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Torture and the Problem of Dirty Hands

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Abstract

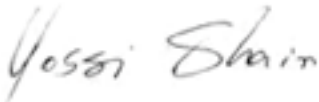
This paper looks at the contemporary debate over investigative torture in liberal democracies besieged by terrorism, from the viewpoint of the state leader, politician, judge or individual interrogator, called upon to make life-and-death decisions. It steers away from the classic debate between utilitarians and Kantians regarding moral justification, and, following Michael Walzer presents the issue as a specific case of "the problem of dirty hands in politics". Contra Walzer, the paper suggests, among other things, that the notion of "dirty hands" functions not only within moral theories that include absolute prohibitions but also within consequentialist theory, and that it is therefore far wider, practically illuminating and more applicable than Walzer originally assumed. Later it addresses Alan Dershowitz's controversial suggestion requiring judicial "torture warrants", and argues that this too should be viewed in light of the notion of "dirty hands" rather than within the conventional debate over justifications. Finally, it suggests that, while torture may be morally unjustifiable on anything but purely consequentialist grounds, circumstances may offer the individual decision maker an excuse, rather than a justification, for resorting to torture under very restricted conditions.

A Note from the Head of the School of Government and Policy

Tamar Meisels' paper considers the political controversy over investigative torture in liberal democracies beset by terrorism, from the viewpoint of the state leader, politician, Judge or individual interrogator. These issues have been a part of the Israeli experience at least since the Landau commission report in the late 1980s. They now also pose a challenge for the US administration as well as for other liberal democracies plagued with terrorism.

The study focuses on the distinctly political aspect of the torture debate. Following Michael Walzer's classic article "Political Action: The Problem of Dirty Hands", Dr. Meisels offers a theoretical analysis that expands on the torture dilemma as a particular instance of "dirty hands in politics". Whilst defending a categorical ban on hard-core torture, the paper questions the role of the politician called upon to make an excruciating decision between the practice of torture and risking the loss of innocent human life. The study also considers Alan Dershowitz's highly debated suggestion requiring judicial "torture warrants", presenting it as a further version of the "dirty hands" argument.

It is my hope that this paper is brought to the attention of decision makers and theoreticians alike.



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Torture and the Problem of Dirty Hands

It is widely agreed among liberals that torture is a moral wrong, even within a just war, as it is particularly degrading and humiliating even in comparison with actual killing.¹ There is some disagreement among philosophers as to the characterization of the precise evil that is torture. In his classic essay, Henry Shue argues that torture violates the basic “just war theory” prohibition against attacking the defenseless.²

Utilitarian opposition to torture highlights the harm it causes, both directly and indirectly, while a typical Kantian “argues that what is essentially wrong with torture is the profound disrespect it shows the humanity or autonomy of its victim”.³ David Sussman suggests that “...Torture forces its victim into the position of colluding against himself through his own effects and emotions, so that he experiences himself as simultaneously powerless and yet actively complicit in his own violation.”⁴ Michael Ignatieff argues that its use is totally anathema to liberal democracy as it expresses the view that human beings are expendable.⁵

While we may disagree about precisely why we tend to draw the line at this particular evil, there has until quite recently been a sweeping consensus within liberal democracies against the use of torture even in the course of a justified armed struggle. Recently, however, with the rise of international terrorism there have been suggestions that liberal democracies may actually be justified in resorting to the use of torture against captured “terrorists” in order to divulge life saving information.⁶

Amongst academics, such suggestions usually take a standard form of presenting a vivid example in which the torture of a known terrorist is pitted against the prospect of saving many innocent lives from violent death by terror.⁷ The inevitable outcome, either implied or explicitly argued for, is a consequentialist justification of specific acts of torture.⁸ I am not interested here in scrutinizing the consequentialist considerations and the arguments they support.⁹ Utilitarian justification (or opposition) to torture is relatively straightforward. It serves to resolve the standard examples by justifying torture under certain, usually extreme, assumptions in which the outstanding suffering for many is taken to outweigh the suffering of the victim of torture. Thus the issue is resolved with a clear conscience and the alternative is presented as morally untenable.

A far more interesting moral problem arises for those who resist the consequentialist conclusion and remain uneasy about regarding torture as morally justifiable under any conditions. Absolute prohibitions on the abuse of individuals and on the violation of individual dignity, autonomy and integrity, are not as alien to our beliefs and intuitions as some extreme examples might lead us to believe. Arguing in favor of an absolute legal ban on torture, Jeremy Waldron points out that most “readers will draw the line *somewhere*, to prohibit *some* action even under the most extreme circumstances – if it is not torture of the terrorist, they will draw the line at torturing the terrorist’s relatives, or

raping the terrorist, or raping the terrorist's relatives all of which can be posited...to be the necessary means of eliciting the information."¹⁰

In the following I will assume that all torture is wrong.¹¹ The position whereby torture is absolutely wrong, always and under all circumstances, does not exhaust the range of moral query on this issue. The familiar examples present a totally different type of moral problem, rather than a solution, for theorists who view the prohibition on torture as a moral absolute. They may still be called upon to consider the perspective of the state leader, the politician, or the individual interrogator, forced to choose between the morally unjustifiable torture of an individual and the lives of many other innocent civilians for whom he has assumed responsibility. Michael Walzer presents this excruciating situation most clearly as "the dilemma of dirty hands", and it is this particular type of moral problem that will concern me throughout.¹² A similar task has recently been undertaken by Steven Lukes as part of his work on "Democratic Torture", where he asks whether torture is simply an instance of "the dilemma of dirty hands", defined as "a species of moral dilemma, where, in doing what appears to be the right, or best thing in the circumstances, we cannot avoid doing wrong."¹³

In the following I suggest that this notion of "dirty hands" best reflects the moral complexity of the torture issue in an age of terror. Later I will show that the variety of familiar philosophical examples referred to above, which pit torture against some potential terroristic catastrophe, are similar in form but not in purpose. While such examples are frequently invoked in order to justify the use of torture in terms of its desirable consequences, they are sometimes used in order to illustrate this more complex type of moral problem defined by Walzer. On this approach, torture is morally unjustifiable but at the same time may, under certain circumstances, remain in some sense the required course of political action. First, I will suggest, contra Walzer and Lukes, that the problem of "dirty hands" is not exclusively an absolutist predicament. It is in fact more universal and reflective of a wider range of moral positions than Walzer himself imagined. A utilitarian, I shall argue, particularly a rule-utilitarian, can certainly suffer from "dirty hands".

Dirty Hands

Walzer's variation on the familiar theme asks us to:

... Consider a politician who has seized upon a national crisis – a prolonged colonial war – to reach for power. He and his friends win office pledged to decolonialization and peace... Immediately the politician goes off to the colonial capital to open negotiations with the rebels. But the capital is in the grip of a terrorist campaign and the first decision the new leader faces is this: he is asked to authorize the torture of a captured rebel leader who knows or probably knows the location of a number of bombs hidden in apartment buildings around the city, set to go off within the next twenty-four hours. He orders the man tortured, convinced that he must do so for the sake of the people who might otherwise die in the explosions – even though he believes that torture is wrong, indeed abominable, not just sometimes, but always.¹⁴

Walzer's own answer is that the politician in such a situation may be right in doing what it is wrong for him to do. Rejecting the utilitarian approach, he insists that the politician in question has committed a definite moral wrong. By so doing he has, in Walzer's terms, tainted his hands with the blood of the interrogated victim. Paradoxically, Walzer tells us, the politician has acquired this moral blemish in the course of committing a wrong that it was actually right for him to commit.¹⁵

Kai Nielson criticizes Walzer on this very point. Claiming that "There is No Dilemma of Dirty Hands", Nielson argues, with much reference to the torture issue, that "dirty hands" is not a dilemma or a paradox but merely the problem of having to commit a necessary lesser evil in a political situation, which requires choosing between two evils.¹⁶ One needn't be a utilitarian, Nielson points out, in order to concede that, when faced with a choice between two evils, a political leader (indeed anyone) is outright justified, and not wrong at all, in choosing the option which, while breaching a *prima facie* obligation, achieves the better (or less bad) all-round consequences.¹⁷

Many forms of soft, or weakened, deontology distinguish themselves from utilitarianism by adhering to rules which are not utility based, and yet concede that in unusual, usually extreme, circumstances these rules can, indeed should, be overridden by consequential considerations.¹⁸ Also, rules and obligations can conflict and should in such cases be balanced against each other.¹⁹ Any moral theory which enables the prioritizing of *prima facie* duties, can allow for this.²⁰ The alternative, unacceptable to Nielson (as well as Walzer), is following moral absolutism to the point of catastrophe rather than tolerate any breach of rules. Pointing out that Walzer himself rejects this course of action (he thinks the politician ought to order the torture), Nielson accuses

Walzer of “paradox mongering”, arguing that his “dirty hands dilemma” is fictitious and confusing.²¹ Neilson does not deny the dirty work involved, only the existence of a paradox. The agent who chooses a lesser evil solution does not do right and wrong simultaneously, as Walzer suggests, but merely what is overall justified and absolutely right, given the difficult circumstances.²²

Howard Curzer recently attributes a similar stand to Walzer himself, pointing out that in opting for torture in his ticking bomb example, Walzer specifies this choice as the lesser evil, thus undercutting his own claim that the dilemma he presents is a moral no-win situation. “He takes torture to be the lesser evil, the greater requirement”.²³

The notion of “dirty hands”, however, properly understood, does not simply involve the prospect of doing a *prima facie* wrong in the process of, or for the sake of, achieving a greater good. If this were the case, “dirty hands” would express little more than the classic question of whether the ends justify the means. At times Lukes appears to view the problem of “dirty hands” in such terms,²⁴ but Walzer clearly rejects the view that “dirty hands” involve the justification of immoral means by referring to their desirable ends, as well as the familiar attribution of such a stand to Machiaveli.²⁵ If Walzer were staking a “lesser evil” argument, there would be no interesting unresolvable dilemma to speak of, but merely the outweighing of a *prima facie* duty never to torture, by a weightier duty to protect the community, as Howard Curzer believes the case to be.²⁶

The problem of “dirty hands” is genuinely paradoxical and far more elusive than justifying means in terms of their good goals. While Curzer argues that Walzer’s decision to torture the rebel reveals a lesser evil position regarding torture, he also recognizes that Walzer denies the consistency of morality and its demands.²⁷ As Thomas Nagel suggests, the world -- war and politics in particular -- presents us with situations in which an agent cannot avoid doing wrong whatever course of action he takes.²⁸ Nagel believes there is a genuine dilemma in such cases, which he describes in terms of the conflict between the principle of utility -- instructing us to maximize good and minimize evil -- and absolutist principles that place constraints on what we may do, whatever the consequences.²⁹ Both kinds of principle play a role in our normative thinking and form incommensurable parts of our moral intuitions. On the one hand, in certain situations, as when torture or murder is the only available means by which to save lives, absolutism requires us, in effect, to refrain from opting for the lesser evil. On the other hand, the pull of the consequentialist consideration is considerable, even for a non-utilitarian. In such cases, Nagel argues, the moral dilemma is acute and in fact insoluble, with both alternative courses of action deemed to be wrong, and he regards torture in order to prevent disaster as a case in point.³⁰

For Nagel, the dilemma is clearly an internal moral one and apparently has no solution. Morality itself pulls in two opposing directions. Walzer’s example illustrates a similar

point, but not necessarily an equivalent one. According to Walzer, a politician will necessarily be called upon in the course of his office to commit what are unmistakably immoral acts. In Nagel's terms, he will sometimes necessarily do wrong, whatever he does.³¹ But Walzer, unlike Nagel, instructs him clearly as to which wrong he is to choose. His take on the familiar torture example, however, is not intended as a justification of torture under any circumstances. He regards torture as a moral wrong and assumes that its prohibition is widely held as a moral absolute. Unlike for Nagel, it is unclear whether Walzer believes the problem to be internally moral or whether it reflects a conflict between morality and other directives. Perhaps, for Walzer, like Machiaveli, "his political judgments are indeed consequentialist in character, but not his moral judgments".³²

Walzer's frequent reference to Machiaveli is telling. For however else he is interpreted, Machiaveli clearly denied the overriding nature of moral obligations in political life. It is somewhat unclear whether Walzer follows wholeheartedly in his footsteps, suggesting that torture is immoral but that it is non-the-less politically required under certain circumstances. He appears to hold simultaneously to the non-overriding view of morality alongside the Nagel type argument, that morality itself is internally inconsistent. These two views are theoretical alternatives, though they need not be mutually exclusive. Morality might be both inconsistent in its demands as well non-overriding in its scope.

Curzer argues against Walzer in support of the "overridingness" thesis. Like Nagel, he describes the "dirty hands" dilemma in terms of a tension within moral theory, though he denies that morality is inconsistent in its requirements. He suggests instead that in the rarest of instances, moral duty and moral virtue diverge, such that there may be vicious, morally required acts (e.g. torture) and virtuous, morally wrong acts (refraining from torture at the expense of catastrophe). This tension is described in terms of a conflict between **moral virtue** -- understood as a disposition enforced by habit, to act in a certain manner which is usually morally required (i.e. never torture, which is normally right as well as virtuous) -- versus **moral duty**, understood as the product of careful reasoning in the particular case (i.e. torture when necessary to avert disaster). Curzer holds unequivocally that torture is morally required when necessary to save the community. The remaining "dirt", associated with torture, is then attributed merely to the viciousness, commonly associated with torture by the virtuous. Torture is usually very wrong, thus the virtuous are habitually disposed to recoil from it. Resorting to torture when it is indeed required is thus out of character for the virtuous, hence the remainder feelings of shame, or dirt.³³ Walzer's dilemma of "dirty hands" exists only to the extent that it is indeed tragic for a good person to choose between virtue and duty. But there is no real moral deadlock, because, on Curzer's account, moral duty -- which is the ultimate directive as to what ought to be done -- unambiguously prescribes torture as the right course of action in a "ticking bomb" situation.³⁴

Walzer does not pursue the issue of torture beyond the short passage cited above. Nonetheless, his theory of “dirty hands” grasps the moral complexities involved in the contemporary debate over investigative torture in liberal democracies, which is missed by simply regarding torture as emotionally repugnant, or ‘out of character’ for the virtuous. The notion of acquiring a severe moral blemish in the process of taking a politically required course of action is stronger than the idea of merely doing a dirty, but morally necessary, job. It also highlights the excruciating moral and meta-moral issues involved in the choice of torture far better than does any theory of “lesser evils”, justifying means by their good goals or prioritizing duties. It raises questions concerning the priority of moral directives as well as the consistency of morality itself, even if it does not supply us with all the answers. Moreover, I will try to show that “dirty hands” reflects a wider scope of moral intuitions than even Walzer himself assumed, as it encompasses a familiar utilitarian approach as well as the absolutist one that he presents.

Rule-Utilitarianism and the problem of Dirty Hands

Nagel describes a moral dilemma that represents a conflict between two principles – utilitarianism and absolutism. Assuming that our moral intuitions may be mixed, he acknowledges that the dilemma he describes can be experienced not only by the devout absolutist but also by the utilitarian.³⁵ He focuses, however, primarily on the absolutist component of this dilemma.³⁶

Walzer argues that the issue of politically “dirty hands” is exclusively an absolutist’s dilemma, as utilitarianism cannot bring out the problem in its own terms. This is because, for the utilitarian, once the balance of utilities has been calculated, the moral prescription is definitive and there is nothing to feel bad, or dirty, about.³⁷ This is certainly the case for act-utilitarians, as implied by the popular examples of torturing the few in order to prevent suffering for many. If what morality requires is the simple comparison of the sum total of pleasure with the pain, there is nothing to feel guilty (or dirty) about when the calculation clearly indicates that the overall suffering can be reduced by torturing individual sentient beings in order to save many others from pain and death. Thus, they cannot suffer from “dirty hands”. As Lukes puts it: “The consequentialist simply asserts that what is morally required is that one always does ‘simply what has to be done’ in order to bring about the best outcome, all things considered. On such a view, the ideas of an un-canceled wrong and regret at committing it have no place and no justification.”³⁸

Contra Walzer and Lukes, I suggest that rule-utilitarians, and not only absolutists, can experience “dirty hands”, and thus that the “dirty hands” thesis is actually more widely applicable and illuminates a greater range of moral positions on issues such as torture than Walzer himself assumes. It is important to see how the problem of “dirty hands” plays out within rule-utilitarianism because rule-utilitarian considerations, even when unarticulated, play an important role in the public debate on torture. Furthermore, as Nagel points out, few of us are pure absolute deontologists, completely immune to utilitarian intuitions.³⁹

After explaining why an act-utilitarian who has acted in accordance with a successful set of calculations is free of any “dirty hands”,⁴⁰ Walzer continues to argue that the same is true of rule-utilitarians. It is true, Walzer admits, that, while act-utilitarians hold that “every political choice ought to be made solely in terms of its particular and immediate circumstances”,⁴¹ other forms of utilitarianism include moral rules. However, according to Walzer, utilitarian rules are no more than moral guidelines, summaries of previous calculations which ease our swift decision-making process in everyday cases. Such rules, according to Walzer, are merely convenient rules of thumb, which enable us to decide quickly and accurately in ordinary situations by simply referring to what was already found to be useful in the past, without having to make constant and repeated calculations. Perhaps such rules also have some general educational pedagogical purpose, but it is

primarily expedient, rather than imperative, to adhere to such rules. Their convenience is their only purpose “and so it cannot be the case that it is or even might be a crime to override them. Nor is it necessary to feel guilty when one does so.”⁴² If the rules are merely indications of greater utility based on previous calculations rather than moral prohibitions in any stricter sense, and if the calculated balance of utility is clearly different in the particular case, there can be no reason whatsoever to follow the (irrelevant) rule in an instance in which it clearly does not apply (that is, where greater happiness can be achieved by disregarding it). In fact it would be a mistake to do so and absurd to feel guilty about not doing so. But “this view” (that is, rule-utilitarianism), Walzer worries, “captures the reality of moral life no better than the last one” (that is, act-utilitarianism). In other words, it makes no sense of the problem of “dirty hands”.⁴³

Walzer assumes that the rules adhered to by rule-utilitarians are merely summaries of previous calculations. But such rules of thumb are actually typical of act-rather than rule-utilitarianism, while the latter contains rules with greater normative force, which derives from the usefulness of the rules themselves.⁴⁴ On an indirect Utilitarian account, a politician may find himself in a moral predicament not entirely dissimilar to the one experienced by the Kantian. In terms of Walzer’s example, the rule-utilitarian would be called upon to disregard a prohibition on torture in favor of the concrete utility to be gained by torturing the rebel in the individual case. But this would not merely be a breach of previous calculations, which indeed would not be problematic. The rule-utilitarian prohibition on torture would be based on the far weightier moral consideration specifying that such individual acts of torture are wrong, regardless of their immediate utility, because the general performance of acts of this class (in our case, torture) would plainly have a very bad effect on the general happiness.⁴⁵ This is indeed the standard form in which rule-utilitarianism claims to escape the more violent conflicts that break out between act-utilitarianism and our common moral intuitions. If the practice of torture is generally detrimental to the greater happiness, a rule-utilitarian is committed, perhaps almost as strongly as the absolutist, to refraining from it, regardless of its immediate effects. Were this not the case, then rule-utilitarianism would indeed simply collapse into act-utilitarianism, as it has at times been accused of doing, and there would be little difference between act- and rule-utilitarianism regarding “dirty hands” or otherwise.

If the general tendency of torture is, as it is not unreasonable to assume, detrimental to the general happiness, then a rule-utilitarian is committed to a rule with considerable substantial merit above and beyond the economy of swift decision-making.⁴⁶ If he decides, like Walzer’s honest politician, to have the rebel tortured, he is not merely breaking some convenient rule of thumb. By his own moral standards, he has breached a prohibition far weightier in nature, and can certainly be said to have dirtied his hands considerably by doing so.

Rule-Utilitarianism, Dirty Hands and Torture

The difference between act- and rule-utilitarianism manifests itself in the prohibition on torture. There is no shortage of hypothetical cases, and (arguably) also some concrete ones, in which act-utilitarians would unscrupulously prescribe the use of torture. Particularly in recent years, it has been suggested that the use of outright torture in the process of interrogating terrorist suspects and those associated with them can be highly expedient, and thus morally justifiable by act utilitarianism. Steven Lukes cites a case of torture from the mid-1990s in which Philippine authorities harshly tortured a terrorist into disclosing information that may have foiled plots to assassinate the Pope and to crash eleven commercial airliners carrying approximately four thousand passengers into the Pacific Ocean, as well as a plan to fly a private Cessna filled with explosives into CIA headquarters.⁴⁷ Similarly, the Israeli high court, rejecting torture on moral-absolutist grounds, nonetheless acknowledged that there had been cases in Israeli history where physical methods of interrogation had actually saved lives.⁴⁸

Notwithstanding this, as a matter of *policy* as opposed to any individual incident, torture has definite detrimental effects on any society's general happiness. It is unlikely that anyone could argue successfully, either historically or hypothetically, for the general utility of reintroducing torture as a rule into our criminal justice system, or even of enhancing its unfortunate use in combat situations. The practice of torture in particular, even in the specific cases of interrogating terrorist suspects, appears to be susceptible to a most dangerous slippery-slope effect. More than three decades ago, Shue pointed out: "There is considerable evidence of all torture's metastatic tendency" and warned of its allure for interrogators as the "ultimate shortcut."⁴⁹ Similarly, Waldron points to the "proven inability to keep torture under control, or the fatuousness of the suggestion made by professor Dershowitz and others that we can confine its application to exactly the cases in which it might be thought justified".⁵⁰

Many arguments against torture appear to run along similar lines. While it may at times be difficult, if not impossible, to resist the act-utilitarian logic behind some of the philosophical (and perhaps increasingly also real-world) examples in which torture is justified by weighing the suffering of one (presumably guilty) individual as against the lives of many potential victims, the overall balance of utilities is questioned when considerations of general policy come into play. The rule-utilitarian may well have strong moral reasons for opposing torture above and beyond any rule of thumb indicating its inexpediency in previous cases. He may even be called upon to abide as strictly to his utility-based rules as the absolutist adheres to his moral imperatives. It is in fact possible to make the accusation diametrically opposed to the one underlying Walzer's argument whereby the two forms of utilitarianism are ultimately similar. The opposite accusation, which asks whether rule utilitarianism ultimately collapses into some form of

deontological moral theory, or something very similar to it, may be more warranted⁵¹.

For the purposes at hand it is clearly unnecessary to resolve this critique of rule-utilitarianism. What is important is to see that a rule utilitarian can adhere to a moral prohibition on torture almost as strongly as an absolutist can, regardless of the expedience of torture in any concrete case. If, when placed in the shoes of Walzer's politician, he nonetheless proceeds to have the interrogated subject tortured in order to gain from the immediate utility of such an act, there is no reason to assume that his hands remain significantly cleaner than do those of his absolutist colleague. The problem of "dirty hands" presents itself with great force to the rule-utilitarian, whose overall moral reasoning against torture may actually reflect a wider range of common moral beliefs than do the categorical imperatives against torture espoused by his Kantian counterpart.

Many of us hold principled, deontological (or agent relative-based) opposition to torture, and yet also find it difficult to meet the challenge posed by the variety of familiar catastrophic examples. Nagel's point about our mixed intuitions is well taken.⁵² Few of us in liberal democracies, I think, are "ruthless moralists", as Steven Lukes puts it. Few are comfortable, as Kant claimed to have been, with the prospect of sacrificing the innocent rather than incurring a moral blemish. Fewer still, even among our civil libertarians, reject out of hand the torture option in the catastrophic case on strict deontological grounds.

Perhaps this is unfortunate. Either way, many also worry, like the rule-utilitarian, about the effect of a single act of torture (however justifiable on consequentialist grounds in the particular case) on our society in general.⁵³ We worry about the effects a single act of torture would have on our constitutional spirit and commitments,⁵⁴ about our civil rights tradition and our legal system,⁵⁵ about interrogators acquiring the habit of using short cuts, about slippery slopes and metastatic tendencies.⁵⁶ In short, many of us, politicians included, have partially rule-utilitarian concerns.

If I am correct in arguing that the rule-utilitarian way of thinking, and not only the assumption of absolute prohibitions, brings out the moral problem of "dirty hands", then the "dirty hands" thesis is even more attractive and applies to an even wider range of moral theories (which may be more popularly intuitive) than Walzer intended. The rule-utilitarian placed in Walzer's example will have sullied his hands by breaking a rule (and thus endangering the anti-torture policy it represents), which is itself based on his highest moral directive – namely, the maximization of utility. By preferring the immediate advantages of torture, he thereby threatens the very useful general policy and practice of refraining from torture in general, which contributed to overall human happiness (his ultimate moral concern). This will definitely leave dirt on his hands.

Finally, it is worth pointing out that there is one extreme point at which the absolutist politician and the rule utilitarian will probably part company. In a totally catastrophic situation in which the utility of the torture in question clearly outweighs any advantages

of adhering to the useful rules, the rule-utilitarian will indeed be justified in breaking the “never torture” rule. In such a case, I am presuming, the harm, in terms of general utility or happiness, caused to the general practice of refraining from torture will be outweighed by the particular large-scale utility to be gained by opting for torture in the individual situation. Shue presents such a situation when he surmises that “it cannot be denied that there are imaginable cases in which the harm that could be prevented by a rare instance of pure interrogational torture would be so enormous so as to outweigh the cruelty of the torture itself and possibly, the enormous potential harm that would result if what was intended to be a rare instance was actually the breaching of a dam which would lead to a torrent of torture”.⁵⁷

In this case, rule-utilitarianism will join with act-utilitarianism in wholeheartedly prescribing the action. There could hardly be rational cause to do otherwise since utility (rather than the rules themselves) is ultimately the primary normative force of rule-, as well as act-,utilitarianism. For the former, as opposed to the latter, the rules have substantive merit above and beyond the economy of swift decision-making which Walzer attributes to them. But they are ultimately justified only with reference to the principle of utility, and therefore can be outweighed by extreme immediate advantages.

Notwithstanding this last point, it is unclear even in this situation that the rule-utilitarian politician could walk away from his decision with clean hands even if (from a utilitarian point of view) he should have a clean conscience. His hands may be less dirty than they would be if looked at from an absolutist moral perspective, but even from a rule-utilitarian point of view his hands may be slightly tainted, for clearly he has paid a moral price for his choice. Unlike the act-utilitarian’s choice, which is clean and clear-cut, leaving no traces of cost, the rule-utilitarian has paid a moral price in terms of his own moral theory – namely, the harm to the very useful rule.

Torture Warrants and Dirty Hands⁵⁸

I am arguing that Walzer's thesis on "dirty hands" supplies the most illuminating perspective for contemplating contemporary investigative torture and that it does so from the widest range of moral theories. It offers a viewpoint which takes the academic hypotheticals beyond the narrow framework of repeatedly contrasting Kantians and utilitarians on this specific issue, and articulates more widely held moral intuitions than either strict Kantian principles or simple utilitarian considerations do. So far I have argued that it operates within a wider range of moral theories than has so far been assumed.

I have already pointed out that the popular and vivid examples pitting torture against catastrophe, which are commonly enlisted in order to justify torture on Consequentialist grounds, have also been solicited in order to present the totally different approach whereby torture is morally unjustifiable, but at the same time may, in certain circumstances, remain the inevitable course of political action. Walzer's own variant on the familiar theme explicitly makes this point.⁵⁹ In this section I will argue that Alan Dershowitz' controversial proposal that liberal democratic judicial systems ought to be officially authorized to issue "torture warrants" to low-level law enforcement officials represents the "dirty hands" approach to torture rather than any justification thereof. Understood as such, his widely publicized and extensively criticized approach emerges as more plausible and palatable than has thus far been acknowledged, though ultimately, I believe that it ought to be rejected.

In his *Shouting Fire: Civil Liberties in a Turbulent Age* Dershowitz asks: what if on September 11 law enforcement officials had "arrested terrorists boarding one of the planes and learned that other planes, then airborne, were heading towards unknown occupied buildings"?⁶⁰ And he has since proceeded to present his proposal that a system of judicial review ought to be set up, enabling and requiring those officials doing the torturing to obtain a "torture warrant" from the judiciary.⁶¹ Dershowitz' hypothetical has been widely misunderstood as, and criticized for, justifying torture on consequentialist grounds concerning the prevention of terrorism.⁶² In fact, Dershowitz no more than entertains the possibility that law enforcement officials, if they had been faced with this highly specific "ticking bomb" situation, might have had "an understandable incentive" to torture these terrorists.⁶³ In his recent "Tortured Reasoning", Dershowitz complains of having been misrepresented in a variety of popular, as well as academic, publications and accused of outright justifying - even prescribing - torture. One reviewer, he complains, went so far as to refer to him as "Torquemada Dershowitz".⁶⁴ Luckily for Dershowitz, he has himself as an advocate. He argues, quite convincingly, that he never intended, nor presented, any justification or moral permission for torture of any kind.⁶⁵ Though

he never says so, his “defense” – that is, his own explanation of his view – can be read as a variation on Michael Walzer’s notion of “dirty hands”, presented in a contemporary light and with reference to the specific debate over the use of torture in the course of interrogating terror suspects in a “ticking bomb” situation.

In “Tortured Reasoning” Dershowitz states that he is a civil libertarian, opposed to torture as a normative matter, and that he would like to see its use minimized.⁶⁶ In the highly specific case of a captured terrorist who refuses to divulge information deemed essential to prevent an avoidable act of mass terrorism, Dershowitz claims that he has at worst declined to take a definite position on the normative issue of whether he personally would approve of the use of non-lethal torture in such cases.⁶⁷ While his September 11 hypothetical has been taken by his critics to imply that torture is justified in such cases, Dershowitz is adamant that he has never explicitly condoned this practice and that he is actually opposed to it in principle.⁶⁸ As a matter of empirical fact, however, Dershowitz argues that liberal democracies confronting terrorism will inevitably resort to torture, at least in so-called “ticking bomb” situations. Whatever the meta-moral truth of the matter, it is evidently clear that liberal-democracies do not subscribe to the “overridingness” thesis of morality whereby moral considerations always trump all other. In this totally non-ideal moral situation, Dershowitz suggests, it is better that they torture overtly and under judicial review than incur the greater ills of covert, unrestricted torture far from public scrutiny and supervision. The latter is also Shue’s great concern when he cautions us to guarantee, even in ticking bomb situations, that “The torture will not be conducted in the basement of a small town jail in the provinces by local thugs popping pills...” and so on.⁶⁹ Regardless of whether one accepts Dershowitz’ empirical assumption that democracies will inevitably resort to torture under certain circumstances, and his normative view that regulating torture is better than condoning its covert use (and there may be room for doubt regarding both propositions), no justification for torture is offered nor required in order to sustain his proposal. For Dershowitz, torture is clearly an instance in which someone’s hands will get dirty. He suggests that a “lesser evil” is incurred when torture is performed within the framework of the rule of law, but the “lesser evil” argument is never presented as a justification of torture itself. When he put his proposal to Israel’s Landau Commission back in the late 1980s, he reports, “The response, especially of Israeli judges, was horror at the prospect that they – the robed embodiment of the rule of law – might have to dirty their hands by approving so barbaric a practice in advance and in specific cases”.⁷⁰

What then of Dershowitz’ alleged justification for torture in his September 11 hypothetical and others like it? In fact, the law-enforcement officials in Dershowitz’ 9-11

hypothetical are no more justified in torturing the terrorist than Walzer's politician is in torturing the rebel leader. Dershowitz explains that his argument, at its core, is not in favor of torture of any sort.⁷¹ He presents his own view as similar to that of former presidential candidate Alan Keyes, who, as cited by Dershowitz, "took the position that although torture might be *necessary* in a given situation, it could never be *right*".⁷² Neither Walzer nor Dershowitz justify torture. They are (as Dershowitz describes his own argument) engaged in a debate quite different from the old abstract one over whether torture can ever be justified.⁷³ Both Walzer and Dershowitz (albeit in their very different ways) are looking at the perspective of a state official confronted with a choice of torture which is at least politically necessary, inevitable, or in some sense even required, either in utilitarian terms – in order to save the many – or in terms of their special responsibility for their public. Dershowitz seeks to minimize what he clearly takes to be an unquestionably evil practice and its ill effect by placing the moral responsibility for its inevitable use in the hands of the judiciary. Walzer asks about the soul and fate of a politician who is politically required to commit a moral wrong. Neither justifies the practices they debate; both believe those responsible for them are sullied by their deeds.

Viewed in light of the notion of dirty hands, Dershowitz' highly debated "torture warrant" suggestion deserves further reflection. As a "dirty hands" argument, it is coherently raised against the background moral view that torture is wrong. The argument assumes that this wrong will be perpetrated by liberal democracies experiencing terrorist threats and proceeds to question whether, from a practical legal viewpoint, it is better for the judiciary to officially and publicly regulate the empirically inevitable moral wrong or for it to go on covertly and unrestricted. In a related question, he asks whether the judiciary should be asked to dirty its own hands with the decision, or whether we should leave the filth to the interrogators themselves. I believe Dershowitz' proposal ought ultimately to be rejected. Israeli Judges were rightly horrified at the prospect of dirtying their hands and contaminating the Israeli judicial system and rule of law with such a barbarous and dangerous a practice as torture.⁷⁴ Nevertheless, whatever the merits or demerits of the "torture warrant" proposal, it ought to be considered accurately as a "dirty hands" argument, which introduces a different perspective for considering contemporary moral and political debates.

It is not incoherent to oppose a practice, even to regard it as utterly evil and unjustifiable, while at the same time holding that a public official could, in certain highly restrained circumstances, be excused, though never justified, in resorting to it. Both Walzer and Dershowitz clearly express this view.⁷⁵ In the following section I turn to the distinction between justifications and excuses.

Justifications and Excuses

Thus far I have suggested that the notion of "dirty hands" may be the appropriate perspective from which to address the modern debate over investigative torture, and that it may be well suited to account for the most widely held liberal intuitions on this issue. It assumes that torture is wrong (based on either deontological or rule-utilitarian reasoning) as well as illegal, and that, if it occurs, for whatever reason and under whatever circumstances, its perpetrator cannot walk away from his deeds with a clean pair of hands and a clear conscience. Catastrophic scenarios, whether real or hypothetical, express the classic problem of "dirty hands", which in turn supplies an alternative way of considering hard cases outside the classic Kantian versus Utilitarian debate. When considering these examples from the viewpoint of the decision maker or his public, they ought never to be taken as a general moral or legal justification for torture under any circumstances, but rather as an illustration of the paradoxical case in which a state official may be required, in the sense that his alternative is unacceptably disastrous, to commit a horrendous wrong, as well as a criminal offense.

In Shue's variant on the familiar theme of catastrophic hypothesis, torture is contemplated in order to defuse a nuclear threat to Paris. Shue found it difficult to "deny the permissibility of torture in a case *just like this* one. To allow the destruction of much of a great city and many of its people would be almost as wicked as purposely to destroy it."⁷⁶ In Shue's example, as in most, the potential victim of torture is a terrorist himself. However, on this logic, one may also find it difficult to deny, as Michael Moore explicitly does, the permissibility of torturing an innocent (imagine a baby from the Bin Laden family) for purposes of extracting life-saving information from the victim's reluctant relative in order prevent absolute catastrophe for the many.⁷⁷ Can these examples justify the use of torture even against the innocent? Must we ultimately succumb to Consequentialism or admit that absolute imperatives yield philosophical conclusions that are wholly detached from the real world as well as counter-intuitive in extreme cases? I believe the answer to both questions is negative.

Shue supplies us with the first piece of the correct answer. After expressing his inability to deny the permissibility of torture in outstandingly threatening situations, he comments that "there is a saying in jurisprudence that hard cases make bad law, and there might well be one in philosophy that artificial cases make bad ethics."⁷⁸ At the very least, hypothetical cases are precarious bases for general policy decisions. An analogy may help here. Consider the familiar example of killing a person to obtain his organs in order to save the lives of several other people, or even removing them for

that purpose against his will without killing him.⁷⁹ Most of us, for a variety of reasons, hold to an absolute ban on such life-saving measures, and such opposition is reflected in law. But what if we need to kidnap an innocent bystander and force him to donate an organ necessary to save a terrorist informer from dying before he supplies us with his life-saving information that could prevent a nuclear bomb on Paris?⁸⁰ Clearly, we would not attempt to deduce any statement of policy on organ donation from this convoluted hypothetical. First, there is Shue's well-taken point about hard or artificial cases making bad ethics and law. Far-fetched examples do not serve well towards forming general policy decisions. Second, it is questionable whether the hypothetical serves to *justify* the kidnapping and dissection, even under the specifics of the examples. This will depend of course on the background moral theory we adhere to. It is conceivably plausible to view the decision maker in such an instance as, at most, retroactively excusable, though less than morally (and legally) justified, in carrying out the life-saving action.

Nagel puts this better than I can when he describes the conflict between absolute moral prohibitions and consequential considerations. "Even if certain types of dirty tactics become acceptable when the stakes are high enough, the most serious of the prohibited acts, like murder and torture, are not just supposed to require unusually strong justification. They are supposed *never* to be done, because no quantity of resulting benefit is thought capable of *justifying* such treatment of a person."⁸¹ By its very definition, absolutism supplies moral requirements which no advantage can justify one in abandoning.⁸² If there are such moral restrictions based, for instance, on our duties towards other persons, (Nagel suggests that many of us are drawn at least intuitively to believing that there are such moral restraints), the prohibition on torture is a very likely candidate for such absolute prohibition. However, Nagel, like Walzer and indeed anyone aside from Kant's most devout followers, acknowledges that, "there may be circumstances so extreme that they render an absolutist position untenable".⁸³ One may find then that one has no choice but to do something terrible. Nevertheless, even in such cases absolutism retains its force in that one cannot claim *justification* for the violation. It does not become *all right*.⁸⁴

The lesson to be learned from the hypotheticals need not be the lesson of justification that they are usually enlisted to teach. The same hypotheticals may do better at expressing our intuitions and approximating the more complex moral truth of the matter if they are read as paradoxically *requiring* the commission of an unmistakable moral wrong, which leaves its perpetrator guilty of making the necessary decision. Perhaps some will agree with Bernard Williams, that morality simply runs out at this point, that is, that it cannot supply us with guidelines for making quite such excruciating choices.⁸⁵ According to

its precepts, both alternatives are simply wrong. Others reject this view, arguing that morality is of the utmost importance precisely in such hard cases, what Nagel dubs “a moral blind alley”, and that, if it is to be taken seriously, it must have something to say about them.⁸⁶

The hypotheticals take the viewpoint of the decision maker – the state leader, interrogator or judge – rather than the bird’s eye view of pure moral theory. They supply a perspective on the agent himself, rather than the act, and supply him with an excuse, rather than a justification, for his action. Walzer himself raises this distinction, though somewhat in passing, in the course of criticizing Utilitarianism rather than with reference to torture specifically. Citing Austin, Walzer reminds us that “an excuse is typically an admission of fault; a justification is typically a denial of fault and an assertion of innocence”.⁸⁷ And Walzer adds, “When rules are overridden, we do not act as if they have been set aside, canceled, or annulled. They still stand and have this much effect at least: that we know we have done something wrong even if what we have done was also the best thing to do on the whole in the circumstances.”⁸⁸ Dershowitz explicitly makes precisely this distinction between justifying unlawful conduct and excusing it, in his aforementioned *Shouting Fire*.⁸⁹ Moore refers to the same distinction, when explaining the legal defense of necessity: “a justification shows that *prima facie* wrongful and unlawful conduct is not wrongful or unlawful at all ... By contrast, an excuse does not take away our *prima facie* judgment that an act is wrongful and unlawful; rather it shows that the actor was not culpable in his doing of an admittedly wrongful and unlawful act”.⁹⁰

Can a plea of necessity be invoked as an excuse, rather than a justification, for torture under dire circumstances? Both Moore and Dershowitz argue that it cannot.⁹¹ Necessity is commonly regarded as a justification defense rather than an excuse, though admittedly the distinction between justifications and excuses is rough and controversial.⁹² Moore argues that necessity is in fact primarily a moral justification rather than an excuse. It was certainly employed as such by Israel’s Landau Commission’s report on torture, which Moore addresses. The report adopted the legal plea of necessity as a defense for Israel’s security forces’ repeated use of physical force in the process of interrogating Arab terrorist suspects. The Landau report clearly viewed the necessity of extracting vital life-saving information as a *justification* for the use of physical force in the investigating chamber. All things considered, they concluded, interrogators were justified, both legally and morally, in resorting to such measures in life-threatening situations.⁹³ This report was overturned, over a decade later, by Israel’s high court in favor of upholding an absolute ban on any form of torture.⁹⁴ If torture is absolutely ruled out as a justifiable measure of interrogation, as I have assumed throughout that it should be, can the extreme examples

nonetheless point to an excuse, rather than a justification, for its use in absolutely extraordinary situations such as those invoked in the philosopher hypothesis? And, if so, can this excuse be regarded as “necessity”?

Arguing against Israel’s original ruling, Dershowitz, as does Moore, opposes such a plea. For one thing, Dershowitz points out, necessity clauses are obviously a defense of the unusual, not of a systematic policy such as the one carried out by Israel’s security forces in the course of a prolonged struggle with terrorism. The usual cases are defined under specific laws. A plea of necessity enters in only in some rare, unforeseeable case.⁹⁵ “The necessity defense is, by its very nature, an *emergency* measure; it is not suited to situations which recur over long periods of time.”⁹⁶ Leaving aside the specific Israeli case and law, Dershowitz raises a more general point about the nature of necessity arguments, which renders it, at least literally, inapplicable to the very agents whose viewpoint we are here considering, that is, state officials and officers of the law. As Dershowitz explains:

*The Defense of necessity is essentially a “state of nature” plea. If a person finds himself in an impossible position requiring him to choose between violating the law and preventing a greater harm, such as the taking of innocent life – and he has no time to seek recourse from the proper authorities, society authorizes him to act as if there were no law. In other words, since society has broken its part of the social contract with him, namely to protect him, it follows that he is not obligated to keep his part of the social contract, namely to obey the law.*⁹⁷

Agents of the state, representatives of the law itself, cannot therefore employ such a defense. They cannot, strictly speaking, argue that they acted out of necessity in order to save innocent lives in an emergency situation in which there was no time for the law to intervene. This is not merely a point of law. It derives from the philosophical basis of this plea. The agents whose decisions we are scrutinizing cannot claim to have found themselves in a ‘state of nature’, since they are themselves the representatives of the state. This is certainly true as regards a recurring policy of torture in order to extract life-saving information. “The point of the necessity defense is to provide a kind of ‘interstitial legislation’, to fill in ‘lacunae’ left by the legislative and judicial incompleteness. It is not a substitute legislative or judicial process for weighing policy options by state agencies faced with long term systematic problems.”⁹⁸ Dershowitz’ point about necessity functioning essentially as a “state of nature” plea is well taken even if the situation under which the interrogator finds himself is rare and unusual rather than a recurring situation.

To this, one may retort that this “state of nature” objection is purely formal.⁹⁹ One can easily envision a situation, like the many described above, in which the politician, state

leader, interrogator or judge is called upon to make a swift decision regarding torture in the face of an immediately pending large-scale terrorist catastrophe. In such a case, it has been put to me, the type of agent we are considering is placed in a situation which is, if not literally, at least morally analogous to the emergency situations in which necessity comes into play.¹⁰⁰

The legal concept of duress may be more appropriate here, by analogy, than necessity. As we have seen, necessity is often thought of as a "lesser evil" type of justification for otherwise criminal conduct, rendering the agent innocent. Having chosen the lesser of two evils he will have done the right thing. Duress, on the other hand, is commonly seen as an excuse for breaking the law or doing the wrong thing.¹⁰¹ Hence, duress may be more analogous (though admittedly not tantamount) to the use of investigative torture in extremely life-threatening situations. In face of an imminent large-scale threat (say, the morning of 9/11) ordinary, legal, interrogation techniques may not suffice in order to extract the urgent life-saving information. Could a state leader, a politician (the minister of defense), an individual interrogator or his supervisor, be regarded as acting under duress, if not out of necessity, in the legal sense?

Whether or not the answer to this question is positive in the strictly legal sense, I suggest that in such hard cases officials might be excused retrospectively for torturing under life-threatening circumstances, even against a background moral theory that totally prohibits torture and within a system of positive laws that totally exclude the use of torture. Furthermore, I argue that legally excusing such officials retrospectively in very restrictive catastrophic situations is morally preferable (truer and more intuitive, as well as morally beneficial as a legal policy) to either justifying their actions in advance or to denying that moral prohibitions can ever be breached, even under cataclysmic situations.¹⁰²

Excuses and Acoustics

When contemplating the desirable legal attitude towards torture, Moore suggests that we consider the option described by Meir Dan Cohen as “acoustic separation”.¹⁰³ Dan-Cohen distinguishes between two types of legal norms: conduct rules – aimed at the general public – and decision rules – aimed at the judiciary.¹⁰⁴ In some imaginary world there might be a total acoustic divorce between the behavior rules aimed at the public and intended to gear them toward some desirable behavior (in our case, never torture), and decision rules, which are intended only for the ears of officials, vested with the authority to justify, pardon or excuse the breach of a conduct rule under certain circumstances.¹⁰⁵ The defenses of necessity and duress which concern us here are decision rules in that they are not intended to shape the behavior of the general public (in our case including the security services) who, in an ideal world, would not even be aware of their existence.¹⁰⁶ The policy advantage of such a separation would be to enable the legal system to advance a desirable mode of conduct (in our case discouraging torture) by requiring this behavior exclusively in a criminal prohibition. Conduct would then be guided exclusively by the relevant criminal prescription.¹⁰⁷ However, the conflicting value of fairness and compassion for individuals in unusual situations who break the law in cases where anyone of us, even the judges themselves, would have done the same, is advanced by a decision rule aimed only at state officials.

In the case of torture, unlike purely personal instances of duress, not only fairness and compassion are at stake. We may actually want our security services to dirty their hands by breaching the prohibition on torture in situations analogous to necessity or extreme duress, for it is the general public not the interrogator himself, who are endangered.¹⁰⁸ As Walzer comments, politicians act on our behalf and in our name (or at least they claim to).¹⁰⁹ What we do not want, either in the ordinary cases of duress or in our analogous case of torture, is for this tactic to be employed too lightly. We know that, when attempting to avert an evil aimed at themselves, people naturally tend to err in favour of themselves, probably also of their compatriots, often exaggerating the danger or downplaying the evil involved in violating the relevant prohibition.¹¹⁰

We know that when push comes to shove they will preserve themselves even at the expense of committing murder or torture. We do not want them to hear that they may be pardoned for doing so, because such knowledge will encourage them to act too swiftly in their own interest or those of their countrymen at intolerable expense to others. We are willing to excuse them for preferring their own lives to those of others only when there was genuinely no alternative way for them to secure their survival. We ensure that they do not take the easy course in their favor, the ultimate short cut, by prohibiting it entirely and seeing to it that they do not hear any alternative. Judges know that defendants acted genuinely out of duress precisely where they were prepared to breach a steadfast rule at

the expense of placing themselves in grave personal risk of punishment.¹¹¹

Of course, as Dan-Cohen as well as Moore readily acknowledge, judges are not separated from the rest of the public (interrogators included) in two acoustically separated chambers, and thus everybody hears everything.¹¹² Consequently, any such acoustic divorce can be maintained and benefited from only if, as Moore suggests, pardons or clemencies could be given without much public attention.¹¹³ More likely, and more desirably to my mind, some acoustic separation between a hard and fast conduct rule prohibiting torture and a decision rule permitting clemency for torturers *in extremis* can be maintained if excuses are employed very rarely indeed.

Recall that Moore actually justifies the torture of terrorists and even of innocents in extreme situations in terms of his “threshold deontology”.¹¹⁴ He then argues that acoustic separation will enable the legislator to achieve the desirable target, which in his view is: to torture only terrorists when necessary, and innocents when pending catastrophe reaches a certain threshold – but not otherwise.¹¹⁵ I have suggested, to the contrary, that torture is never justified, but that when dealing with terrorists specifically, and under very rare and extreme life-threatening circumstances, particular agents of the state may be retroactively excused or pardoned for dirtying their hands with the wrong that is torture. Acoustic separation is then morally desirable in order to uphold an absolute legal ban on torture, and yet to leave a small loophole for those who dirty their hands in our name and for our sake in those rare instances in which the alternative course of action is truly cataclysmic.¹¹⁶ The agent in such cases will be guilty of doing what is unquestionably a moral wrong, but nonetheless one which he will have committed on our behalf and which we may even want him to commit. We recognize this act as wrong, and aspire to minimize its occurrence. Hence the strict conduct rule prohibiting it. We do not believe it to be justified under any circumstances; we do not want it ever to be implemented within our society. But just in case the unbearable should in fact occur, we whisper another rule, a decision rule, to the judges, in the name of fairness, authorizing and asking them to legally excuse the agent who tortured on our behalf.

Two final points must be emphasized regarding this plea for excuse as opposed to any justification of torture. First, justification is a matter of policy. As a matter of policy, we ought not to tolerate torture within liberal democracies under any general circumstances. Policymaking has both an instructive and a pedagogic function, and the strict liberal prohibition on torture ought to be upheld at this level within all civilized societies whatever the threats they face, from terrorists or otherwise. Interrogators as well as all other state officials must be advised that torture is simply out of the question and that its use, at any level, will be treated harshly. This is where I part company with Dershowitz and his suggested policy of torture warrants. Only if a genuine situation analogous to immediate necessity or duress should arise, under which no alternative

to torture is available other than enduring a cataclysmic loss of innocent life, will we want to excuse the individual official for making a truly excruciating decision to resort to torture in order to save our lives. On a purely moral level, as well as legally, he will never be entirely vindicated for his action; he will have dirtied his hands with the blood of his interrogated suspect. But we will excuse him for doing what we would do in his uncomfortable shoes. For he will have dirtied his hands (as Walzer explains) for us and in our name.

This leads me to the second crucial point about excuses versus justifications. Excuses operate retroactively. As opposed to justifications and policy considerations, they are essentially backward-looking. They supply an after-the-fact defense for breaking a valid moral rule rather than a license to violate it.¹¹⁷ This point is both moral and practical. From a moral point of view, it is important to see that the circumstances do not make the torture a rightful action, as the utilitarian or soft deontologist would have us believe.¹¹⁸ From a practical point of view, an agent facing such a decision will have to consider not only the risk of punishment but also the need to explain and excuse his immoral and unlawful conduct if he is to avoid punishment. This places a heavy burden on the individual decision maker, but so it should. Torture is wrong and our primary commitment ought to be to its eradication rather than to excusing its abhorrent use. We do not require an interrogator, or any other official, to delve into moral theory, balance evils or resolve moral dilemmas. He is not trained in ethical theory, nor is he authorized to make such decisions. The law should tell him that torture is absolutely wrong, and he must not ponder this issue any further. He ought to be legally deterred from considering the various options and weighing moral considerations. The possibility of a retroactive excuse exists only in a rare and extreme situation in which any reasonable person would have virtually no choice but to opt for torture.

Crime and Punishment

To sum up: I assumed throughout that torture is wrong both on deontological and, for the most part, on rule-utilitarian grounds, and suggested that even in the specific case of dangerous terrorists, it can at most be retroactively excused, rather than justified, in the face of unmistakable extreme circumstances analogous to necessity or duress. I argued that even in such cases the decision maker is not morally vindicated for his action, but merely legally exempt from the full repercussions of breaking the moral and legal rules. The most appropriate way of viewing this complicated situation, I suggested following Michael Walzer, is as a case of political “dirty hands”. What then, practically speaking, is to become of the agent – the interrogator, leader, politician or judge – who dirtied his hands with this life-saving decision? When should he be excused, and to what extent should he be immune from punishment?

Walzer argues that a politician’s “dirty hands” are not washed clean by the successful consequences of his deeds, as Machiavelli is often understood to have believed.¹¹⁹ Nor, according to Walzer, is it sufficient for him to feel guilty for his actions, as Nielson argues.¹²⁰ Walzer believes that some practical measure of punishment ought to be implemented by the state, or public, even if this means paradoxically that we are in effect punishing a state official for doing what, all things considered, he ought to have done, or at least what we wanted him to do. Furthermore (as if that irony were not enough) Walzer suggests that in doing so we in fact dirty our own hands, and in turn will have to find our own way of paying the price.

Walzer does not take any particular view of punishment, and it is clear that his imagery of an executioner is purely metaphorical.¹²¹ He has in mind some course of political repercussion with the educational intent of deterring immoral deeds in politics. Perhaps we can reduce, though we cannot eliminate, dirty politics by denying the greatest power and glory to those with particularly “dirty hands”.¹²² He also believes that a politician’s own willingness to pay, to do penance for his action, is the only indication he can offer us of his ultimate goodness, despite his “dirty hands”. In fact, Walzer tells us, we know a moral politician (or other state official) only by his “dirty hands”. “If he were a moral man and nothing else, his hands would not be dirty; if he were a politician and nothing else, he would pretend that they were clean.”¹²³

Let us set aside the question of the agent’s real-world success and assume that our politician or interrogator acted in good faith, with utmost caution, and indeed opted for torture only when the only alternative was catastrophe. Whether or not he succeeded in preventing the disaster by extracting the information in time will be largely affected by reasons other than his own actions. Machiavelli is notorious for pointing out that political success is based on results and consequences rather than intentions or moral deeds.¹²⁴ A moral consequentialist may incorporate the actual results, not only the foreseeable ones,

into their ethical calculations. I address the agent who acted as we undoubtedly would, and would want him to, in the very destructive “ticking bomb” scenario, regardless of whether he actually succeeded in preventing the catastrophe. I have already argued that in this very specific case such an agent may be excused as acting under duress, or something very closely analogous to it.

Unlike Walzer, I find the idea of punishment in such cases, whatever its educational value, totally counter-intuitive. In such a truly hard case, where there is no doubt that the agent acted in good faith and with the utmost caution, with risk to his own liberty and career, external punishment is not only unjustifiable (thus rendering our own hands ironically dirty, as Walzer believes) but also inexcusable. Unlike the official who can be excused for committing his crime, any subsequent punishment on our part strikes me as analogous to the indefensible case of punishing the innocent (even if our decision maker can paradoxically be described as an innocent criminal, or as excusably guilty). Punishing him for what we ourselves would have wanted him to do is no longer an irony or a paradox; it is simply wrong.

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Footnotes

- ¹ Henry Shue, "Torture" *Philosophy and Public Affairs*, Vol. 7, no. 2, 1978, 124-143, 125-126. Michael Ignatieff, *The Lesser Evil - Political Ethics in an Age of Terror*, Edinburgh University press, Edinburgh, and Princeton University Press, Princeton, New Jersey, 2004, Chapter 5, p. 137.
- ² Shue, 129.
- ³ David Sussman, "What's Wrong With Torture?" *Philosophy and Public Affairs*, Vol. 33 (1), 2005, pp. 1-33, 13-14.
- ⁴ Sussman, 4.
- ⁵ Ignatieff, *The Lesser Evil*, 143.
- ⁶ Cf: John H. Langbein, "The Legal History of Torture", in Sanford Levinson (ed.) *Torture - A Collection* (Oxford and New-York: Oxford University Press, 2004), Chapter 5, 93. For criticism of the pro-torture arguments voiced by lawyers and officials of the Bush Administration, see Jeremy Waldron, "Torture and Positive Law", 105 *Columbia Law Review* (2005), 1715, Sections I-II, pp. 1688-1618. See also Steven Lukes, "Liberal Democratic Torture", *British Journal of Political Science*, Vol. 36, pp. 1-16, 5-9.
- ⁷ Jean Bethke Elshtain, "Reflection on the Problem of 'Dirty Hands'", in Sanford Levinson (ed.) *Torture - A Collection* (Oxford and New-York: Oxford University Press, 2004), 77-89, 78.
- ⁸ Henry Shue, "Torture", 141; Alan Dershowitz, *Shouting Fire: Civil Liberties in a Turbulent Age* (New York: Little, Brown, 2002), 477. Some justifications are not primarily utilitarian but argue that consequences come in to play a secondary role, at least at some cataclysmic point. See, for example, Michael Moore's, "soft deontology" in Michael Moore, "Torture and the Balance of Evils", *Israel Law Review*, Vol. 23, Nos. 2-3 (1989), 280-344. and: Kai Nielson, "There is No Dilemma of 'Dirty Hands'" in Paul Rynard and David P. Shugarman, (eds.) *Cruelty and Deception - The Controversy Over Dirty Hands in Politics*, (Broadview Press, 2000), Chapter 8.
- ⁹ I do so elsewhere...
- ¹⁰ Waldron, "Torture and Positive Law" (2005), 1715.
- ¹¹ There is, as I say at the outset, no shortage of liberal scholars who argue against torture. The issue to be unraveled here is of a different kind, and it presupposes, rather than argues for, a moral prohibition on torture. It addresses situations in which upholding what we take to be an absolute moral wrong bears an unbearable price in terms of innocent human life.
- ¹² Michael Walzer, "Political Action: The Problem of Dirty Hands", *Philosophy and Public Affairs*, Vol. 2(2) (1973), 160-180, 167, reprinted in Sanford Levinson (ed.) *Torture - A Collection* (Oxford and New-York: Oxford University Press, 2004), 61-76, 64-5. References are to this last reprinted version.
- ¹³ Lukes, "Democratic Torture", 2.

- ¹⁴ Walzer, *ibid*, "Political Action: The Problem of Dirty Hands", *Philosophy and Public Affairs*, Vol. 2(2) (1973), 160-180, 167, reprinted in Sanford Levinson (ed.) *Torture - A Collection* (Oxford and New-York: Oxford University Press, 2004), 61-76, 64-5.
- ¹⁵ Walzer, "Dirty Hands", in Levinson, *Torture*, *ibid*, 63.
- ¹⁶ Kai Nielson, "There is no Dilemma of Dirty Hands", in Paul Rynard and David P. Shugarman, (eds.) *Cruelty and Deception – The Controversy Over Dirty Hands in Politics*, (Broadview Press, 2000), Chapter 8, pp. 139-155.
- ¹⁷ Nielson, 140-141. For a specific discussion of torture within a 'lesser evil theory', see: Michael Ignatieff, *The Lesser Evil - Political Ethics in an Age of Terror*, 135-144. It is interesting to note that Ignatieff, who dedicates an entire volume to his theory of "the lesser evil", resists justifying outright torture on these grounds.
- ¹⁸ Nielson 143-145. At various points I discuss Michael Moore's "threshold deontology" alongside his view on torture, which is also a form of "soft deontology". See Moore, "Torture and the Balance of Evils".
- ¹⁹ Nielson 150.
- ²⁰ Coady discusses this approach toward exemptions from profound moral obligations in C.A.J Coady, "Terrorism, Morality and Supreme Emergency" in Igor Primoratz, *Terrorism – The Philosophical Issues* (Palgrave, Macmillan 2004), 80-96, 83.
- ²¹ Nielson, 152.
- ²² Nielson 151-152.
- ²³ Howard J. Curzer, "Admirable Immorality, Dirty Hands, Ticking Bombs, and Torturing Innocents", *The Southern Journal of Philosophy* (2006) Vol. XLIV, 31-56, 46.
- ²⁴ "Perhaps we tend to associate dirty hands with politics because in political life the good to be attained tends to be framed in general terms and the wrongs committed highly specific: Spreading freedom around the world, social justice, the Defense of the Realm, the Cause of the Revolution, The Glory of the Republic..."Lukes, 3.
- ²⁵ Walzer, 69-70.
- ²⁶ Curzer, 46.
- ²⁷ *Ibid*.
- ²⁸ Thomas Nagel, "War and Massacre", *Philosophy and Public Affairs*, Vol. 1 (2) (Winter 1972), pp. 123-144, 143.
- ²⁹ Nagel, *ibid*, p. 124-125.
- ³⁰ Nagel, 125-126, 129, 136-137, see esp. 143. For his reference to torture see pp. 124, 137.
- ³¹ Nagel, 143.
- ³² Walzer on Machiaveli, "Political Action", 69.
- ³³ Curzer, esp. 31-32, 47-49.

- ³⁴ Curzer, 48-49.
- ³⁵ Nagel, 143.
- ³⁶ Nagel, 125.
- ³⁷ Walzer, *ibid*, 66.
- ³⁸ Lukes, 5. See also: Walzer, 66-67. The Act utilitarian may of course have psychological inhibitions about actions such as murder or torture, deriving from social conditioning or simple queasiness, but these cannot be justified in terms of his own moral theory, unless the feeling of guilt itself enhances utility.
- ³⁹ Nagel, 124.
- ⁴⁰ Walzer 66.
- ⁴¹ Walzer, 66.
- ⁴² Walzer, 67.
- ⁴³ Walzer, 67
- ⁴⁴ See: J.L. Mackie, J.L. *Ethics - Inventing Right and Wrong*, (Penguin Press, London, 1990). See also: Coady, "Terrorism Morality and Supreme Emergency", 82.
- ⁴⁵ Cf: Mackie, 137.
- ⁴⁶ Mackie, 136.
- ⁴⁷ Lukes, 12, citing Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven, Conn.: Yale University Press, 2002), 137. Of course it could also be argued that the *Washington Post* may not have reported the facts objectively, and that one case over the past decade, cited repeatedly, hardly proves the scenario typical or the means employed efficient.
- ⁴⁸ Israel Supreme Court Judgment on the interrogation methods Applied by the GSS, September 1999, Statement of court president A. Barak, http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.HTM (accessed January 31, 2007). Also cited by Ignatieff, *The Lesser Evil*, 140.
- ⁴⁹ Henry Shue, "Torture" *Philosophy and Public Affairs*, 124-143, 141.
- ⁵⁰ Waldron, "Torture and Positive Law", 1749.
- ⁵¹ E.g. Coady, "Terrorism, Morality and Supreme Emergency", 82, believes that the indirect utilitarian is ultimately for most, if not all, practical purposes, a bedfellow of the deontologist. Coady, "Terrorism, Morality and Supreme Emergency, 82.
- ⁵² Nagel, 124-128.
- ⁵³ This is an effect the act-utilitarian can also consider.
- ⁵⁴ Ignatieff, *The Lesser Evil*, 18, 143.
- ⁵⁵ Waldron, "Security and Liberty: The Image of Balance", *Journal of Political Philosophy*, Vol. 11, (2003) 191-210; Waldron, "Torture and Positive Law."

⁵⁶ Shue, 141.

⁵⁷ Shue, 141.

⁵⁸ I am extremely grateful to Alan Dershowitz for some important clarifications regarding his proposal, and in particular for very useful critical comments on a previous version of this paper. I truly regret any possible inaccuracy in my previous presentation of his view on torture. I believe it is clear thorough that I do not wish to join those who misinterpret Dershowitz as justifying torture under any conditions.

⁵⁹ Walzer, 65.

⁶⁰ Alan Dershowitz, *Shouting Fire: Civil Liberties in a Turbulent Age* (New York: Little, Brown, 2002), 477.

⁶¹ Alan Dershowitz, *Why Terrorism Works: Understanding the threat, Responding to the Challenge* (New Haven, Conn.: Yale University Press, 2002), 248.

⁶² E.g.: Waldron, "Security & Liberty", 206. Waldron, "Torture and Positive Law", 1713-1718, esp. 1714 with reference to Dershowitz, *Why Terrorism Works*, 143-6. See also: Elaine Scary, "Five Errors in the Reasoning of Alan Dershowitz" in Levinson (ed.) *Torture*, Chap. 15, 284.

⁶³ Dershowitz, *Shouting Fire*, p. 477.

⁶⁴ Dershowitz, "Tortured Reasoning", in Levinson (ed.) *Torture*, 265.

⁶⁵ Dershowitz, "Tortured Reasoning".

⁶⁶ Dershowitz, "Tortured Reasoning", 257, 258, 266, 274.

⁶⁷ Dershowitz, "Tortured Reasoning", 264.

⁶⁸ Dershowitz, "Tortured Reasoning", throughout.

⁶⁹ Shue, "Torture", *Philosophy and Public Affairs*, 142, and in Levinson, *Torture*, 58.

⁷⁰ Dershowitz, "Tortured Reasoning", 259.

⁷¹ See: Dershowitz, "Tortured Reasoning", 275.

⁷² Dershowitz, "Torture reasoning", 272.

⁷³ Dershowitz, "Tortured Reasoning", 266. Or perhaps Dershowitz, Keyes and Walzer are debating torture not only within an imperfect world and in a non-optimal moral situation, but also in the framework of a totally non-ideal type of moral theory.

⁷⁴ For all the good reasons to uphold an absolute legal ban on torture see: Waldron, "Torture and Positive law". For Waldron's critique of Dershowitz and torture warrants, see pp. 1713-1717.

⁷⁵ See: Dershowitz, *Shouting Fire*, p. 475. And Walzer, p. 67.

⁷⁶ Shue, 141.

⁷⁷ Michael Moore, "Torture and the Balance of Evils", 328: "It just isn't true that one should allow a nuclear war rather than killing or torturing an innocent person."

⁷⁸ Shue 141.

⁷⁹ Moore 288.

- ⁸⁰ Francis Kamm uses a more specific analogy in order to defend the torture of guilty and knowledgeable terrorists. "Suppose A deliberately takes B's crucial organs. A is captured and is no longer a threat. However, the only way to save B is to transplant all of A's organs into B. I think doing so is permissible". F.M. Kamm, "Failure of Just War Theory: Terror, Harm and Justice", *Ethics*, Vol. 114 (4) July 2004, pp. 650, 659.
- ⁸¹ Nagel, 142-143.
- ⁸² Nagel, 136.
- ⁸³ Nagel, 136.
- ⁸⁴ Nagel, 136-7.
- ⁸⁵ J. Smart & B. Williams, *Utilitarianism: For and Against* (1973), 92.
- ⁸⁶ E.g.: Thomas Nagel, "War and Massacre" (1972) 1(2) *Philosophy and Public Affairs*, 123-144, see esp. 143; reprinted in *Consequentialism and its Critics* (S. Scheffler ed. 1988), 57; Elizabeth Anscombe, "Modern Moral Philosophy", 33 *Philosophy* (1958), 17. See also Michael Moore, who discusses these various views with regard to torture and rejects Williams stand, in Moore, "Torture, The Balance of Evils", 337-8.
- ⁸⁷ Walzer, 67, quoting J.L. Austin, "A Plea for Excuses" in *Philosophical Papers*, J. O. Urmson and G.J. Warnock (eds.) (Oxford: Oxford University Press, 1961), 123-152.
- ⁸⁸ Walzer, *ibid*, 68.
- ⁸⁹ Dershowitz, *Shouting Fire*, p. 475.
- ⁹⁰ Moore, 284.
- ⁹¹ Moore, *ibid*, 283-286, where he raises a variety of arguments against employing the necessity argument as a defense of torture; Alan M. Dershowitz, "Is it Necessary to Apply 'Physical Pressure' to Terrorists – And to Lie About It", *Israel Law Review*, Vol. 23, Nos. 2-3 (1989), 193-200, 197.
- ⁹² See e.g. George Fletcher, *Rethinking Criminal Law* (Boston, 1978), 759, 762, 799-800, 810-811.
- ⁹³ Moore 282. For the report itself see: The Landau Commission Report, 23 *Israel Law Review* (1989), 216-279.
- ⁹⁴ Israeli supreme court, sitting as the high court of Justice, HCJ 5100/94 May 5 1998, Jan. 13 1999, May 26 1999. http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.HTM (accessed January 31, 2007).
- ⁹⁵ Alan M. Dershowitz, "Is it Necessary to Apply 'Physical Pressure' to Terrorists – And to Lie About It", 197. Moore, 286, makes a similar point about necessity clauses referring to the unusual and unexpected.
- ⁹⁶ Dershowitz, "Is it Necessary..." (1989) 197.
- ⁹⁷ Dershowitz, "Is it Necessary..." (1989), 195-6.
- ⁹⁸ Dershowitz, *ibid*, 198.

⁹⁹ I am grateful to Chaim Gans for this comment.

¹⁰⁰ Israeli Supreme Court Justice Barak states in his Judgment on the interrogation methods Applied by the GSS, September 1999 that “necessity” can be invoked retroactively by agents of the state defending themselves against charges of torture. http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.HTM (accessed January 31, 2007).

¹⁰¹ Meir Dan Cohen, *Harmful Thoughts, Essays on Law, Self and Morality*, (Princeton University Press, Princeton and Oxford, 2002), 47.

¹⁰² Admittedly, the distinction between justifications and excuses as applied in the case of actions supported by a legal policy to excuse them, raises a certain difficulty. Excusing the state official for torturing in extremis is justified as a policy or practice in law, and so, it could be argued that the act of torturing is itself justified legally—it is all right to excuse the wrongdoer, perhaps required. Despite this ambiguity, I hold to the conclusion states in the above text whereby viewing a rare instance of torture under conditions analogous to extreme duress as both morally and legally unjustifiable, while at the same time excusing the culprit from full repercussions of the law, is the best policy solution, as well as the most just. Though I differ with regard to the language of “necessity”, I think this conclusion is in keeping with Israeli Supreme Court Justice Barak’s ruling on torture, see: http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.HTM.

¹⁰³ Moore, 340-2, with reference to Meir Dan-Cohen, “Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law” (1984) 97 *Harvard Law Review*, 625. Reprinted in: Dan Cohen, *Harmful Thoughts*, Chapter 2, 37-93 (references are to the latter).

¹⁰⁴ *Harmful Thoughts*, 37-40.

¹⁰⁵ *Harmful Thoughts*, *ibid*, 40-41.

¹⁰⁶ *Harmful Thoughts*, 42-42; 46-47.

¹⁰⁷ *Harmful Thoughts*, 43.

¹⁰⁸ Cf: Moore, 340-341. Note that Moore, unlike myself, actually justifies some investigative torture.

¹⁰⁹ Walzer, 62-3.

¹¹⁰ Dan-Cohen, *Harmful Thoughts*, 47, Moore, 341.

¹¹¹ *Harmful Thoughts*, 47.

¹¹² Dan-Cohen, *Harmful Thoughts*, 41-42, on the difference between the model of acoustic separation and the real world. Moore, 341. For example they can hear the Barak ruling from 1999, cited earlier, which enables interrogators to site “necessity” as a retroactive defense.

¹¹³ Moore, 341.

¹¹⁴ Moore, 327-334.

¹¹⁵ Moore, 341.

¹¹⁶ Note that, aside from his theory of acoustic separation, Dan-Cohen discusses the dilemma of dirty hands within the law, inter alia apropos the advantages (versus disadvantages) of the legal system's segregating normative messages by means other than acoustic separation, such as selective transmission (e.g. by vagueness), etc. The problem of dirty hands, as he points out, exists not only in politics but also in law. I cannot possibly delve into this aspect of the dirty hands issue in this connection, nor am I convinced that there is reason to do so here. Nevertheless, it is worth pointing out that certain aspects of Dan-Cohen's discussion of dirty hands in law may have some bearing on the issue of legislation about torture. See Dan-Cohen on dirty hands, *Harmful Thoughts*, 68, 75, 259.

¹¹⁷ Cf: Moore, 284. See also Justice A. Barak http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.HTM. "Necessity" cannot authorize the GSS in advance to use physical methods of interrogation.

¹¹⁸ Nielson and Moore both believe that, however excruciating the decision; torture would be the right, justifiable action under the circumstances.

¹¹⁹ Walzer 69-70. Note that Walzer is not convinced that this is the appropriate reading of Machiavelli, but he does admit that Machiavelli offers no account of the effect of bad deeds on the successful prince's soul or conscience.

¹²⁰ Walzer, 65, 71-2. See Nielson, 148.

¹²¹ Walzer, 72-73.

¹²² Walzer, 74.

¹²³ Walzer, 65.

¹²⁴ Walzer, 70, comments that Machiavelli's Prince "must do bad things well. There is no reward for doing bad things badly".