Technologies of InSecurity

The surveillance of everyday life

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'Catastrophic moral horror'

Torture, terror and rights

Vidar Halvorsen

When the notorious photos from Iraq's Abu Ghraib prison were broadcast worldwide in April 2004, the official US response invoked the well-known theory of a few rotten apples in an otherwise untainted barrel of professional detention and interrogation practices.

For historian Alfred McCoy, however, the photo of a hooded Iraqi, standing in an up-right position on a box with fake electrical wires hanging from his extended arms, illustrated two essential ingredients in a historically well-established pattern of so-called psychological interrogation techniques. The hood generates sensory disorientation or deprivation; the extension of arms is a stress position technique for the self-infliction of pain. Furthermore, the photo of Private Lynndie England, holding an Iraqi detainee in a leash like a dog, provides another illustration of a closely related technique, namely, the systematic attempt to undermine cultural identity by way of sexual humiliation and by exploiting an individual's fears and phobias.

As McCoy convincingly demonstrates in *A Question of Torture* (2006), these techniques were based on extensive psychological research financed by the CIA and the American military during the 1950s and the beginning of the 1960s and subsequently implemented primarily in Asia and Latin America. I mention the historical background of these interrogation practices not merely because it serves to make sense of their reappearance after September 11, but also because it might serve to make sense of an emerging, public debate or discourse on the meaning of torture and its possible justifiability.

One might object that there is nothing really new in these debates on the justifiability of torture or torture-like interrogation techniques; that they merely provide yet another illustration of what is commonly described as a 'balancing' of the vital moral goods of security versus liberty. Scholars and practitioners of criminal justice, for example, are already familiar with Herbert Packer's (1968) influential distinction between 'due process' and 'crime control'. However, from being a useful device of moral reasoning in theoretical ethics, thought-experiments involving so-called 'ticking bomb scenarios' are now increasingly invoked by politicians and media commentators to suggest that the threat of terrorism has drastically altered the stakes,

thus requiring an equally drastic reconsideration of the means necessary to rebalance the scales of liberty and security. Moreover, such justificatory attempts resonate with images of heroic responses to moral horror in popular culture, as embodied by Clint Eastwood in *Dirty Harry* and Kiefer Sutherland in *24*. 'If the ends don't justify the means, what does?' is reported to have been the favourite aphorism of Robert Moses, who vigorously defended the instrumental rationality of post-war urban planning in New York (Caro 1974). Yet, from the fact that noble ends are essential ingredients in the justification of means, it does not follow that we are entitled to ignore moral side-constraints on their use.

THE PROHIBITION AGAINST TORTURE

Although the prohibition against torture is the only *absolute* human right, well-known initiatives have ignited controversies concerning its meaning and scope. For example, on 19 January 2002, Defence Secretary Donald Rumsfeld declared that the Geneva Conventions of 1949, which protect prisoners of war against the infliction of torture and inhuman treatment, did not apply to 'unlawful combatants' captured in Afghanistan or elsewhere and subsequently transported to Guantanamo Bay and other detention facilities around the globe. In August 2002, Assistant Attorney General Jay Bybee issued the now infamous 'torture memo', in which it was suggested that torture should be conceived of as pain associated with 'serious physical injury so severe that death, organ failure, or permanent damage' results.

In making the case for a distinction between a physicalist conception of unacceptable torture techniques on the one hand and a psychological conception of acceptable interrogation practices on the other, Bybee and his associates made an interesting reference to a European court case. In *Ireland v The United Kingdom* (1978), the European Court of Human Rights (ECHR) ruled that the widespread and systematic use of five interrogation techniques against detainees suspected of IRA terrorism in the 1970s – wall-standing, hooding, exposition to noise, and deprivation of food/water and sleep – did *not* constitute torture in terms of article 3 in the European Convention on Human Rights. Crucially, however, Bybee missed an important point in his memo, namely the point that according to the court, there had nevertheless been a violation of article 3, which states: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

Bybee was right to insist that on the court's own explicit account, the basis for article 3's distinction between torture, inhuman and degrading treatment or punishment is the severity of pain and injury suffered by victims. The term 'torture', then, is, as in Bybee's memo, reserved for practices falling on the upper end of a scale of harmful consequences. As the court has made clear in a variety of cases, practices that fail to reach the threshold of torture may

nevertheless constitute a violation of article 3's prohibition against inhuman or degrading treatment or punishment. Yet this threshold conception of torture does not exhaust the court's understanding of the nature of torture, as Malcolm Evans and Rod Morgan make convincingly clear in their impressive work on *Preventing Torture* (1998). In the court's adjudicative practice, two further elements are operative: the underlying purpose of torture and the context of its infliction.

The basic purpose of torture is the obtaining of information and confessions or the imposition of punishment, or both. The paradigmatic context of torture is a situation in which the victim is already under complete physical control by his torturers and vulnerably exposed to their powers. Thus, although cases involving intentional infliction of pain and injury might be indistinguishable in terms of the threshold approach, they might be distinguishable in terms of the contextual and purposive elements invoked by the European Court of Human Rights.

Indeed, the contextual ingredient has a profound bearing on the question of justification. Reasonable people might disagree on whether, say, the shooting by the police of a dangerous, fleeing criminal is legitimate or illegitimate. However, reasonable people are reasonable precisely by virtue of their willingness to provide arguments to vindicate their conclusions in public debates. In a variety of cases involving coercive force and violence by the police, answers to questions of legitimacy are sometimes not easily available, and moral deliberation seems inescapable.

With torture, inhuman and degrading treatment or punishment, the situation is radically different. In the eyes of the ECHR, the status of article 3 is absolute and non-derogatory; from the moment a given practice has been subsumed under the article, no question arises as to its legitimacy. This is a 'default position', the validity of which has been increasingly challenged in public debate after September 11. If we accept it, however, as I think we should, it follows that many of the cases analysed in empirical research on police violence are *ethically* trivial in the sense that no moral deliberation is needed to establish their illegitimacy.

Ethics is a subject reflecting on the morality (and immorality) of human practices. Consider, for example, the notorious Louima case: on 9 August 1997, in the restroom of the 70th precinct station house in Brooklyn, NYPD officer Justin A. Volpe shoved a wooden stick into the rectum of Haitian immigrant Abner Louima, who suffered a torn rectum and ruptured bladder that hospitalised him for two months. Needless to say, such injuries are hard to rationalise in terms of the usual 'cover charges' of disorderly conduct, resisting arrest and assault. Instead, Volpe's defence attorney, Marvyn Kornberg, argued that Louima had suffered the injuries in an act of consensual, homosexual intercourse prior to his arrest. Surprisingly and quite atypically, however, on 8 June 1999 Volpe pleaded guilty to charges of aggravated sexual abuse and first-degree assault and was later sentenced to 30 years

in prison. The 'default position' implies that there can be no ethically interesting discourse on the legitimacy of non-consensual police sodomy. Characteristically, the lack of valid reasons for these kinds of police abuses is manifest in the more or less routine denials of their existence or in the legal 'cover charges' rationalising their occurrence.

The Dirty Harry problem

The 'default position' has, as already mentioned, been challenged, first most notably by the Israeli Landau Commission, which was established in 1987 to investigate the lawfulness of interrogation methods employed by the General Security Service (GSS) against Palestinians suspected of terrorism.[1] Invoking the well-known 'ticking bomb scenario', the Commission argued that techniques involving 'physical pressure', the exact nature of which had to be kept secret to retain their effectiveness, were justified on grounds of their necessity for the prevention of a greater evil. 'The ticking bomb scenario' refers to a situation in which a detained adversary, known to have programmed a lethal device to explode, say, in a crowded shopping centre in the very near future, is interrogated about the exact location of the device. Could we justifiably inflict pain and injury on the suspect to obtain the vital, life-saving information? 'The answer,' the Landau Commission concluded, 'is self-evident.'

However, the Commission was unable to identify GSS cases that could plausibly be said to illustrate the real-life relevance of 'the ticking bomb scenario' and thus provide a justification for the agency's systematic use of physical interrogation techniques against terrorist suspects. In police ethics, the usual starting point for discussion is Carl Klockars' classic article on 'The Dirty Harry Problem' (1985). Klockars' description of the problem is not informed by empirical works on policing but draws on Don Siegel's Hollywood movie, *Dirty Harry* (1971), starring Clint Eastwood in the role of Detective 'Dirty Harry' Callahan. A psychopathic serial killer, Scorpio, has kidnapped a 14-year-old girl and holds her captive under conditions with so little oxygen available that she will die in a few hours unless a $200,000 ransom is paid by the city of San Francisco. Callahan delivers the money to Scorpio, who refuses to act on his promise to release the girl. After a series of dramatic events, Callahan confronts Scorpio on the playing field of a football stadium and shoots him in the leg. On the belief that there is a possibility that the girl might be alive, Callahan twists his foot on Scorpio's wounded leg to obtain the necessary information concerning the girl's location. Alas, it turns out that the girl is dead. Was 'Dirty' Harry nevertheless justified in the application of 'dirty means' in his attempt to achieve a noble end? The movie does

1 See the special edition of the *Israel Law Review* (vol. 23, no. 2–3, 1989), which includes excerpts from the commission's report.

not provide the audience with much doubt about what the correct answer must be. Furthermore, an overwhelming majority of recruits regularly reach the same conclusion as the Landau Commission when challenged to respond to various versions of the 'Dirty Harry' dilemma in ethics classes at police academies around the globe.

Unlike methods of police interrogation, which are typically employed to obtain evidence of a suspect's *past* wrongdoing, 'the ticking bomb scenario' and the 'Dirty Harry problem' are now, after September 11, seen as instances of the right of self-defence and defence of others (who are unable to defend themselves): these cases raise the question of what we are morally permitted to do to ward off an *imminent* and unjust lethal attack. Although the perpetrator's body has already been physically constrained, as in cases of torture, the ticking bomb is still beyond our control, thus posing a serious threat to the lives of innocent people. On the right of self-defence, which reflects a strong moral intuition shared by most people, we are morally entitled to shoot and seriously wound or kill a person who is caught in the process of detonating a bomb. This requirement of imminence is at least partially preserved in some real-life cases of modern warfare, as when Israel launched a first strike on Egypt in The Six Day War of 1967. In contrast, it was strikingly absent in one of President Bush's first formulations (on 1 June 2002) of the new security doctrine of pre-emption:

> Yet the war on terror will not be won on the defensive. We must take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge. In the world we have entered, the only path to safety is the path of action. And this nation will act.
> (Graduation Speech at West Point, available at the White House website)

The fatal consequences of a more comprehensive logic of pre-emption, with its relaxation of the basic requirement of epistemic justification underlying the principle of imminence, have been unfolding since 20 March 2003, when USA and its 'coalition of the willing' invaded Iraq.

A much more plausible version of the principle of pre-emption was applied by the Special Air Service (SAS) in the ECHR case of *McCann and Others v the United Kingdom* (1995). Prior intelligence indicated that the Provisional IRA was planning a terrorist attack on Gibraltar in March 1988. Moreover, use of a remote-control device to detonate a car bomb was considered to be the modus operandi most likely to be used in the attack. An extensive surveillance operation enabled local police to identify three IRA members, and four plain-clothes soldiers from the SAS surveillance team followed the suspects in the streets of Gibraltar.

Acting on the belief that the suspects were reaching for the button of a remote-control device, the soldiers fired altogether 27 rounds, killing the suspects immediately. Subsequent searches established that the deceased

were unarmed and that their car did not contain a bomb, although a second car was discovered two days later, containing explosives and timing devices.

The Strasbourg court found that the soldiers' descriptions were substantiated by independent eyewitness accounts and that their split-second interpretations of the suspects' movements were reasonable in the circumstances of the case. Nevertheless, although the killings, taken in isolation, did not constitute a violation of the right to life guaranteed by article 2 in the European convention, the court's majority (10–9) ruled that the anti-terrorist operation as a whole had been controlled and planned in a manner which failed to respect the requirements of article 2.

The crucial question is whether the self-defence justification of intentional injuring or killing in 'the remote-control scenario' can be extended to cover the intentional infliction of pain and injury in 'the ticking bomb scenario'. There is a difference between the two scenarios: in 'the remote-control case' but not in 'the ticking bomb case', we operate on the person's body to counteract and neutralise his ongoing, lethal actions; in 'the ticking bomb case' but not in 'the remote-control case', we operate on a person's mind by way of inflicting (coercive) pain and injury on a body which has already been neutralised. Now, is this difference a morally relevant difference?

The ECHR has argued that the distinction between body and mind is legally and morally relevant as far as the acceptability of evidence is concerned. For example, on the court's account, the right to remain silent 'does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect'. The court's argument explains why coercion necessarily must nullify the evidential status of confessions, since such evidence, unlike objects and facts, does not have an existence independent of a person's will or, more generally, of his rationality.

Confessions are relevant to the extent that they serve to establish a justificatory, evidential connection between certain facts on the one hand and the truth of a specific proposition on the other. Because confessions cannot exist independently of suspects' rationality, the normal legal effects of confessions must be nullified to the extent that they have been obtained through the infliction of torture or the threats of torture, which are paradigmatic instances of coerced confessions. A torture-based confession is the outcome of an essentially unreasonable choice in the sense that it replaces a justificatory relation between facts and beliefs with a causal or quasi-causal relation generated by pain or fear of pain. The replacement of justification with causation explains, of course, the notorious and well-known unreliability of torture-based interrogation techniques.

'CATASTROPHIC MORAL HORROR'

However, the obtaining of *evidence* for past wrongdoing lacks the urgency of a situation in which we are in desperate need of *information* that may enable us to ward off, in Robert Nozick's terminology, 'catastrophic moral horror' (1974: 30) in the very near future. Replace the suffocating girl in the *Dirty Harry* movie with a nuclear bomb on Manhattan, and replace Scorpio with a captured member of a terrorist team, and you get the version of the ticking bomb scenario that regularly informs the plot of the TV series *24*. Its protagonist, agent Jack Bauer of the Counter Terrorist Unit (CTU) in Los Angeles, is regularly involved in torture scenes to ward off atrocities that would otherwise be imposed by terrorists with weapons of mass destruction. Torture is invariably presented as unfailingly effective, except, of course, when it is occasionally inflicted on Bauer himself (Mayer 2007). The moral urgency of time running out is dramaturgically reinforced by a reappearing ticking digital clock on the screen. The impact is aptly described by Jane Mayer as 'a riveting sensation of narrative velocity'.

Alas, catastrophic moral horror is also the starting point for Alan Dershowitz (2002), the well-known Harvard law professor and criminal defence lawyer, who has frequently invoked the scenario in American debates on the justifiability of torture or torture-like interrogation methods in the War against Terror.

It is important to appreciate the fact that what gives Dershowitz's example a certain intuitive appeal is *not* that it is a traditional utilitarian justification in terms of balancing costs and benefits; rather, it is a *right-based* justification, which recognises that *information* obtained by torture can never be presented as *evidence* in court. However, we should resist the application of this thought-experiment – because *that* is precisely what it is: an ethical *thought-experiment* – to real-life situations. Although the right of suspects not to be harmed cannot be more stringent than the right of innocent bystanders not to be killed, these rights collide in so extreme (and extremely rare) cases that no *legislator* can be justified in legally authorising the numerous 'Jack Bauers' to inflict pain and injury on the alleged 'unlawful combatants' in the circumstances characterising the fight against terrorism. It does not follow, from the moral intuitions underlying the 'ticking bomb scenario', that officials, in real-life situations, are entitled to ignore moral side-constraints in their pursuit of noble ends.

A problematic aspect of Dershowitz's 'ticking bomb scenario' is that it is used, in public debates, to justify something else, namely the ongoing detention and interrogation practices at Guantanamo Bay, and the outsourcing of torture and torture-like techniques, inflicted on an unknown number of 'ghost detainees' indefinitely detained at an unknown number of interrogation centres elsewhere in the world. The current US administration has responded to widespread national and international criticism by claiming that unlawful

combatants are, in the words of former Attorney General John Ashcroft, 'not entitled to and do not deserve the protections of the American constitution'.

Basically, this is yet another illustration of how the logic of pre-emption has been established as a new paradigm for dealing with uncertainty, as something distinct from quantifiable risks. Nevertheless, the paradigm of pre-emption can be compatible with the rule of law only to the extent that it incorporates the principle of *habeas corpus*, which is the fundamental right of citizens and aliens to challenge, in independent courts, the factual and legal basis for detention, imprisonment and other coercive practices by the state. Here, the distinction between information and evidence can no longer be maintained. A democratic state that fails to respect the principle of *habeas corpus* is a state that has ceased to be a constitutional democracy.

THE RELEVANCE OF RIGHTS

At least prior to September 11, rights occupied a central place in public discourse on law and morality. In a comprehensive survey of police research, *Policing Citizens* (1999), P.A.J. Waddington plausibly demonstrates the *explanatory* significance of human rights for policing by way of contrasting the British colonial police's paramilitary subjection of native populations in the former colonies with the relatively constrained exercise of police authority in domestic affairs. Unlike people in the colonies, people in the mainland were recognised by the police as citizens with rights, indicating that

> . . . *how* a society is policed depends upon *who* is policed. When it is citizens with civil and political rights, then policing is approached with caution; but when the recipients of police authority are not citizens, then police are free to exercise naked coercive force.
>
> (Waddington 1999: 26, italics in original)

Of course, in a *justificatory* context, state officials are hardly 'free to exercise naked coercive force'. Rather, the moral and legal challenge of human rights flows from the fact that non-citizens no less than citizens are bearers of certain fundamental rights. These rights entitle their bearers to basic respect and recognition, committing state officials to provide justifications whenever their exercise of coercive authority interferes with the autonomy of persons. Accordingly, the moral and legal significance of Waddington's explanatory dichotomy between citizens and non-citizens extends to the domestic domain as well, because, as he aptly points out:

> . . . policing is not simply restrained or unrestrained *per se*, but tends to be restrained when dealing with *some* members of the civil population and less so when dealing with others . . . If citizenship is unevenly

> distributed, the civil population are not merely passive recipients of rights: they assert their citizenship and contest its denial.
>
> (Waddington 1999: 28–29, italics in original)

Thus, within a state's jurisdiction, human rights constitute moral and legal yardsticks enabling citizens and non-citizens to identify and critically assess contested exercises of state authority. Critical assessment of state practices in terms of human rights involves three separate standards. First, a state, by ratifying an international human rights convention, commits its officials to passively *refrain* from violating the rights of persons (and, infrequently, the rights of collective entities) comprised by the convention. Second, officials of a ratifying state are committed to actively *protect* those among the convention's recipients who are unable to defend their rights against illegitimate interference by third parties.[2] The combined obligation to 'respect and protect' does not undermine the well-known distinction between negative and positive rights. As Alan Gewirth observes, a police officer's duty to protect (and not merely respect), say, the negative right not to be murdered is a duty 'to see to it that potential offenders *refrain from* the prohibited actions' (Gewirth 1996: 35, author's italics). Consequently, although the content of a correlative duty to defend a negative right necessitates a positive act of interference, the right itself is nevertheless properly classified as negative. Third, positive rights correlate with duties to perform two separate positive actions: not merely a duty to protect the right-holder's enjoyment of the good or benefit against illegitimate attacks from third parties but also a duty to make the good or benefit available to the right-holder in the first place.

The contents of rights are goods or benefits to which right-holders attach great moral significance; the right, for example, to life, liberty and security of person, which are goods protected by the European Convention on Human Rights. Thus, by virtue of their contents, human rights are moral rights, but simultaneously they are also internationally binding legal rights, by virtue of the way they have been enacted within the UN and European systems.[3] Although the holders of human rights are almost invariably individual

2 The latter aspect of a state's dual obligation 'to respect and to ensure' human rights resonates strongly with moral sentiments of police culture. The solidarity felt by many police officers with victims of crime is cogently expressed by the recurrent remark of Detective Frank Pembleton (powerfully played by actor Andre Braugher), the ruthless interrogator in the acclaimed NBC television series *Homicide: Life on the Street:* 'We speak for those who cannot speak for themselves.'

3 Among human rights scholars, there are some disagreements about the extent to which the Universal Declaration has attained the force of law during the more than 50 years that have elapsed since its adoption in 1948 by the UN General Assembly. This issue, however, has no bearing on the status of moral/human rights regulating the use of force and violence by state officials, which are extractable from covenants adopted by the UN and the Council of Europe, respectively.

human beings,[4] the addressees of those rights are the ratifying states, which undertake, as already mentioned, a three-fold obligation to 'respect, protect and provide' the various goods picked out by the corresponding rights.

Infringements of rights

Theoretically, almost *any* right included in human rights covenants might necessitate the use of force and violence by the police and other agencies of the state in order to protect right-holders against illegitimate interference. Moreover, even the provision (and not merely the protection) of a positive human right occasionally implies the use of physical force and violence against some among its recipients, undermining their active enjoyment of benefits guaranteed by negative as well as positive rights. Consider, for example, the *possible* conflict between article 12 of the International Covenant on Economic, Social and Cultural Rights, which stipulates the positive 'right of everyone to the enjoyment of the highest attainable standard of physical and mental health', and article 18 of the International Covenant on Civil and Political Rights, which states that 'Everyone shall have the right to freedom of thought, conscience and religion'. In health systems of western welfare states, the former right more or less routinely requires, on certain medical indications, the administration of blood transfusions on consenting patients and patients whose physical or mental conditions require consent by their legal representatives. Yet there are US court cases in which members of Jehovah's Witnesses, who oppose blood transfusion on religious grounds, have failed to substantiate their alleged status as victims of illegitimate state coercion. For example, in *Raliegh Fitkin-Paul Morgan Memorial Hospital v Anderson* (1964) the court ordered a blood transfusion to save the life of a woman and her unborn child. It is easy to imagine a quite plausible scenario in which the enforcers of the court's decision must resort to the use of physical force and possibly even violence to subdue a vigorously resisting patient, trespassing her negative right to manifest her 'religion or belief in worship, observance, practice and teaching'. However, the court's justification for discounting the patient's right to freedom of religion is recognised by paragraph 3 of article 18:[5]

> Freedom to manifest one's religion or beliefs may be subject to such limitations as are prescribed by law and are necessary to protect public

4 An exception is the right of self-determination, which applies to peoples, not persons.

5 Needless to say, paragraph 3 of article 18 was not available to courts in 1964, two years prior to the covenant's adoption (in 1966) by the General Assembly. In fact, the Civil Rights Covenant was not ratified by the United States until 1992. Because the USA has to date not adhered to the covenant's Optional Protocol, it is not possible for victims of human rights violations to bring complaints against the USA before the Human Rights Committee established by the Civil Rights Covenant.

> safety, order, health, or morals or the fundamental rights and freedoms of others.

In other words, the court's order to coercively (and possibly forcefully or violently) ensure the patient's positive right to physical health was, in retrospect, justifiable in terms of the unborn child's right to life,[6] despite the fact that discharging two human right duties (to protect life and provide health) was tantamount to discarding a third (to respect religious freedom). Importantly, in addition to rights, paragraph 3 refers to vital goods like public safety, order, health and morals, only two of which (health, order) are incorporated as rights in UN covenants. This juxtaposition of goods as distinct from rights is plausibly taken to imply that whilst the former are social *goals* to be promoted, the latter are constraints that may or may not be overridden by either goals or other, more stringent rights.

Legitimate aims and conditions of infringement

In the terminology of the European Court of Human Rights, the pursuit of goals as well as the protection of (more stringent) rights are *legitimate aims* which may or may not justify a state's imposition of limitations on right-holders' exercise of their rights. Consequently, from the point of view of political philosophy, the term 'legitimate aims' comprises 'the good' no less than 'the just'.[7] Article 18 belongs to a group of human rights that not only picks out particular goods for protection but subsequently proceeds to explicitly enumerate the conditions under which right-holders are justifiably deprived of these goods. Other examples of what might be called internal derogation are article 2 (life), 5 (liberty), 8 (privacy), 9 (freedom of thought),

6 True, paragraph 3 refers to the rights of *others*, not the rights of the individual whose rights are infringed. It might be the case that respect for the patient's way of practising her religious beliefs constitutes a constraint on what the state is allowed to do to save her life. To refrain from providing the necessary blood transfusion is in some sense tantamount to 'performing' (by omission) a kind of passive euthanasia. According to the doctrine of doing and allowing there is a morally relevant difference between bringing about some harm and letting some harm befall someone, which might explain why passive and not active euthanasia is morally permissible. On this interpretation of article 18, the best justification for the court's decision is the unborn child's and not the mother's right to life.

7 In *Ethics for Adversaries* (1999), Arthur Applbaum has 'at the risk of invoking the title of a spaghetti western . . . identified three orders of reason: the good, the just and the legitimate' (p. 217). Citizens of pluralistic societies frequently fail to reach agreement in their deliberations about the good, and such disagreements must be resolved at the level of justice. Alas, there are rivalling conceptions of what justice requires as well. For example, citizens disagree as to whether women should be granted a right to abortion. In the light of possibly irreconcilable disagreement as to what justice requires, citizens may agree to defer to the legitimate authority of Parliament. Evidently, as Applbaum observes (p. 218), 'at some point one runs out of reasons'.

10 (freedom of expression) and 11 (freedom of assembly) of the European Convention on Human Rights. Thus, when some of these rights, like the right to life, are said to be non-derogable, the reference is to the *external* derogation applying to the majority of rights in virtue of article 4 of the International Covenant on Civil and Political Rights and article 15 of the European convention 'in time of war or other public emergency threatening the life of the nation'. However, with the exception of the prohibition against torture, no human right is absolute, the conditions of derogation being either internally and externally explicated by rights or extractable from covenants by interpretative reconstruction of the scope and stringency of rights.

Although conditions of internal, external and extractable derogation are conditions of the legitimate infringement of rights, the UN covenant nowhere explicitly endorses infringement by the use of force and violence. The European convention does so only once, in article 2 on the right to life, which in paragraph 2 states:

> Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from *the use of force* which is no more than absolutely necessary: a. in defence of any person from unlawful violence; b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; c. in action lawfully taken for the purpose of quelling a riot or insurrection (italics added).

To be sure, it is theoretically feasible to have a system of law devoid of physical enforcement mechanisms. One of the fundamental functions of rules is, as Wittgenstein pointed out in his celebrated analysis of what it means to follow a rule in *Philosophical Investigations* (1953), to establish standards enabling practitioners (and observers) to distinguish between a right and a wrong way of doing things. Thus, to follow a rule logically implies the possibility of making mistakes. A purely declarative system of legal rules would suffice to fulfil this function, providing its subjects with authoritative criteria of appraisal and criticism. Indeed, the UN and European systems of human rights are declarative in the sense that decisions by, respectively the UN Human Rights Committee and the European Court of Human Rights in cases of individual complaints are entirely dependent on domestic enforcement by ratifying Member States.[8]

8 At the international level, the Security Council and the General Assembly, which are UN charter-based institutions, have repeatedly been criticised for declarative impotence, failing to fulfil their obligation 'to take effective collective measures for . . . the suppression of acts of aggression or other breaches of the peace' (UN charter, article 1, paragraph 1). Most significantly, article 2(4) prohibits 'the threat or use of force' by Member States 'against the territorial integrity or political independence of any state'. Nevertheless, under article 51 each Member State retains its 'inherent right of individual or collective self-defence' against

However, when states explicitly take on an obligation to 'respect and to ensure' and to 'secure to everyone within their jurisdiction' the rights included in the UN and European conventions, domestic enforcement would be radically self-defeating and subversive of these aspirations to the extent that use of force and violence were to be excluded in the absence of positive textual endorsement. Consequently, it seems plausible to argue that conditions of internal, external and extractable derogation of human rights comprise the conditions of the legitimate infringement of these rights by the state's use of force and violence.

TWO LEGAL PARADIGMS

In order to reinforce the conclusion that 'the ticking bomb scenario' does not constitute such conditions of legitimate infringements of the prohibition against torture in the fight against terrorism, it might be fruitful to situate the events of September 11 in a more comprehensive conceptual framework. Two competing *legal* paradigms are frequently invoked by state officials and commentators. According to the first paradigm, the atrocities were the effects of an 'armed attack' on America, justifying President Bush's subsequent declaration of 'war against terrorism'. According to the second paradigm, the atrocities constituted 'crimes against humanity', implying that a law enforcement response would be more appropriate. Intuitively, the phenomenon of war involves large-scale, institutionalised forms of force and violence which conflicting political entities inflict on each other. Clearly, John Keegan is right to point out in *A History of Warfare* (1993: 3) that the practice of warfare 'antedates the state, diplomacy and strategy by many millennia'. Yet in its modern version, war and warfare are intimately connected to the international system of nation states. This system is, despite political realism's allegations to the contrary, essentially a normative and moralised system, constituted by the mutual recognition (and sometimes rejection) of normative claims articulated by officials of states. To a large extent, such claims are either recognised as principles of customary international law or increasingly enacted as positive international law, stipulating standards of right and wrong conduct. This implies that we are not, as observers, completely free to

military aggression by adversarial states. Moreover, under article 42 the Security Council may authorise 'such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security'. However, it is a contested issue whether such measures, which evidently must encompass the collective use of force and violence against a state's territorial integrity, can be authorised by the Security Council to prevent large-scale human rights violations by state governments against segments of their own populations. In contrast, *peacekeeping* involves, with the consent of a target state, the use of UN military and police personnel to keep rivalling segments among the state's population apart. In peacekeeping operations, UN officers are permitted to use force and violence in self-defence only.

identify phenomena like war and warfare as we please. Rather, because war and warfare have become thoroughly legalised and, by implication, also thoroughly moralised, we can do no better than to attempt to reconstruct the framework of international law and see whether it can appropriately accommodate the events of September 11.

As Michael Walzer (1977: 21) observes, war is morally judged twice, first with respect to the reasons states have for going to war in the first place (*jus ad bellum*: the justice of war) and second with respect to the way the war is waged or what kind of methods are used in the waging of war (*jus in bello*: justice in war). Of course, *jus ad bellum*-considerations are crucial ingredients in the just war tradition. A basic distinction is made between war as *self-defence* against unjust aggression and war as the infliction of *punishment* of state wrongdoing. The latter category is deeply problematic and relies on a flawed analogy with the guilt of individual wrongdoers in a way that the conception of war as self-defence does not.

The impact of just war thinking on the normative regulation of international conduct is indicated by the fact that just war principles have to a large extent been codified as positive international law. Yet the principle that war is justified as the infliction of punishment of wrongdoing is not one of them. On the contrary, the United Nations' Security Council has repeatedly made crystal-clear that retributive justice by way of *reprisals* is absolutely at odds with the basic principles of the UN charter. Therefore, the argumentative strategy adopted by the USA and Israel, the two foremost practitioners of reprisals on the international scene, has been, as Christine Gray (2000: 119) has observed, to stretch the meaning of self-defence so as to include the right to inflict reprisals. So far, these attempts to re-describe the infliction of reprisals as justifiable self-defence have failed to win the explicit approval by other members of the United Nations.

On September 12, the NATO allies stated that the events of the preceding day constituted an attack on *all* the members of the alliance in terms of the mutual defence guarantee of the treaty's article 5. Of course, one might argue that the NATO members in a similar way stretched the meaning of collective self-defence in article 5. To be sure, when article 5 was drafted 52 years ago, no one could, in the words of Philip Gordon (2001: 89), 'have imagined that its first invocation would involve Europeans coming to the aid of the United States rather than the other way around'. As many commentators have pointed out, a statement by the NATO Council is, taken in isolation, hardly sufficient to establish the conclusion that the United States was entitled to invoke the right of individual self-defence within the meaning of article 51 of the UN Charter. This right is said to be *inherent* in the sense that it can be exercised by members of the United Nations independently of explicit authorisation by the Security Council, provided that 'an armed attack' has occurred. All *other* exceptions to the general prohibition of the threat or use of force contained in article 2(4) of the UN Charter must be authorised by the Security Council.

However, to the extent that it could be legally established that the events of September 11 constituted 'an armed attack', it seems reasonably clear that international law did provide the United States and its allies with a just cause for waging war in Afghanistan.[9]

Warfare or law enforcement?

Nine days after the attacks on the World Trade Center and the Pentagon, President Bush made a sweeping statement in his speech to Congress: 'Our war on terror,' he said, 'begins with al-Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated' (Stevenson 2001: 35). However, the limited applicability of the paradigm of warfare in the fight against terrorism was recognised even by then Secretary of Defence Donald Rumsfeld, who indicated that the military elimination of every terrorist would be 'setting a threshold that is too high'. Indeed, the strictness of conditions under which a war against terrorism can be justifiably waged serve to illustrate the primacy of the second legal paradigm, the paradigm of law enforcement and criminal justice.

Nevertheless, although warfare and law enforcement are plausibly considered as distinct ideal types in Weber's sense, they sometimes tend to converge metaphorically in terms of slogans like 'war against crime' or 'war against drugs'. Because such metaphors resonate strongly with certain characteristics of police culture, they have real consequences, as demonstrated by Jerome Skolnick in his classic study *Justice without Trial* (1966). The basis for Skolnick's illuminating reflections on police attitudes towards law and legal reasoning is Herbert Packer's (1968) influential discussion of two models of the criminal justice system, which he called the 'due process model' and the 'crime control model'. The due process model embodies the doctrine of the rule of law, emphasising individual rights and legal restraints on the various governmental agencies operating within the criminal justice system. The crime control model, meanwhile, aims at maximising the criminal justice system's ability to discover arrest, prosecute, convict and incapacitate criminal wrongdoers, and hinges on the assumption that formal law enforcement is the most efficient way of controlling or reducing the overall level of crime. The challenge, as Packer saw it, is to strike a proper balance between those two models; to achieve 'order through law'.[10]

9 But, needless to say, *not* in Iraq.

10 Yet, as Andrew Ashworth (1994: 28–29) has pointed out, Packer's distinction is too rigid in certain respects. Ashworth lists five objections, to which I would like to add the following two: (1) notions of fairness, so crucial in most accounts of due process, are embedded in criminal law in terms of *mens rea* requirements for criminal liability; (2) violations of due process norms sometimes generate criminal liability and thus should be counted among the crimes to be controlled or reduced according to the crime control model.

However, a fundamental feature of police culture, originally conceptualised by Skolnick and subsequently confirmed by anthropologists like Jonathan Rubinstein (1973) and Malcolm Young (1991) among others, is likely to imply that the scales of criminal justice are already tilted in favour of the model of crime control. A crucial passage in Skolnick's study explains why this is so:

> . . . it must be understood that the police draw a moral distinction between criminal law and criminal procedure. . . . The substantive law of crimes is intended to control the behavior of people who wilfully injure persons or property, or who engage in behaviors eventually having such a consequence, as the use of narcotics. Criminal procedure, by contrast, is intended to control authorities, not criminals. As such, it does not fall into the same moral class of constraints as substantive criminal law.
>
> (Skolnick 1966: 191–192)

It is important to realise that this distinction of 'police cosmology' between criminal law and criminal procedure is, as Skolnick points out, a morally based distinction, despite the fact that it frequently emerges as cynicism or disillusionment about the realities of the criminal justice system. Above all, police cynicism reflects the view that procedural norms are unrealistic and counterproductive external constraints to be stretched or set aside in the higher mission of fighting crime, maintaining order and protecting the rights of victims.

Cynicism about procedural rules, then, can hardly be understood independently of the strong moral commitments of crime fighting. A typical expression of this sense of moral mission is found in the preface to the American *Law Enforcement Handbook*:

> As police officers, we have a vital role: we are the front-line troops in the war against the forces that would disrupt society and destroy the right of our fellow citizens to live in peace and security. Ours is an honourable task, one that requires our best.
>
> (Rowland and Bailey 1985: 13)

Not surprisingly, then, whether or not moral conditions for waging a just war against terrorism can be met, actual warfare will have a profound impact on legislation and the theory and practice of law enforcement. Dramatic changes in the legal framework of criminal justice agencies have been introduced in several countries, most notably in the United States itself, in the form of the so-called PATRIOT Act, and in the United Kingdom, in the form of the Anti-Terrorism Crime and Security Bill. Enacting repressive modifications in the legal frameworks of constitutional democracies is not necessarily at odds with fundamental principles of human rights and the rule of law. As already

mentioned, article 15 of the European Convention on Human Rights allows derogation from certain rights, including the right to liberty and security of person (article 5), 'in time of war or other public emergency threatening the life of the nation'. The right to liberty and security of person was precisely the right that the British government derogated from when its Security Bill, with some minor modifications, was passed. Moreover, according to the influential human rights organisation JUSTICE (November 2001: 4), 'a court would be likely to find, in the current circumstances, that a public emergency does exist for the duration of any credible threat from the Al Qaida organisation'.

FIGHTING TERRORISM: SECURITY VERSUS LIBERTY?

It is quite common to think of such derogation as the result of a necessary trade-off between, on the one hand, the vital interests of security and, on the other hand, the no less vital interests of liberty. Yet this way of thinking about security and liberty tends to ignore the urgent need for legal safeguards whenever liberty is set aside for the sake of security. A more principled basis for thinking about these matters is suggested by John Rawls' requirement that arguments for coercive restrictions of liberty must proceed from the principle of liberty itself. 'Limitations upon the extent of liberty,' Rawls says in *A Theory of Justice*, 'are for the sake of liberty itself and result in a lesser but still equal freedom' (Rawls 1971: 247). According to Rawls' moral individualism, which insists that the moral status of the state is parasitic upon the moral status of persons and not the other way around, a state can justifiably invoke the principle of national security only to the extent that its application of that principle is essentially informed by the individual rights and values that are to be secured.

It is very hard to see that this is the case with the establishment of military tribunals, authorised to secretly try and possibly sentence to death non-citizen terrorist suspects, suspending standard requirements of evidence and the right of appeal. The relevant answer to Ashcroft's statement that foreign terrorists 'are not entitled to and do not deserve the protections of the American constitution' is, of course, that the argument is circular, presupposing that the guilt of suspects has already been established independently of fair procedures in general and defensible interrogation techniques in particular. It is also very hard to see that the principle of 'restricting liberty for the sake of liberty' is properly reflected in various provisions of European legislations, allowing for more or less indeterminate detention of foreign suspects without trial. Such measures become particularly worrisome when considered in the light of Thomas Mathiesen's convincing documentation (2002) of a consistent drift among members of the European Union towards expanding the very concept of terrorism.

Significantly, there is a realistic alternative to all of this, as indicated by the fact that American federal courts, without compromising fundamental principles of constitutional democracy, have tried and convicted persons with links to bin Laden and al-Qaeda for the 1993 bombing of the World Trade Center (killing six people) and the 1998 bombings of the American embassies in Kenya and Tanzania (killing 224 people). As these trials illustrated, there are, in terms of domestic criminal law, a vast number of offence categories that might apply to the events of September 11.

However, there is one category of customary international law that seems to be particularly relevant, namely the concept of 'crimes against humanity', which appeared for the first time in 1945, at least as a technical legal term, in the charter of the Nuremberg trial. 'Crimes against humanity', as well as war crimes, have been at the forefront at the International Criminal Tribunals for the former Yugoslavia and Rwanda, established under the authority of the Security Council. Yet according to Law Professor Ruth Wedgwood (2001), 'only 31 individuals have been tried by the Yugoslav tribunal in 8 years, at a cost of $400 million', so it seems to be a more feasible alternative to let national courts exercise their so-called universal jurisdiction over crimes such as genocide, crimes against humanity and war crimes.

CONCLUSION

Let me, in conclusion, very briefly situate my discussion of torture, terror and rights within the grand historical context of Samuel Huntington's theory of 'clash between civilisations', which has frequently been invoked by commentators in the wake of September 11. I take this theory to be empirically false, but I shall not justify that claim here. However, in contrast to theories of natural science, the objects of the social sciences and the humanities are, as Charles Taylor (1985: 45) puts it, 'self-interpreting animals', capable of making false theories true by acting on them. There are some significant and destructively influential agents on the international scene who do subscribe to the theory of 'clash between civilisations', namely bin Laden and whatever is left of his al-Qaeda organisation and the Taliban regime. Yet it is not merely up to them whether the clash will become true. It is also up to the western countries to exercise moral constraint, when waging war and pursuing criminal justice, to ensure that the theory is performatively falsified.

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Epilogue

The inescapable insecurity of security technologies?[1]

Lucia Zedner

INTRODUCTION

Techno-credulity – or blind faith in technological solutions to otherwise irresolvable problems – is a hallmark of late modernity. Enormous trust is placed in the capacity of technology to surmount the gravest challenges to our well-being and happiness. The big hazards of disease, poverty, global warming, and, not least, insecurity are the foci of intense technological innovation dedicated to curing the incurable, eradicating the ineradicable, securing the vulnerable, and, of course, saving the planet. The political, financial and emotional investment in the cure-all capabilities of modern technology is on such a grand scale as seriously to inhibit critical scrutiny of the tensions, ironies and paradoxes that arise in seeking technological solutions to the ills of modern life (Marx 2001). This epilogue reflects and builds upon the superb contributions to this volume that together institute just such a critical enquiry into the insecurities of technologies whose very raison d'être is ostensibly to provide security.

The preceding chapters make clear the extraordinary variety of technologies capable of being viewed through the lens of security. The technologies discussed extend from the mundane to the exceptional: from the 'everyday objects' discussed by Neyland to the torture-like interrogation techniques explored by Halvorsen. They range from high- to relatively low-tech. Contrast the satellite tracking of offenders (Nellis) to the national ID cards debated by Lyon. They comprise virtual technologies, for example access to the internet (Jewkes) and computer crime (Yar), and concrete ones like the physical spaces and architecture considered by Jones. And their deployment ranges from the expert to the amateur. Compare the operators of CCTV systems (discussed by Smith and by Goold) and the use of DNA (Dahl) to the amateur photographers whose surveillance activities are considered by Koskela. Clearly the range of technologies to which security gives its imprimatur is far-reaching.

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