Articles

Not Enough Official Torture in the World? The Circumstances in Which Torture Is Morally Justifiable

By MIRKO BAGARIC* AND JULIE CLARKE**

RECENT EVENTS stemming from the "war on terrorism" have highlighted the prevalence of torture, both as an interrogation technique and as a punitive measure.[1] Torture is almost universally deplored. It is prohibited by international law and is not officially sanctioned by the domestic laws of any state.[2] The formal prohibition against torture

* B.A., LL.B. (with honors), LL.M., Ph.D., Head of Deakin Law School. Professor Bagaric was a panelist at the *U.S.F. Law Review*'s spring symposium, "Torture: When, If Ever, Is It Permissible?" Janis Karpinski, the commander of the military police brigade that oversaw Abu Ghraib prison, was the symposium's keynote speaker. The symposium also featured a panel discussion and debate on the moral and legal permissibility of torture, which included Professor Bagaric, Professor Marcy Strauss of Loyola Law School, Los Angeles, and Professor John Parry of the University of Pittsburgh School of Law. Professor Bagaric would like to express his thanks for the assistance he received from the editorial team of the *U.S.F. Law Review*, especially Kathryn Dittrick Heebner.

** Lecturer, Deakin Law School.

1. For the purposes of this Article, the "use of torture" refers to governmental use of torture and not to non-government actors.

2. Israel was the last state to officially sanction the practice. TOTSE.COM, USE OF TORTURE AGAINST PALESTINIAN POLITICAL PRISONERS (Feb. 2000), *at* http://www.totse.com/en/politics/the_world_beyond_the_usa/164142.html (last accessed Mar. 8, 2005). At least after the Landau Report of 1987, and for some time before, the nature of the conduct sanctioned by Israel was ambiguous, and precise interrogation methods were classified as secret. The Israeli Government denied that the interrogation methods employed amounted to torture. *See, e.g.*, Nili Arad, Israeli Representative, Statement Before the 18th Session of United Nations Committee Against Torture (May 7, 1997), *in* ISRAEL MINISTRY OF FOREIGN AFFAIRS WEB SITE, *at* http://www.mfa.gov.il/MFA/Foreign+Relations/Israel+and™he+UN/Speeches+§tatements/ (last accessed Apr. 18, 2005) [hereinafter Statement of Nili Arad]. After the Landau Report of 1987, the Israeli government only admitted to using "moderate physical pressure" and in some cases "enhanced physical pressure" for purposes of interrogation, still claiming that this did not amount to torture. In May 1998, however, the United Nations Committee Against Torture found that the interrogation methods used in Israel, of which it was aware, constituted torture. *Conclusions and Recommendations of the Committee Against Torture: Israel*, U.N. HCHR, 27th Sess., at 1, U.N. Doc.

is absolute—there are no exceptions to it. This is not only pragmatically unrealistic, but unsound at a normative level. Despite the absolute ban on torture, it is widely used. Contrary to common belief, torture is not the preserve of despot military regimes in third world nations. For example, there are serious concerns regarding the treatment by the United States of senior Al Qaeda leader Khalid Shaikh Mohammad.[3] There is also irrefutable evidence that the United States tortured large numbers of Iraqi prisoners, as well as strong evidence that it tortured prisoners at Guantanamo Bay prison in Cuba, where suspected Al Qaeda terrorists are held.[4] More generally Professor Alan Dershowitz has noted, "[C]ountries all over the world violate the Geneva Accords [prohibiting torture]. They do it secretly and hypothetically, the way the French did it in Algeria."[5]

Dershowitz has also recently argued that torture should be made lawful. His argument is based on a harm minimization rationale from the perspective of victims of torture. He said, "Of course it would be best if we didn't use torture at all, but if the United States is going to continue to torture people, we need to make the process legal and accountable."[6] Our argument goes one step beyond this. We argue that torture is indeed morally defensible, not just pragmatically desira-

CAT/C/XXVII/Concl.5 (2001). Nevertheless, the practices continued without judicial intervention until September 1999 when the Israeli Supreme Court ruled it illegal. Steve Weizman, *Israel Uses Torture in Defiance of Court Ban*, INDEPENDENT (London), Nov. 12, 2001, *available at* http://news.independent.co.uk/world/middle_east/story.jsp?story=104447 (last accessed Apr. 18, 2005). Despite this ruling, it has been suggested that the Israeli authorities continue to use torture. *Id.* Ken Roth, the executive director of Human Rights Watch, suggests that Israel ended up torturing around ninety percent of its Palestinian security detainees until finally the Israeli supreme court outlawed the practice. Interview by Wolf Blitzer with Alan Dershowitz, Professor of Law, Harvard University, and Ken Roth, *Dershowitz: Torture Could Be Justified* (Mar. 3, 2003), *available at* http://edition.cnn.com/2003/LAW/03/03/cnna.Dershowitz (last accessed Apr. 18, 2005) [hereinafter Dershowitz Interview].

3. *See, e.g.*, Richard J. Wilson, *United States Detainees at Guantánamo Bay: The Inter-American Commission on Human Rights Responds to a "Legal Black Hole"*, 10 HUM. RTS. BRIEF 2, 3–4 (2003).

4. *Legal Definitions of Torture not Black and White*, CNN, May 11, 2004, *at* http://www.cnn.com/2004/LAW/05/10/torture.legal.ap (last accessed Apr. 18, 2005) ("The [U.S.] Defense Department is investigating more than forty cases of possible misconduct against civilians in Iraq and Afghanistan, including as many as twelve unjustified deaths. The CIA inspector general, meantime, is looking into three detainee deaths during or after interrogations with agency personnel.").

5. Dershowitz Interview, *supra* note 2.

6. James Silver, *Why America's Top Liberal Lawyer Wants to Legalise Torture*, SCOTSMAN (Scotland), May 22, 2004, *available at* http://thescotsman.scotsman.com/international.cfm?id=582662004 (last accessed Apr. 18, 2005) (quoting Alan Dershowitz).

ble. The harm minimization rationale is used to supplement our argument.

While a "civilized" community does not typically condone such conduct, this Article contends that torture is morally defensible in certain circumstances, mainly when more grave harm can be avoided by using torture as an interrogation device. The pejorative connotation associated with torture should be abolished. A dispassionate analysis of the propriety of torture indicates that it is morally justifiable. At the outset of this analytical discussion, this Article requires readers to move from the question of whether torture is *ever* defensible to the issue of the circumstances in which it is morally permissible.

Consider the following example: A terrorist network has activated a large bomb on one of hundreds of commercial planes carrying over three hundred passengers that is flying somewhere in the world at any point in time. The bomb is set to explode in thirty minutes. The leader of the terrorist organization announces this intent via a statement on the Internet. He states that the bomb was planted by one of his colleagues at one of the major airports in the world in the past few hours. No details are provided regarding the location of the plane where the bomb is located. Unbeknown to him, he was under police surveillance and is immediately apprehended by police. The terrorist leader refuses to answer any questions of the police, declaring that the passengers must die and will do so shortly.

Who in the world would deny that all possible means should be used to extract the details of the plane and the location of the bomb?[7] The answer is not many.[8] The passengers, their relatives and friends, and many in society would expect that all means should be used to

7. "'Everybody says they're opposed to torture. But everyone would do it personally if they knew it could save the life of a kidnapped child who had only two hours of oxygen left before death. And it would be the right thing to do.'" Vicki Haddock, *The Unspeakable: To Get the Truth, Is Torture or Coercion Ever Justified*, S.F. CHRON., Nov. 18, 2001, at D1 (quoting Alan Dershowitz).

8. A recent CNN poll indicated that of the 237,131 votes received, 47% indicated torture could be justified during interrogation in some circumstances. *Poll: Is Torture Ever Justified During Interrogation?*, CNN, May 26, 2004, *at* http://www.cnn.com/POLLSERVER/results/10612.content.html (last accessed Mar. 22, 2005). A similar poll conducted by *Japan Today* asked whether respondents thought torture of captured terrorist suspects is acceptable if it leads to information that might prevent further attacks or take out terrorist leaders. Of 1,094 votes counted, 50.9% supported the use of torture in those circumstances. *Poll: Do You Think Torture of Captured Terrorist Suspects Is Acceptable If It Leads to InformationThat Might Prevent Further Attacks or Take Out Terrorist Leaders?*, JAPAN TODAY, May 2004, *at* http://www.japantoday.com/e/?content=vote&id=157 (last accessed Apr. 18, 2005). It should be noted that the hypothetical described is more extreme than those adverted to by the polls and hence is likely to generate more support.

extract the information, even if the pain and suffering imposed on the terrorist resulted in his death.

Although the above example is hypothetical and is not one that has occurred in the real world, the force of the argument cannot be dismissed on that basis. As C.L. Ten notes, "fantastic examples" that raise fundamental issues for consideration, such as whether it is proper to torture wrongdoers, play an important role in the evaluation of moral principles and theories.[9] These examples sharpen contrasts and illuminate the logical conclusions of the respective principles to test the true strength of our commitment to the principles.[10] Thus, fantastic examples cannot be dismissed summarily merely because they are "simply" hypothetical.

Real life is, of course, rarely this clear cut, but there are certainly scenarios approaching this degree of desperation,[11] which raise for discussion whether it is justifiable to inflict harm on one person to reduce a greater level of harm occurring to a large number of blameless people. Ultimately, torture is simply the sharp end of conduct whereby the interests of one agent are sacrificed for the greater good. As a community, we are willing to accept this principle. Thus, although differing in degree, torture is no different in nature from conduct that we sanction in other circumstances. It should be viewed in this light.

Given this, it is illogical to insist on a blanket prohibition against torture. Therefore, the debate must turn to the circumstances when torture is morally appropriate. This is the topic of this Article.

International law defines torture as severe pain and suffering, generally used as an interrogation device or as a punitive measure.[12] This Article focuses on the use of torture as an interrogation device

9. C.L. TEN, CRIME, GUILT AND PUNISHMENT 18–25 (1987). Ten draws a distinction between a fundamental moral principle (a principle that is not justified by reference to some further moral principle) and a secondary moral principle (that has to be justified by appeal to some further moral principle), and makes the point that fantastic examples play an important role in relation to the evaluation of fundamental moral principles. *Id.* at 20.

10. *Id.*

11. A situation akin to the above example would have arisen if police had apprehended the ring leader of the group responsible for the September 11, 2001 attacks after the first plane crashed into the twin towers at New York City's World Trade Center.

12. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, Supp. No. 51, pt. 1, art. 1, at 197, U.N. Doc.A/29/51 (1984) [hereinafter U.N. Convention Against Torture]. As a punitive measure, it could be argued that torturing wrongdoers will deter them and potential offenders from committing criminal acts. This justification is unsound, given the empirical evidence does not support the view that inflicting harsher penalties results in less crime.

and poses that the device is only permissible to prevent significant harm to others. In these circumstances, there are five variables relevant in determining whether torture is permissible and the degree of torture that is appropriate. The variables are (1) the number of lives at risk; (2) the immediacy of the harm; (3) the availability of other means to acquire the information; (4) the level of wrongdoing of the agent; and (5) the likelihood that the agent actually does possess the relevant information.

Part I of this Article analyzes the meaning of torture and the nature and scope of the legal prohibition against torture. Part II examines whether torture is morally defensible. It is argued that torture is no different than other forms of morally permissible behavior and is justifiable on a utilitarian ethic. It is also argued that, on close reflection, torture is also justifiable against a backdrop of a non-consequentialist rights-based ethic, which is widely regarded as prohibiting torture in all circumstances. Thus, the Article concludes that torture is morally justifiable in rare circumstances, irrespective of which normative theory one adopts. Part III examines the circumstances in which torture is justifiable. Finally, Part IV debunks the argument that torture should not be legalized because it will open the floodgates to more torture.

I. Torture: Reality and Legal Position

A. The Law on Torture

Pursuant to international law, "torture" is defined 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.[13]

Torture is prohibited by a number of international documents.[14] It is also considered to carry a special status in customary international

13. *Id.*

14. Amnesty International has observed that "numerous new international standards have been adopted prohibiting torture and setting out governments' obligations to prevent it. An impressive array of international human rights mechanisms has been put in place to

law, that of *jus cogens*, which is a "peremptory norm" of customary international law.[15] The significance of this is that customary international law is binding on all states, even if they have not ratified a particular treaty. At the treaty level, there are both general treaties that proscribe torture and specific treaties banning the practice.

In terms of general treaties, torture is prohibited by a number of international and regional treaties. These include Article 5 of the Universal Declaration of Human Rights (1948);[16] Articles 7 and 10(1) of the International Covenant on Civil and Political Rights (1966);[17] Article 3 of the European Convention on Human Rights (1950);[18] Article 5(2) of the American Convention on Human Rights (1978);[19] and Article 5 of the African Charter on Human and People's Rights (1981).[20]

In addition to these instruments, which set out a range of human rights, the international community has implemented specific treaties addressing torture. The main treaties are the U.N. Convention Against Torture (1984); the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (1987);[21] and the Inter-American Convention to Prevent and Punish Torture (1985).[22]

The rigidity of the rule against torture is exemplified by the fact that it has a non-derogable status in human rights law. That is, there are no circumstances in which torture is permissible. This prohibition is made clear in Article 2(2) of the U.N. Convention Against Torture,

press states to live up to their commitments." AMNESTY INT'L, TORTURE WORLDWIDE: AN AFFRONT TO HUMAN DIGNITY 2 (2000) [hereinafter AMNESTY INT'L, TORTURE WORLDWIDE]. For an excellent overview of the prohibition against torture, see CONOR FOLEY, COMBATING TORTURE: A MANUAL FOR JUDGES & PROSECUTORS §§ 1.9–1.10, *available at* www.essex.ac.uk/combatingtorturehandbook/manual (last accessed Feb. 13, 2005). Much of the foregoing overview of the law of torture is derived from this source.

15. *General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant*, U.N. GAOR, Hum. Rts. Comm., General Comment 24, at 52, para. 10, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).

16. G.A. Res. 217 A(III), U.N. Doc. A/810 at 71 (1948) [hereinafter UDHR].

17. G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. 16, at 52, U.N. Doc. A/6316 (1966) [hereinafter ICCPR].

18. European Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 U.N.T.S. 222.

19. Nov. 22, 1969, 1114 U.N.T.S. 1243, *reprinted in* 9 I.L.M. 675 (1970).

20. June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, *reprinted in* 21 I.L.M. 58 (1982).

21. E.T.S. No. 126 (perm. ed. rev. vol. 1990), *reprinted in* 27 I.L.M. 1152 (entered into force Feb. 1, 1989).

22. Feb. 28, 1987, O.A.S. Treaty Series No. 67, at 83, OEA/Ser.L.V/II.82 doc.6 rev.1, *reprinted in* 25 I.L.M. 519 (1986).

which states, "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."[23] Thus, the right not to be tortured is absolute.

> There are no circumstances in which states can set aside or restrict this obligation, even in times of war or other emergency threatening the life of the nation, which may justify the suspension or limitation of some other rights. States are also restricted from making derogations which may put individuals at risk of torture or ill-treatment—for example, by allowing excessive periods of incommunicado detention or denying a detainee prompt access to a court. This prohibition operates irrespective of circumstances or attributes, such as the status of the victim or, if he or she is a criminal suspect, upon the crimes that the victim is suspected of having committed.
>
> State officials are prohibited from inflicting, instigating or tolerating the torture or other cruel, inhuman or degrading treatment or punishment of any person. An order from a superior officer or a public authority may not be invoked as a justification for torture. States are also required to ensure that all acts of torture are offences under their criminal law, establish criminal jurisdiction over such acts, investigate all such acts and hold those responsible for committing them to account.[24]

This absolute prohibition is frequently highlighted by Amnesty International and other human rights organizations. For example, Amnesty International states, "The law is unequivocal—torture is absolutely prohibited in all circumstances. . . . The right to be free from torture is absolute. It cannot be denied to anyone in any circumstances."[25]

Torture is also prohibited as a war crime, pursuant to humanitarian law.[26] In addition, torture is considered to be a crime against humanity when the acts are perpetrated as part of a widespread or systematic attack against a civilian population, whether or not they are committed in the course of an armed conflict.[27]

---

23. U.N. Convention Against Torture, *supra* note 12, at pt. 1, art. 2.

24. FOLEY, *supra* note 14.

25. AMNESTY INT'L, TORTURE WORLDWIDE, *supra* note 14, at 10.

26. *See, e.g.*, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, arts. 12 & 50, 75 U.N.T.S. 38, 62; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, arts. 12 & 51, 75 U.N.T.S 94, 116; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, arts. 13, 14, 87 & 130, 75 U.N.T.S. 146, 148, 202, 238.

27. Thus, Article 7 of the Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998), includes torture and rape within the International Criminal Court's jurisdiction.

B. The Reality of Torture

As with many legal precepts, the black letter law must be considered against the context of reality. As this part shows, various forms of torture are used despite the legal prohibition of it.

1. Forms of Torture

As is noted by Dershowitz, torture comes in many different forms and intensities:

> Torture is a continuum and the two extremes are on the one hand torturing someone to death—that is torturing an enemy to death so that others will know that if you are caught, you will be caused excruciating pain—that's torture as a deterrent. . . . At the other extreme, there's non-lethal torture which leaves only psychological scars. The perfect example of this is a sterilised needle inserted under the fingernail, causing unbearable pain but no possible long-term damage. These are very different phenomena. What they have in common of course is that they allow the government physically to come into contact with you in order to produce pain.[28]

Various methods of torture have and continue to be applied in a multitude of countries. The most common methods are beating, electric shock, rape and sexual abuse, mock execution or threat of death, and prolonged solitary confinement.[29] Other common methods include sleep and sensory deprivation, suspension of the body,[30] "shackling interrogees in contorted painful positions" or in "painful stretching positions,"[31] and applying pressure to sensitive areas, such as the "neck, throat, genitals, chest and head."[32]

2. The Benefits of Torture: An Effective Information Gathering Device

The main benefit of torture is that it is an excellent means of gathering information. Humans have an intense desire to avoid pain, no matter how short term, and most will comply with the demands of a torturer to avoid the pain. Often even the threat of torture alone will

28. Silver, *supra* note 6.

29. AMNESTY INT'L, TORTURE WORLDWIDE, *supra* note 14, at 10.

30. *Id.*

31. ALLEGRO PACHECO, PUBLIC COMMITTEE AGAINST TORTURE IN ISRAEL, PROVING TORTURE: NO LONGER NECESSARY IN ISRAEL (1999), *at* http://internationalstudies.uchicago.edu/torture/abstracts/allegrapacheo.html (last accessed Apr. 16, 2005).

32. *See id.* Many of these "methods" are alleged to have been used in the interrogation of prisoners by United States military personnel in Abu Ghraib prison, Iraq. *See* Scott Higham & Joe Stephens, *Secret Detainee Statements Reveal Savagery of Abu Ghraib*, AGE (Austl.), May 22, 2004, at 17; Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, at 42.

evoke cooperation. To this end, Dershowitz cites a recent kidnapping case in Germany in which the son of a distinguished banker was kidnapped.[33] The eleven-year-old boy had been missing for three days. The police had in their custody a man they were convinced had perpetrated the kidnapping. The man was taken into custody after being seen collecting a ransom that was paid by the boy's family.[34] During seven hours of interrogation the man "toyed" with police, leading them to one false location after another.[35] After exhausting all lawful means of interrogation, the deputy commissioner of the Frankfurt police instructed his officers, in writing, that they could try to extract information "by means of the infliction of pain, under medical supervision and subject to prior warning."[36] Ten minutes after the warning was given the suspect told the police where the boy was; unfortunately the boy was already dead, having been killed shortly after the kidnapping.[37]

3. The Widespread Use of Torture

a. Torture Around the World

Despite the contemporary abhorrence against it, dozens of countries continue to use torture. A study of 195 countries and territories by Amnesty International between 1997 and mid-2000 found reports of torture or ill-treatment by state officials in more than 150 countries[38] and in more than seventy countries that torture or ill-treatment was reported as "widespread or persistent."[39] It is also clear that tor-

33. Silver, *supra* note 6.

34. Peter Finn, *Police Torture Threat Sparks Painful Debate in Germany*, WASH. POST, Mar. 8, 2003, at A19.

35. John Hooper, *Germany Racked by Torture Controversy*, AGE (Austl.), Feb. 28, 2003, *at* http://theage.com.au/articles/2003/02/27/1046064162443.html (last accessed Apr. 18, 2005).

36. Finn, *supra* note 34.

37. *Police Threat Fuels Debate on Torture*, DEUTSCHE WELLE (Germany), Feb. 24, 2003, *at* http://www.dw-world.de/english/0,3367,1430_A_785751,00.html (last accessed Apr. 18, 2005). The precise nature of the warning is not clear. The kidnapper has alleged that he was told a specialist was being flown to Frankfurt who could inflict on him "pain of the sort [he] had never before experienced." Hooper, *supra* note 35. The police deputy commissioner has denied this account but admitted that it was made very plain to the suspect that they would hurt him until he "identified the whereabouts of the child." *Id.* The suspect pleaded guilty at trial, was pronounced guilty of abduction, murder, and blackmail, and sentenced to life in prison. Associated Press, *Schoolboy's Killer Gets Life Sentence*, INT'L HERALD TRIB., July 29, 2003, *at* http://www.iht.com/articles/104393.html (last accessed Apr. 18, 2005).

38. AMNESTY INT'L, TORTURE WORLDWIDE, *supra* note 14, at 2.

39. *Id.* at 3. Further, the report concluded that in more than eighty countries people were reported to have died as a result of being tortured. Amnesty International believes

ture is not limited to military regimes in third world nations. Amnesty International recently reported that in 2003 it had received reports of torture and ill-treatment from 132 countries, including the United States, Canada, Japan, France, Italy, Spain, and Germany.[40] Israel, for example, officially sanctioned interrogation practices deemed by the U.N. Committee Against Torture to constitute torture[41] until a decision of the Supreme Court of Israel, sitting as the High Court of Justice, in September 1999, ruled a number of these interrogations unlawful absent any clear statutory authorization.[42] Prior to the Israeli Supreme Court ruling, the U.N. Committee Against Torture made the following observations in relation to Israeli interrogation techniques:

> [T]he methods of interrogation, which were described by non-governmental organizations on the basis of accounts given to them by interrogatees and appear to be applied systematically, were neither confirmed nor denied by Israel. The Committee must therefore assume them to be accurate. Those methods include: (1) restraining in very painful conditions, (2) hooding under special conditions, (3) sounding of loud music for prolonged periods,

that this figure "underestimates" the extent of torture that exists. *Id.* at 2–3. In its most recent report, Amnesty claims that "victims of torture and ill-treatment by security forces, police and other state authorities were reported in 132 countries." AMNESTY INT'L, INTRODUCTION: AMNESTY INTERNATIONAL REPORT 2004, *at* http://web.amnesty.org/report2004/index-eng (last accessed Apr. 18, 2005).

40. AMNESTY INT'L, AMNESTY INTERNATIONAL REPORT 2004: TORTURE AND ILL-TREATMENT, *available at* http://www.amnesty.org/resources/report04/stats-eng/text/03.html (last accessed Apr. 18, 2005). The United States, Canada, Japan, France, Italy, Spain, and Germany have all ratified the U.N. Convention Against Torture. *See* OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, RATIFICATIONS AND RESERVATIONS, *at* http://www.ohchr.org/english/countries/ratification/9.htm (last accessed Apr. 18, 2005).

41. *Conclusions and Recommendations of the Committee Against Torture: Israel*, U.N. HCHR, 27th Sess., U.N. Doc. CAT/C/XXVII/Concl.5 (2001), *available at* http://www.unhchr.ch/tbs/doc.nsf/ (last accessed Apr. 18, 2005); *see also* John T. Parry & Welsh S. White, *Interrogating Suspected Terrorists: Should Torture Be an Option?*, 63 U. PITT. L. REV. 743, 757–60 (2002). The Israeli Government denied the force used in interrogations of Palestinians constituted torture, claiming that the "State of Israel categorically deplores and prohibits the practice of torture, including . . . against persons under interrogation. Torture is prohibited under Israel Law . . . investigators are never, and never have been, authorized to use torture, even if its use might possibly prevent some terrible attacks and save human lives." Statement of Nili Arad, *supra* note 2. Instead, the Israel government, while accepting the "prohibition on torture is absolute" claimed that the interrogation techniques used, which might involve the use of "moderate physical pressure" did not contravene that prohibition. *Id.*

42. Not all forms of physical interrogation were banned as illegal. In particular, methods—including sleep deprivation—are allowed if incidental to the interrogation process and the defense of necessity might be available to interrogators who use physical pressure. AMNESTY INT'L USA, COMMITTEE AGAINST TORTURE SAYS ISRAEL'S POLICY OF CLOSURES AND DEMOLITIONS OF PALESTINIAN HOMES MAY AMOUNT TO CRUEL, INHUMAN OR DEGRADING TREATMENT (2001), *at* http://www.amnestyusa.org/news/2001/israel11232001.html (last accessed Apr. 18, 2005).

> (4) sleep deprivation for prolonged periods, (5) threats, including death threats, (6) violent shaking, and (7) using cold air to chill, and are, in the Committee's view, breaches of article 16 and also constitute torture as defined in article 1 of the Convention. This conclusion is particularly evident where such methods of interrogation are used in combination, which appears to be the standard case.[43]

Despite the Court's ruling, there is little doubt that the practice of torture by the Israeli government continues.[44] This may have been facilitated by the Court's comments that it would accept, in appropriate circumstances, that Israel's General Security Service investigators might "avail themselves of the 'necessity' defense, if criminally indicted," for using the banned interrogation methods.[45] One report cites official statistics between September 1999 and July 2002 that indicate that during that time ninety Palestinians were defined as "ticking bombs" and thus subject to interrogation methods that would constitute torture under international law.[46]

Indeed, a recent detailed study of forty-eight Palestinian detainees found that interrogees were, in various combinations, frequently beaten, slapped or kicked, bent and placed in painful positions, violently shaken, deprived of sleep, shackled behind their backs for prolonged periods of cases, cursed at, threatened, degraded, and deprived of essential needs, including food, water, and medical care

43. *Concluding Observations of the Committee Against Torture: Israel*, U.N. HCHR, U.N. Doc. A/52/44 (1997), *available at* http://www.unhchr.ch/tbs/doc.nsf/ (last accessed Apr. 18, 2005).

44. *See generally* Associated Foreign Press, *Israeli Forces Increasing Use of Torture*, GLOBAL EXCHANGE, Nov. 21, 2001, *at* http://www.globalexchange.org/countries/palestine/news2001/afp112101.html.pf (last accessed Apr. 18, 2005); *see also* YUVAL GINBAR, PUBLIC COMM. AGAINST TORTURE IN ISRAEL, BACK TO A ROUTINE OF TORTURE: TORTURE AND ILL-TREATMENT OF PALESTINIAN DETAINEES DURING ARREST, DETENTION AND INTERROGATION—SEPTEMBER 2001–APRIL 2003.

45. Pub. Comm. Against Torture in Israel v. State of Israel, 38 I.L.M. 1471, 1486 (1999). Parry and White have recently advocated the introduction of a "necessity" defense for torture in the United States. They argue that while torture should never be authorized, a defense of "necessity" should be available to a government agent using torture if that agent can prove his actions "were necessary to avert a greater, imminent harm." Parry & White, *supra* note 41, at 762–63. We suggest that there is little practical difference between authorizing torture prior to the act and effectively authorizing it by providing the perpetrators with legal defense after the act, save that it makes it more difficult for interrogators to determine when their actions are justifiable. Parry and White believe this to be a positive, suggesting that either ignorance of the availability of the defense or uncertainty about whether the defense would be available would promote deterrence. *Id.* It is dubious logic, however, to enact a law that relies on ignorance or ambiguity to achieve the desired result.

46. These are referred to by the authorities as "exceptional means of interrogation." GINBAR, *supra* note 44, at 17.

amongst other things.[47] In more than seventy percent of cases, three or more of these methods were applied.[48] Extrapolating from this and official data of the number of Palestinian detainees, the study estimated that each month in Israel "ill-treatment reaching the level of torture as defined in international law is inflicted in dozens of cases, and possibly more."[49]

The widespread use of torture is also clearly demonstrated by even a cursory reading of the most recent U.S. Department of State Country Information Reports. For example, the report on Turkey provides that torture, beatings, and other abuses by security forces remain widespread.[50]

> Security forces reportedly killed 43 persons during the year . . . . Security forces continued to use arbitrary arrest and detention, although the number of such incidents declined. . . . The rarity of convictions and the light sentences imposed on police and other security officials for killings and torture continued to foster a climate of impunity. Prosecutions brought by the Government in State Security Courts (SSCs) reflected a legal structure that favored government interests over individual rights. . . . Police beat, abused, detained, and harassed some demonstrators.[51]

Likewise, the assessment on Pakistan states:

> Security force personnel continued to torture persons in custody throughout the country. For example, according to Human Rights Watch (HRW), Rasheed Azam was beaten and tortured at Khuzdar military cantonment. In September, two prison officials allegedly beat and killed 18-year-old Sunil Samuel at Camp Jail in Lahore after he was sexually assaulted by inmates. Over the years, there have been allegations that common torture methods included: Beating; burning with cigarettes; whipping the soles of the feet; sexual assault; prolonged isolation; electric shock; denial of food or sleep; hanging upside down; forced spreading of the legs with bar fetters; and public humiliation.[52]

In relation to China, the report asserts:

> The law prohibits torture; however, police and other elements of the security apparatus employed torture and degrading treatment

47. *Id.* at 20.

48. *Id.* at 21.

49. *Id.* at 22.

50. U.S. DEP'T OF STATE, TURKEY: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2003, at 1 (Feb. 25, 2004) (on file with U.S.F. Law Review) [hereinafter U.S. DEP'T OF STATE, TURKEY]; *see also* AMNESTY INT'L USA, TURKEY: AN END TO TORTURE AND IMPUNITY IS OVERDUE! (Oct. 2001), *at* http://www.amnestyusa.org/stoptorture/turkey_torture_report.rtf (last accessed Apr. 18, 2005).

51. *See* U.S. DEP'T OF STATE, TURKEY, *supra* note 50, at 1.

52. U.S. DEP'T OF STATE, PAKISTAN: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2003, at 5 (Feb. 25, 2004) (on file with U.S.F. Law Review).

> in dealing with some detainees and prisoners. The Prison Law forbids prison guards from extorting confessions by torture, insulting prisoners' dignity, and beating or encouraging others to beat prisoners. While senior officials acknowledged that torture and coerced confessions were chronic problems, they did not take sufficient measures to end these practices. Former detainees reported credibly that officials used electric shocks, prolonged periods of solitary confinement, incommunicado detention, beatings, shackles, and other forms of abuse. Recommendations from the May 2000 report of the U.N. Committee Against Torture still had not been fully implemented by year's end. These recommendations included incorporating a definition of torture into domestic law, abolishing all forms of administrative detention (including reeducation through labor), promptly investigating all allegations of torture, and providing training courses on international human rights standards for police. During the year, police use of torture to coerce confessions from criminal suspects continued to be a problem. The 2002 death in custody of Zeng Lingyun of Chongqing Municipality remained unresolved. On July 26, 2002, public security personnel detained Zeng on theft charges. On July 28, his family was informed that he had died. Local officials initially told Zeng's family that he had been shot by police, and the family noticed extensive bruises and a bullet wound on the body. Since the crackdown on Falun Gong began in 1999, there reportedly have been several hundred deaths in custody of Falun Gong adherents, due to torture, abuse, and neglect.[53]

In the Philippines a similar picture emerges:

> The Constitution prohibits torture, and evidence obtained through its use is inadmissible in court; however, members of the security forces and police continued to use torture and to abuse suspects and detainees. The CHR [Commission on Human Rights] provides the police with mandatory human rights training, including primers on the rights of suspects, and higher level PNP [Philippine National Police] officials seemed more receptive to respecting the human rights of detainees; however, rank-and-file awareness of the rights of detainees remained inadequate.

TFDP [The NGO Task Force Detainees of the Philippines] stated that torture remained an ingrained part of the arrest and detention process. Common forms of abuse during arrest and interrogation reportedly included striking detainees and threatening them with guns. Less common forms included the placing of plastic bags over heads to de-

53. U.S. DEP'T OF STATE, CHINA (INCLUDES TIBET, HONG KONG, AND MACAU): COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2003, at 7 (Feb. 25, 2004) (on file with U.S.F. Law Review) [hereinafter U.S. DEP'T OF STATE, CHINA] (citations omitted); *see also* AMNESTY INT'L USA, TORTURE—A GROWING SCOURGE IN CHINA (Feb. 2001), *at* http://www.amnestyusa.org/interfaith/document.do?id=5DE714C0187DFD31802569DD0041B35C.

prive the detainee of air. TFDP reported that arresting officers often carried out such beatings in the early stages of detention.[54]

b. The United States in Iraq, Afghanistan, and Guantamamo Bay

The United States has also been widely engaged in the practice of torture in the context of the "war against terrorism." Most recently, graphic photographs of the torture of Iraqi prisoners occurring at Abu Ghraib have spread around the world.[55] The photographs show prisoners bound in painful positions, placed in stress positions, such as being made to stand with arms outstretched, and forced into sexually humiliating positions.[56] Other abuses, reported by Major General Antonio Taguba in a secret report in March 2004, included pouring cold water on naked prisoners, beating inmates with a broom handle and chair, threats of rape, sodomy with a chemical light, using dogs to frighten and intimidate detainees, and forcing detainees to engage in sexually humiliating conduct, such as being arranged in "sexually explicit positions for photographing."[57]

In addition to the widely publicized photographs of torture occurring at the Abu Ghraib facility in Baghdad, Amnesty International, the International Committee of the Red Cross, and a variety of other commentators have reported numerous other instances of torture by United States personnel since the beginning of the "war on terror." Instances of torture have been reported primarily in Afghanistan, Iraq, and Guantanamo Bay, suggesting that the Abu Ghraib incidents were not merely isolated cases.[58] Among other case studies, Amnesty

54. U.S. DEP'T OF STATE, PHILLIPINES: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2003, at 4 (Feb. 25, 2004) (on file with U.S.F. Law Review).

55. *See generally Shock, Outrage Over Prison Photos*, CNN, May 1, 2004, *at* http://www.cnn.com/2004/WORLD/meast/04/30/iraq.photos/ (last accessed Apr. 18, 2005).

56. *Id.*

57. M.G. ANTONIO M. TAGUBA ET AL., ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICY BRIGADE 16–18 (2004), *reprinted at* BBC NEWS WEB SITE, http://news.bbc.co.uk/nol/shared/bsp/hi/pdfs/10_5_04_tagubareport.pdf (last accessed Apr. 18, 2005). This report of the investigation conducted by Major General Taguba is nevertheless labeled "Secret/No Foreign Dissemination" but has been published on the BBC News web site. *See also Report Into Baghdad Prison Abuse*, BBC NEWS (U.K.), May 5, 2004, *at* http://news.bbc.co.uk/2/hi/americas/3684825.stm (last accessed Apr. 18, 2005).

58. AMNESTY INT'L, IRAQ: AMNESTY INTERNATIONAL REVEALS A PATTERN OF TORTURE AND ILL-TREATMENT (May 26, 2004), *at* http://web.amnesty.org/web/web.nsf/prnt/irq-torture-eng (last accessed Apr. 18, 2005); *see also* Susan Sontag, *Regarding the Torture of Others*, N.Y. TIMES, LATE EDITION, May 23, 2004, at 25; AMNESTY INT'L, AMNESTY INTERNATIONAL REPORT 2004: IRAQ 3, *at* http://web.amnesty.org/web/web.nsf/print/2004-irq-summary-eng (last accessed Apr. 18, 2005); David Barrett, *Fresh Bid to Bring Home Guantanamo Britons*, SCOTSMAN, May 27, 2004, *at* http://news.scotsman.com/latest.cfm?id=2985571 (last accessed Apr. 18, 2005); Ken Coates, *The Creeping Sickness*, GUARDIAN (U.K.), Mar. 13, 2004, *available*

cites the treatment of Khreisan Khalis Aballey, who was arrested at his home in Baghdad in April 2003. Amnesty claims that

> [d]uring his interrogation at Baghdad's airport detention facility, he was made to stand or kneel facing a wall for seven-and-a-half days, hooded, and handcuffed tightly . . . . At the same time, a bright light was placed next to his hood whilst distorted music was played. Throughout this period, he was deprived of sleep and fell unconscious some of the time. He reported that at one time a US soldier stamped on his foot, tearing off one of his toenails. The prolonged kneeling made his knees bloody . . . .[59]

In another case in April 2003, Abdallah Khudhran al-Shamran was reported to have been subjected to beatings and electric shocks as well as other torture methods, including sleep deprivation through playing constant loud music and "being suspended from his legs and having his penis tied."[60]

Even domestically, and prior to the "war on terror," the U.N. Committee on Torture claimed that American police officers and prison guards had engaged in various forms of torture and ill treatment on numerous occasions.[61] Of particular concern was the use of electro-shock stun belts to restrain prisoners.[62] In addition, the United States has been repeatedly accused of turning over prisoners to other countries to have them tortured.[63] One official said, "We don't kick the [expletive] out of them. We send them to other countries so they

---

at http://www.guardian.co.uk/guantanamo/story/0,13743,1168592,00.html (last accessed Apr. 18, 2005); James Grubel, *Lawyer Backs Minister's Torture Claim*, ADVERTISER (Austl.), May 19, 2004, *at* http://www.theadvertiser.news.com.au/common/story_page/0,5963,9690288%255E911,00.html (last accessed Apr. 18, 2005); Patrick Martin, *Soldier Beaten at Guantanamo in Interrogation Training*, WORLD SOCIALIST WEB SITE, May 29, 2004, *at* http://www.wsws.org/articles/2004/may2004/guan-m29.shtml (last accessed Apr. 18, 2005); *see generally* AMNESTY INT'L, AMNESTY INTERNATIONAL REPORT 2004: UNITED STATES OF AMERICA, *at* http://web.amnesty.org/web/web.nsf/print/2004-usa-summary-eng (last accessed Apr. 18, 2005).

59. AMNESTY INT'L USA, IRAQ: HUMAN RIGHTS PROTECTION AND PROMOTION VITAL IN THE TRANSITIONAL PERIOD, *at* http://www.amnestyusa.org/women/document.do?id=23055999CF853CD680256EB60052AE1C (last accessed Apr. 18, 2005).

60. *Id.*

61. Elif Kaban, *The United Nations Rebukes the U.S. Over Brutality in Prisons*, REUTERS, May 15, 2000, *at* http://www.prisons.org/un.htm (last accessed Apr. 18, 2005); *see also* Jamie Fellner, Commentary, *Prisoner Abuse: How Different Are U.S. Prisons?*, HUM. RTS. WATCH, May 14, 2004, *at* http://hrw.org/english/docs/2004/05/14/usdom8583.htm (last accessed Apr. 18, 2005).

62. *See* Kaban, *supra* note 61.

63. *See, e.g.*, *The Legal Prohibition Against Torture*, HUM. RTS. WATCH, Mar. 11, 2003, at A2; Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, at A01.

can kick the [expletive] out of them."[64] In terms of the prevalence of torture in the United States, Dershowitz has noted:

> Many of the countries who are signatories to the various conventions routinely torture . . . . Egypt, Jordan and the Philippines are signatories—we know those countries torture. How do we know? Because the United States sends our detainees to those countries to have them tortured. Hypocrisy is prevailing today. My suggestion is that if the United States were to authorise torture, we would have to write a letter to the various signatory organisations saying we reserve the right under the convention to exclude the following from the definition of torture . . . and then we'd list our exceptions.[65]

It is very easy to multiply these examples of torture,[66] but enough has been said to emphasize the distinction between reality and rhetoric regarding torture.

II. Moral Theory

Broadly, there are two types of normative moral theories. Consequential moral theories claim that an act is right or wrong depending upon its capacity to maximize a particular virtue, such as happiness. Non-consequential (or deontological) theories claim that the appropriateness of an action is not contingent upon its instrumental ability to produce particular ends, but rather follows from the intrinsic features of the act. Thus, the notion of absolute (or near absolute) rights, which now dominates moral discourse, is generally thought to sit most comfortably in a non-consequentialist ethic. This section proves that torture is permissible pursuant to both of these ethical theories. It is only consequentialist theories, however, that provide a logical frame-

64. Priest & Gellman, *supra* note 63, at A02.

65. Silver, *supra* note 6.

66. *See, e.g.*, AMNESTY INT'L, ALBANIA: TORTURE AND ILL-TREATMENT—AN END TO IMPUNITY (May 18, 2001), *at* http://web.amnesty.org/ai.nsf/print/EUR110012001?OpenDocument (last accessed Apr. 18, 2005); AMNESTY INT'L, BANGLADESH: TORTURE & IMPUNITY (Nov. 29, 2000), *at* http://web.amnesty.org/library/print/engasa130072000?open&of=Eng-bgd (last accessed Apr. 18, 2005); AMNESTY INT'L, EGYPT: TORTURE REMAINS RIFE AS CRIES FOR JUSTICE GO UNHEEDED (Feb. 2001), *at* http://web.amnesty.org/ai.nsf/Index/MDE120012001?OpenDocument&of=COUNTRIES\EGYPT (last accessed Apr.18, 2005); AMNESTY INT'L USA, MEXICO: JUSTICE BETRAYED—TORTURE IN THE JUDICIAL SYSTEM (June 2001), *at* http://www.amnestyusa.org/stoptorture/mexico_justice_betrayed.pdf (last accessed Apr. 18, 2005); RENATA CAPELLA & MICHAEL SFARD, PUB. COMM. AGAINST TORTURE IN ISRAEL ("PCATI") & PALESTINIAN SOC'Y FOR THE PROTECTION OF HUMAN RIGHTS & THE ENV'T ("LAW"), THE ASSASSINATION POLICY OF THE STATE OF ISRAEL: NOVEMBER 2000–JANUARY 2002 (May 2002). For a more general discussion of the extent torture see AMNESTY INT'L, TORTURE WORLDWIDE, *supra* note 14.

work within which it is possible to demarcate the circumstances in which torture is permissible.

Prior to discussing how torture sits in the context of these theories, an overview of the essential aspects of each of the theories is first discussed.

A. Non-Consequentialist Rights-Based Theories

The main argument in support of rights-based moral theories is aptly stated by John Rawls who claims that only rights-based theories take seriously the distinction between human beings and protect certain rights and interests that are so paramount that they are beyond the demands of net happiness.[67]

1. The Proliferation of Rights Talk

Charges of this nature have been extremely influential. Following the Second World War, there has been an immense increase in rights talk,[68] both in sheer volume and the number of supposed rights. The rights doctrine has progressed a long way since its original modest aim of providing "a legitimization of . . . claims against tyrannical or exploiting regimes."[69] As Tom Campbell points out, "The human rights movement is based on the need for a counter-ideology to combat the abuses and misuses of political authority by those who invoke, as a justification for their activities, the need to subordinate the particular interests of individuals to the general good."[70]

There is now, more than ever, a strong tendency to advance moral claims and arguments in terms of rights.[71] Assertion of rights has become the customary means to express moral sentiments: "[T]here is virtually no area of public controversy in which rights are not to be found on at least one side of the question—and generally on both."[72] There is no question that "the doctrine of human rights has

67. JOHN RAWLS, A THEORY OF JUSTICE 27–28 (Harvard Univ. Press 1971).

68. *See* TOM CAMPBELL, THE LEGAL THEORY OF ETHICAL POSITIVISM 161–88 (1996) (discussing the near universal trend towards bills of rights and constitutional rights as a focus for political choice).

69. Stanley I. Benn, *Human Rights—For Whom and For What?*, *in* HUMAN RIGHTS 59, 61 (Eugene Kamenka & Alice Erh-Soon Tay eds., 1978).

70. Tom Campbell, *Realizing Human Rights*, *in* HUMAN RIGHTS: FROM RHETORIC TO REALITY 1, 13 (Tom Campbell et al. eds., 1996).

71. This is almost to the point where it is not too far off the mark to propose that the "escalation of rights rhetoric is out of control." L. WAYNE SUMNER, THE MORAL FOUNDATION OF RIGHTS 1 (1987).

72. *Id.*

at least temporarily replaced the doctrine of maximizing utilitarianism as the prime philosophical inspiration of political and social reform."[73]

2. Rights Documents

The influence of rights-based theories is demonstrated by the sheer number of international human rights instruments that most nations have signed or ratified. The main three of such instruments are the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights,[74] and the International Covenant on Civil and Political Rights. There are dozens of rights that are prescribed in one form or another by at least one of these documents. The scope of these rights includes what can be described as basic protections, such as the right to life,[75] liberty, and security of person,[76] and to be free from torture or cruel, inhuman, or degrading treatment or punishment.[77] There are also the somewhat vaguer rights, such as the right to the economic, social, and cultural rights that are said to be indispensable to one's dignity and the free development of one's personality.[78] Other such rights include the right to be free from the arbitrary interference with one's privacy, family, home, or correspondence and from attacks upon one's honor and reputation.[79] Then, there are some so-called rights that are probably best placed on a wish list, such as the right to rest and leisure[80] and the right to a standard of living adequate for the health and well being of oneself and one's family, including food, clothing, housing, and medical care and necessary social services.[81]

3. Influential Contemporary Rights Theorists

Numerous rights-based theories have been advanced as a result of the colossal, and apparently ever increasing, amount of ethical language that is expressed in the form of rights. Rights talk transcends all

73. H. L. A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 196–97 (1983).

74. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICESCR].

75. UDHR, *supra* note 16, at art. 3; ICCPR, *supra* note 17, at art. 6.

76. UDHR, *supra* note 16, at art. 3; ICCPR, *supra* note 17, at art. 9.

77. UDHR, *supra* note 16, at art. 5; ICCPR, *supra* note 17, at art. 7.

78. UDHR, *supra* note 16, at art. 22; ICESCR, *supra* note 74, at arts. 9 & 15.

79. UDHR, *supra* note 16, at art. 12; ICCPR, *supra* note 17, at art. 17.

80. UDHR, *supra* note 16, at art. 24; ICESCR, *supra* note 77, at art. 7(d).

81. UDHR, *supra* note 16, at art. 25; ICESCR, *supra* note 76, at art. 11. The list does not end there.

areas of moral discourse. Rights are now the conventional moral currency. The main differences between them are typically the precise rights that are acclaimed, the basis of the rights, and the absolutism with which they apply. The main role of rights in deontological theories is to protect people from being compelled to do something against their wishes for the good of another or the general good. Two of the most influential contemporary rights theories are examined in the following sections—those of Ronald Dworkin and Robert Nozick. Many of the observations made in relation to these theories are applicable to most other rights-based theories.

a. Dworkin: Concern and Respect

For Dworkin, rights are "political trumps held by individuals,"[82] which protect them from the pursuit of common goods. Dworkin states that "[t]he prospect of utilitarian gains cannot justify preventing a man from doing what he has a right to do,"[83] and that the general good is never an adequate basis for limiting rights.[84] He asserts that people have rights when there are good reasons for conferring upon them benefits or opportunities despite a community interest to the contrary.[85]

> According to Dworkin, in order to take rights seriously, one must accept . . . one or both of two important ideas. The first is the vague but powerful idea of human dignity. This idea, associated with Kant . . . supposes that there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community, and holds that such treatment is profoundly unjust.

The second is the more familiar idea of political equality.[86]

Observance of these ideals leads to the fundamental right of equal concern and respect, which is the foundation of Dworkin's rights thesis.[87] Under this theory, it makes sense to say that a person has a right if that right is necessary to protect the person's dignity or his standing as being equally entitled to concern and respect. To treat one with concern is to treat one as a human being, capable of suffer-

82. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (Gerald Duckworth & Co., 4th ed. 1978).

83. *Id.* at 193.

84. *Id.*

85. *Id.* at 194.

86. *Id.* at 198.

87. *Id.* at 199; *see also* Ronald Dworkin, *Liberalism*, *in* PUBLIC AND PRIVATE MORALITY 113, 127, 136 (Stuart Hampshire, ed., Cambridge Univ. Press 1979).

ing and frustration,[88] and to accord respect is to recognize one as a human being capable of forming and acting on intelligent conceptions of how life should be lived.[89]

b. Nozick: Rights That Exist in a State of Nature

Robert Nozick's rights theory stems from his analysis of the legitimate role of the state.[90] For the purpose of this Article, the end product of this state is less important than his picture of morality that underpins it. Nozick believes that morality is founded on rights. For him, the rights we have are those that supposedly exist in a state of nature and derive from our natural liberty.[91] This gives rise to several distinct rights: the right to absolute control over ourselves, the right to be free from all forms of physical violations, and the right to acquire property and other resources as a result of the proper exercise of our personal rights. These rights are contingent upon not violating the same rights of others. Individuals also have the right to exact retribution against, and compensation from, those who violate their rights. Under this theory, moral rights are said to act as side constraints on the actions of others and cannot be violated even to achieve greater goods.[92] Thus, on Nozick's account, moral rights are negative rights—

88. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 82, at 272.

89. *Id.*

90. Nozick begins by imagining that no state exists. He then details the type of state that is legitimate and the type of state that he believes people would mold consistent with their moral rights. Through this process he claims that we would arrive at the minimal state, a position between anarchy and a redistributive state. In this state, fetters on freedom are few. Individuals have power to own and transfer property and to hire the labor of others. The state has an extremely minimalist role, its functions being confined to those that are essentially protective in nature. Basically, the state can only protect against such matters as force, theft, enforcement of contracts, and so on. It cannot implement paternalist measures or coerce citizens to aid others. Thus, the state cannot assume private property or impose taxes in order to, say, redistribute resources to the disadvantaged. Roles such as this, if they are to be undertaken, must be left to private individuals and enterprises. This is the type of state, a pure form of capitalism, that it is claimed will emerge through an "invisible hand process" by rational people acting in a self-interested manner. Nozick claims that this type of minimal state is the best manner to ensure that rights are not violated. A more powerful state would impinge upon individual rights and is, hence, unjustifiable unless people unanimously waive some of their rights to establish such a state. ROBERT NOZICK, ANARCHY STATE AND UTOPIA 206–07 (Basic Books 1974) [hereinafter NOZICK, ANARCHY].

91. *Id.*

92. Nozick believes that the paramountcy accorded to the right of self-ownership and liberty is necessary to protect people from the burdensome demands of competing moral theories such as utilitarianism. For example, he believes only his rights theory can protect people from such ghastly violations as forced organ donations where the donations would

there are no positive rights such as the right to welfare or health care.[93]

On the basis of either theory, torture is on its face offensive. For Dworkin torture does not accord an agent the concern and respect that is owed to each individual. On the basis of Nozick's account, torture is indefensible because it directly violates the right to be free from physical violations.

4. Explanation for the Influence of Rights Theory

There are several responses to rights-based theorists. First, the fact that a belief or judgment is capable of moving and guiding human conduct says little about its truth—the widespread practice of burning "witches" being a case in point. Second, at the descriptive level, it is probably the case that the intuitive appeal of rights claims and the absolutist and forceful manner in which they are expressed has been normally sufficient to mask over fundamental logical deficiencies associated with the concept of rights. Claims couched in the language of rights seem to carry more emotive punch than equivalent claims grounded in the language of duties. For whatever reason (perhaps due to the egocentric nature of rights discourse) the claim that "I have a right to life" appears to resonate more powerfully than the

maximize happiness by saving the lives of many or assisting those most in need. NOZICK, ANARCHY, *supra*, note 90, at 206–07.

93. Nozick goes on to develop a retributive theory of punishment from his general moral theory. Nozick advances a communicative theory of punishment in which he claims that punishment is justified on the basis that it reconnects the offender with the correct values from which his wrongdoing has disconnected him. Punishment conveys a message from those with appropriate values to offenders, whose own conduct shows that they possess incorrect values, that their conduct was wrong. The message aims to affect the criminal in a way that corresponds with the magnitude of the offense. ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 363–97 (1981). Thus Nozick's theory has many similarities with Duff's theory of punishment, though a significant difference between the theories is that Nozick's theory is even more purely non-consequential, since in order for punishment to be justified on Nozick's account there is no need that this message should achieve moral transformation of the offender; punishment is "right or good in itself, apart from the further consequences to which it might lead." *Id.* at 374. There are several specific problems with Nozick's theory of punishment. It has been noted that if it is irrelevant whether or not punishment changes the offender or not, then we are still left wondering why the message must be conveyed in the first place. *See* NIGEL WALKER, WHY PUNISH? 81 (1991). Nozick provides a hint when he states that through punishment the correct values have some significant effect on the offender's life and make the offender less pleased with his actions. In this way he argues the offender is encouraged to regret the values that he once held. As Ten points out, however, this is, in effect, no more than a subtle way of stating that the aim of punishment is to encourage regret and to achieve deterrence, which are clearly consequentialist considerations from which Nozick is disqualified from resorting. *See* TEN, *supra* note 9, at 42–46.

assertion that "you have a duty not to kill me." In effect, the much criticized meta-ethical theory of emotivism,[94] which provides that morality is a set of utterances that express one's attitude with the aim of influencing the behavior of others, seems to provide at least a partial explanation for the influence of rights-based discourse.

The real analysis, however, must move outside of the abstract and determine how these theories would respond to the use of torture in a real-life scenario.

5. Practical Application of Rights Theories and the Terrorist-Plane Scenario

Despite the dazzling veneer of deontological rights-based theories and their influence on present day moral and legal discourse, when examined closely, such theories are unable to provide persuasive answers to central issues such as: What is the justification for rights? How can we distinguish real from fanciful rights? Which right takes priority in the event of conflicting rights?[95] Such intractable difficulties stem from the fact that contemporary rights theories lack a coherent foundation for rights. Tom Campbell has argued against certain rights-based theories on the basis that they are unable to provide a satisfactory account of the relationship between concrete rights (rights that provide a justification for political decisions by society in general) and more fundamental rights ("background rights") from which concrete rights are supposedly derived.[96] An even more fundamental flaw with rights theories, however, is that there is no defensible virtue that underpins the background interests from which narrower rights claims can be derived.

When examined closely, the concept of non-consequentialist rights is vacuous at the epistemological level. It has been argued that attempts to ground concrete rights in virtues such as dignity, integrity, concern, and respect are unsound because resort to such ideals is arbitrary and leads to discrimination against certain members of the community (for example, those with severely limited cognitive func-

94. *See, e.g.*, G. J. WARNOCK, CONTEMPORARY MORAL PHILOSOPHY 24–26 (1967).

95. Mirko Bagaric, *In Defence of a Utilitarian Theory of Punishment: Punishing the Innocent and the Compatibility of Utilitarianism and Rights*, 24 AUSTL. J. LEGAL PHIL. 95, 121–43 (1999); MIRKO BAGARIC, SENTENCING AND PUNISHMENT: A RATIONAL APPROACH ch. 4 (2000).

96. *See* Tom Campbell, Justice 52 (1st ed. 1990).

tioning) or speciesism (the systematic discrimination against non-humans).[97]

Ultimately, a non-consequentialist ethic provides no method for distinguishing between genuine and fanciful rights claims and is incapable of providing guidance regarding the ranking of rights in the event of a clash. It is not surprising then that nowadays all sorts of dubious rights claims have been advanced. Thus, we have a situation where individuals are able to hold a straight face and urge interests such as "the right to a tobacco-free job," the "right to sunshine," the "right of a father to be present in the delivery room," the "right to a sex break,"[98] and even the "right to drink myself to death without interference."[99]

A further flaw with many rights theories, including those of Dworkin and Nozick, is that an absolute right does not exist. Not even the right to life is sacrosanct. This is evident from the fact that all cultures sanction the use of lethal force in self-defense. And, indeed, torture—in the circumstances that we indicate is morally permissible—is in fact a manifestation of the right to self-defense, which extends to the right to defend another. By conceding that in some situations consequences must prevail, Dworkin's and Nozick's respective theories become unstable.

Despite the absolute overtones of their theories and their insistence of the importance of the individual, Dworkin and Nozick would probably, yet reluctantly, respond to the terrorist-plane scenario by approving of torture in certain circumstances.

Dworkin accepts that it is correct for a government to infringe on a right when it is necessary to protect a more important right or to ward off "some grave threat to society."[100] In a like manner, Nozick states that teleological considerations would take over to "avert moral catastrophe."[101] Although both fail to state, even loosely, at what point a great threat to society or a moral catastrophe exists, so that consequentialist considerations can legitimately "kick in" to guide conduct, it is tenable to argue that the loss of 300 innocent lives satisfies this

97. *See, e.g.*, Michael Tooley, *Abortion and Infanticide, in* APPLIED ETHICS 64–71 (P. Singer ed., 1986); Peter Singer, *All Animals Are Equal, in* APPLIED ETHICS 215, 215–16 (P. Singer ed., 1986).

98. These examples are cited by John Kleinig, *Human Rights, Legal Rights and Social Change, in* HUMAN RIGHTS 36, 40 (Eugene Kamenka & Alice Erh-Soon Tay eds., 1978).

99. Stanley I. Benn, *Rights, in* THE ENCYCLOPEDIA OF PHILOSOPHY vol. 7, at 196 (Paul Edwards ed., 1967).

100. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 82, at 201.

101. NOZICK, ANARCHY, *supra* note 90, at 95.

criteria. When consequential considerations are admitted as being relevant, the theories become hybrid and the main theoretical advantage of a deontological theory, the absolute protection given to people against certain intrusions, is forsaken. This problem is heightened because, in both cases, we are given no guidance as to when consequentialist considerations become overriding. At this point rights theories collapse—they can neither fully rely on the theoretical justifications of deontological or consequentialist theories.

Nearly twenty years ago, Hart said of rights theories, "It cannot be said that we have had . . . a sufficiently detailed or adequately articulate theory showing the foundation for such rights and how they are related to other values . . . . Indeed the revived doctrines of basic rights . . . are in spite of much brilliance still unconvincing."[102] Nothing has changed to diminish the force of this objection.

This may seem to be unduly dismissive of rights-based theories and to pay inadequate regard to the considerable moral reforms that have occurred against the backdrop of rights talk over the past half-century. It cannot be denied that rights claims have been an effective lever for social change. As Campbell correctly notes, rights have provided "a constant source of inspiration for the protection of individual liberty rights."[103] For example, recognition of the right to liberty resulted in the abolition of slavery and, more recently, the right of equality has been used as an effective weapon by women and other disempowered groups seeking greater employment and civil rights, such as the right to vote.

There is no doubt that there is an ongoing need for moral discourse in the form of rights; "[w]hether or not . . . rights are intellectually defensible or culturally tolerant, we do have need of them, at least at the edges of civilization and in the tangle of international politics."[104] Rather, as is discussed below, the only manner in which rights can be substantiated is in the context of a consequentialist ethic. The criticism is with *deontological* rights-based moral theories and their absolutist overtones. Theories of this nature are incapable of providing answers to questions such as the existence and content of proposed rights. This view could obviously be criticized on the basis that if non-consequentialist rights are fanciful, then one has difficulty accounting for the significant changes to the moral landscape for which they have provided the catalyst.

102. HART, *supra* note 73, at 195.
103. CAMPBELL, *supra* note 68, at 165.
104. *Id.*

B. Torture and Utilitarianism

There have been a range of consequentialist moral theories advanced, such as egoism and utilitarianism. The most cogent of these theories, and certainly the most influential in moral and political discourse, is hedonistic act utilitarianism. This theory provides that the morally right action is that which produces the greatest amount of happiness or pleasure and the least amount of pain or unhappiness.[105]

Utilitarianism has received a lot of bad press over the past few decades,[106] resulting in its demise as the leading normative theory. There are several reasons for this. The main general argument against utilitarianism is that because it prioritizes net happiness over individual pursuits, it fails to safeguard fundamental individual interests. As a result of this, it has been argued that in some circumstances utilitarianism leads to horrendous outcomes, such as punishing the innocent[107] or forcing organ donations where the donations would maximize happiness by saving the lives of many or assisting those most in need.[108] These outcomes are essentially inflicting harsh pain of one person for the benefit of others. Another major criticism of utilitarianism is that it supposedly does not accord sufficient weight to individual interests. As noted above, it has been charged that only rights-based theories take seriously the distinction between human beings. This is in contrast to utilitarianism where the ultimate goal—happiness—is aggregative is nature. The happiness of any particular individual is trumped by the goal of net human happiness.

Against a background of utilitarian ethic, torture is clearly justifiable where the harm caused to the agent will be offset by the increased happiness gained to other people.[109] Utilitarianism has been persuasively criticized in the eyes of many, precisely because it justifies sup-

105. *See* J. J. C. SMART, *An Outline of a System of Utilitarian Ethics, in* UTILITARIANISM: FOR AND AGAINST 1 (J. J. C. Smart & B. Williams eds., 1973).

106. *See, e.g.*, B. WILLIAMS, *A Critique of Utilitarianism, in* UTILITARIANISM: FOR AND AGAINST 12–16 (J. J. C. Smart and B. Williams eds., 1973).

107. *See* H.J. MCCLOSKEY, META-ETHICS AND NORMATIVE ETHICS 180–82 (1969). A similar example to McCloskey's is provided in E.F. CARRITT, ETHICAL AND POLITICAL THINKING 65 (1947).

108. *See* NOZICK, ANARCHY, *supra* note 90, 206–07.

109. *See, e.g.*, JEREMY BENTHAM, *Value of a Lot of Pleasure or Pain, How To Be Measured, in* AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Clarendon Press 1907) (1789). This work has been cited by Dershowitz as providing "the most powerful utilitarian case for limited torture of convicted criminals to gather information necessary to prevent serious future crime." Alan M. Dershowitz, *The Torture Warrant: A Response to Professor Strauss*, 48 N.Y.L. SCH. L. REV. 275, 275–76 (2004).

posedly egregious conduct of this nature. Thus, it can be argued tha the fact that utilitarianism justifies torture indicates that the theory i: flawed. Historically, the same sort of argument has been used mos: forcefully in the context that utilitarianism may justify punishing the innocent. The issue of torturing the innocent is directly discussed in Part IV.

The most telling theoretical objection against utilitarianism is that it permits punishment of the innocent. A famous illustration of the objection concerning punishing the innocent is McCloskey's small town sheriff example:

> Suppose a sheriff were faced with the choice of either framing a negro for a rape which had aroused white hostility to negroes (this particular negro being believed to be guilty) and thus preventing serious anti-negro riots which would probably lead to loss of life, or of allowing the riots to occur. If he were . . . [a] utilitarian he would be committed to framing the negro.[110]

1. Hard Cases Lead to Hard Decisions

A common utilitarian response to this dilemma is that such examples are impossible in the real world and hence need not be addressed.[111] Punishing the innocent may at times provide short term benefits, such as securing social stability. Nevertheless, these benefits are always more than offset by the likelihood of greater long term harm due to the loss of confidence in the legal system and the associated loss of security to all members of the community who will fear that they may be the next person framed, once the inevitable occurs and it is disclosed that an innocent person has been punished. But with only a little imagination, the above example can be tightened up by introducing considerations that significantly reduce or totally obviate the possibility of disclosure, so that the only logical utilitarian conclusion is to punish the innocent.[112] Even if the process of modifying

110. MCCLOSKEY, *supra* note 107, at 180–81. A similar example to McCloskey's is provided in EDGAR F. CARRITT, ETHICAL AND POLITICAL THINKING 65 (1950).

111. *See, e.g.*, T.L.S. Sprigge, *A Utilitarian Reply to Dr. McCloskey*, 8 INQUIRY 264, 272 (1965).

112. As an example, McCloskey's hypothetical could be altered by providing that the town was an isolated one, hence there is no opportunity for help arriving before the riots occurred. Also the crime should be a murder, not a rape, in which case there is one less person who could reveal the miscarriage of justice that has occurred, and thus the risk of a possible loss of respect and confidence in the law is not as significant. *See also* TEN, *supra* note 9, at 18. Brandt & Rawls have argued that the utilitarian rule is not necessarily committed to punishing the innocent. RICHARD B. BRANDT, ETHICAL THEORY: THE PROBLEMS OF NORMATIVE AND CRITICAL ETHICS 490–95 (1959); J. Rawls, *Two Concepts of Rules* 64 PHIL.

the examples appears to far remove them from the real world, it is still a situation that the utilitarian must deal with.

The more promising utilitarian response is not to attempt to deflect or avoid the conclusion that there may be some extreme situations where utilitarianism commits us to punishing the innocent or torturing individuals, but rather the correct approach is to accept this outcome and contend that, as horrible as this may seem on a pre-reflective level, on closer consideration it is not a matter that *really* insurmountably troubles our sensibilities to the extent that it entails that any theory that approves of such an outcome must necessarily be flawed. By drawing comparisons with other situations in which we take the utilitarian option, it is contended that practices such as punishing the innocent and torture are not necessarily unacceptable.

The view that punishing the innocent and torturing individuals is the morally correct action in some circumstances is consistent with and accords with the decisions we as individuals and societies as a whole readily have made and continue to make when faced with extreme and desperate circumstances. Once we come to grips with the fact that our decisions in extreme situations will be compartmentalized to desperate predicaments, we do, and *should*, though perhaps somewhat begrudgingly, take the utilitarian option. In the face of extreme situations, we are quite ready to accept that one should, or even must, sacrifice oneself or *others* for the good of the whole.

For example, in times of war we not only request our strongest and healthiest to fight to the death for the good of the community, but we often demand that they do so under threat of imprisonment or even death. Quite often they must battle against hopeless odds, in circumstances where we are aware that in all probability they are not coming back.[113] What is more: they *must* give their life. Not because they want to, not because they are bad, but merely because it would be good for the rest of us. This is classical utilitarian reasoning. Faced with the reality of the decisions we *do* make in such horrible situations, the examples proffered against utilitarianism about the terrible things it entails, such as punishing the innocent, lose their bite.

REV. 3 (1955). *But see* H.J. McCloskey, *A Non-Utilitarian Approach to Punishment*, 8 INQUIRY 249 (1965); TEN, *supra* note 9, at 67–71.

113. While this is not normally the case, i.e., we normally like to think that we send our soldiers into situations with at least a fighting chance, there are countless reported instances of men being ordered to go or remain in situations that can only be described as suicide missions. For those brave men who voluntarily place themselves in such situations, it is rather illuminating that the proscription against suicide disappears. They are heroes rather than bad men—they followed the dictates of utilitarianism.

Horrible situations make for appalling decisions whichever way we turn, but ultimately we do make the utilitarian choice because of our lack of true commitment to any higher moral virtue. By opting for the utilitarian line we are soothed by one saving grace: at least the level of harm has been minimized. When the good of many or the whole is at significant threat, we have no difficulty selecting certain classes of innocent individuals, whose only "flaw" is their sex, state of health, and date of birth to go in to bat for the rest of us. Their protests that they should not be compelled to go because it impinges on their civil, legal, or human rights to such matters as life and liberty, or their desperate appeals to other virtues such as justice or integrity, fall on obstinate ears; for this is serious stuff now—our lives (or other important interests) are at stake. Such appeals should be saved for rosier times. When advanced in theory, we can all "agree" that this is so.

The decisions we do actually make in a real life crisis are the best evidence of the way we actually do prioritize important, competing principles and interests. Matters such as rights and justice are important, but, in the end, are subservient to and make way for the ultimate matter of significance: general happiness. Bad as it seems, framing the African-American, imprisoning the innocent, and torturing the terrorist are certainly no more horrendous than the decisions history has shown we have made in circumstances of monumental crisis.

A pointed example is the decision by then English Prime Minister Winston Churchill to sacrifice the lives of the residents of Coventry in order not to alert the Germans that the English had deciphered German radio messages. On 14 November 1940 the English decoded plans that the Germans were about to air bomb Coventry.[114] If Coventry was evacuated or its inhabitants advised to take special precautions against the raid, the Germans would know that their code had been cracked, and the English would be unable to obtain future information about the intentions of its enemy.[115] Churchill elected not to warn the citizens of Coventry, and many hundreds were killed in the raid that followed. Many innocent lives were sacrificed in order not to reveal the secret that would hopefully save many more lives in the future.[116] Significantly, such decisions have subsequently been im-

114. MANUEL VELASQUEZ & CYNTHIA ROSTANKOWSKI, ETHICS: THEORY AND PRACTICE 103–06 (Prentice-Hall 1985).

115. *See id.*

116. *See id.* A famous modern day example that comes closest to the dilemma of choosing whether to frame the innocent or tolerate massive abuses of rights followed the Rodney King beating in Los Angeles on 3 March 1991. The policemen who beat King were acquitted under state law of any offense regarding the incident. Riots ensued resulting in wide-

mune from widespread or persuasive criticism. This shows not only that when pressed we *do* take the utilitarian option, but also that it is felt that this is the option we *should* take.

Now, what we actually do does not justify what ought to be done. Morality is normative, not descriptive in nature: an "ought" cannot be derived from an "is."[117] Still, the above account is telling because the force of the "punishing the innocent" objection lies in the fact that it supposedly so troubles our moral consciousness that utilitarianism can thereby be dismissed because the outcome is so horrible that "there must be a mistake somewhere." But this claim loses its force when it is shown that punishing the innocent and torturing the culpable is, in fact, no worse than other activities that we condone.

2. The Role of Rights in Utilitarian Ethic

The criticism that utilitarianism has no place for rights must be responded to for the sake of completeness (and in an attempt to further redeem utilitarianism). Rights do in fact have a place in a utilitarian ethic, and, what is more, it is only against this background that rights can be explained and their source justified. Utilitarianism provides a sounder foundation for rights than any other competing theory. Indeed, for the utilitarian, the answer to why rights exist is simple: recognition of them best promotes general utility.[118] Their origin accordingly lies in the pursuit of happiness. Their content is discovered through empirical observations regarding the patterns of behavior that best advance the utilitarian cause. The long association of utilita-

spread looting, damage to property, and dozens of deaths. Shortly afterwards the government announced the almost unprecedented step that the policemen, who were found innocent of the alleged crime, were to be tried on federal charges regarding the incident. They were duly found guilty, despite the apparent double jeopardy involved. See DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN JUSTICE SYSTEM 23 (1999), for a discussion of this incident. Whatever one's view of the government's motivation for charging the policemen, it seems that justice took a back seat, at least for a while.

117. This has been used as an argument against a naturalistic view of morality. See, however, C.R. Pigden, *Naturalism*, *in* A COMPANION TO ETHICS 421, 422–26 (P. Singer ed., 1991), where he points out that this phenomenon simply reflects the conservative nature of logic—you cannot get out of it what you do not put in.

118. According to Mill, rights reconcile justice with utility. Justice, which he claims consists of certain fundamental rights, is merely a part of utility. "[T]o have a right is . . . to have something which society ought to defend . . . . [If asked why,] . . . I can give no other reason than general utility." J.S. Mill, *Utilitarianism*, *in* UTILITARIANISM 251, 309 (Mary Warnock ed., Fontana Press, Glasgow, 1986). Campbell also proposes a reductive approach to rights, however, underlying his rights thesis is not utilitarianism, but rather (ethical) positivist ideals. CAMPBELL, *supra* note 68, at 161–85; *see also* Tom Campbell, *The Point of Legal Positivism*, *in* LEGAL POSITIVISM 323 (Tom Campbell ed., 1999).

rianism and rights appears to have been forgotten by most. Over a century ago it was Mill, however, who proclaimed the right of free speech, contending that truth is important to the attainment of general happiness and this is best discovered by its competition with falsehood.[119]

Difficulties in performing the utilitarian calculus regarding each decision make it desirable that we ascribe certain rights and interests to people that evidence shows tend to maximize happiness[120]—even more happiness than if we made all of our decisions without such guidelines. Rights save time and energy by serving as shortcuts to assist us in attaining desirable consequences. By labeling certain interests as rights, we are spared the tedious task of establishing the importance of a particular interest as a first premise in practical arguments.[121] There are also other reasons why performing the utilitarian calculus on each occasion may be counterproductive to the ultimate aim. Our capacity to gather and process information and our foresight are restricted by a large number of factors, including lack of time, indifference to the matter at hand, defects in reasoning, and so on. We are quite often not in a good position to assess all the possible alternatives and to determine the likely impact upon general happiness stemming from each alternative. Our ability to make the correct decision will be greatly assisted if we can narrow down the range of relevant factors in light of pre-determined guidelines. History has shown that certain patterns of conduct and norms of behavior if observed are most conducive to promoting happiness. These observations are given expression in the form of rights that can be asserted in the absence of evidence as to why adherence to them in the particular case would not maximize net happiness.

Thus, importance of rights in a utilitarianism view do not have a life of their own (they are derivative not foundational), as is the case with deontological theories. Due to the derivative character of utilitarian rights, they do not carry the same degree of absolutism or "must be doneness" as those based on deontological theories. This is not a criticism of utilitarianism, however; indeed, this characteristic is a

119. Mill, *supra* note 118, at 141–83.

120. These rights, however, are never decisive and must be disregarded where they would not cause net happiness (otherwise this would be to go down the utilitarianism rule track).

121. *See* JOSEPH RAZ, THE MORALITY OF FREEDOM 191 (Oxford Univ. Press 1986). Raz also provides that such rights are useful because they enable us to settle on shared intermediary conclusions, despite considerable dispute regarding the grounds for the conclusions. *Id.*

strength because it is farcical to claim that any right is absolute. Another advantage of utilitarianism is that only it provides a mechanism for ranking rights and other interests. In the event of a clash, the victor is the right that will generate the most happiness. As the next part discusses, the balancing aspect of utilitarianism is the reason that it is particularly apposite to determining the circumstances in which torture is appropriate.

III. The Circumstances in Which Torture Is Acceptable

The only situation where torture is justifiable is where it is used as an information gathering technique to avert a grave risk. In such circumstances, there are five variables relevant in determining whether torture is permissible and the degree of torture that is appropriate. The variables are (1) the number of lives at risk; (2) the immediacy of the harm; (3) the availability of other means to acquire the information; (4) the level of wrongdoing of the agent; and (5) the likelihood that the agent actually does possess the relevant information. Where (1), (2), (4) and (5) rate highly and (3) is low, all forms of harm may be inflicted on the agent—even if this results in death.

A. The Harm to Be Prevented

The key consideration regarding the permissibility of torture is the magnitude of harm that is sought to be prevented. To this end, the appropriate measure is the number of lives that are likely to be lost if the threatened harm is not alleviated. Obviously, the more lives that are at stake, the more weight that is attributed to this variable.

Lesser forms of threatened harm will not justify torture. Logically, the right to life is the most basic and fundamental of all human rights—non-observance of it would render all other human rights devoid of meaning.[122] Every society has some prohibition against taking life,[123] and "the intentional taking of human life is . . . the offence which society condemns most strongly."[124] The right to life is also enshrined in several international covenants. For example, Article 2 of the European Convention on Human Rights (which in essence mir-

122. *See also* MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: C.C.P.R. COMMENTARY 104 (N.P. Engel ed., 1993); Sarah Joseph, *The Right to Life*, *in* THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND UNITED KINGDOM LAW 155 (David Harris & Sarah Joseph eds., 1995).

123. *See* PETER SINGER, PRACTICAL ETHICS 85 (2d ed. 1993).

124. THE HOUSE OF LORDS, REPORT OF THE SELECT COMMITTEE ON MEDICAL ETHICS, vol. 1, at 13 (1994).

rors Article 6 of the International Covenant on Civil and Political Rights) provides that "everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."[125]

Torture violates the right to physical integrity, which is so important that it is only a threat to the right to life that can justify interference with it. Thus, torture should be confined to situations where the right to life is imperiled.

B. Immediacy of Harm and Other Options to Obtain Information

Torture should only be used as a last resort and hence should not be utilized where there is time to pursue other avenues of forestalling the harm. It is for this reason that torture should only be used where there is no other means to obtain the relevant information. Thus, where a terrorist has planted a bomb on a plane, torture will not be permissible where, for example, video tapes of international airports are likely to reveal the identity of the plane that has been targeted.

C. The Likelihood of Knowledge or Guilt

As a general rule torture should normally be confined to people that are responsible in some way for the threatened harm. This is not, however, invariably the case. People who are simply aware of the threatened harm, that is "innocent people," may in some circumstances also be subjected to torture.

Regardless of the guilt of the agent, it is most important that torture is only used against individuals who actually possess the relevant information. It will be rare that conclusive proof is available that an individual does, in fact, possess the required knowledge; for example, potential torturees will not have been through a trial process in which their guilt has been established. This is not a decisive objection, however, to the use of torture. The investigation and trial process is simply one means of distinguishing wrongdoers from the innocent. To that end, it does not seem to be a particularly effective process. There are other ways of forming such conclusions. One is by way of lie-detector tests. The latest information suggests that polygraphs are accurate

125. European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 18, at art. 2.

about eighty to ninety per cent of the time.[126] There has been little empirical research done to ascertain the number of innocent people who are ultimately convicted of criminal offenses. As one example, however, research carried out in the United Kingdom for the Royal Commission on Criminal Justice suggests that up to eleven percent of people who plead guilty claim innocence.[127] The wrongful acquittal rate would no doubt be even higher than this.

Moreover, it is important to note that even without resort to polygraphs there will be many circumstances where guilt or relevant knowledge is patently obvious. A clear example is where a person makes a relevant admission that discloses information that would only be within the knowledge of the wrongdoer. Another example occurred in the recent German kidnapping case, referred to earlier, where the man in custody had been witnessed collecting a ransom and had indicated to the police that the kidnapped boy was still alive.[128] Where lesser forms of evidence proving guilt are available, the argument in favor of torture is lower.

D. The Formula

Incorporating all these considerations, the strength of the case in favor of torture can be mapped as follows:

$$\frac{W+L+P}{T\times O}$$

Where:

W = whether the agent is the wrongdoer
L = the number of lives that will be lost if the information is not provided
P = the probability that the agent has the relevant knowledge
T = the time available before the disaster will occur ("immediacy of the harm")
O = the likelihood that other inquiries will forestall the risk

W is a weighting that is attributable to whether the agent has had any direct connection with the potential catastrophe. Where the person is

126. Dan Vergano, *Telling the Truth About Lie Detectors*, USA TODAY, Sept. 9, 2002, *available at* http://www.usatoday.com/news/nation/2002-09-09-lie_x.htm (last accessed Apr. 4, 2005).

127. ROYAL COMM'N ON CRIMINAL JUSTICE, REPORT, UNITED KINGDOM (1993); *see also* ROGER HOOD, RACE AND SENTENCING 125 (1992); P. Darbyshire, *The Mischief of Plea Bargaining and Sentencing Rewards*, CRIM. L. REV. (London), 2000, at 903; M. Zander, *What on Earth Is Lord Justice Auld Supposed to Do?*, CRIM. L. REV. (London), 2000, at 419.

128. *Police Threat Fuels Debate on Torture*, DEUTSCHE WELLE (Germany), Feb. 24, 2003, *available at* http://www.dw-world.de/english/0,3367,1430_A_785751,00.html (last accessed Apr. 18, 2005).

responsible for the incident—for example, planted or organized the bomb—more emphasis should be attached. Where the agent is innocent and has simply stumbled on the relevant information—for example, she saw the bomb being planted or overheard the plan to plant the bomb—this should be reduced by a certain amount. The prohibition against inflicting harm on the innocent is certainly strong, but it is not inviolable.[129]

Torture should be permitted where the application of the variables exceeds a threshold level. Once beyond this level, the higher the figure the more severe the forms of torture that are permissible. There is no bright line that can be drawn concerning the point at which the "torture threshold" should be set. More precision can, however, be obtained by first ascribing unit ranges to each of the above variables (depending on their relative importance), then applying the formula to a range of hypothetical situations, and then making a judgment about the numerical point at which torture is acceptable.

There is obviously a degree of imprecision attached to this process and considerable scope for discussion and disagreement regarding the *exact* weight that should be attached to each variable. It is important to emphasize, however, that this is not an argument against our proposal. Rather it is a signal for further discussion and refinement. This is a call that we are confident other commentators will take up. The purpose of this Article is not to set in stone the full range of circumstances where torture is justifiable. Our aim is more modest—to convince readers that torture is justifiable in some circumstances and to set out the variables that are relevant to such an inquiry.

IV. Regulation Better Than Prohibition

In addition to the moral argument for torture as an interrogation device, Dershowitz has argued that torture should be legalized for harm minimization reasons. Dershowitz has pushed for the introduction of "a torture warrant," which would place a "heavy burden on the government to demonstrate by factual evidence the necessity to administer this horrible, horrible technique of torture."[130] He further adds:

129. *See* discussion *supra* Part I.

130. Dershowitz Interview, *supra* note 2. Dershowitz came across the idea for "torture warrants" while reading about sixteenth and seventeenth century England and France. While the French were torturing "virtually everybody," the English Privy Council instituted warrants. This led to about 100 people being tortured over the course of a century. *See* Silver, *supra* note 6.

> I think that we're much, much better off admitting what we're doing or not doing it at all. I agree with you, it will much better if we never did it. But if we're going to do it and subcontract and find ways of circumventing, it's much better to do what Israel did. They were the only country in the world ever directly to confront the issue, and it led to a supreme court decision, as you say, outlawing torture, and yet Israel has been criticized all over the world for confronting the issue directly. Candor and accountability in a democracy is very important. Hypocrisy has no place.[131]

The obvious counter to this is the slippery slope argument. "If you start opening the door, making a little exception here, a little exception there, you've basically sent the signal that the ends justify the means," resulting in even more torture.[132] The slippery slope argument is often invoked in relation to acts that in themselves are justified, but which have similarities with objectionable practices, and urges that in morally appraising an action we must not only consider its intrinsic features but also the likelihood of it being used as a basis for condoning similar, but in fact relevantly different undesirable practices.[133] The slippery slope argument in the context of torture holds that while torture might be justified in the extreme cases, legalizing it in these circumstances will invariably lead to torture in other less desperate situations.

This argument is not sound in the context of torture. First, the floodgates are already open—torture is widely used, despite the absolute legal prohibition against it. It is, in fact, arguable that it is the existence of an unrealistic absolute ban on torture that has driven torture "beneath the radar screen of accountability"[134] and that the legalization of torture in very rare circumstances would, in fact, reduce the instances of torture because of the increased level of accountability.[135]

Second, there is no evidence to suggest that the *lawful* violation of fundamental human interests will necessarily lead to a violation of fundamental rights where the pre-conditions for the activity are

131. Dershowitz Interview, *supra* note 2.

132. *Id.* (quoting Ken Roth, the executive director of Human Rights Watch). It has been suggested that Israel ended up torturing around ninety percent of the Palestinian security detainees they had until finally the Israeli Supreme Court outlawed the practice. *Id.*; *see also* Parry & White, *supra* note 41, at 757–60.

133. For a discussion of the use and persuasiveness of the argument, see KUMAR AMARASEKARA & MIRKO BAGARIC, EUTHANASIA, MORALITY AND THE LAW ch. 4 (2002).

134. Dershowitz, *supra* note 109, at 283.

135. Dershowitz, for example, has stated, "People say '[o]h my God, that will open the floodgates.' I say the reverse is true. I believe that would close the floodgates. My view is that accountability . . . will reduce the amount of torture rather than increase it." Silver, *supra* note 6.

clearly delineated and controlled. Thus, in the United States the use of the death penalty has not resulted in a gradual extension of the offenses for which people may be executed or an erosion in the respect for human life. Third, promulgating the message that the "means justifies the ends [sometimes]" is not inherently undesirable. Debate can then focus on the precise means and ends that are justifiable.

Conclusion

The absolute prohibition against torture is morally unsound and pragmatically unworkable. There is a need for measured discussion regarding the merits of torture as an information gathering device. This would result in the legal use of torture in circumstances where there are a large number of lives at risk in the immediate future and there is no other means of alleviating the threat. While none of the recent high profile cases of torture appear to satisfy these criteria, it is likely that circumstances will arise in the future where torture is legitimate and desirable. A legal framework should be established to properly accommodate these situations.