the Ticking Bomb,” 1433.

<sup>156</sup> Pinker, *The Better Angels of Our Nature*, 552.

<sup>157</sup> Ibid., 15.

<sup>158</sup> Ibid.

<sup>159</sup> Scott, *A History of Torture*, 300.

<sup>160</sup> Luban, “Liberalism, Torture, and the Ticking Bomb,” 1433.

forces to maintain unquestioned authority by instilling intense fear that rebellion would mean a fate arguably worse than death.<sup>161</sup>

Lastly, torture has historically used to extract confessions. While similar to torture as punishment, torture to extract confessions preceded a trial and guilty verdict, though the law limited torture to cases in which the accused was highly likely to be guilty.<sup>162</sup> Ancient Greek and Roman courts capitalized on the inhumanity of torture by requiring that slaves' confessions be extracted through torture in order to highlight the class difference between even poor freemen and slaves.<sup>163</sup> Since a suspected criminal could only be tortured if highly likely to be guilty, circumstantial evidence was allowed to demonstrate the likelihood of guilt; over time, this evidence came to be more and more heavily relied upon until there was no longer a need for a confession to secure a conviction, and thus no longer a use for torture in such cases<sup>164</sup> (though torture could still be used as punishment if the person was found guilty).

Liberalism and respect for humanity and human rights have pulled modern democracies away from torture as entertainment, as punishment, as a method for ensuring submission, and to extract confessions. Because Enlightenment values and human rights norms have framed torture as barbarous, the infliction of torture by governments today occurs almost entirely

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<sup>161</sup> Ibid.

<sup>162</sup> John H. Langbein, "Torture and Plea Bargaining," *University of Chicago Law Review* 46, no. 3 (Autumn, 1978): 3-8.

<sup>163</sup> Moses I. Finley, *Ancient Slavery and Modern Ideology* (Princeton, NJ: Markus Wiener Publishers, 1998), 162.

<sup>164</sup> John H. Langbein, Torture and Plea Bargaining, 46 U. Chi. L. Rev. 5 (1978)

in secret.<sup>165</sup> In modern, liberal democracies, the only possibly acceptable use of torture is interrogational torture, or the instrumental and pragmatic use of torture to prevent a catastrophe, which can thus be framed as undertaken only reluctantly to protect others' rights.<sup>166</sup>

Interrogational torture – widely condemned before George W. Bush declared the “War on Terror” after the September 11 attacks – re-entered the public discourse when evidence came to light that members of the US Army and CIA had committed horrific human rights abuses against prisoners at the Abu Ghraib prison in Iraq.<sup>167</sup> In late 2003, Amnesty International and the Associated Press published reports of extreme physical and sexual abuse of prisoners, including torture with electrical wires and rape.<sup>168</sup> While Bush’s administration was quick to condemn the abuses, the Red Cross and Human Rights Watch published evidence that the torture of detainees at Abu Ghraib was part of a pattern of torture at overseas American detention centers, particularly those in Iraq and Afghanistan, and at Guantanamo Bay in Cuba.<sup>169</sup>

A few years after Abu Ghraib, documents known as the “Torture Memos” were leaked to the press. The documents – drafted by Deputy Assistant Attorney

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<sup>165</sup> Pinker, *The Better Angels of Our Nature*, 552.

<sup>166</sup> Luban, “Liberalism, Torture, and the Ticking Bomb,” 1436.

<sup>167</sup> Glenn Greenwald, “The Abu Ghraib Files,” *Salon*, March 14, 2006, accessed April 6, 2016, [http://www.salon.com/topic/the\\_abu\\_ghraib\\_files/](http://www.salon.com/topic/the_abu_ghraib_files/).

<sup>168</sup> Amnesty International, “Iraq: Human Rights Must Be Foundation for Rebuilding,” *Amnesty International*, June 20, 2003, accessed April 6, 2016, <http://reliefweb.int/report/iraq/iraq-human-rights-must-be-foundation-rebuilding>.

<sup>169</sup> Human Rights Watch, “The Road to Abu Ghraib,” *Human Rights Watch*, June 8, 2004, accessed April 6, 2016, <https://www.hrw.org/report/2004/06/08/road-abu-ghraib>; International Committee of the Red Cross, “Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation,” February 2004, accessed April 6, 2016, <https://cryptome.org/icrc-report.htm>; and Amnesty International, “Iraq: Human Rights Must Be Foundation for Rebuilding.”

General John Yoo and signed by Assistant Attorney General Jay Bybee – presented damning evidence that the CIA, the Department of Defense, and President Bush had been advised as early as 2002 that so-called “enhanced interrogation techniques” may be legal. The techniques examined in the memos included mental and physical torture and coercion including prolonged sleep deprivation, binding in stress positions, and waterboarding – techniques that had been used at Abu Ghraib and, it is now known, at Guantanamo Bay.<sup>170</sup> In the memo, the head of the Office of Legal Counsel of the US Department of Justice advised Alberto Gonzales, Counsel to the President, that the Geneva Conventions did not apply to American interrogators overseas. However, even if the Geneva Conventions did apply, the memo argued that “cruel, inhuman, or degrading” treatment is not considered torture and most enhanced interrogation techniques could be defended because torture necessarily induces pain equivalent to “serious physical injury, such as organ failure, impairment of bodily function, or even death.”<sup>171</sup> Under this definition, psychological tactics could only be considered torture if they were “prolonged,” which they argued meant they must last for “months or even years.”<sup>172</sup> Finally, Yoo and Bybee’s memo concluded that even if interrogators engaged in tactics ruled to be torture, “prosecution under Section 2340A may be barred because enforcement of the statute would represent an unconstitutional infringement of the

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<sup>170</sup> Jay Bybee. “Memorandum to Alberto R. Gonzales, Counsel to the President. Re: Standards of Conduct for Interrogation Under Article 4 of the Third Geneva Convention of 1949,” *Department of Justice*, August 1, 2002, accessed April 6, 2016, <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-gonzales-aug2002.pdf>.

<sup>171</sup> Ibid.

<sup>172</sup> Ibid.

President's authority to conduct war” and that “under the current circumstances, necessity or self-defense may justify interrogation methods that might violate Section 2340A.”<sup>173</sup>

Though the leaked memo hinted at the ongoing abuse at US overseas prisons, the public was largely shielded from the extent to which torture was practiced until the Senate Intelligence Committee released its report on CIA torture in 2014. The committee reported that, “[b]eginning with the CIA's first detainee, Abu Zubaydah, and continuing with numerous others, the CIA applied its enhanced interrogation techniques with significant repetition for days or weeks at a time.”<sup>174</sup> Interrogation techniques included physical violence (ranging from slaps to throwing detainees against a wall), nudity, and sleep deprivation up to 180 hours standing or in stress positions, rectal rehydration when not medically necessary, ice baths, and waterboarding.<sup>175</sup> They found no evidence that the CIA started with less coercive techniques then escalated to torture; rather, the CIA tortured suspected terrorists before even attempting normal interrogation techniques, whether or not the detainee was known to have relevant information.<sup>176</sup> Interrogators also continued the techniques after being warned by medical personnel that they could “exacerbate physical injuries,” in one instance even torturing a detainee instead of treating the bullet

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<sup>173</sup> Ibid.

<sup>174</sup> U.S. Senate Select Committee on Intelligence. *Report of the Senate Select Committee on Intelligence Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, Together with Foreword by Chairman Feinstein and Additional and Minority Views* (Washington, DC: U.S. Government Printing Office, 2014), xii.

<sup>175</sup> Ibid., xii-xiii.

<sup>176</sup> Ibid., xii.

wound incurred during his capture.<sup>177</sup> While the physical effects of waterboarding were substantial – detainees would convulse and vomit, sometimes becoming completely unresponsive – its psychological effects were arguably even more damaging. Prolonged sleep deprivation and extended isolation, too, induced disturbing hallucinations, paranoia, insomnia, and self-mutilation. But interrogators continued using the enhanced interrogation techniques regardless of an individual detainee’s mental health.<sup>178</sup> In fact, the Senate Committee found evidence that interrogators intentionally inflicted long-lasting psychological damage on detainees; psychological techniques seemed to be encouraged by Defense Department arguments that treatment was only considered “torture” if it involved excruciating physical pain or years of psychological torment.

Indeed, the most extreme abuse at Guantanamo seems to have been psychological in nature: CIA interrogators told detainees they would never be allowed out of their custody alive, and that they would never have a chance to argue their case in court because the CIA did not want the world to know the extent of its use of “enhanced interrogation techniques.”<sup>179</sup> Officers also threatened to harm the families of at least three detainees, including threats of harm to a detainee’s children, sexual abuse to a detainee’s mother, and murder of another detainee’s mother.<sup>180</sup> Even when not being interrogated, detainees in

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<sup>177</sup> Ibid., xii-xiii.

<sup>178</sup> Ibid.

<sup>179</sup> Ibid., xiii.

<sup>180</sup> Ibid.

CIA detention sites were shackled in isolated cells in total darkness without access to a bathroom.<sup>181</sup>

A year after the Senate Intelligence Committee released its report, the Senate passed the McCain-Feinstein Amendment to the National Defense Authorization Act of Fiscal Year 2016.<sup>182</sup> The amendment – meant to codify the ban on torture instituted through an executive order – did not receive universal support: 21 Republican senators voted against the amendment, and Marco Rubio abstained.<sup>183</sup> In the days following the vote, a former FBI agent published an op-ed piece that summarized arguments made by Senators against the amendment, writing that the legislation is “short-sighted” and “unnecessarily limits the president’s power to defend this country in times of extreme threat.”<sup>184</sup>

Following the coordinated attacks by ISIS in Paris in November of 2015, torture has reemerged as a point of contention among presidential candidates. Chris Christie has argued that waterboarding isn’t torture and should be used against terror suspects; Jeb Bush refused to rule torture out; and Marco Rubio said he would do whatever was necessary in the interrogation of a suspected terrorist, but wouldn’t go on record with what techniques he would use lest terrorists train to resist them.<sup>185</sup> Donald Trump, perhaps the most aggressively

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<sup>181</sup> Ibid.

<sup>182</sup> Conor Friedersdorf, “These 21 Republicans Voted Against a Torture Ban,” *The Atlantic*, June 17, 2015, accessed April 6, 2016, <http://www.theatlantic.com/politics/archive/2015/06/these-21-republicans-voted-against-a-torture-ban/396095/>.

<sup>183</sup> Ibid.

<sup>184</sup> Jim Davis, “The Senate Anti-Torture Bill: A Step Too Far,” *Washington Examiner*, June 26, 2015, accessed April 6, 2016, <http://www.washingtonexaminer.com/the-senate-anti-torture-bill-a-step-too-far/article/2567035>.

<sup>185</sup> Michael Crowley, “On Torture, Cruz Stands Alone,” *Politico*, January 21, 2016, accessed April 6, 2016, <http://www.politico.com/story/2016/01/ted-cruz-republicans-torture-217976>.



pro-torture candidate, has stated that he will not only bring back waterboarding to overseas CIA detention facilities, but that he would “approve more than that,” regardless of the tactics’ efficacy: “It works,” he said at a rally. “Believe me, it works. And you know what? If it doesn't work, they deserve it anyway, for what they're doing. It works.”<sup>186</sup> When asked about torture in a debate, Ted Cruz seemed to refer to a 2002 “torture memo” stating that waterboarding is not torture because, “[u]nder the law, torture is excruciating pain that is equivalent to losing organs and systems. So under the definition of torture, it is not. It is enhanced interrogation, it is vigorous interrogation, but it does not meet the generally recognized definition of torture.”<sup>187</sup>

The Republican candidates are hardly advocating for torture to ardent opponents, though. A Pew Research Center poll found that 73% of Republicans think torture can be justified.<sup>188</sup> While Americans were found to be some of the most likely to find torture justifiable at 58%, a median of 40% across 38 countries polled in 2015 thought torture against suspected terrorists could be justified.<sup>189</sup> It is this pro-torture climate that gives weight to arguments as to whether torture is morally permissible, and if not, whether it is worth it anyway to dirty our hands.

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<sup>186</sup> Jenna Johnson, “Donald Trump on Waterboarding: ‘If it doesn’t work, they deserve it anyway,’” *Washington Post*, November 23, 2015, accessed April 6, 2016, <https://www.washingtonpost.com/news/post-politics/wp/2015/11/23/donald-trump-on-waterboarding-if-it-doesnt-work-they-deserve-it-anyway/>.

<sup>187</sup> NPR, “GOP Presidential Candidates Bring Torture Back Into The Spotlight,” *NPR*, February 9, 2016, accessed April 6, 2016, <http://www.npr.org/2016/02/09/466186345/gop-presidential-candidates-bring-torture-back-into-the-spotlight>.

<sup>188</sup> Pew Research Center, “Global Opinion Varies Widely on Use of Torture Against Suspected Terrorists,” *Pew Research Center*, February 9, 2016, accessed April 6, 2016, <http://www.pewresearch.org/fact-tank/2016/02/09/global-opinion-use-of-torture/>.

<sup>189</sup> *Ibid.*

## PART 2: THE MORALITY AND LEGALITY OF TORTURE

The only use of torture accepted by proponents today is interrogational torture. While theorists do not explicitly state the deontological constraint they place on torture, no popular philosopher is willing to accept torture for entertainment, punishment, or even to extract a confession. Through this constraint, liberal philosophers are able to see torture “as a civilized, not an atavistic, practice, provided that its sole purpose is preventing future harms.”<sup>190</sup> These politicians and philosophers, ready to dirty their hands for the sake of protecting their fellow humans, become heroes, though the pain they hope to inflict on others hasn’t changed from the pain inflicted on shoplifters in Medieval Christendom. Torturing suspected terrorists becomes rational, in contrast to the barbarity of pre-Enlightenment torturers who relished inflicting pain on others. But torture by its very nature cannot be disassociated from the cruelty of times past. Can the arguments of torture proponents, then, justify the seemingly ad hoc restriction of acceptable torture to interrogational torture and morally absolve the torturer?

### THE MYTH OF THE “TICKING BOMB”

The ticking time bomb case has come to frame the discussion of torture, particularly in the US. Torture supporters frequently use the thought experiment because its careful design makes it nearly impossible to deny that

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<sup>190</sup> Luban, “Liberalism, Torture, and the Ticking Bomb,” 1436.

torture would be permissible – or even morally necessary – in certain situations. The proposed scenario, though, distorts the torture discourse by purporting to show that there actually *could* be circumstances in which torture could even be morally required, thus subtly shifting the burden of proof onto torture proponents and obscuring the role of moral principles by shifting the emphasis to consequentialist considerations.

Jeremy Bentham first proposed the ticking time bomb hypothetical in the late 18<sup>th</sup> century to illustrate the sort of extraordinary circumstance in which torture would be morally right.<sup>191</sup> Its most popular iteration appeared more recently in Michael Walzer’s “Political Action: The Problem of Dirty Hands”:

[A political leader] is asked to authorize the torture of a captured rebel leader who knows or probably knows the location of a number of bombs hidden in apartment buildings around the city, set to go off within the next twenty-four hours. He orders the man tortured, convinced that he must do so for the sake of the people who might otherwise die in the explosions—even though he believes that torture is wrong, indeed abominable, not just sometimes, but always.<sup>192</sup>

While some philosophers such as Henry Shue have argued that hypotheticals should not be used to judge an act’s morality, McMahan argues that, unlike historical examples, hypotheticals allow irrelevant and distracting details to be filtered out so that our consideration can be focused on only those details with moral significance.<sup>193</sup> Critics have complained, though, that the way

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<sup>191</sup> W.L. Twining and P.E. Twining, “Bentham on Torture,” *Northern Ireland Legal Quarterly* 24 (1973): 305-306.

<sup>192</sup> Michael Walzer, “Political Action: The Problem of Dirty Hands,” *Philosophy & Public Affairs* 2, no. 2 (Winter, 1973): 167.

<sup>193</sup> Jeff McMahan, “Torture and Method in Moral Philosophy,” in *Torture, Law, and War*, ed. Scott Anderson and Martha Nussbaum (Chicago: University of Chicago Press, 2015), 3.

the ticking time bomb filters out details makes such a scenario exceedingly unrealistic. McMahan responds that it is no more unrealistic than other widely used thought experiments provided one understands what the example is meant for. He argues that the ticking time bomb

has no features that are not characteristic of the majority of hypothetical examples in moral philosophy. It is no different in relevant respects from the familiar trolley cases, transplant cases, examples comparing and contrasting terror bombers and tactical bombers, and so on. It is, if anything, more realistic than most.<sup>194</sup>

While the ticking time bomb is more realistic than certain other thought experiments (the trolley problem involving the fat man whose body is the only tool available to stop the trolley comes to mind), being more realistic than the absurd does not make a realistic hypothetical. Philosophers' uncanny ability to develop thought-experiments in which torture could be construed as morally correct does not mean institutional preparations of any sort should be based on the outcome of such unrealistic hypotheticals.

The ticking time bomb hypothetical distorts our thinking about the issue of torture by misrepresenting reality through excessive abstraction so that people asked to consider the example reach conclusions that do not represent their actual moral judgments. The ticking time bomb idealizes reality by assuming features that could never be realized in an actual situation to make torture more palatable than it would be in real life. The example assumes that the torturers have apprehended the right person, someone who not only has sufficient knowledge of the imminent attack but also is responsible for it – the

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<sup>194</sup> Ibid., 4.

torture thus has the capacity to both be productive and to harm only the person who tried to harm others. In order for the torture to have been productive and not to add harm unnecessarily, the ticking time bomb also assumes that the information the terrorist provides will be accurate: the terrorist will not be lying nor will their accomplices have moved the bomb since their capture.

The ticking time bomb also assumes that an interrogator with no experience using torture will be able to physically and psychologically manipulate the detainee effectively enough to acquire the necessary information in time. The ticking time bomb example is meant to seem excessively rare, so that those considering the example feel that accepting torture in the exceptional case will in no way lead to or require the institutionalization of torture. But if someone who is inexperienced cannot use torture effectively, then the effort to gain information would be ineffective unless a system of institutionalized torture training – and practice – were set up so that interrogators acquire effective torture techniques should they need them. Thus, Shue argues that because torture requires an expert in order to be successful, a moderate position on torture is not feasible: the only real options are the extremes, absolute prohibition or the acceptance of a torture culture.<sup>195</sup> Although many commentators agree that if torture is permitted, it will be abused, Shue's argument that torture can only be employed effectively by an expert does not seem to be widely accepted. However, given how time-sensitive the ticking time bomb is, it is reasonable to assume that someone with experience would be

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<sup>195</sup> Henry Shue, "Torture in Dreamland: Disposing of the Ticking Bomb," *Case Western Reserve Journal of International Law* 37, no. 2 (2006): 237-238.

required to get the necessary information in time, particularly considering that real-life cases discussed later in this section required months of sustained torture to yield any useful information if the torture were successful at all. By failing to set out the conditions that are actually necessary for torture in the ticking time bomb case to work, the use of this idealized hypothetical distorts the actual choices we face.

The ticking time bomb also tries to excuse the resort to torture through urgency. Claudia Card writes that torture is made tempting in the ticking time bomb because in the example “humane methods would take too long.”<sup>196</sup> However, torture has been known to take excruciatingly long—weeks or months even—even when torture methods that fall outside “torture lite” are employed.<sup>197</sup>

Card writes that

[p]ain might be inflicted quickly. But the time required to produce an effective level of fear may not be short. Why not spend that time gaining the suspect’s confidence? Is it that when torture is an option and feelings run high, humane procedures may not appear attractive to interrogators? If it is unrealistic to expect torture to yield useful results in the time remaining, it is no argument to point out that there is insufficient time for more humane methods.<sup>198</sup>

In short, interrogators have no way of knowing which individuals have precise and accurate information about the attack, whether torture will be effective, what tactics will work on an individual captive, and how long it might

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<sup>196</sup> Claudia Card, “Ticking Bombs and Interrogations,” *Criminal Law and Philosophy* 2, no. 1 (2008): 11.

<sup>197</sup> David Luban, *Torture, Power, and Law* (Cambridge: Cambridge University Press, 2014), 90.

<sup>198</sup> Card, “Ticking Bombs and Interrogations,” 11-12. The first and second historical example demonstrate this point: in the first, torture took months before investigators learned any useful information and in the second, it was only after investigators attempted more humane methods that they received any information.

take to break them, *even if* they knew that an attack was planned and were able to capture an individual who might have information. On top of this, if the attack is so soon that there is no time for other methods, it is unlikely that a committed terrorist would give up the location of the attack. Instead, they would likely distract the interrogators with lies in order to use up the time remaining before the attack. If the terrorist was not working alone, it is likely that they no longer has the information anyways; a clever organization would change the bomb's location if someone privy to that information were captured. As Luban writes, "The first thing to notice about the [ticking time bomb] is that it rests on a large number of assumptions, each of which is somewhat improbable, and which taken together are vanishingly unlikely."<sup>199</sup> By carefully crafting an example just far enough from reality, the ticking time bomb transforms a real moral question into a puzzle that disorients us and brings us to conclusions that do not necessarily reflect our moral understandings. And yet the moral, rational listener is expected to listen to the example and agree that there are scenarios in which interrogators should torture.

The ticking time bomb is depicted as entirely exceptional, a rare, isolated case that makes it acceptable or even necessary to torture one person for the good of humanity, but will not be repeated.<sup>200</sup> The example depicts torture as an emergency exception, but the exceptional case is then used to justify torture as

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<sup>199</sup> David Luban, "Unthinking the Ticking Bomb," *Georgetown University*, Georgetown Public Law Research Paper No. 1154202 (2008): 7.

<sup>200</sup> Shue, "Torture in Dreamland," 231-239.

an institutionalized practice;<sup>201</sup> this is one of the most unforgivable uses of the ticking time bomb. We see this in references to the ticking time bomb in the Schlesinger Report on Abu Ghraib<sup>202</sup> and Assistant Attorney General Jay Bybee's assertion that "the 'ticking time bomb' that could justify the necessity defense was, in fact, a "real world" scenario,"<sup>203</sup> among other cases.

Despite disagreement regarding the use of hypotheticals in moral philosophy, Shue and McMahan agree that the ticking time bomb is imaginary. Oren Gross, though, finds that the ticking time bomb scenario is real, albeit rare. If a government has very good intelligence about a terrorist organization, it is possible (though unlikely) they would know that operatives had been sent out on a mission and could capture a known group member without knowing all of the details of the imminent attack. In order to fill in the blanks, they would need the captive to talk, which he argues *may* require torture.<sup>204</sup> However, as unlikely as this scenario is, Gross' example does not address all of the improbable assumptions of the ticking time bomb case; for example, the fact that someone is sent on a mission does not entail that the person has full knowledge of the

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<sup>201</sup> Luban, "Liberalism, Torture, and the Ticking Bomb," 14:27.

<sup>202</sup> David Luban notes in "Liberalism, Torture, and the Ticking Bomb" at 1440 that "The Schlesinger Report on Abu Ghraib notes that '[f]or the U.S., most cases for permitting harsh treatment of detainees on moral grounds begin with variants of the 'ticking time-bomb' scenario.'" (James R. Schlesinger et al. "Final Report of the Independent Panel to Review DoD Detention Operations." *U.S. Department of Defense*. Washington, DC, August 2004, accessed April 6, 2016, <http://nsarchive.gwu.edu/torturingdemocracy/documents/20040824.pdf>, supra note 39, at 908, 974.)

<sup>203</sup> Bybee's response is cited in U.S. Justice Department Office of Professional Responsibility, "Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of 'Enhanced Interrogation Techniques' on Suspected Terrorists," *Department of Justice*, July 29, 2009, accessed April 6, 2016, [https://www.aclu.org/files/pdfs/natsec/opr20100219/20090729\\_OPR\\_Final\\_Report\\_with\\_20100719\\_declassifications.pdf](https://www.aclu.org/files/pdfs/natsec/opr20100219/20090729_OPR_Final_Report_with_20100719_declassifications.pdf), footnote 171.

<sup>204</sup> Oren Gross, "Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience," *Minnesota Law Review* 88, no. 6 (2004): 1501.



mission itself, most crucially where the time bomb will be planted, which is required by the scenario.

Historical examples, too, have shown that authentic cases are much less cut-and-dry than the ticking time bomb story. McMahan would argue that the messy nature of authentic examples demonstrates the usefulness of the ticking time bomb, but the details that make real world torture cases messy are not irrelevant to the moral judgment one might make about torture in these instances. Luban points to three historical examples that approximate the ticking time bomb as closely as we've seen but that do not support the conclusions of the ticking bomb case. His first example is Abdul Hakim Murad, a Pakistani captured by Philippine authorities in 1995. Most all of the important information Murad had was uncovered within minutes of questioning him before any coercive techniques were used when the FBI uncovered his laptop that led them to the bomb plot and another suspect.<sup>205</sup> They then subjected Murad to 67 days of heavy torture (as opposed to torture lite, which includes techniques that do not mutilate the victim's body such as sleep deprivation and mock execution), after which he finally revealed the information they had already found on his laptop. This example is frequently used to justify interrogational torture, but in reality, the interrogators had no knowledge of another plot and were only hoping that Murad would reveal something if they

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<sup>205</sup> Alfred W. McCoy, *A Question of Torture: CIA Interrogation, from the Cold War to the War on Terror* (New York: Holt, 2006), 112.

tortured him long enough, but that did not happen. Ironically torture in that case was useless.<sup>206</sup>

The second example is provided by President Bush, who cited a case to justify the CIA's enhanced interrogation techniques that was neither close to the ticking time bomb scenario nor entirely truthful about the efficacy of torture. Bush claimed that in the case of Abu Zubaydah, interrogators learned the identities of multiple September 11<sup>th</sup> masterminds, but in reality, the government was well aware of the al Qaeda members Zubaydah mentioned before he was tortured. And Zubaydah didn't give away the information under torture; he gave the information after the torture stopped, after being persuaded by a new interrogator that it was his religious duty.<sup>207</sup> Not even President Bush – who had much to gain by disclosing a real ticking time bomb scenario – could find a convincing case to justify so-called enhanced interrogation techniques.

After Luban gave a lecture at West Point on the impossibility of the ticking time bomb, the cadets proposed a third example of a potential real-life ticking time bomb scenario they had learned from their instructors.<sup>208</sup> After further research, it seems that the cadets only used the example because of misinformation about the specifics. The cadets were told that an officer in Iraq learned that his troops were to be ambushed, then, desperate for information,

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<sup>206</sup> Luban, "Unthinking the Ticking Time Bomb," 9-10, referencing Peter Maas, "Torture, Tough or Lite; If a Terror Suspect Won't Talk, Should He Be Made To?" *New York Times*, March 9, 2003, accessed April 6, 2016, <http://www.nytimes.com/2003/03/09/weekinreview/world-torture-tough-lite-if-terror-suspect-won-t-talk-should-he-be-made.html>; and Marites Dañguilan Vitug and Glenda M. Gloria, *Under the Crescent Moon: Rebellion in Mindanao* (Manila, Philippines: Ateneo Center for Social Policy and Public Affairs, 2000), 223.

<sup>207</sup> Luban, "Unthinking the Ticking Bomb," 12-13.

<sup>208</sup> *Ibid.*, 11-12.

he fired a shot next to a man they had captured who was part of the enemy group. After this act of psychological torture, the man proceeded to reveal information about the ambush.<sup>209</sup> In reality, the officer heard about an assassination plot against himself rather than a future ambush, then captured a local policeman he believed might have had information about the enemy group's plans. After instructing his troops to beat the man for an hour, the officer fired one or two shots next to the man's head, convincing the man that he would be killed if he refused to reveal what he knew. But the policeman still did not reveal any information. The actual events are nothing like the ticking time bomb example at all: the "imminent disaster" would have affected only the officer (while the ticking time bomb suggests many will die if the attack isn't stopped) and the captive did not reveal (or, it seems, even possess) relevant information.

The ticking time bomb scenario is vanishingly unlikely. As Luban writes, "in a world of uncertainty and imperfect knowledge, the ticking bomb scenario should not form the point of reference."<sup>210</sup> Examples such as the ticking time bomb become useless once they are made so foreign to us that we can no longer use our normal moral tools to examine them. As Bernard Williams wrote that

there are certain situations so monstrous that the idea that the processes of moral rationality could yield an answer in them is insane: they are situations which so transcend in enormity the human business of moral deliberation that from a moral point of view it cannot matter anymore what happens.... [T]o spend time

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<sup>209</sup> Ibid., 11-12 referencing Tom Ricks, *Fiasco: The American Military Adventure in Iraq* (New York: Penguin, 2006), 280-281. Ricks footnotes his version of the story to a document titled "CID Report of Investigation—Final" (Feb. 6, 2004), with exhibits and sworn statements.

<sup>210</sup> Luban, "Liberalism, Torture, and the Ticking Bomb," 1444.

thinking what one would decide if one were in such a situation is also insane, if not merely frivolous.<sup>211</sup>

The ticking time bomb idealizes reality to the point that anyone who questions the plausibility of the example is in effect charged with being guilty of letting thousands of innocent people die so that the guilty party could escape temporary pain, thus shutting down discourse on the morality of torture. Torture is the only possible answer to the ticking time bomb, but the ticking time bomb's impossibility makes this irrelevant to the real moral question facing governments today.

## THE IMPOSSIBILITY OF CONSEQUENTIALIST JUSTIFICATIONS FOR TORTURE

Consequentialist justifications for torture depend on two main ideas: first, that torture is effective; and second, that torture decreases terrorism. Neither of these is true. The next section illustrates why torture is ineffective (but why people think it works), and the following section examines the way torture and other tactics that violate human rights function to increase terrorism through blowback.

### IS TORTURE EFFECTIVE?

At its core, consequentialism holds that we should choose that option from the set of options we face that has the best outcome on balance, after subtracting harmful from beneficial consequences. However, if torture is

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<sup>211</sup> Bernard Williams, *Utilitarianism; For and Against* (Cambridge: Cambridge University Press, 1973), 92.

ineffective, then torturing a terrorist for information is likely to add to the overall harm rather than reduce it: information will not likely be revealed that would allow the state to stop an attack, but someone has been tortured in addition to the carnage of unstoppable terrorist attack. Thus in order to evaluate the strength of the consequentialist argument for torture, we must evaluate whether interrogational torture really is effective and reliable.

According to several who argue for the justifiability of torture, coercive interrogation is not only effective but necessary in order to save lives. Dershowitz writes, “The tragic reality is that torture sometimes works, much though many people wish it did not. There are numerous state instances in which torture has produced self-proving, truthful information that was necessary to prevent harm to civilians.”<sup>212</sup> Mirko Bagaric and Julie Clarke echo this sentiment, arguing that torture is an “excellent means of gathering information.”<sup>213</sup> But how is torture’s effectiveness evaluated? Given that torture culture – especially in recent years since torture was banned by several international conventions – is notoriously secretive, data on coercive interrogation techniques is difficult to come by, let alone analyze. Indeed, we have little more than a handful of anecdotes with which to evaluate the claim that torture works.<sup>214</sup>

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<sup>212</sup> Dershowitz, *Why Terrorism Works*, 137.

<sup>213</sup> Mirko Bagaric and Julie Clarke, “Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable,” *University of San Francisco Law Review* 39, no. 3 (2005): 588.

<sup>214</sup> While the examples I use here are similar – and indeed, one is identical – to those in the previous section, they are set out for different purposes: those in the last section were set out by torture proponents as examples of the extreme case in which torture was morally necessary and investigators had enough information to know it could save lives, while these examples are just

In a critique of Bagaric and Clarke's article on the effectiveness of torture, Philip Rumney assesses the validity of the anecdotes used to support torture and finds them inconclusive, at best. He finds that Bagaric and Clarke jump to the conclusion that torture is oftentimes necessary and morally justifiable on the basis of only one example of torture, a case in which the suspect nearly died before he divulged any information due to the severity of harm inflicted.<sup>215</sup> Perhaps more problematic than their lack of evidence is Bagaric and Clarke's argument that "all forms of harm may be inflicted on the agents – even if that results in death."<sup>216</sup> Not only does this argument suggest that interrogators will likely find extreme torture techniques necessary in order to obtain information, but if interrogators may require techniques so extreme that they could kill the prisoner, the interrogators could quite possibly blow any chance of uncovering information by killing their source.<sup>217</sup> Posner and Vermeule's anecdotes are similarly problematic: their article examines only information provided by Israeli security services which was put forward to justify their own use of physical coercion.<sup>218</sup> Because of this, their anecdotes seem to stretch the truth in regards to how much information was actually uncovered through torture, while simultaneously downplaying the extremity of tactics necessary to obtain the information.

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meant to illustrate that torture is effective and timely, regardless of the extremity of the circumstances in which it was undertaken.

<sup>215</sup> Rumney, "Is Coercive Interrogation of Terrorist Suspects Effective?" 486.

<sup>216</sup> Bagaric and Clarke, "Not Enough Official Torture in the World?" 611.

<sup>217</sup> Philip Rumney, "Is Coercive Interrogation of Terrorist Suspects Effective? A Response to Bagaric and Clarke," *University of San Francisco Law Review* 40 (2006): 486.

<sup>218</sup> *Ibid.*, 489-490.

Though Dershowitz is not nearly as optimistic about torture's effectiveness as Bagaric and Clarke, he does claim that torture is sometimes effective. Dershowitz uses only three actual examples to illustrate the effectiveness of torture, and these anecdotes have a questionable relationship with torture.<sup>219</sup> In the first example, Dershowitz states that "Jordan apparently broke the most notorious terrorist of the 1980s, Abu Nidal, by threatening his mother."<sup>220</sup> Using family members to coerce suspects into talking, though, is a technique that Dershowitz himself finds immoral. He writes, "Unless we are prepared to impose some limits on the use of torture or other barbaric tactics that might be of some use in preventing terrorism, we risk hurtling down a slippery slope into the abyss of amorality and ultimately tyranny."<sup>221</sup> In addition to Dershowitz's moral qualms with his own example, anecdotes elsewhere have shown threatening family members to be unsuccessful: former CIA officer Ralph McGehee wrote that, while interrogating suspected communists in Thailand, the wife of a suspected communist leader still refused to cooperate after being told that interrogators would kill her child.<sup>222</sup>

The second example Dershowitz uses is not supported by available evidence; given records publically available, it is impossible to determine how necessary or effective torture was. He writes, "Philippine Police reportedly

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<sup>219</sup> Ibid., 486-489.

<sup>220</sup> Dershowitz, *Why Terrorism Works*, 249.

<sup>221</sup> Ibid., 146. From a purely consequentialist position, Dershowitz's claim that certain potentially effective torture tactics are immoral is problematic; from within his modified consequentialist argument, his moral stance against certain instances of torture demonstrates problems with a pure consequentialist argument. These issues with consequentialism – and with Dershowitz's philosophy – will be addressed in the section "Problems with Consequentialism."

<sup>222</sup> Ralph McGehee, *Deadly Deceits: My 25 Years in the CIA* (Melbourne: Ocean Press, 1999), 105-106.

helped crack the 1993 World Trade Center bombings by torturing a suspect.”<sup>223</sup> But while his source – a *Washington Times* article a month after the September 11<sup>th</sup> attacks – attempts to justify the use of torture, it doesn’t reference the World Trade Center attack or the Philippines, nor does it provide any other anecdote of successful torture.<sup>224</sup> If torture was effective in regards to the 1993 World Trade Center bombings, there seems to be no record of it.

Dershowitz leans most heavily on the third anecdote, the case of Abdul Hakim Murad who was tortured in the Philippines in 1995 before being extradited to the US to stand trial for his involvement in the aforementioned World Trade Center attack that was addressed in the last section.<sup>225</sup> However, Dershowitz leaves out the most crucial details: the FBI uncovered the necessary information without torture, and had to torture him for months before he admitted the information himself.<sup>226</sup> Thus, the example shows that torture is not always necessary, nor is it a particularly timely method. The *Washington Post* article that Dershowitz references<sup>227</sup> includes these details that he strategically effaced in his argument for torture’s efficacy.

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<sup>223</sup> Dershowitz, *Why Terrorism Works*, 249.

<sup>224</sup> Steve Chapman, “No Tortured Dilemma,” *Washington Times*, November 5, 2001, accessed April 6, 2016, <http://www.washingtontimes.com/news/2001/nov/5/20011105-030902-8927r/>. Dershowitz’s unrelated reference to the Philippines here suggests he’s confusing this story with that referenced in his third anecdote, found in a *Washington Post* article: Matthew Brzezinski, “Bust and Boom,” *Washington Post*, December 30, 2001, accessed April 6, 2016, <https://www.washingtonpost.com/archive/lifestyle/magazine/2001/12/30/bust-and-boom/1109903e-3762-4b78-90a6-d191efd39920/>.

<sup>225</sup> Dershowitz, *Why Terrorism Works*, 137.

<sup>226</sup> Alfred W. McCoy, *A Question of Torture: CIA Interrogation, from the Cold War to the War on Terror* (New York: Holt, 2006), 112.

<sup>227</sup> Matthew Brzezinski, “Bust and Boom,” *Washington Post*, December 30, 2001.



While it may be difficult to achieve more representative data of recent torture due to the secrecy surrounding it, studies of historical torture have demonstrated that anecdotes seeming to show “effective torture” fail to show the whole story. Lisa Silverman’s analysis of French torture from the 1500s through the mid-1700s “showed approximate rates of error – that is, no confession on the rack, under repeated drowning, crushing of joints, and the like—in 67% to 95% of cases, depending on the province.”<sup>228</sup> More recently, torture proved unsuccessful for the Gestapo: despite its willingness to engage in any conceivable method of torture, records show that there is no evidence that they were ever able to obtain any precise knowledge of the German Resistance Movement from captured members.<sup>229</sup>

While the data used by American agencies in the development of field manuals is unavailable, both army and CIA documents advise against torture on grounds of inefficacy. A 1977 army manual on intelligence interrogation explains that torture “is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the interrogator wants to hear.”<sup>230</sup> The CIA KUBARK manual on counterintelligence interrogation also addresses the ineffectiveness of physical torture: “In fact, most people underestimate their capacity to withstand pain....

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<sup>228</sup> Jean Maria Arrigo, “A Consequentialist Argument against Torture Interrogation of Terrorists,” Paper presented at the Joint Services Conference on Professional Ethics, Springfield, Virginia, 2003 17, citing Lisa Silverman, *Tortured Subjects: Pain, Truth, and the Body in Early Modern France* (Chicago: University of Chicago Press, 2001), 182.

<sup>229</sup> Peter Hoffman, *The History of the German Resistance: 1933-1945*, trans. Richard Barr (Cambridge, MA: MIT Press, 1977), 519.

<sup>230</sup> U.S Army, *Intelligence Interrogation*. Department of the Army. FM 34-52 (Washington, DC: Government Printing Office, 1977), 5-21.

In general, direct physical brutality creates only resentment, hostility, and further defiance.”<sup>231</sup> It also advises that for those committed to their cause (as captured terrorists tend to be), torture can be counter-effective: “Persons of considerable moral or intellectual stature often find in pain inflicted by others a confirmation of the belief that they are in the hands of inferiors, and their resolve not to submit is strengthened.”<sup>232</sup> This phenomenon is compounded by the organizational structure of terrorist organizations: few people know all strategically critical information regarding an attack, and those with valuable information “are precisely those who have been selected and trained to withhold true information when tortured and to provide disinformation to their captors when interrogated.”<sup>233</sup>

The most comprehensive analysis of modern-day torture, the 2012 report of the Senate Select Committee on Intelligence on the CIA’s detention and interrogation program,<sup>234</sup> concluded that torture was no more effective at Guantanamo Bay than intelligence field manuals had predicted.<sup>235</sup> A review of CIA interrogation records revealed that “enhanced interrogation techniques was not an effective means of obtaining accurate information or gaining detainee

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<sup>231</sup> CIA, “KUBARK Counterintelligence Interrogation,” *National Security Archive*, July 1963, accessed April 6, 2016, <http://nsarchive.gwu.edu/NSAEBB/NSAEBB122/CIA%20Kubark%201-60.pdf>, 90-91.

<sup>232</sup> *Ibid.*, 94.

<sup>233</sup> Mark A. Costanzo and Ellen Gerrity, “The Effects and Effectiveness of Using Torture as an Interrogation Device: Using Research to Inform the Policy Debate,” *Social Issues and Policy Review* 3, no. 1 (2009): 188.

<sup>234</sup> While the report was approved by the Committee on December 13, 2012, it was not fully declassified until December 9, 2014.

<sup>235</sup> The citations here refer to the majority report, approved by a 9-6 vote of the Committee. The minority – divided largely along partisan lines, though one Republican voted with the majority – disagreed with the report for various reasons.

cooperation” and many “detainees provided significant accurate intelligence prior to, or without having been subjected to these techniques.”<sup>236</sup> Several interrogations of tortured detainees resulted in false information “on critical intelligence issues, including the terrorist threats which the CIA identified as its highest priorities.”<sup>237</sup> CIA interrogators themselves questioned the enhanced interrogation methods; internal assessments showed that confronting prisoners with already-acquired information was the most effective interrogation technique, causing CIA officers to “regularly [call] into question whether the CIA’s enhanced interrogation techniques were effective, assessing that the use of the techniques failed to elicit detainee cooperation or produce accurate information.”<sup>238</sup>

The Senate Committee found the anecdotal evidence frequently cited to support CIA enhanced interrogation techniques to be problematic in many of the same ways as those cited by Dershowitz, Bagaric and Clarke, and Posner and Vermeule. In 20 of the most prominent examples that purported CIA counterterrorism successes, there was “no relationship between the cited counterterrorism success and any information provided by detainees during or after the use of the CIA’s enhanced interrogation techniques,” the information provided by the detainee was already available to the US intelligence

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<sup>236</sup> Senate Select Committee on Intelligence, *Report of the Senate Select Committee*, xi.

<sup>237</sup> Ibid.

<sup>238</sup> Ibid.

community, or the information was obtained before interrogators began using enhanced interrogation techniques.<sup>239</sup>

While torture is unlikely to produce new or valuable information, it can also hinder investigations by triggering a high rate of false confessions, which divert resources from real threats, waste time, and put soldiers and civilians at risk. Interviews with torture survivors have shown that any truthful information they admitted left out crucial details or included lies to confuse investigators as the goal was only to make the torture stop with as little true information as possible.<sup>240</sup> Civilian criminal interrogations have shown that even legal coercive techniques that are much less severe than torture have produced false confessions in a surprisingly high proportion of cases; since “the amount of coercion in torture-based interrogations is exponentially greater than that in criminal interrogations, torture is likely to elicit a substantially higher portion of false confessions.”<sup>241</sup> The risk of false confessions is especially high with captured terrorists because the high stakes mean long interrogations which “[wear] down the suspect and thus [impair] his or her ability and motivation to resist pressure,”<sup>242</sup> leading to false confessions.

Trained interrogators feel more confident with their ability to tell if a suspect is lying but are no more likely to judge whether a suspect is lying than

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<sup>239</sup> Ibid., xi-xii.

<sup>240</sup> Costanzo and Gerrity, “The Effects and Effectiveness of Using Torture,” 183.

<sup>241</sup> Ibid.

<sup>242</sup> Ibid., 187.

anyone else.<sup>243</sup> Studies have also shown that trained interrogators have an increased tendency to believe they are being lied to.<sup>244</sup> This dangerous combination of confidence and low accuracy means that interrogators often continue to torture even after true information has been divulged because they feel certain that their training has made them competent judges of suspects' honesty.<sup>245</sup> When the suspect and the interrogators come from different cultures – as is frequently the case in the interrogation of suspected terrorists today – the interrogator is even more likely to incorrectly judge whether a suspect is being honest.<sup>246</sup> In order to stop the torture, the innocent victim – or the victim who has already divulged what they know – will then have to fabricate information to satisfy the interrogator;<sup>247</sup> the false confession will divert resources, even if any true information disclosed could have been useful for preventing an attack. Henry Shue points out that willing collaborators will immediately tell what they know, thus only the committed and the innocent will likely be severely tortured;<sup>248</sup> in the first case, the torture will likely never be effective and could strengthen the captive's resolve as the CIA manual suggests, and in the second case, no useful information could have been obtained anyway. Costanzo and Gerrity argue, "Interrogators are likely to become most coercive when questioning innocent suspects who are perceived to be lying, because these

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<sup>243</sup> Jaume Masip et al., "Officers as Lie Detectors: Guilty Before Charged," in *Current Themes in Social Psychology*, ed. Derek Chadee and Jason Young (Kingston, Jamaica: The University of the West Indies Press, 2006): 187-192.

<sup>244</sup> Ibid.

<sup>245</sup> Ibid., 185.

<sup>246</sup> Charles Bond, Adnan Omar, Adnan Mahmoud, and Richard Neal Bonser, "Lie Detection Across Cultures," *Journal of Nonverbal Behavior* 14, no. 3 (1990): 200-202.

<sup>247</sup> Costanzo and Gerrity, "The Effects and Effectiveness of Using Torture," 183.

<sup>248</sup> Henry Shue, "Torture," *Philosophy & Public Affairs* 7, no. 2 (Winter, 1978): 130.

truthful suspects are regarded as resistant and defiant.”<sup>249</sup> This is especially concerning when the interrogator has been authorized to use torture, as they will have no way of determining whether the suspect is telling the truth and will likely increase the severity of coercion used on innocent people as frustration and desperation increases. And since torturers want to see themselves as good, productive, and moral, they often dehumanize those they torture to justify their actions to themselves;<sup>250</sup> as a result of these psychological processes, perpetrators of torture believe their behavior is normal or even desirable, which contributes to the use of torture on undeserving suspects.<sup>251</sup>

### DOES TORTURE REDUCE TERRORISM?

State repression and tactics that violate human rights are frequently employed as counterterrorism measures in the so-called “War on Terror,” but the efficacy of repression remains in question. Repression<sup>252</sup> has been used by many Middle Eastern countries and external actors intervening in the War on Terror to put down protest movements and violent insurrections, and some opposition movements have seemingly been deterred or even defeated through such tactics. But scholars have also argued that these violent or abusive tactics

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<sup>249</sup> Costanzo and Gerrity, “The Effects and Effectiveness of Using Torture,” 185-186.

<sup>250</sup> This dehumanization is compounded by the prison environment, which facilitates the dehumanization of the powerless, as seen in the Stanford prison experiment referenced in the section “Non-Consequentialist Liability-Based Argument for Torture” (Craig Haney, Curtis Banks, and Philip Zimbardo, “A Study of Prisoners and Guards in a Simulated Prison,” *Naval Research Review* 30 (1973): 4-17.).

<sup>251</sup> *Ibid.*, 193-194.

<sup>252</sup> Given the secrecy surrounding torture, data on its efficacy is unavailable. Thus repressive tactics more generally are considered here.

serve to escalate conflicts and increase terrorist incidents and recruitment in the long run. These conflicting analyses leave us with a puzzle: do repressive policies such as torture actually deter terrorists and if not, why do so many governments use these tactics as a means of self-defense and counterterrorism?

In recent years, several scholars have argued against the claim that repression successfully chokes terrorist organizations and decreases overall violence. Their studies aim to show that repressive actions by a state are not only unlikely to counter terrorist activity, but frequently serve to *increase* violence because of the backlash against abusive policies. Scholars found that backlash is particularly severe when repressive policies are indiscriminate (i.e. directed towards the population at large<sup>253</sup>) rather than targeted at the groups they were meant to deter or punish, as individuals that base their goals and motivation (at least in their own minds) on the needs of their society view the repression as unwarranted and are thus motivated to engage in violence, including supporting and joining terrorist groups.<sup>254</sup> Because of this, states with the most problematic human rights records were found to be the most likely to experience terrorist incidents and the growth of terrorist networks with domestic support.<sup>255</sup> The strong relationship between terrorism and state abuse of physical integrity rights – a specific subset of human rights that includes individuals' rights

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<sup>253</sup> It can be argued that tactics undertaken by state actors that are directed at the population at large are themselves a form of terrorism; the moral issue here is addressed in Chapter 1 Part 2 in which I examine state actors' abuse of the lateral provided by the doctrine of double effect.

<sup>254</sup> Laura Dugan and Erica Chenoweth, "Moving Beyond Deterrence: The Effectiveness of Raising the Expected Utility of Abstaining from Terrorism in Israel," *American Sociological Review* 77, no. 4 (August 2012): 617-9.

<sup>255</sup> Rhonda Callaway and Julie Harrelson-Stephens, "Building a Causal Model of Terror: The Relationship Between Human Rights and Terrorism," Paper presented at the annual meeting of the International Studies Association, Montreal, Quebec, Canada, 2004.

against torture, disappearance, extrajudicial murder, and political imprisonment by the state, arguably the rights most widely accepted as universal – demonstrates that whether a state employs repressive policies is one of the most determinant factors in its vulnerability to terrorism.<sup>256</sup> (While the causal relationship may instead run from terrorism to human rights abuses, the rest of the section will show that human rights abuses do make a state more likely to experience terrorist attacks.) But given that repressive policies and human rights abuses increase the cost of terrorism, why don't these policies deter terrorists?

The primary argument for the heightened risk of terrorist attacks in countries that have utilized repressive and abusive tactics indiscriminately (whether in the name of counterterrorism or not) is that potential terrorists feel disconnected from their government or, if external actors are employing abusive tactics, angry at the repressive action undertaken by a foreign actor.<sup>257</sup> When citizens feel not only unrepresented but abused by their government, they are much more likely to support or join terrorist organizations that threaten the regime, in spite of the risks.

Scholars argue that public opinion is a crucial tool in counterterrorism because governments need sources within the population to supply them with information so that they can prevent terrorist attacks. Not only can abusive tactics increase terrorist recruitment, but they can quickly turn public opinion

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<sup>256</sup> James Walsh and James Piazza, "Why Respecting Physical Integrity Rights Reduces Terrorism," *Comparative Political Studies* 43, no. 5 (2010): 564.

<sup>257</sup> Emilie Hafner-Burton and Jacob Shapiro, "Tortured Relations: Human Rights Abuses and Counterterrorism Cooperation," *PS: Political Science & Politics* 43, no. 3 (July 2010): 416.



against governments seen to be using immoral or unjust tactics.<sup>258</sup> Thus, not only do abusive tactics increase the overall number of terrorists, but they also hinder the abusive state's security bureaucracies and as a result, their ability to effectively stop future terrorism.<sup>259</sup> When a government uses tactics that violate human rights, it can also create a rift with military and/or police forces within the country which may then refuse to cooperate with the abusive government, thereby significantly damaging the efficacy of the counterterrorism policy.<sup>260</sup>

While repressive tactics have served to alienate affected Middle Easterners, within foreign democracies intervening in the War on Terror, public pressure to stop human rights abuses has not significantly affected cooperation between intelligence agencies.<sup>261</sup> Likewise the alienation of Middle Eastern citizens by abusive foreign actors has not significantly decreased the cooperation between foreign actors employing abusive tactics and regimes in Middle Eastern countries that serve as breeding grounds for terrorist organizations, nor has the alienation stopped Middle Eastern regimes from employing repressive tactics themselves.<sup>262</sup> Thus the argument that abusive practices hinder cooperation between intelligence-gathering agencies, while theoretically valid, has not been shown to be significantly problematic in the War on Terror. However, intelligence gathering is likely still harmed by the alienation of Middle Eastern society, as the people in closest proximity to the organizations – civilians – likely

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<sup>258</sup> Ibid., 416-417.

<sup>259</sup> Walsh and Piazza, "Why Respecting Physical Integrity," 572.

<sup>260</sup> Ibid.

<sup>261</sup> Hafner-Burton and Shapiro, "Tortured Relations," 416.

<sup>262</sup> Ibid., 416-417.

have the most information.<sup>263</sup> In addition to this, less powerful and wealthy states should not necessarily expect such high levels of foreign participation after employing repressive tactics; other governments may be willing to cooperate with the U.S. in spite of domestic pressure solely because of the U.S.'s immense international power, and would not necessarily continue to aid a less powerful country that employed the same tactics.

While many statistical analyses have been conducted in order to evaluate the relationship between human rights abuses and frequency and extremity of terrorist attacks, analyses that only look for an association between repressive practices and increased terrorist activity cannot determine causation. Studies that found a relationship cannot definitely say whether the human rights abuses caused an increase in terrorist activity, or whether intelligence regarding increased terrorist activity triggered the implementation of more repressive policies. Emilie Hafner-Burton and Jacob Shapiro note that literature on the subject could be improved by examining situations in which there is a change in level of human rights abuses that is certainly unrelated to a change in frequency of terrorist attacks or increase in terrorist activity, such as an unexpected judicial ruling against torture in a democracy.<sup>264</sup> Further research on this would allow scholars to test more conclusively whether human rights abuses do in fact account for the increase in terrorism rather than the other way around.

The problem of causation is addressed in part by studies that examine how and why terrorist groups are formed out of movements that were originally

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<sup>263</sup> Walsh and Piazza, "Why Respecting Physical Integrity," 558.

<sup>264</sup> Hafner-Burton and Shapiro, "Tortured Relations," 417-418.

nonviolent. Clark McCauley and Sophie Moskalenko examined the evolution of organizations created for the purpose of civil disobedience to terrorist cells after interaction with a repressive state created or escalated violence. After the state adopted repressive policies to stop the nonviolent organization or movement, in addition to the increase in sympathy for victims of state repression and human rights abuses as discussed earlier, the group's sympathizers were also moved to employ more extreme tactics.<sup>265</sup> While models that attempt to show that state repression is necessary for combatting terrorism correctly show that some of a group's supporters abandon the mission when state repression increases, they do not take into account that the state's repression also serves to condense the movement into a more radical group that will choose to adopt extreme (often terrorist) tactics in the face of human rights abuses meant to suppress the nonviolent or less extreme movement. This "radicalization by condensation" tends to occur when there are strong ties between members of the group, and human rights abuses have affected someone with whom the group has a relationship.<sup>266</sup> This suggests that in certain instances, at least, increased state repression motivates the formation of terrorist organizations rather than the other way around.

The counterargument to the claim that repression leads to backlash that increases terrorism is that, under certain conditions, repression and indiscriminate violence can effectively defeat terrorist groups and guerrilla

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<sup>265</sup> Clark McCauley and Sophie Moskalenko, "Mechanisms Of Political Radicalization: Pathways Toward Terrorism." *Terrorism and Political Violence* 20, no. 3 (2008): 425-426.

<sup>266</sup> McCauley and Moskalenko, "Mechanisms Of Political Radicalization," 425-426.

insurgencies by making them unable to continue fighting.<sup>267</sup> The conditions in which such a policy is effective, though, are rather strict: When a state is able to control or restrict the land in which the group operates, no external area is available for the group to flee to, external actors are not able to penetrate the controlled territory with supplies, and the body of potential terrorists is relatively small, a terrorist organization can be defeated through repression.<sup>268</sup> Repression in such instances can essentially choke the group, making them unable to continue fighting because of a lack of supplies and information from the population. However, Alexander Downes' study argues that a state's ability to control the entire territory and population is critical for the success of indiscriminate repressive policies; if such control is not feasible, targeted violence rather than widespread repression is more effective, as it will provoke less backlash that the state is unable to control.<sup>269</sup> However, targeted violence requires the ability to obtain high quality information, and is therefore not always possible.

While Downes' study shows the potential success of repressive tactics under certain conditions, these conditions are far from the reality in the current War on Terror. Given that several states in the region – notably Yemen, a breeding ground for al Qaeda – are failed or failing, no state, external actor, or

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<sup>267</sup> See Alexander Downes, "Draining the Sea by Filling the Graves: Investigating the Effectiveness of Indiscriminate Violence as a Counterinsurgency Strategy," *Civil Wars* 9, no. 4 (2007): 420-444; Dipak Gupta, Harinder Singh, and Tom Sprague, "Government Coercion of Dissidents: Deterrence or Provocation?" *Journal of Conflict Resolution* 37, no. 2 (1993): 301-339; and Ursula Daxecker and Michael Hess, "Repression Hurts: Coercive Government Responses and the Demise of Terrorist Campaigns," *British Journal of Political Science* 43, no. 3 (2013): 559-577.

<sup>268</sup> Downes, "Draining the Sea by Filling the Graves," 437-440.

<sup>269</sup> *Ibid.*, 440-441.

coalition is able to control either population or territory. Middle Eastern states threatened by growing terrorist organizations have Sunni populations too large to control; indiscriminate violence would thus be unlikely to produce the desired effects, and repression of the general population would appear unjustified, and likely be met with substantial backlash that no actor would be able to contain, thus adding to the original problem.<sup>270</sup>

When repression is employed outside these narrow conditions, groups have several tactics to choose from. Why does a group choose violence in the face of some repression, but nonviolence when faced with other repressive policies? One possible model designed to explain the contradictory findings on the success of repression is Mark Irving Lichbach's Rational Actor model.<sup>271</sup> In this model, one of the primary considerations in determining whether repression will stop dissenting action is which sort of tactic is being repressed: If a state represses nonviolent tactics, these will likely be reduced, but violent tactics may increase; if the legal choice (nonviolent protest) is rendered illegal and even dangerous, groups are likely to choose violent tactics that may be more effective but had been avoided before because they are illegal.<sup>272</sup> (Post-Arab Spring Syria has proven to be a model example for this proposition: After the government brutally repressed nonviolent demonstrations, the relative cost of engaging in protests and demonstrations increased so much that peaceful tactics weren't worth it, and groups resorted to violence instead.) Whether a repressive policy

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<sup>270</sup> Ibid., 441.

<sup>271</sup> Mark Irving Lichbach, "Deterrence or Escalation?: The Puzzle of Aggregate Studies of Repression and Dissent," *Journal of Conflict Resolution* 31, no. 2 (1987): 266-269.

<sup>272</sup> Ibid., 271-279.

will increase or decrease dissent also depends on the government's accommodative policy to the group and whether state policies are consistent: If a government consistently enforces repressive policies and does not yield to more effective or extreme tactics, opposition activity will decrease.<sup>273</sup> If policies are reliably enforced, there will be little to no conciliatory action by the state to justify the cost to the group of employing extreme tactics. However, given that repressive state policies can motivate relatively extreme tactics, it may be difficult for a government not to yield to dissenting groups, but any conciliatory action would demonstrate that the tactics are effective and thus would likely increase group action.

Another explanation for the variation of effectiveness of repressive tactics (i.e. whether terrorist organizations can be defeated without a large backlash) is that the success of such policies is determined by the country's regime type.<sup>274</sup> According to these studies, democratic states are likely to face higher levels of protest following abusive policies; human rights abuses and repression are likely to provoke dissent rather than reduce violence or quash opposition movements because the level of repression undertaken will be enough to provoke anger but not enough to stop backlash.<sup>275</sup> In democratic countries, constitutions limit the actions that a government can take against its people. In order to maintain regime legitimacy, the state cannot push constitutional limits too far, as this

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<sup>273</sup> Ibid., 286-287.

<sup>274</sup> See Gupta, Singh, and Sprague, "Government Coercion of Dissidents," 301-339 and Daxecker and Hess, "Repression Hurts: Coercive Government Responses," 559-577.

<sup>275</sup> Gupta, Singh, and Sprague, "Government Coercion of Dissidents," 335-336.

would provide greater motivation for opposition groups.<sup>276</sup> Because of this, governments are unable to impose severe enough repressive policies for such tactics to be effective.<sup>277</sup> The same constitutional restrictions that determine legitimacy do not apply to non-democracies, so these regimes are more willing to disregard the human rights of the opposition;<sup>278</sup> such countries may thus be able to create such severe costs for terrorist action that potential terrorists are dissuaded from using terrorist tactics,<sup>279</sup> though as I showed in Chapter 1 with the discussion of collective bargaining, potential terrorists can also be persuaded by severe repression to join a terrorist group in spite of any danger to themselves.

In determining the relative effectiveness of repression in authoritarian regimes, Daxecker and Hess's study used group termination to gauge whether or not repressive tactics were effective in counterterrorism. However, group termination is not an accurate measure of effectiveness as it fails to take into account the ways in which repression affects individuals and society in the long run. Repression and human rights abuses can stop terrorist activity in the present by making the cost of such actions too high, but may contribute to a revolution or to the renewal of a terrorist organization in the future after the group has had time to rebuild. Repression causes movements to condense, with extreme members willing to engage in more extreme tactics creating new groups down the line. Because of this, Daxecker and Hess's conclusion that repression

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<sup>276</sup> Daxecker and Hess, "Repression Hurts: Coercive Government Responses," 576.

<sup>277</sup> Gupta, Singh, and Sprague, "Government Coercion of Dissidents," 335-336.

<sup>278</sup> Daxecker and Hess, "Repression Hurts: Coercive Government Responses," 576-577.

<sup>279</sup> Gupta, Singh, and Sprague, "Government Coercion of Dissidents," 336.

is successful for authoritarian regimes because it leads to group termination fails to examine all possible consequences of abusive policy and may not in fact be accurate.

Since most studies have shown that repressive policies are counterproductive except possibly when employed under certain limiting conditions, the question remains: If repression and human rights abuses do increase terrorist activity, why do governments in the Middle East and foreign actors in the War on Terror continually employ such policies as a response to terrorism?

In many Middle Eastern countries, a rich elite controls the state, determines which groups receive state resources, and in the case of oil-producing states, enjoys the financial benefits of external rents. The elites are desperate to maintain their privileged position, because regime changes could mean being excluded from state resources, or even the redistribution of wealth from the elite to the poor. Poorer states tend to take from the masses so that the elites are well provided for,<sup>280</sup> thus poor states are likely to have higher degrees of inequality, and elites are more willing to use repression in order to keep their privileged positions since the alternative to their positions of power is poverty.<sup>281</sup> Because of this, when opposition groups pose a substantial risk to a regime or to the stability of the state, the elite is forced to choose between employing repressive policies, transitioning to a full democracy in which they will almost

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<sup>280</sup> Conway Henderson, "Conditions Affecting the Use of Political Repression," *Journal of Conflict Resolution* 35, no. 1 (March 1991): 125.

<sup>281</sup> Tedd Robert Gurr, "On the Political Consequence of Scarcity and Economic Decline." *International Studies Quarterly* 29, no. 1 (March 1985): 62.



certainly lose their privileges, or making some lesser concession to the population.<sup>282</sup> One study has found evidence that conceding less than the transition to a full democracy indicates weakness to the population and fuels further discontent until more radical demands are met, thus repression is viewed by elites as the only option for maintaining their position.<sup>283</sup>

Terrorist organizations and their acts of violence pose less of a threat to the Middle Eastern political elite that depends on its ability to influence the division of wealth and resources than do mass demonstrations which threaten to overthrow the current regime and redistribute political and economic power. Thus, the safer choice for the elite is to repress the population, making the cost of demonstrating too high for the majority of people; though this will likely motivate potential terrorists, the increase in terrorist attacks poses less of a political threat to the elite. In fact, increased terrorist activity might consolidate the power of the political elite and has been used to justify politically convenient, restrictive counterterrorism policies (such as Egypt's recent counterterrorism bill), because the population will depend on the regime for security. However, if high levels of repression continue, the population may begin to support terrorist organizations working against the repressive regime.

Repression has been found to be often counterproductive because abusive policies create a disconnect with the state. This can manifest itself in increased terrorist recruitment, or in difficulty gathering information from a

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<sup>282</sup> Daron Acemoglu and James A. Robinson, "Democratization or Repression?" *European Economic Review* 44, no. 4 (2000): 683-685.

<sup>283</sup> *Ibid.*, 685.

hostile population. The theory is complicated, though, by repression's instances of success. This variation has been explained in part by regime types: democratic regimes depend on their adherence to the constitution for legitimacy, and thus are unable to adopt severe enough repressive measures to be effective without provoking dissent, but non-democratic regimes are willing to commit more extreme human rights abuses, thus making the cost of dissent too high for most groups. A relatively narrow set of conditions is left in which repression can be successfully implemented without doing long-term damage that may result in reinvigorated terrorist organizations down the line. However, repression is frequently employed in the Middle East outside of these conditions, because political elites are more afraid of losing their position through revolution than of terrorist attacks.

While the studies shown here have explored repression more generally, jihadist literature over the past decade has made frequent references to American torture at Guantanamo Bay and Abu Ghraib. The extremity of torture, as explored in Chapter 2 Part 1, makes it a particularly powerful and persuasive example of the evil and abusive nature of the state for potential terrorist recruits. For instance, an al Qaeda strategist, Abu Mus'ab Al-Suri, recently wrote in *al Qaeda in the Arabian Peninsula's* magazine,

In Afghanistan, tens of thousands were killed in the December 2001 invasion by the Americans in blind rage, most were innocent civilians. Guantanamo has been filled with not only with your

mujhideen brothers but also with hundreds of innocent civilians. All being tortured and subjected to the most despicable crimes.<sup>284</sup>

Even President Bush has acknowledged the blowback caused by his torture policies; he wrote in his memoir, “[T]he detention facility had become a propaganda tool for our enemies and a distraction for our allies.”<sup>285</sup> Thus it seems clear that torture has played into the terrorist logic explored in Chapter 1: torture, rather than deter or decrease terrorism, has served as a tool for terrorist recruitment by making the enemy seem so evil that it must be stopped, regardless of the risk to the individual. And since the studies examined here explore repression more generally, the conclusion that such policies likely increase terrorism through blowback applies to other tactics proposed by revisionists that aren’t explored in depth in this thesis.

## WHAT TERRORISTS WANT AND WHY DEMOCRACIES GIVE IT TO THEM

Terrorist attacks are designed to provoke a response, but a proportional and discriminating response would not satisfy terrorist aims. Terrorists depend on overreactions in the form of torture and indiscriminate attacks and repression in order to gain support for their “honorable” mission against the oppressor. But the likelihood that a counterterrorism campaign will engage in tactics that violate human rights – the sort of tactics that terrorist groups hope

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<sup>284</sup> Abu Mus’ab Al-Suri, “The Jihadi Experiences: The Strategy of Deterring With Terrorism,” *Inspire*, Spring 2013, accessed April 6, 2016, <https://azelin.files.wordpress.com/2013/05/inspire-magazine-issue-11.pdf>, 23.

<sup>285</sup> George W. Bush, *Decision Points* (New York: Broadway Books, 2011), 180.

to provoke to propel recruitment – depends not only on the perception that terrorists represent total evil and want to undermine an entire culture or value system, but on the belief that the threat being faced is real, imminent, and capable of doing lasting damage. Some strategic choices by terrorist organizations provoke the state to override moral prohibitions by giving the impression that the groups are strong and capable of doing great damage. As Chapter 1 argued, terrorists tend to strike symbolic targets in order to make the most impact mentally, emotionally, and in terms of media coverage of the attack. By attacking symbolic targets, terrorists give the impression that they both want to undermine the culture, government, or value system represented by the target and are capable of doing so. Eugene Dais sets out this idea:

The 9/11 attack by a terrorist network with global reach presented an unforeseen threat to the hegemonic role the United States had assumed. This attack, unlike the truck bombing of the Twin Towers in 1993, clearly revealed the network's potential to deliver by surprise and at will weapons of mass destruction (WMD) against the United States, something no state, with its territorial location, could do and hope to survive. This form of terrorism, whatever its content or purpose, I call perfect terrorism, perfect in the sense that, given its potential to involve WMD, even the SWS [sole world superpower] must fear its threat as a continuing clear and present danger... The fact that the 9/11 attack hit the two most famous symbols of America's economic and military dominance clearly signaled al-Qaeda's intention to undermine the hegemonic role the United States reluctantly took on in 1945.<sup>286</sup>

Had the attack not struck an American symbol, the belief that the threat posed by al Qaeda was a threat to the very fabric of Western culture and that terrorists posed a significant threat would likely have been much less strong, as would the

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<sup>286</sup> Eugene E. Dais, "Just War Theory Post-9/11: Perfect Terrorism and Superpower Defense," in *Intervention, Terrorism, and Torture Contemporary Challenges to Just War Theory*, ed. Steven P. Lee, 105-106 (New York: Springer, 2007), 105-106.

willingness to employ immoral tactics meant to destroy the threat, tactics that would not be employed against other state actors. Terrorism is the weapon of the weak. The actual destructive power of non-state groups is severely limited by lack of money, advanced weaponry, and recruits. And yet by using their resources as strategically as possible, the attacks created the belief that “[n]ot only would the international economy be seriously disrupted, harming most the people least able to bear it, but the military resources of all states would thereby be drastically weakened, thus facilitating the global spread of terrorist insurgencies.”<sup>287</sup>

The primary reason that seemingly just democratic states are so willing to abandon centuries-old moral traditions in favor of tactics such as torture and indiscriminate airstrikes that are both immoral and counterproductive is that the decision makers are held hostage by the democracies they represent. One of the main strategic goals of a terrorist attack is to provoke a response – preferably an excessive or repressive one – that will drive recruitment and support, thereby increasing the group’s resources so that they can employ meaningful and effective attacks against legitimate targets or convince the state to make the concessions they want. Why, then, do knowledgeable leaders make decisions that seemingly play into the hands of terrorist groups? Ethan Bueno de Mesquita answers:

When there is divergence between voters and government preferences, strategic substitution among different modes of attack by terrorists and agency problems between the voters and government create a situation in which the politically optimal

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<sup>287</sup> Ibid., 106.

counterterrorism strategy pursued by the government in response to electoral and institutional incentives is quite different from the security maximizing counterterrorism strategy. In particular, in response to electoral pressure, the government allocates resources to observable counterterror in excess of the social optimum.<sup>288</sup>

Democratically elected leaders may have to employ the more public and less discriminating or effective counterterrorism strategies to prove to constituents that the government is taking sufficient action against terrorists, even if these steps are provocative and prolong or intensify the conflict. It is for this reason that democracies are particularly attractive targets for terrorism: these states are especially sensitive to the costs of terrorism and are more likely “to grant concessions to terrorists so as to limit future attacks, to be constrained in their ability to pursue a lengthy attritional campaign against an organization, but also to be under greater pressure to ‘do something.’”<sup>289</sup>

As John Mueller notes, “The costs of terrorism very often come mostly from the fear and consequent reaction (or overreaction) it characteristically inspires (qualities stoked by the terrorism industry), not from its direct effects which are usually comparatively limited.”<sup>290</sup> While democratic leaders may be willing to decrease the chances of having a secure future for their state in order to ensure job security and thus may be willing to employ an ineffective strategy that is itself morally flawed, it is crucial to note that these actions do not create a safer world or decrease the damage done to innocent people across the globe.

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<sup>288</sup> Ethan Bueno de Mesquita, “Politics and the Suboptimal Provision of Counterterror,” *International Organization* 61 (Winter 2007): 9.

<sup>289</sup> Kydd and Walter, “The Strategies of Terrorism,” 80.

<sup>290</sup> John Mueller, “Six Rather Unusual Propositions About Terrorism,” *Terrorism and Political Violence* 17, no. 4 (2005): 487.

The population must stop demanding torture and other tactics that violate human rights on the grounds that they are neither morally justifiable nor effective, or leaders must choose the moral – and effective – path for themselves; until then, elected leaders will likely continue playing into the hands of terrorist organizations.

### PROBLEMS WITH CONSEQUENTIALISM

Torture is very rarely, if ever, effective and likely increases overall terrorist activity. But is it morally justified regardless of its inefficacy? The next two sections examine the failures of two different moral justifications for torture.

The foremost moral justification for the use of torture and other seemingly immoral tactics in the War on Terror is consequentialist. From this perspective, torture is not only excusable but would be a moral obligation if it could prevent more harm than it causes.<sup>291</sup> But the actual consequentialist arguments are flawed because, as I will show, they fail to provide a sound moral theory and as such cannot be used to justify immoral tactics employed in the War on Terror. As Michael Walzer repeats time and time again, even though “War is hell,” we cannot permit immoral tactics simply because their use inflicts less harm bringing an earlier end to the war. We must instead not commit atrocities at all.

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<sup>291</sup> Though whether torture is truly capable of preventing harm is addressed in a previous section, “Is Torture Effective?”.

Consequentialism comes in two main varieties: act and rule consequentialism. For act consequentialists, the morally right action is the action that will produce the least harmful (or most beneficial) result. For rule consequentialists, a sort of hybrid between deontology and act consequentialism, the morally right action is that which follows the set of rules whose acceptance by everyone would have the best consequences. R.B. Brandt writes of rule consequentialists: “in justifying the rules, utilitarian considerations are in order and nothing else is; whereas in making decisions about what to do in concrete circumstances, the rules are absolutely binding.”<sup>292</sup>

The rule consequentialist’s rules, according to R.B. Brandt, are established using a process similar to the reflective equilibrium described by John Rawls wherein “rational persons in the initial situation would choose [one set of] principles over those of the other for the role of justice.”<sup>293</sup> In a similar vein, Brandt writes that “utilitarian rules of war are the ones rational, impartial persons would choose.”<sup>294</sup> However, he does not provide a convincing reason as to why rational persons would all conclude that consequentialist-based rules should be adopted, all things considered. According to Brandt, rational people want to maximize the good of society without regard to who deserves the good, rather than distribute the good fairly to those whose actions warrant it. Aggregate notions of value of this sort in which benefits to one person are just as important as benefits to any other person are problematic because they do not

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<sup>292</sup> R.B. Brandt, “Utilitarianism and the Rules of War,” *Philosophy and Public Affairs* 1, no. 2 (Winter, 1972): 147.

<sup>293</sup> John Rawls, *A Theory of Justice* (Cambridge: The Belknap Press, 1971), 17.

<sup>294</sup> Brandt, “Utilitarianism and the Rules of War,” 147.



recognize the special responsibility of, e.g., a parent to their children or a politician to their citizens, nor do they acknowledge that people who have acted wrongly do not deserve benefits. Brandt simply assumes that the aggregate of good of society has priority over fairness and justice and that people do not have special responsibilities to those with whom they stand in morally important relationships.

He also assumes that people care only about outcomes, but that begs the question since those who hold deontological positions are also concerned about how outcomes are brought about. In sum, numbers are not the only thing that matter when determining whether something is morally right: if the only way to prevent harm to two people is by torturing a terrorist's child, the harm that would come to those two people is not more significant merely by virtue of their numbers than the harm done to the child. Not preventing harm to befall someone and actively harming someone are not morally equivalent, as consequentialists would have us believe, so the fact that more people could suffer if the detainee is not tortured is not the only relevant fact when determining the moral course of action. Even if numbers were the most significant factor, real life scenarios don't make for simple or straightforward calculations. For instance, Dershowitz's example failed to consider the harm done to the interrogator made to torture an innocent person, the pain felt by the family of the torture victim, the possible backlash resulting from torturing an innocent person, or the use of torture itself.

In arguing that consequentialist rules are those that rational people would choose, Brandt assumes that self-interested and altruistic people would come to the same consequentialist conclusions when making rules for everyone, the self-interested because they want to minimize harm to themselves and the altruistic because they want to maximize the good for everyone. However, self-interested people will likely want to secure themselves a minimally acceptable outcome rather than taking their chances with an outcome that maximizes aggregate well being, but allows for some people to have serious losses, and the altruistic may likewise not accept an outcome that inflicts serious loss on some. In regards to human rights-violating tactics used in war, the self-interested and the altruistic might agree on an absolute prohibition of certain actions regardless of the good that could come from them, the self-interested out of fear that the tactics could be used on themselves and the altruistic out of empathy for those who would experience the severe harm they cause.

It is particularly difficult to see how torture and similar tactics could be vindicated in a rule utilitarian framework. A rule permitting torture of detained suspects would not maximize the good for everyone because instances in which torture could prevent greater harm than the damage it does are excessively rare, so a rule permitting torture would do more harm than it would prevent. In addition, “front-line moral decision-makers would be prone to commit error by using coercive interrogation in cases where its costs outweigh its benefits,”<sup>295</sup> as was elaborated in the section “Is Torture Effective?” Thus given the rarity of the

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<sup>295</sup> Eric Posner and Adrian Vermeule, “Should Coercive Interrogation Be Legal?” *University of Chicago*, University of Chicago Public Law Working Paper No. 84 (March 2005): 9.

ticking time bomb case, the extraordinary scenario in which torturing a suspect is the only way to prevent imminent disaster, and the human propensity to err, a rule-consequentialist would (or should) forbid torture absolutely.

Act consequentialism, on the other hand, asks too much of an actor by demanding that their actions produce the least harm and the greatest benefit. Life is messy, and one cannot determine all of the consequences of an action beforehand. Humans are incapable of even determining whether the consequences of one's action will be net positive on a personal level, let alone on a societal level. In terms of torture, an interrogator has no way of knowing whether the torture will be effective or whether it will add to the overall harm given that it has rarely worked in the past, even if the interrogator knew for certain that the individual in custody had the pertinent information about an impending attack.

The final problem with consequentialism, as touched on earlier in the discussion of terrorism, is that it requires that diverse human goals be condensed onto one scale to measure how much value a certain action creates. But such a scale requires that a singular value be maximized above all else,<sup>296</sup> and that each distinct action be judged by how well it optimizes this value (measured by subtracting the action's harmful consequences from beneficial outcomes). Humans do not have singular goals, nor is it likely that the "net"

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<sup>296</sup> Strictly speaking, consequentialists do not have to claim that all values are reducible to a single value (such as utility); rather, they may argue that there is a unique ordering of distinct values which can be maximized, but because there is reasonable disagreement about the "trade-offs" between different values, it is unlikely that agreement could be reached on such a value function.

goodness of each action one may take can be represented on a single scale. As Charles Larmore writes, “there exist many different but independently and even equally valuable conceptions of the good life” that “reasonable people are likely to disagree about.”<sup>297</sup>

While there is no way of proving that various theories of value truly represent distinct values that can never be reconciled with one another and therefore plotted on a singular scale, reasonable disagreements over theories of value cannot be resolved in real time; that is, in time to actually guide our decisions. Reasonable people have been arguing over these issues for millennia, and no agreement is in sight. Given that ethics seeks to inform humans of the right way to act when they face choices, as long as reasonable disagreements about theories of value persist, the morally correct choice cannot be found through consequentialism. The different human goals and ideas of what holds the ultimate value are each viable for their own reasons, and they “neither represent different versions of some single, homogenous good nor fall into any discernable hierarchy.”<sup>298</sup> Because each conception of good has its own merits and the various conceptions cannot be reduced to the same underlying good from which all value stems, it seems that reason cannot give humans the answer to the ultimate good that must be privileged, “but tends rather to drive us apart.”<sup>299</sup>

The variety of schools of consequentialism – each of which privileges a

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<sup>297</sup> Charles Larmore, *Patterns of Moral Complexity* (New York: Cambridge University Press, 1987), xii.

<sup>298</sup> Larmore, *Patterns of Moral Complexity*, 23.

<sup>299</sup> Charles Larmore, *Morals of Modernity* (New York: Cambridge University Press, 1996), 12.

distinct good – demonstrates that there is reasonable disagreement about the ultimate value. Hedonistic utilitarianism, for instance, argues that the value of an act is the net pleasure it produces, and so pleasure is the nonmoral good the actor must maximize; the morally right course of action, then, is to do whatever will produce the most pleasure net of pain. Preference utilitarianism, on the other hand, sets out a different theory of value in which actions should seek to fulfill the interests of those involved rather than maximize net pleasure.

Consequentialism claims to be agent-neutral, meaning that the value of consequences is the same whether evaluated from the perspective of the agent or of an observer, but reasonable disagreement suggests there is no definition of nonmoral good that every actor will agree on; actions (and their consequences) will be good from some perspectives and bad from others. For instance, if torture is morally right because coercive interrogation may provide information necessary to stop an attack, the consequentialist has argued that what is right (i.e. what is best for society) is for the people who would die in an attack to be protected and for their society to devolve into one that tortures other human beings. But a different consequentialist could just as easily argue that more people are harmed if the society permits torture – or if a secretive underground torture culture develops – than if the original attack were carried out. Because there is reasonable disagreement between theories of value that in effect cannot be resolved, consequentialism is not an adequate moral theory: each school of consequentialism unjustly imposes on the world a singular good that must be maximized, regardless of any alternative theory of value that is equally

grounded. Deontology – at least with respect to the rules that protect human rights rather than more culturally relativistic values – furthers rules that protect each person’s right to choose for themselves the ultimate source of good; deontological rules against torture are meant to protect captives from the damage it inflicts on the mind and body that interfere with their ability to make their own decisions in the future, just as deontological rules against terrorism protect the innocent from the privileging of one group’s conception of the good life over their right to life. This does not mean that consequences never matter: as I argue in the “Conclusion,” in certain moral disasters the enormity of the consequences may allow deontological constraints to be overridden. But in normal circumstances, when the possible consequences are not utter catastrophes, consequentialism seems to be unable to reduce diverse human goals into a singular ultimate good that might lend it legitimacy so that it can be used to justify tactics such as torture.

Alan Dershowitz, one of the most prominent recent advocates for torture, takes a modified consequentialist stance. While his argument is subject to the same flaws as the generic ticking time bomb hypothetical presented earlier, his effort to fix issues with the ticking time bomb and to respond to arguments against torture are problematic in other ways. First, Dershowitz mentions the argument that one cannot prove that the *total amount* of terrorism is reduced through torture because “[t]he foiling of any one plot may simply result in the planning of another terrorist act, especially given the unlimited reservoir of

potential terrorists.”<sup>300</sup> Dershowitz calls this argument weak when referring to mega-terrorism, though he acknowledges that it may be correct for suicide bombing: he argues that while foiling one suicide bomber’s mission may simply result in a different terrorist stepping in to complete the attack, mega-terrorist attacks require much more money and planning, and depends on exploiting security weaknesses that will be strengthened if the plot is foiled.<sup>301</sup> However, the argument Dershowitz refutes here is not fleshed out, presumably because the real argument put forth by torture opponents puts down consequentialist justifications fairly decisively: in cases when the rebellious group could not be totally isolated, I’ve shown that torture and repression likely *increase* the overall use of terrorism and the pool of potential recruits terrorist organizations draw from by turning popular opinion against the torturer and making terrorists seem reasonable and just, fighting against the oppressor. He incorrectly limits the consequences evaluated in the moral judgment of torture to the immediate: one mega-terrorist plot was (possibly) foiled. However, if torturing terrorists to prevent one attack leads to many new recruits and many new terrorist plots, torture has actually done harm rather than it prevented.

Dershowitz also argues that no method of crime prevention *always* works, and torture must be considered because it *sometimes* works<sup>302</sup>; thus since in some instances torture reduces rather than adds to overall harm, consequentialism demands it be considered. But torture advocates’ inability to

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<sup>300</sup> Dershowitz, *Why Terrorism Works*, 137.

<sup>301</sup> *Ibid.*, 137-138.

<sup>302</sup> *Ibid.*, 137.

show one convincing example of effective and efficient torture suggests that torture is extremely unlikely to work. The possibility that torture could someday work does not justify allowing interrogators to add to overall harm in every other instance, even according to consequentialist logic. In addition to torture's dubious efficacy, Dershowitz – in a last ditch effort to make torture more palatable – proposes that interrogators only be permitted to use “torture lite,” a concept commonly used by torture supporters in order to differentiate methods they condone from more extreme forms of torture that have been used periodically throughout history. Torture lite is considered by many supporters not to be torture at all but rather acceptable interrogation techniques that do not violate international human rights conventions. Limiting permissible techniques in a moral catastrophe to torture lite as Dershowitz does makes it even less likely that torture will be successful at extracting information in a timely manner.

Dershowitz summarizes his argument, “Pain is a lesser and more remedial harm than death; and the lives of a thousand innocent people should be valued more than the bodily integrity of one guilty person.”<sup>303</sup> Even in this sentence, Dershowitz runs into two major problems. First, Dershowitz requires here that the person tortured be guilty. But how is the interrogator to know for certain without a trial that this is the case? Dershowitz calls for torture warrants so that the interrogator must be certain of the individual's guilt before torture begins, but if interrogators have time to prevent evidence to secure a torture

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<sup>303</sup> Ibid., 144.



warrant, it seems they have time to undertake less damaging (and more effective) interrogation practices. If this is the case, the tortured person is not the “Ticking Time Bomb Terrorist” Dershowitz references torturing in the title of the chapter, because the situation is not the exceptional ticking time bomb scenario at all.

Dershowitz also insists that investigators grant the suspect immunity from prosecution, thus voiding their Fifth Amendment rights and obligating them to provide information. Through this strategy, investigators don’t need to find the suspect guilty of anything to require them to testify; indeed, having given them immunity, the investigators won’t be finding them guilty of the crimes they have committed about which they give information. If the suspect fails to provide the information voluntarily, he argues that the use of force is justified because they are a material witness and can be subjected to sanctions for failing to comply with the investigation. However, Dershowitz does not explain why terrorists who were prepared to violate dozens of laws in their attack would give up sensitive information because it was their legal obligation. He also fails to explain why being liable for sanctions against uncooperative material witnesses can be escalated from the typical punishment, imprisonment, to torture in the case of suspected terrorists.<sup>304</sup>

Dershowitz’s next problem is his reference to “morality by math”: how many people must be slated to die to make torture necessary? He purposefully

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<sup>304</sup> In the next section, “Non-Consequentialist Liability-Based Argument for Torture,” I discuss – and refute – a more plausible explanation as to why suspected terrorists liable to sanctions could be liable to be tortured put forth by Jeff McMahan.

chooses a large number to fool readers into agreeing that torture is the best option. But what if just one person were to die? Numbers are not all that matter in morality. Dershowitz has a response to the argument that if torture is permitted in dire circumstances, it will be normalized and then permitted in less extreme scenarios: “The slippery slope is an argument of caution, not a debate stopper, since virtually every compromise with an absolutist approach to rights carries the risk of slipping further. An appropriate response to the slippery slope is to build in a principled break.”<sup>305</sup> But he doesn’t answer where the principled break might be. Ten dead people? A hundred? How does a consequentialist calculate the value of a human life? The answer, of course, is that the consequentialist demand that we calculate when torture is “worth it” is a fallacy: torture is unlikely to work, and even if it did, we are not choosing between torturing one guilty person to save many lives and permitting an attack in order to keep our hands clean, but rather we are choosing not to destroy someone’s humanity – while both their guilt and their knowledge are uncertain – instead of first trying other more effective and humane methods of obtaining information.

Perhaps the most interesting and damning aspect of Dershowitz’s philosophy is his own refusal to commit to pure consequentialism. His added constraints (no torturing the children of terrorists, no torture that does lasting damage such as amputation of a limb, etc.) demonstrate his own moral problems with the theory of morality he purports to follow. If the calculation to determine which action will result in the least overall harm is not all that

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<sup>305</sup> Dershowitz, *Why Terrorism Works*, 147.

matters for morality, then Dershowitz agrees that certain deontological moral rules must be followed regardless of how much harm may result from following them. He demonstrates that his version of morality is not purely a morality of numbers, but fails to explain why some (immoral) acts that would prevent harm are acceptable while others are impermissible. In order to justify restricting the use of torture by principles without respect to the consequences of observing those principles, Dershowitz would need to provide some account of how he weighs principles against consequences. This account is notably absent in Dershowitz's justification, and as such, his ad hoc restrictions make his overall account arbitrary.

### NON-CONSEQUENTIALIST LIABILITY-BASED ARGUMENT FOR TORTURE

Not all arguments undermining moral prohibitions against torture are consequentialist in nature: Jeff McMahan has notably developed a non-consequentialist based argument that the use of torture is not wrong in itself. According to McMahan's liability-based argument, the terrorist has given up the right not to be tortured; therefore it is morally right to torture them in order to save innocent lives. He writes that

the terrorist's own moral responsibility for the fact that someone must suffer torture makes it the case that, as a matter of justice, he should be the one to suffer the harm that he has made unavoidable. This is a claim about justice in the ex ante distribution of harm, not a claim about greater and lesser harms.<sup>306</sup>

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<sup>306</sup> McMahan, "Torture and Method in Moral Philosophy," 4-5.

While McMahan finds the ticking time bomb useful for illustrating the difficult position the absolutist takes with regard to interrogational torture, McMahan's reasons for endorsing torture in this circumstance are not dependent on the number of people who might be harmed by the bomb if the absolutist had their way. On the contrary, the liability-based argument does not even require the imminent destruction to be catastrophic; for McMahan, the most dangerous piece of the ticking time bomb is that the disastrous results of the attack described in the hypothetical scenario create the mistaken belief that torture is permissible either because the state of emergency allows moral rules to be overridden or because so many people would die that torturing one person is the morally correct choice. These reasons, by McMahan's logic, are not what create the permissibility of torture:

It would be more illuminating if the harm to be prevented were not cataclysmic.... It could still, I think, be permissible to torture him. If so, that would show that the justification is not a necessity or lesser evil justification — that is, it is not that the harm done to the terrorist would be significantly less than the harm that would thereby be prevented.<sup>307</sup>

Since *someone* is going to be harmed, and the options are that either innocent people will be harmed or the terrorist whose action put innocent people at risk would be harmed, it is morally right for the terrorist to be the one to suffer. The number of innocent people who would be harmed does not matter. The only thing that matters is that the terrorist is liable to be harmed because he created the situation in which innocent people would suffer. In McMahan's view the

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<sup>307</sup> Ibid.

terrorist could be tortured in situations in which the consequentialist would find torture to be unjustified. If the terrorist could be tortured to prevent only one innocent person from being harmed, the consequentialist would resist torturing the terrorist because doing so would not prevent greater harm. McMahan, though, would find it morally wrong to allow an innocent to suffer harm when the alternative was to torture someone liable to be harmed:

The harm inflicted on a person who is liable to be harmed may be fully justified even if it is not the lesser evil. It is often justifiable, for example, to inflict greater harm on a culpable aggressor if that is necessary to prevent him from inflicting a lesser harm on an innocent victim.<sup>308</sup>

While McMahan's argument avoids some of the consequentialist justification's major pitfalls (namely the problem of morality by arithmetic), his reasoning nonetheless has problems of its own. These problems are of three sorts: first, by arguing that torture must remain illegal, McMahan hands the decision regarding an individual's liability to be tortured to the biased and desensitized torturers who are likely to incorrectly judge a suspect's likely guilt and as a result torture someone who should not be tortured. More important, even if his argument shows that a suspected terrorist is liable to be harmed, it does not show that the suspect is liable to be *tortured* since liability to harm and liability to torture are not the same. Finally, McMahan argues that torture is never a suitable punishment for even the most horrendous crimes. Nonetheless, his argument that those who have (or have planned to) harm other are liable to

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<sup>308</sup> Ibid., 12-13.

be tortured functions, in effect, as a punishment for their actions, contradicting his prohibition of torture as a form of punishment.

The first issue at stake in McMahan's proposal is that the suspects likely to be tortured may not be guilty at all. The terrorist has been captured. They do not directly threaten the captors and are therefore not liable to be killed as a soldier in the heat of battle, who can be killed according to just war theory because of the immediate threat they pose to their opponent's life. But by McMahan's argument, this terrorist is liable to be tortured at the discretion of the captors, without the benefit of due process and a fair trial (and in fact, by opposing the legalization of torture,<sup>309</sup> McMahan actively rejects the idea that the terrorist deserves a trial). McMahan argues that the terrorist is liable to be tortured, but does not specify who determines that any given person has lost the right not to be tortured. Should the captors be left to judge whether the captured individual is a terrorist? As I discussed in the section "Is Torture Effective?", those in charge of security on the front-line are likely to make cognitive errors in assessing the stakes involved in carrying out their duties versus observing others' rights.

Since McMahan's argument hinges on the idea that the captive is tortured because he is guilty and therefore liable to be tortured, it is highly problematic that he fails to lay out the burden of proof necessary before someone is tortured. Many detainees claim to be victims of mistaken identity (most notably Mohammed El-Masri, a German cab driver who was kidnapped

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<sup>309</sup> Jeff McMahan, "Torture, Morality, and Law," *Case Western Reserve Journal of International Law* 37 (2005): 241-248.

by American agents<sup>310</sup>). In Iraq, some detainees were arrested and brought in with their records reading only “Suspected of anti-coalition activity,” which could have been caused by something as innocuous as being in the area where a roadside bomb had been deployed. In cases such as these, interrogators were left to their own devices to determine the guilt of the captive and the methods they would employ to uncover this information.<sup>311</sup> It’s all well and good for McMahan to claim terrorists are liable to be tortured because of their past (and future) guilt, but without stringent evidence requirements, his argument allows interrogators to make up facts for themselves as to whether or not the captive is guilty. Even if his argument were convincing in theory, accepting it in practice would likely mean accepting the torture of innocent people assumed to be terrorists.

McMahan does recognize that some uncertainties are more morally significant than others, so that certain types of knowledge and certain circumstances make it easier to justify torture in some situations compared with others. For example, he argues that it would be harder to justify torture if the interrogators know that there is going to be an attack but don’t know that the captive is a terrorist compared to a situation in which the interrogators knew that the captive was a terrorist but were unsure whether there was an attack planned.<sup>312</sup> In the former case, the interrogators could not use McMahan’s argument to justify torture, as they would not know whether or not the captive

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<sup>310</sup> Luban, “Unthinking the Ticking Bomb,” 14.

<sup>311</sup> *Ibid.*, 14-15.

<sup>312</sup> Jeff McMahan, “Torture in Principle and in Practice,” *Public Affairs Quarterly* 22, no. 2 (2008): 122-123.

has given up his or her right not to be harmed. However, a problem remains: the ambiguity regarding evidence requirements means that interrogators could easily falsely claim (as some have in the past) that the person they have in custody is a terrorist.

In Abu Ghraib, captors decided that the very act of living in an occupied area made Iraqis liable to be tortured.<sup>313</sup> And psychological experiments have shown that this brutality – the brutality that makes it highly unlikely that any captors given the power to determine for themselves whether or not a new captive is a terrorist, whether or not the captive is liable to be exposed to inhumane conditions and unimaginable pain – is part of wielding complete power over helpless captives. In the Stanford prison experiment, it took less than a week for average people to internalize their role as prison guards and viciously abuse the “prisoners” they knew to be innocent.<sup>314</sup> In the context of the War on Terror in which soldiers are well versed in the absolute evils committed by terrorist organizations and trained to see terrorists as inhuman monsters, can these soldiers be expected to reasonably and fairly determine whether the captive is liable to be tortured?

By allowing captors to determine whether someone is a terrorist, whether someone captured fulfills enough of the definition, and whether the individual is

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<sup>313</sup> Mark Danner, “Torture and Truth,” *New York Review of Books*, June 10, 2004, accessed April 6, 2016, <http://www.nybooks.com/articles/2004/06/10/torture-and-truth/>.

<sup>314</sup> Haney, Banks, and Zimbardo, “A Study of Prisoners and Guards,” 4-17.



therefore liable to undergo harm that 158 states have agreed<sup>315</sup> should *never* be inflicted on anyone, McMahan must be arguing that there is something about terrorism that makes the suspect (who may only been planning an attack and not have inflicted harm on anyone to date) undeserving of the fair trial granted to those suspected of being serial killers or rapists. He acknowledges different opinions on the standards of evidence required in order to torture terrorists,<sup>316</sup> but refuses to spell out the burden of proof that torturers must meet, saying only that torture can be morally justified if there is some vaguely defined and improbable “irrefutable evidence.”<sup>317</sup> However, given that McMahan argues torture must be illegal, it is highly unlikely that torturers would be held to such a high burden of proof.

David Luban argues this point particularly successfully in his article entitled “Liberalism, Torture, and the Ticking Bomb.”<sup>318</sup> He questions how torturers – people able to do things others would find immoral and horrifying – can be left to judge when the case is exceptional, a case in which torture is justified because (in McMahan’s words) enough evidence has been provided to show that the captive is certainly a terrorist with pertinent information: “[Y]ou cannot reasonably expect that interrogators in a torture culture will be the fastidious and well-meaning torturers that the liberal ideology fantasizes.”<sup>319</sup>

Luban argues that if torture were sometimes permitted but remained illegal, the

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<sup>315</sup> Office of the United Nations High Commissioner for Human Rights (OHCHR), “UN Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment,” *OHCHR*, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>.

<sup>316</sup> McMahan, “Torture, Morality, and Law,” 245-246.

<sup>317</sup> *Ibid.*, 246.

<sup>318</sup> Luban, “Liberalism, Torture, and the Ticking Bomb,” 1425-1461.

<sup>319</sup> *Ibid.*, 1452.

nature of bureaucracy means superiors would push down the chain of command anything that would leave them with dirty hands. But matters as inhumane and terrible as torture, the decision should be made by someone higher up, someone removed from the situation – definitely *not* by the interrogator who is desensitized and cannot be expected to know when to stop. He argues that social psychology teaches us the danger of McMahan’s suggestion here; the decision as to whether a captive is liable to be tortured would fall to those who have been trained to see the captives as less-than-human, but “we judge right and wrong against the baseline of whatever we have come to consider ‘normal’ behavior, and if the norm shifts in the direction of violence, we will come to tolerate and accept violence as a normal response.”<sup>320</sup> Thus one who has tortured cannot be allowed to judge when there is sufficient evidence that someone is liable to be tortured.

The second issue at stake is whether a suspect – even a guilty suspect who planned a future terrorists attack – is really liable to be tortured simply because they are liable for some form of harm. Torture is an extreme form of treatment, with substantial long-term effects. McMahan makes no convincing argument that it is even possible to lose the right not to be tortured, nor does he explain how others could come to have the right or liberty to commit such a grave evil as to torture someone. One can harm another without torturing them – and indeed, most instances of harm fall far short of torture – and yet McMahan treats being harmed and being tortured as equivalent. McMahan argues that no

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<sup>320</sup> Ibid., 1451.

moral prohibition on harming another need be overridden (as in a lesser evil argument) if the terrorist is guilty; by violating human rights the terrorist loses the right not to be harmed. But torture is arguably the most extreme form of harm that can be inflicted on another person. Torture breaks a person apart, separating them mind from body. Torture is undeniably a great evil, so a person's liability to be harmed does not entail a liability to be tortured.

McMahan could respond by arguing that torture is the only way to prevent the harm that would otherwise befall innocents; thus the terrorist is in fact liable to be tortured because they are causally responsible for this other harm. However, just because the extreme form of harm is the most effective in protecting the innocent does not mean that the suspected perpetrator is liable to it. The interrogator has no way of knowing what amount of pain or psychological pressure will be necessary to make the terrorist talk, if any will be effective at all. Thus even if effectiveness did determine what harm the terrorist is liable to, the interrogator would have no way of knowing whether torture would be necessary to obtain information, and therefore cannot argue that the prisoner is therefore liable to this extreme harm.

McMahan also writes that torture should never be used as punishment, but his explanation of how torturing someone who is guilty and therefore liable to be tortured is not punishment rests on a very precise and purposeful definition of punishment. He distinguishes here between retributive justice, or "the infliction of deserved harm" and preventive justice, or "the ex ante

distribution of unavoidable harm<sup>321</sup>: the suspected terrorist can be tortured only if harm is unavoidable and thus should be inflicted on someone who has lost the right not to be harmed. He writes, "There can be no liability-based justification for harming a person unless harming that person is either instrumental or unavoidable in producing some good effect, which in cases of defense is the prevention of wrongful harm."<sup>322</sup> The terrorist, he argues, does not *deserve* to be punished but is nonetheless *liable* to be tortured by virtue of their guilt. But torturing someone who is liable to be tortured because of their actions functions in effect as punishment: regardless of whether the torturer is consciously torturing the terrorist as punishment or merely as an acceptable means to the end of acquiring information which is acceptable because of the terrorist's guilt, the terrorist is being tortured because of their actions. McMahan rules out torture when it would not produce new information, but he at least implicitly allows those who are likely to have information to be tortured as punishment for their previous actions. Indeed, even McMahan himself seems to have a difficult time separating torture as tool from torture as punishment: when providing examples for the familiarity of the liability justification, he writes, "In criminal law, the infliction of punishment is justified on the ground that the criminal has made himself liable to be punished by virtue of his moral responsibility for a criminal act, usually involving harm to the innocent."<sup>323</sup>) If

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<sup>321</sup> McMahan, "Torture and Method in Moral Philosophy," 13.

<sup>322</sup> Ibid.

<sup>323</sup> McMahan, "Torture in Principle and in Practice," 117.

torture is not a suitable or justifiable punishment, then the liability-based justification for torture rests on shaky grounds.

Even under the liability argument, torturing someone should only be acceptable if it will actually produce the information necessary to prevent an attack. If a prisoner is tortured and it produces no information, the torture has added to the overall harm rather than reduced it; the torture does not result only in a change in the distribution of harms, but also an increase in harm overall. McMahan might argue that the possibility that the prisoner would give up information under torture makes torture necessary, and that torturing someone who has lost the right not to be tortured does not add to the overall harm, thus an act of torture was right whether or not the torture produced information that stopped the harm to innocents. But if it is irrelevant whether the torture produced the necessary information because the prisoner had already lost the right not to be tortured, this torture amounts to punishment rather than a redistribution of harm. McMahan argues that torture should never be used as a form of punishment; if torture is not to be used as punishment, it follows that torture cannot be used unless it is certain to lead to information on the coming attack, which no interrogator can ever guarantee.

McMahan rejects the ticking time bomb's consequentialist suggestion that torture is permissible or necessary because of the catastrophic damage that would otherwise occur. He argues that torture could be used even in instances when the damage that would otherwise occur would be less extreme than the damage inflicted by torture. If the liability argument is correct and the amount

of harm that would occur is irrelevant, anyone responsible for setting in motion a chain of events leading to some harm befalling an innocent person, regardless of what it is, would be liable to be tortured. But this is absurd. The extremity of the harm that someone is liable to must in some way be proportional to the potential harm they have set in motion.

### LEGALIZING TORTURE

Moral or not, torture has been – and likely will continue to be – used in the War on Terror. Some philosophers on both sides of the absolutist-consequentialist divide have proposed that, given the reality on the ground, keeping torture illegal while knowing full well that it is being employed enables a secretive torture culture in which torturers are not held accountable. In this culture, data regarding who is tortured and how severely is unavailable to domestic and international law enforcement and to the public. Keeping torture secret, Luban argues,

does not reject the normalization of torture. It accepts it, but layers on top of it the normalization of state secrecy. The result would be a shadow culture of torturers and those who train and support them, operating outside the public eye and accountable only to others inside of the torture culture.<sup>324</sup>

And as discussed in the previous section, permitting torture while it is illegal means handing over the decision to torture to those on the front lines who are subject to cognitive errors. Is the solution, then, to legalize torture so that its use can be regulated and minimized as much as possible? Dershowitz has famously

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<sup>324</sup> Luban, “Liberalism, Torture, and the Ticking Bomb,” 1446.

argued for the use of “torture warrants” to ensure political accountability and eliminate politicians’ plausible deniability.<sup>325</sup> He writes,

[I]f torture is or will be practiced, is it worse to close our eyes to it and tolerate its use by low level law enforcement officials without accountability, or instead to bring it to the surface by requiring that a warrant of some kind be required as a precondition to the infliction of any type of torture under any circumstances?<sup>326</sup>

Since torture warrants would be difficult to secure (relative to the free reign investigators seem to currently have over who will be tortured), he argues that the warrants would reduce the frequency and length of torture, the frequency because detainees without information presumably will not be tortured. He also claims it will reduce the severity of torture used,<sup>327</sup> because a regime of supervised torture is more likely to keep it within the deontological bounds he posits.

One of the primary issues with legalizing torture is the question of who can objectively decide that a detainee should be tortured. As discussed above, torturers who are desensitized to things that others find immoral and horrifying should not be allowed to judge which cases warrant torture. Dershowitz’s torture warrants attempt to solve this problem by taking the decision to torture out of the hands of those who would carry it out. However, in proposing torture warrants, Dershowitz is concerned not only with investigators’ ability to objectively determine whether torture is necessary in a particular case, but also with the liability placed on investigators if they torture an innocent person.

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<sup>325</sup> Alan Dershowitz, “Tortured Reasoning,” in *Torture: A Collection*, ed. Sanford Levinson (New York: Oxford University Press, 2006), 257-259.

<sup>326</sup> *Ibid.*, 257.

<sup>327</sup> *Ibid.*, 267.

Investigators, he argues, should not be held responsible for torturing a detainee without information: “This leaves each individual member of the security services in the position of having to guess how a court would ultimately resolve his case. That is unfair to such investigators.”<sup>328</sup> Instead, he writes, judges should be the ones to “dirty their hands” and permit the torture of certain detainees. While judges are less likely to make the same cognitive mistakes than operatives and therefore more likely to stringently require probable cause, judges are no more likely to be held accountable for issuing a torture warrant for a detainee who didn’t have information than they are for issuing a search warrant for an innocent person’s home. But the act of carrying out a search does not normally have the same psychic consequences on the actors involved. Because of this, torture warrants should not follow the model of search warrants in which the interrogators and judges are excused for torturing an innocent person provided they followed the rules in procuring the warrant. In effect, torture warrants serve to excuse everyone involved in the decision to torture an innocent person; while the system would be more transparent, it hardly holds anyone more accountable, though this was the original goal of Dershowitz’s proposal. While it would surely be necessary for torture warrants to be issued by someone removed from the situation, this in and of itself does not increase the accountability of those involved in the decision to torture a detainee. In sum, though torture warrants would make investigators liable to discipline or punishment if they used torture without a warrant, or used techniques that were

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<sup>328</sup> Dershowitz, “Tortured Reasoning,” 263.



not permitted since structures of supervision would be in place, it nonetheless would not make those who torture innocent people with a warrant liable to discipline or punishment.

In addition to this dangerous shortcoming, torture warrants would still perpetuate a torture culture, albeit not a secretive one. In a world with legalized torture, Luban writes, judges would be selected based on their willingness to issue warrants: “Politicians pick judges, and if the politicians accept torture, the judges will as well. Once we create a torture culture, only the naive would suppose that judges will provide a safeguard. Judges do not fight their culture — they reflect it.”<sup>329</sup> Anyone involved in the decision to torture another human must – whether consciously or not – dehumanize the tortured person; given what torture does to a person’s mind and body, there is no other way to cope with the guilt of torturing someone without desensitization to torture through dehumanization of the tortured. Because of this, legalizing torture would not prevent a torture culture from developing, but rather increases the degree to which torture is normalized in civil society. And given that judges in this society would actively participate in the torture culture, it is not clear that they would not fall prey to some of the same cognitive errors that operatives make, though as discussed above, they would likely not be held accountable.

A crucial and often overlooked phrase in Dershowitz’s argument seems to undermine the benefits he claims torture warrants will bring: “It would have been far better, in my view, had the court required any investigator who believed

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<sup>329</sup> Luban, “Liberalism, Torture, and the Ticking Bomb,” 1452.

that torture was necessary in order to save lives to apply to a judge, *when feasible.* [emphasis added] Torture warrants – meant to ensure openness and accountability – seem to be required only when time permits. This loophole would mean that the frequency of torture would not be reduced as much as much as he claims it would because it licenses torture when the security services deem it “infeasible” to get a warrant. It would appear, then, that Dershowitz does not intend that torture be restricted to ticking time bomb cases; indeed, for extraordinary moral disasters (or those cases that appear this way to investigators), he seems to condone torture without oversight and advanced approval. Torture warrants, then, seem to be used only when operatives in non-emergency situations hope to torture their captive. Dershowitz’s feasibility exemption undercuts his argument that the system would keep torture appropriately limited.

## CONCLUSION: MORALITY IN SUPREME EMERGENCIES

In any ethical system that combines deontological constraints with consequentialist considerations, there is a tension when adhering to absolutist prohibitions would produce disastrous results. In the realm of international relations, it is often claimed that leaders dedicated to upholding just war theory and human rights protections may be confronted with certain disaster if they refuse to abandon moral absolutes. These scenarios, in which it may be morally necessary to commit a moral wrong, are known as supreme emergencies.<sup>330</sup>

I have argued that the tactics endorsed by revisionists in the age of asymmetric conflict are immoral, but in instances when disaster looms so large if one of these actions is not undertaken — a disaster whose prevention seems, in some sense, of greater importance than strict adherence to a moral code — could it be permissible to commit such a wrong? There have been instances over the course of history — notably the success of Nazi forces early in World War II and Hitler's seemingly imminent triumph — and undoubtedly will be again when a looming catastrophe presents leaders with an impossible choice between preventing it and remaining true to the principles of justice and morality on which that society was built. Unyielding absolutists in such scenarios can then be criticized for putting their own moral purity before the needs of society. As Bellamy writes, political leaders who hold fast to absolute bans must defend themselves against charges of irresponsibility, that is, that the “political leader

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<sup>330</sup> Walzer, *Just and Unjust Wars*, 251-255.

sacrifice [d] the welfare of the political community to satisfy his or her own moral beliefs [.]”<sup>331</sup> The maxim, “Let justice be done though the heavens fall,” illustrates the problem of maintaining moral rightness in the face of preventable disaster from a human rights perspective: are human rights and justice so privileged that they must be respected even if adherence to such moral principles would mean massive devastation, suffering, and loss of human life?

In his play entitled *Dirty Hands* Sartre famously demonstrates the dilemma:

Well, go ahead then, stay pure! What good will it do, and why even bother coming here among us? ... [Y]ou invoke purity as your rationalization for doing nothing. Do nothing, don't move, wrap your arms tight around your body, put on your gloves. I have dirty hands right up to the elbows. I've plunged them in filth and blood. Do you think you can govern innocently?<sup>332</sup>

The question then remains: is it the moral responsibility of leaders to violate their own moral code for the good of society as a whole?

Michael Walzer refers to supreme emergencies as instances in which leaders are torn between the absolutism that defines their moral code in every other situation and the great cost of maintaining this moral code. He writes that supreme emergencies are “those rare moments when the negative duty that we assign – that we can't help assigning – to the disaster that looms before us devalues morality itself and leaves us free to do whatever is militarily necessary to avoid the disaster, so long as what we do doesn't produce an even worse

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<sup>331</sup> Alex Bellamy, “Supreme Emergencies and the Protection of Non-Combatants in War,” *International Affairs* 80, no. 5 (2004): 834.

<sup>332</sup> Jean-Paul Sartre, *Dirty Hands*, in *No Exit and Three Other Plays*, trans. Lionel Abel and Stuart Gilbert (New York: Vintage Books, 1989), 224.

disaster.”<sup>333</sup> Nagel refers to these scenarios as moral blind alleys, instances in which either choice one makes is morally wrong:

The fact remains that when an absolutist knows or believes that the utilitarian cost of refusing to adopt a prohibited course will be very high, he may hold to his refusal to adopt it, but he will find it difficult to feel that a moral dilemma has been satisfactorily resolved. The same may be true of someone who rejects an absolutist requirement and adopts instead the course yielding the most acceptable consequences. In either case, it is possible to feel that one has acted for reasons insufficient to justify violation of the opposing principle.<sup>334</sup>

The paradoxical aspect of such scenarios lies not in the difficulty of choosing to adhere to one’s moral principles in spite of the consequentialist cost but in the idea that retaining an absolutist position in such a situation is no longer moral: as Nagel writes, “We must face the pessimistic alternative that ... the world can present us with situations in which there is no honorable or moral course for a man to take, no course free of guilt and responsibility for evil.”<sup>335</sup>

Instances of supreme emergency that may necessitate the use of tactics that are otherwise prohibited – particularly tactics that violate noncombatant immunity – must be of the utmost rarity; to ensure this, the definition of supreme emergency must be both precise and narrow. Walzer writes, reasonably, that a supreme emergency exists “when our deepest values and our collective survival are in imminent danger.”<sup>336</sup> However, in other instances, his

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<sup>333</sup> Michael Walzer, *Arguing About War* (New Haven and London: Yale University Press, 2004), 40.

<sup>334</sup> Nagel, “War and Massacre,” 142.

<sup>335</sup> *Ibid.*, 143.

<sup>336</sup> Walzer, *Arguing About War*, 33.

dedication to the preservation of the international state system seems to infect his reasoning:

This commitment to continuity across generations is a very powerful feature of human life, and it is embodied in the community. When our community is threatened, not just in its present territorial extension or governmental structure or prestige or honor, but in what we might think of as its ongoingness, then we face a loss that is greater than any we can imagine, except for the destruction of humanity itself. We face moral as well as physical extinction, the end of a way of life as well as of a set of particular lives, the disappearance of people like us. And it is then that we may be driven to break through the moral limits that people like us normally attend to and respect.<sup>337</sup>

Oddly, though, Walzer categorically prohibits non-state groups (regardless of the justness of their cause) from employing the supreme emergency argument, though it would seem that these groups are as capable as states of experiencing a threat to the survival of their “communities,” a threat which is generally compounded by their lack of representation within the international state system. Walzer writes, “But communities, in emergencies, seem to have different and larger prerogatives. I am not sure that I can account for the difference, without ascribing to communal life a kind of transcendence that I don’t believe it to have.”<sup>338</sup> The difference, he finds, between the threat facing non-state groups and that facing states is that “the survival and freedom of political communities . . . are the highest values of international society,”<sup>339</sup> but it is far from clear how a threat to the “highest values” or the so-called “international society” relates to what he had earlier described as the “ongoingness of a distinct

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<sup>337</sup> Ibid.

<sup>338</sup> Walzer, *Just and Unjust Wars*, 254.

<sup>339</sup> Ibid.

human community.” Nonetheless, Walzer grants states the liberty to determine whether their situation fits the requirements of a supreme emergency, while he dedicates an entire essay to rejecting every “excuse” used by “terrorists” (i.e. non-state groups that violate noncombatant immunity), even in situations in which he finds it permissible for state actors to do the same.<sup>340</sup> Stateless nations such as the Palestinians and the Kurds are thus forbidden from protecting themselves with the same tactics that Walzer permits states in supreme emergencies. Walzer’s restriction of supreme emergencies to communities who have been fortunate enough to achieve political independence is unconvincing. If supreme emergency exemptions are to be allowed, they must be allowed to non-state groups facing imminent and horrible threats such as genocidal tyrannical regimes.<sup>341</sup>

This broadening of supreme emergency, though, worries Coady: “the question arises whether the broadening of the potential application of supreme emergency considerations provides a reason for skepticism about the category itself.”<sup>342</sup> He writes,

the supreme emergency story ... gets its persuasiveness from the idea that its disruptive power to override profound moral prohibitions is available only in the rarest of circumstances. Any broadening of the reach of those circumstances tends to reduce the rarity value of the exemption and hence increase the oddity of the idea that it can be right to do what is morally wrong.<sup>343</sup>

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<sup>340</sup> Michael Walzer, “Terrorism: A Critique of Excuses,” in *Problems of International Justice*, ed. Steven Luper-Foy (Boulder, CO: Westview Press, 1988), 237-247.

<sup>341</sup> C.A.J. Coady, “Terrorism, Morality, and Supreme Emergency,” *Ethics* 114, no.4 (July 2004): 780-787.

<sup>342</sup> *Ibid.*, 787.

<sup>343</sup> *Ibid.*

Coady's argument continues that if supreme emergency is to be permitted to non-state groups facing threats of a certain type (as he argues it must be for the sake of consistency), what stops other large entities such as corporations that, in a sense, ensure the livelihood of thousands of people, from using the same exemptions from profound moral rules?<sup>344</sup> While Coady hopes this line of questioning will shut down the possibility of supreme emergency exemptions for any group, it only serves to emphasize the need for explicit criteria specifying the type of situation in which the idea of a supreme emergency can be invoked. Opening up supreme emergency exemptions to non-state groups, rather than devaluing the "currency of supreme emergency"<sup>345</sup> as Coady worries, serves to level the playing field in asymmetric conflict as Gross hopes to do by revising just war theory for modern warfare, but in a way that will protect rather than endanger human rights.

Rather than worrying about whether permitting non-state groups supreme emergency exemptions will result in the overuse of exemptions, we should instead worry about the leeway Walzer already permits through his pro-state bias: the use of supreme emergency for political (rather than moral) disasters. By placing undue importance on political communities, Walzer at times conflates the survival of political communities with moral catastrophes. Primoratz writes in opposition to Walzer's permissive stance, "[E]ven if a polity does have moral legitimacy," a threat to the preservation of its political independence "falls short of 'an ultimate threat to everything decent in our lives'.

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<sup>344</sup> Ibid.

<sup>345</sup> Ibid.



[As such] its military cannot be justified in waging war on enemy civilians in order to defend it.”<sup>346</sup> In order to preserve the rarity of supreme emergency exemptions against such misuse while permitting non-state actors to use the exemption when necessary, supreme emergency must be explicitly and narrowly defined by reference to moral values and principles – such as basic human rights – that are of ultimate importance.

In order for a situation to be deemed a supreme emergency, Walzer requires that the threat must be imminent and “of an unusual and horrifying kind.”<sup>347</sup> The impending danger must be “an ultimate threat to everything decent in our lives, an ideology and a practice of domination so murderous, so degrading even to those who might survive, that the consequences of its final victory were literally beyond calculation, immeasurably awful”;<sup>348</sup> moral prohibitions cannot be overridden simply to reduce the damage done or shift who receives the harm.<sup>349</sup> Unfortunately for leaders and policy makers, this aspect of the definition is vague and its application could serve as a realization for Coady’s worst fear: the uncontrolled extension of supreme emergency exemptions. The practical application of supreme emergency requires precise rules to prevent abuse. In order to maintain the weight supreme emergency carries when it is sufficiently rare, some have proposed that fundamental moral principles can be violated only in the case of “extermination or ethnic cleansing

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<sup>346</sup> Igor Primoratz, “Terrorism,” in *The Stanford Encyclopedia of Philosophy*, ed. E. N. Zalta (Stanford, CA: Stanford Encyclopedia of Philosophy, 2007), accessed April 6, 2016, <http://plato.stanford.edu/entries/terrorism/>.

<sup>347</sup> Walzer, *Just and Unjust Wars*, 253.

<sup>348</sup> Ibid.

<sup>349</sup> Ibid., 268.

of entire peoples—two wrongs that, in view of their enormity and finality, constitute a category apart....”<sup>350</sup> Ethnic cleansing is precisely defined here as “a well-defined policy of a particular group of persons to systematically eliminate another group from a given territory on the basis of religious, ethnic or national origin. Such a policy involves violence and is very often connected with military operations.”<sup>351</sup> Martin Cook writes in objection to supreme emergency, “If just war is meant to provide both meaningful guidance and meaningful restraint, such permission will inevitably be employed by leaders to justify acts just war theorists should not be willing to bless.”<sup>352</sup> But using such narrow conditions for supreme emergency will make it nearly impossible for leaders – no matter how politically motivated – to use the exemption in cases that are not genuinely moral disasters.

If these conditions are met, normally prohibited force may be employed if and only if all other options have been exhausted and the means could effectively ward off the threat.<sup>353</sup> While those in danger of ethnic cleansing or extermination can hardly be expected to do nothing if the actions available to them will not successfully stop the threat, their attacks should be waged only against legitimate targets; if an immoral tactic isn’t likely to be effective, there can be no moral justification for unnecessarily adding to the destruction. Brian Orend adds to these conditions the requirements that groups make a public

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<sup>350</sup> Igor Primoratz, “Civilian Immunity, Supreme Emergency, and Moral Disaster,” *The Journal of Ethics* 15, no. 4 (2011): 384.

<sup>351</sup> Dražen Petrović, “Ethnic Cleansing—An Attempt at Methodology,” *European Journal of International Law* 5 (1994): 351.

<sup>352</sup> Martin Cook, “Michael Walzer's Concept of 'Supreme Emergency,’” *Journal of Military Ethics* 6, no. 2 (2007): 145.

<sup>353</sup> Primoratz, “Civilian Immunity, Supreme Emergency, and Moral Disaster,” 384.

declaration of their cause and their intended action, and an appeal to the international community for help;<sup>354</sup> while it is helpful to explicitly lay out these requirements, these conditions can plausibly be considered as part of the last resort requirement, as a group cannot claim to have exhausted all other options without appealing to the international community for help that will not violate moral prohibitions. Appealing to the international community and making a public declaration can also help to ensure that the group has the right intention or a just cause, as determined under international humanitarian law.

To summarize, in order for a group to claim a supreme emergency exemption, these conditions must be met:

1. The threat of ethnic cleansing or extermination of a people must be imminent.
2. The action undertaken must be the last resort. All options – including appealing to the international community for help – must have been exhausted before an actor violates fundamental moral principles including basic human rights.
3. The action must have a high likelihood of stopping the threat.
4. The moral stakes involved if the disaster is not prevented must be weighed against the moral stakes of the proposed tactic, i.e. the immoral tactic used to ward off disaster must be proportional to the disaster.

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<sup>354</sup> Brian Orend, “Is There a Supreme Emergency Exemption?” in *Just War Theory: A Reappraisal*, ed. Mark Evans (Edinburgh: Edinburgh University Press, 2005), 149-150.

Regarding how certain an actor must be of the moral violation's likelihood of success, Walzer finds that "when *in extremis*, we cannot apply stringent epistemic standards in deciding how to cope—that if we cannot really know what will work, we must take our chances with what might" (as paraphrased by Primoratz).<sup>355</sup> In situations that may qualify as supreme emergencies, there will not be certainty about the effectiveness of measures to block the disaster, but after studying the situation, an actor will be justified in doing whatever seems likely to work in response to a threat that seems undeniable: "There is no [other] option [than to act]; the risk otherwise is too great."<sup>356</sup> It is undoubtedly true that there is no certainty in life – and indeed the threshold must be lower than absolute certainty in order to permit a response to likely moral disasters. But emphasis must be placed not only on the horrifying consequence of failing to act as Walzer does, but also on the horrifying nature of the proposed action: as Primoratz writes, in considering action in a supreme emergency we must

give due weight to the enormity of the means proposed for fending off the threat – the enormity of deliberately killing and maiming innocent people. When that is taken into account, the conclusion should rather be that, even in *extremis*, if deliberate onslaught on innocent people is to be justified, the reasons for believing that it will work, and that nothing else will, must be very strong indeed.<sup>357</sup>

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<sup>355</sup> Primoratz, "Civilian Immunity, Supreme Emergency, and Moral Disaster," 384.

<sup>356</sup> Walzer, *Just and Unjust Wars*, 260.

<sup>357</sup> Igor Primoratz, *Terrorism: A Philosophical Investigation* (Cambridge: Polity, 2013), 110.

Walzer makes note of this, as well, by requiring that action undertaken during a supreme emergency create no greater disaster than the one being prevented.<sup>358</sup> However, it is not enough that the action not wreak greater havoc; prohibitions on killing civilians and torture have great moral weight, and the horror of acting in these ways must be weighed against the horror of failing to act, not simply in a consequentialist calculation of the which outcome produces the least harm. As Anne Schwenkenbecher writes, “[E]ven a supreme emergency does not justify any available means.”<sup>359</sup>

Critics of supreme emergency exemptions have presented one final objection that must be answered in order to allow exceptions for the use of tactics such as torture and terrorism: permitting violations of human rights principles and just war theory in some instances will let leaders off the hook for bad decisions, or situations in which they choose to violate a moral rule when the threat they were facing was not serious enough or was not truly imminent, or when the action they chose to overcome the threat was not proportional. However, the punishment of leaders who permit torture or the killing of civilians when not utterly justified can coexist with supreme emergency. As Walzer writes, “There are limits on the conduct of war, and there are moments when we can and perhaps should break through the limits (the limits themselves never disappear).”<sup>360</sup> The misuse of supreme emergency (whether intentionally or not) should result in punishment by the international

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<sup>358</sup> Walzer, *Arguing About War*, 40.

<sup>359</sup> Anne Schwenkenbecher, “Terrorism, Supreme Emergency and Killing the Innocent,” *Perspectives* 17, no. 1 (2009): 118.

<sup>360</sup> Walzer, *Arguing About War*, 43.

community (e.g. by the International Criminal Court), even (or especially) if the actor who invoked supreme emergency is on the victor's side. Supreme emergency does not create a new moral code such that necessary action taken is not immoral, but rather it permits such action when no option is morally sound and the alternative to the action is morally devastating. Supreme emergency does not make revisionist tactics discussed here moral, but rather it permits the rules laid out to be broken *under very specific circumstances*: "The effect of the supreme-emergency argument should be to reinforce professional ethics and to provide an account of when it is permissible (or necessary) to get our hands dirty,"<sup>361</sup> to excuse the use of immoral tactics in certain devastating instances, not to deem them morally right.

The concept of a supreme emergency also has bearing on the issue of legalizing torture taken up in the last chapter. According to Dershowitz, in a democracy with a strong rule of law, leaders must not act in illegal or morally wrong ways; in order for leaders to use torture in any situation (including ticking time bomb scenarios), it must be legalized.<sup>362</sup> In reality, though, supreme emergency exemptions eliminate this concern without normalizing torture through legalization: by accepting that there are supreme emergencies in which leaders are morally excused for acting in a way that would normally be prohibited, society accepts that violating the law established for times that aren't supreme emergencies is not problematic in a moral disaster. It is crucial that acts in a supreme emergency remain illegal and therefore must be examined

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<sup>361</sup> Ibid., 47.

<sup>362</sup> Dershowitz, *Why Terrorism Works*, 152-153.

*post hoc* to ensure that it truly was a supreme emergency and the action was proportional and likely to be effective. The looming threat of punishment makes it less likely that supreme emergency exemptions – unlike acts of torture after legalization – will be misused.

A law legalizing torture in certain instances would undoubtedly be exploited. McMahan writes, “Any legal permission to use torture, however restricted, would make it easier for governments to use torture, and would therefore have terrible effects overall, including more extensive violations of fundamental human rights.”<sup>363</sup> By legalizing torture, it is then up to the state to protect their torturers and their government, by developing moral justifications for their actions that are less stringent than those required by supreme emergency, in which the international community judges whether the circumstances were indeed a moral disaster and whether the action taken was justified (i.e. proportional and likely to succeed); by declaring tactics such as torture to always be illegal and immoral though sometimes necessary, supreme emergency prevents the overuse of torture that legalization would allow.

Without a supreme emergency exemption, prohibiting tactics such as torture unconditionally would likely increase their usage just as legalizing them would, but with the added problem of secrecy: If investigators feel as though they are prohibited from using torture even in a moral disaster, they will likely find the prohibition ludicrous and violate it in secret when they judge the circumstances to be dire. Since they would be the ones to determine which

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<sup>363</sup> Ibid., 125.

circumstances warrant torture and their secret actions would not be scrutinized *post hoc* to determine if they were warranted under the supreme emergency exemptions, it is likely that they would torture more and more, in part because of the normalization of secretive torture and in part because of their lack of accountability. Though I discuss later the relative inapplicability of supreme emergency exemptions to torture (largely because of torture's inefficacy), the possibility of the exemption is nonetheless necessary to prevent a secretive torture culture from developing by assuring investigators that they will be excused for torturing when it is the morally right course of action and thus they do not need to secretly torture because the circumstances are dire.

### APPLYING SUPREME EMERGENCY EXEMPTIONS

It is easy to imagine scenarios or remember historical instances in which non-state groups have faced a supreme emergency. But can these groups rightfully employ a supreme emergency exemption to justify the use of terrorism against their oppressor? The main obstacle between terrorist groups and moral exemption is that violence against civilians is often not the *last resort* but rather one of the first tactics attempted because their relative military weakness leaves them unable to feasibly attack legitimate targets. But non-state groups oftentimes have another option available: nonviolent resistance. Far from being yet another ineffectual tactic groups must attempt before employing justified violence (and therefore possibly securing international support), nonviolent resistance is much more likely than terrorism to secure a non-state group's



goals. A study conducted by Erica Chenoweth and Maria Stephan found that, of the 323 violent and nonviolent resistance campaigns waged throughout the world between 1900 and 2006, nonviolent campaigns were almost twice as likely to be successful than violent campaigns waged to the same ends.<sup>364</sup> They write,

in recent years civilian populations have successfully used nonviolent resistance methods, including boycotts, strikes, protests, and organized noncooperation to exact political concessions and challenge entrenched power. To name a few, sustained and systematic nonviolent regimes have removed autocratic regimes from power in Serbia (2000), Madagascar (2002), Georgia (2003), and Ukraine (2004-2005), after rigged elections; ended a foreign occupation in Lebanon (2005); and forced Nepal's monarch to make major constitutional concessions (2006).<sup>365</sup>

Using nonviolent means greatly enhanced success in anti-regime campaigns, slightly increased the likelihood of success for campaigns with territorial objectives (e.g. anti-occupation or self-determination campaigns), and were the only successful campaigns in other major resistance campaigns (notably antiapartheid campaigns).<sup>366</sup> While no nonviolent campaigns with the goal of secession were successful, their violent counterparts also had low levels of success (less than 10 percent),<sup>367</sup> indicating that no tactics are likely to secure secession because of the opponent's high motivation to resist secessionist demands.

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<sup>364</sup> Chenoweth and Stephan, *Why Civil Resistance Works*, 7.

<sup>365</sup> *Ibid.*, 6.

<sup>366</sup> *Ibid.*, 7.

<sup>367</sup> *Ibid.*, 7-10.

The relative success of nonviolent campaigns is largely due to its enormous participation advantage: because “moral, physical, informational, and commitment barriers to participation” are significantly lower for nonviolent campaigns, the dissatisfied population turns out en masse compared to the relatively few supporters garnered by terrorist and other violent organizations.<sup>368</sup> With more participants, nonviolent campaigns are able to take advantage of “enhanced resilience, higher probabilities of tactical innovation, expanded civil disruption (thereby raising the costs to the regime of maintaining the status quo), and loyalty shifts involving the opponent’s erstwhile supporters, including members of the security forces.”<sup>369</sup> Nonviolent campaigns also do not require external support (either for arms or for manpower), which can be unreliable; many violent campaigns, though, depend on external allies due to their inability to heavily recruit from the local population.<sup>370</sup>

Nonviolent campaigns tend to be more successful than terrorist groups in the same scenarios that terrorist organizations have achieved their goals through violent means: when goals are specific and relatively limited. Because of this, groups that are unable to achieve their goals through nonviolent campaigns are even less likely to find success through violence. Non-state groups that could likely achieve their goals through nonviolence, though, would not meet the requirements for supreme emergency exemptions anyway: supreme emergency requires that the threat be of a particularly horrifying nature, namely ethnic

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<sup>368</sup> Ibid., 10.

<sup>369</sup> Ibid.

<sup>370</sup> Ibid.

cleansing or extermination, that could not be stopped through nonviolent resistance. Non-state groups that do meet the requirements for supreme emergency (i.e. groups facing the imminent threat of genocide or a similar moral disaster) will probably not successfully ward off the threat through terrorism. Walter Laqueur writes, “[W]here terrorism might be justified as the *ultima ratio*, such as against totalitarian rule, it has no chance, and where it seemingly succeeds, the political results are in the long run often self-defeating.”<sup>371</sup> Thus while it is conceivable that a non-state group could be in a situation that constitutes a supreme emergency,<sup>372</sup> terrorism is impermissible in almost all circumstances because immoral tactics are only exempted in a supreme emergency if they are likely to be effective.

The question of what circumstances fulfill the necessary requirements for state actors to engage in torture is a more difficult one. As the section on the myth of the ticking time bomb details, supreme emergency has not yet been relevant in a torture scenario. Nonetheless, the question remains as to whether torture would be justified if such a situation did arise. Walzer’s first two conditions could possibly be satisfied in a scenario in which interrogators are questioning whether they can use torture on a detainee who potentially has

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<sup>371</sup> Laqueur, *Terrorism*, 119.

<sup>372</sup> In Schwenkenbecher, “Terrorism, Supreme Emergency and Killing the Innocent,” Schwenkenbecher argues that noncombatant immunity is not absolute and can be violated by terrorist groups in a supreme emergency provided the criteria of proportionality, last resort, and public declaration are satisfied. However, her argument does not consider whether terrorism is likely to be successful. She follows Walzer’s definition of a supreme emergency, permitting groups to override the prohibition on killing innocents only in a moral disaster such as ethnic cleansing or genocide. However, in such disasters, terrorist attacks by weak groups are extremely unlikely to be effective and thus tactics that violate noncombatant immunity cannot be justified, regardless of whether all other criteria has been satisfied.

information about an imminent attack *if* (and likely only if) there is extremely reliable intelligence that a group is planning an attack with nuclear weapons; in such a scenario, the threat could be both imminent and sufficiently horrifying. The other conditions outlined here, though, are highly unlikely to be satisfied. While supreme emergency exemptions do not require the interrogator to be certain that torture will work, the rarity of successful coercive interrogations makes it exceedingly difficult to claim that torture has a high likelihood of achieving the desired results. While the consequences are so severe that they may permit overriding moral norms, the severity of the immoral tactic being used must also be considered in a supreme emergency and used carefully only in specific instances when it is likely to be effective; thus, supreme emergency permit indiscriminately torturing all those thought to be potential terrorists. For torture to be justified on a particular detainee, then, there would also need to be highly reliable information that the detainee had pertinent – and not yet known – information about the attack. Before torture is used, all other interrogation techniques must be exhausted. Since non-coercive interrogation has proven to be significantly more successful than torture, it is both the practical and moral first step before torture is considered. Lastly, the group considering torture must appeal to the international community for help and inform them of the decision to use torture. If all these conditions are met,<sup>373</sup> interrogators may employ the

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<sup>373</sup> It is possible to imagine a scenario in which there is not enough time to fulfill all of the conditions necessary in order to apply a supreme emergency exemption, particularly the requirement that other options be exhausted. All examples we have of relatively successful torture, though, required extended interrogations lasting weeks if not months. Thus, if there is not enough time to exhaust other options and appeal to the international community for help, it

supreme emergency exemption and torture a detainee with relevant information; however, torture's low rate of success, and the unlikelihood that the impending terrorist attack is extreme enough to warrant an exemption, make supreme emergency more or less irrelevant here and any torture undertaken thus exceedingly difficult to justify to the international community. Torture can be rejected in (almost) all imagined scenarios.

As I've shown here, there may be occasions of supreme emergency – though more rare than people often claim – in which deontological constraints may or even must be overridden. The question the thesis set out to answer, though, was whether the conditions of asymmetric conflict were sufficiently different from conventional warfare that they permit revisionist versions of just war theory in which previously disavowed tactics may be used without breaking any rules; in sum, it questioned whether the nature of asymmetric conflict permits that deontological constraints on warfare be undermined. The grounds for the revisionist claim are that without revising just war theory – a doctrine written with conventional actors in mind – it is in effect impossible for the weak side to effectively employ force. In a world where there is no authoritative political process through which weak actors with a potentially just cause can address claims, revisionists argue that it is unfair for weak actors not to have some method through which they can wage war given their limited resources without violating moral rules and thus being labeled criminal. This argument

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is very difficult to imagine torture being timely enough for interrogators to get the necessary information in time to stop the attack. What's more, if the attack is soon enough that not all conditions can be met, the captive is further incentivized not to reveal any information before the attack.

seems persuasive on the surface and when reflecting on communities such as the Tibetan and Palestinian people that seem to deserve the chance to express their legitimate grievances through war just as state powers are permitted to do. I've tried to show here, though, that if the point of making revisions to just war theory is to make modern conflicts fairer by reestablishing the reciprocity on which traditional just war theory was built, then revisionists fail at their own goal: revisionist assumptions are so implausible and the tactics they permit so unjustifiable that their reworking of just war theory would make waging war considerably less just than it is under traditional just war theory. While I agree with revisionists that non-state actors should be given a process through which their grievances can be addressed and judged to be just or unjust, if the goal is to make the world a more peaceful place, then this process cannot be to permit tactics shown here to be immoral.

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