CHAPTER 13

PRINCIPLES UNDER PRESSURE: JUST WAR DOCTRINE AND AMERICAN ANTITERROR STRATEGY AFTER 9/11

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In the study of international relations today, the willingness to cross theoretical and methodological boundaries is often a sign of mature scholarship, as is the willingness to engage a diverse nonacademic audience that includes policy makers and practitioners. Few in the discipline have crossed as many of these boundaries, and with such good effect, as Bruce Russett. One frequent crossing has been into the area of international ethics, especially the ethics of war and nuclear deterrence. Russett served as principal consultant to the U.S. Conference of Catholic Bishops, participating in the drafting of their highly influential pastoral letter on the ethics of war in the nuclear era, *The Challenge of Peace* (1983). He has written on nearly every ethical problem encountered by the student of world politics: not only war and weapons, but also poverty, inequality, human rights, representation, female empowerment, and environmental degradation. In our field, social scientific inquiry may often appear dispassionate and detached from the pressing moral issues of our times, but social scientists need not be. Russett's boundary crossings demonstrate that very clearly (e.g., Russett 1989, 2001).

This chapter is about a different kind of boundary crossing, though, a worrisome one. The boundaries I refer to are the limits established by just war theory; the crossings are the transgressions of those limits by the United States in its war on terror. In particular, I focus on two of the most controversial elements of the George W. Bush administration's campaign against global terrorism. The first is the administration's reconceptualization of preemptive self-defense, which challenges *jus ad bellum* limits in its rejection of the traditional notion of imminent threat. I consider whether this is a reasonable revision of the *jus ad bellum* principle, even if in practice—that is, as a justification for the war against Iraq—it was misapplied.

The second is the treatment of prisoners. The premium placed on intelligence as the key to dismantling global terrorist networks has encouraged practices that challenge and plainly cross the limits of *jus in bello*, namely the rules governing the rights of those not participating (or no longer participating) in combat. More than this, they may call into question the government's and maybe our society's, commitment to basic human rights. The debate over torture is revealing; indeed, that there *is* a debate is revealing. I conclude this chapter by arguing that when we tolerate the crossing of *jus in bello* limits, even in emergencies, we erode another, more fundamental boundary in just war doctrine: the one requiring that we judge the conduct of war independently of the resort to war. If that boundary cannot be maintained, then we ought to consider whether just war doctrine can be applied at all to the war on terror.

My conjecture is that the threat of terrorism—its potential to impose truly catastrophic costs on American society—is taken very seriously by the Bush administration and this may account for its willingness to push ethical and legal limits. Therefore, I start with the question of American vulnerabilities.

Expected Destruction

Most Americans, if asked, could probably provide a fairly accurate estimate of the death toll from the 9/11 attacks (the official count is 2,976). Although few would dispute that this represents an awful loss, there has also been some debate about the gravity of this human toll. We are encouraged, for example, to compare it to the number of innocent lives lost as the result of ongoing wars, ethnic cleansing, and other injustices, or natural disasters. As distasteful as such considerations and comparisons may be, they seem to be an important element in both the moral and policy discourse on just war in the post-9/11 context. In fact, contemplating the magnitude of death and destruction has always been an essential exercise when applying certain concepts inherited from the just war tradition.

Whether or not the Bush administration takes the principles of just war theory seriously—some in the administration surely do—the U.S. government presumably has given quite a lot of thought to the level of destruction likely to be caused by future terrorist attacks, and under various scenarios. I believe that the administration's main violations of just war principles, and its apparent departure from prevailing interpretations of international law, can be partly explained by its estimate of the potential destruction that may be caused by subsequent terrorist attacks on the American homeland. Critics of U.S. strategy and tactics in the war on terror argue that American actions are nevertheless disproportionate to the probable threats the nation faces; in fact, some tactics, like torture, are condemned by many as crossing moral and legal limits regardless of the level of threat the nation faces.

The most authoritative statement of the Bush administration's approach to combating terrorism, the *National Security Strategy of the United States of America*, contains many references to weapons of mass destruction (WMD). "As was demonstrated by the losses on September 11, 2001, mass civilian casualties is the specific objective of terrorists and these losses would be exponentially more severe if terrorists acquired and used weapons of mass destruction" (Bush 2002).[1] In casting the Iraq War as a battle in the larger war on terror, officials encouraged the American public to contemplate the devastation associated with atomic "mushroom clouds" in lieu of demanding a rock solid case for preemptive military action. As the President put it in his 2003 State of the Union address: "Imagine those 19 hijackers with other weapons, and other plans—this time armed by Saddam Hussein. It would take one vial, one canister, one crate slipped into this country to bring a day of horror like none we have ever known" (Bush 2003). Outsiders cannot know for sure how much of this is hyperbole, but we ought to assume that massive human losses—tens of thousands or more—are considered a real possibility by the U.S. government.

In addition to the human losses, there are the economic costs. The New York City Comptroller estimated the property loss due to the 9/11 attacks on the World Trade Center at $22 billion, and the lost future earnings of those killed at $9 billion. Other costs, such as business relocations and foregone tourism, represent losses for New York City but not net economic losses to the nation. Although these and other direct costs are not insignificant sums, they are the smallest of the economic costs associated with 9/11 (about one-quarter of 1 percent of GDP).[2]

We may have more to fear from fear itself. Everyone knows that floods, hurricanes, tornados, and other natural disasters recur and that we should be ready for them. But we go about our business. Unlike Mother Nature,

however, we think terrorists are aiming at us, and that makes us nervous. We do try to go about our business, but until Americans become more accustomed to terrorist attacks, or until we are confident that our enemies have been defeated and that further attacks are unlikely, we behave with an additional measure of caution. Immediately following 9/11, this caution was most clearly manifest as a sharp decline in tourism, especially overseas tourism and air travel. After paying on claims related to the terrorist attacks, the insurance industry (which markets caution) substantially increased premiums in the aviation and tourism sectors, as well as in other areas such as shipping, commercial property, construction, and energy production.

The question of who profits—not only economically, but also politically—from this fear and caution is an interesting one, but it is safe to say that, from the perspective of the nation as a whole, it represents an overall drag on economic behavior and therefore a net cost. The big unknown is how high this cost might be in the aftermath of future terrorist strikes. The massive power failure in the northeast quadrant of the United States in August 2003 was instructive. Predictably, there was some panic and anxiety among those most directly affected: people trapped in darkened subway cars, traffic gridlock, and so on. But even far away in the Pacific Northwest, public places buzzed as cell phones brought news of the blackout and conversations immediately turned to the possibility that this was another al Qaeda attack. It wasn't, but the point is that Americans were on edge after 9/11, and even though we are somewhat less jumpy today, it would not take much to bring the fear back.

This suggests that weapons need not produce mushroom clouds to cause mass destruction, especially in a modern, technology-dependent, and (as many say) "soft" society like the United States, unaccustomed in recent times to imposed hardships. The risk is not just due to the interconnectedness of our social and economic infrastructure, but also due to a social psychology that may serve to multiply the behavioral impact of any direct damage done in the form of human casualties, destroyed property, or the suspension of social services. Because the United States has experienced few direct attacks on its homeland, the government can only speculate as to their potential reverberations. The likely damage is unknowable, but potentially very great, and the Bush administration presumably takes it very seriously.

As hard is it is to estimate, this fear factor is only heightened by any perceived ineffectiveness in the U.S. government's campaign against terrorist networks. And here is the special challenge presented by the nation's current enemies: nonstate actors fighting a jihad cannot be deterred. The perpetrators of the 9/11 attacks were prepared to sacrifice themselves to strike

a blow at the United States. Their willingness to die for the cause was not impulsive; these were not decisions in desperation or the heat of battle to give one's life for comrades or country, but premeditated, carefully planned actions undertaken by individuals devoted to a struggle ordained by some sort of religious authority. That their jihad may not be consistent with Koranic or other Islamic teachings is not relevant to the unique threat this type of warrior poses.

Deterring terrorism or any other form of attack requires that the would-be attacker attaches greater value to something the deterrer is in a position to deny than to the attack itself (or its expected consequences). Jihadists, at least the type al Qaeda was able to recruit for 9/11, are not deterrable because there is nothing in the earthly realm, not even their lives, that meets this requirement. As nonstate actors without responsibility for the security and well-being of a political community, the threat of reprisal is also ineffective. Suicide bombers often do have families that might be punished, but Israel's policy of bulldozing the homes of bombers' families never seemed to meet with much success. A strategy involving more draconian reprisals has not been tried; they have probably been contemplated, but judged counterproductive.

The early years of the cold war were marked by bouts of public fear and anxiety as it became clear that the superpowers were developing nuclear force postures and strategies that involved holding each other's population hostage; a nuclear first strike would bring on a retaliatory attack and the "assured destruction" of the aggressor. Over time, however, the fear and anxiety subsided and the general public came to regard nuclear war between the superpowers as nearly implausible. Americans believed that the Russians were deterrable, and vice versa. But we think that al Qaeda and its ilk are not deterrable and cannot be punished, and this knowledge keeps public fear from fully dissipating as long as these terrorist networks exist and are assumed to have some capacity to strike at the American homeland.

Obviously, Americans are now not paralyzed by the terrorist threat. Aside from longer lines at airport checkpoints and a general awareness that we are more vulnerable than we thought here at home, our day-to-day behavior is almost indistinguishable from what is was before 9/11. But neither do we know our tipping point. It may require only a few well-planned and faithfully executed attacks to get us very close, and this prospect may be especially worrisome for the Bush administration—perhaps more worrisome than any direct damage, including casualties, inflicted by those attacks. Americans would ultimately adjust to the new circumstances; paralysis, if it came, would be temporary. But the process of recovery and

adaptation to an environment perceived as substantially more threatening will alter our rather comfortable way of life.

All of this is very speculative, of course. We don't know the likelihood of future terrorist attacks on the U.S. homeland, the magnitude of the immediate damage they could cause, or the extent to which the fear they induce might reverberate, imposing indirect costs and social dislocations. Even coming up with probability distributions for attacks and direct losses is a major challenge, which is why the insurance industry has had so much difficulty pricing the risk (Major 2002; Woo 2002). But the likelihood that the United States will be hit hard again need not be terribly high for the "expected destruction"—that is, the destruction produced by the attack discounted by its probability—to prompt extreme measures by the U.S. government. In my view, this sort of risk assessment has pushed the Bush administration's counterterrorism strategy beyond certain limits drawn by the just war tradition.

Sufficient Threat

Probably the most controversial element in what has now come to be known as the Bush doctrine is preemptive war. The administration's *National Security Strategy* is forthright: "In an age where the enemies of civilization openly and actively seek the world's most destructive technologies, the United States cannot remain idle while dangers gather." The administration's reconceptualization of preemption, at least for purposes of conducting the war on terror, is a departure from the *jus ad bellum* criterion found in just war theory. It is not without some justification, however, and may (if not taken too far) accord with the underlying logic of self-defense employed by some just war theorists themselves. Its application to Iraq in 2003 is another matter altogether.

The Bush administration, in making its case for striking preemptively, points out that international law has long recognized states' rights to attack first when presented with an imminent danger (see Yoo 2003). The danger does have to be imminent, though, if preemption is to be subsumed under the international legal concept of self-defense. In *The Rights of War and Peace*, Hugo Grotius (1901 [1625], 268) writes thus, "to authorize hostilities as a defensive measure, they must arise from the necessity, which just apprehensions create; apprehensions not only of the power, but of the intentions of a formidable state, and such apprehensions as amount to a moral certainty." Political scientists, historians, and legal scholars have long distinguished between preemptive war and other anticipatory uses of force, like "preventive war," and it was the latter that Grotius (1901 [1625], 83)

was anxious to condemn:

> Some writers have advanced the doctrine which can never be admitted, maintaining that the law of nations authorises one power to commence hostilities against another, whose increasing greatness awakens her alarms. As a matter of expediency such a measure may be adopted, but the principles of justice can never be advanced in its favor. . . .[T]o maintain that the bare probability of some remote, or future annoyance from a neighbouring state affords a just ground of hostile aggression, is a doctrine repugnant to every principle of equity.

Many critics of the Bush administration's war on Iraq maintained that this was not a case of preemptive self-defense, but rather the sort of preventive war that has never been sanctioned by just war theory or international law. The war certainly did not fit the customary legal definition of preemption, but neither was it a preventive war as such wars are normally understood.[3] A preventive war is one launched by a state in order to head off a disadvantageous shift in the balance of power (e.g., Levy 2002, 354). This was Britain's motivation (vis-à-vis France) during the War of the Spanish Succession and Germany's motivation (vis-à-vis Russia) at the outset of World War I. Clearly, the United States had nothing to fear from Iraq in this regard, even if it did have nuclear weapons and the intention to use them or supply them to others. Today, and for the foreseeable future, the only plausible challengers to U.S. preponderance are China and a unified Europe.

This is not to say that the overthrow of the Ba'ath regime in Iraq was a just war of preemptive self-defense. Few believe that to be the case, no matter what the other justifications may be. Yet the nature of the threat posed by contemporary global terrorism does challenge the suitability of the conventional interpretation of legitimate preemption. This is due, in part, to the fact that the war on terror is not the kind of conflict that the just war tradition and international law evolved to regulate; one or more parties to this conflict are nonstate actors, and the spatial and temporal boundaries of war itself are ill-defined. Who and where are we fighting, and for how long? How do we know when the war is over? Although this unfamiliar context may make it difficult to apply just war criteria—both *jus ad bellum* and *jus in bello*—those interested in preserving the normative force of just war theory need to consider whether its principles can and should adapt to new realities, on the assumption that these new realities are likely to persist.

Even in the more familiar context of wars between states, Michael Walzer (1977) has argued that the "legalist paradigm" may be too restrictive

in regard to preemptive self-defense. The bar was set high by the *Caroline* precedent (1842), in which U.S. Secretary of State Daniel Webster, while acknowledging Britain's right to preemptive self-defense as a matter of principle, rejected their attack on the *Caroline* as unlawful. Although the American vessel was supplying Canadian rebels, the threat to the British was not, in Webster's view, "instant, overwhelming, and leaving no choice of means and no moment for deliberation" (Malanczuk 1997, 314). Walzer wants to set the bar lower, at what he calls "sufficient threat." States are sufficient threats when they intend to injure us and are actively preparing to do so, and when our failure to strike first heightens the risk substantially.

His example is the Six Day War of 1967. Egypt may not have been making preparations to immediately attack Israel, but the joint mobilization of Arab military forces, as well as Egypt's blockade of the Strait of Tiran was an ominous development. If the positioning of Arab forces was allowed to continue, Israel might be subject to an attack at the time of the enemy's choosing, and there was little doubt that the choice would be made—if not now, then at some point in the near future. Walzer (1977, 84) describes the Israeli mood at the time:

> [R]umors of coming disasters were endlessly repeated; frightened men and women raided food shops, buying up their entire stock, despite government announcements that there were ample reserves; thousands of graves were dug in the military cemeteries; Israel's political and military leaders lived on the edge of nervous exhaustion. . . . Israeli anxiety during those weeks seems an almost classical case of "just fear"—first, because Israel really was in danger (as foreign observers readily agreed), and second, because it was Nasser's intention to put it in danger.

Walzer contends that this danger was serious; Israel's failure to act would have placed in jeopardy its territorial integrity and political independence.

In its *National Security Strategy*, the Bush administration asserts that "the United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack." In the abstract, that sounds very much like Walzer's revision of the legalist paradigm (which is not uncontroversial).[4] As applied to the war on terror, however, the Bush doctrine lowers the bar to preemptive self-defense still further; the administration reserves for itself—and presumably other states engaged in the war on terror—greater latitude in regard to both the timing and the targets of preemptive attack.

The "sufficient threat" presented by contemporary global terrorism is said to derive from the proliferation of WMD and the enemy's intention (and capacity) to use them against us. The 9/11 attacks demonstrated that groups like al Qaeda can operate covertly in the United States, camouflaged by the diversity and tolerance found in American society, especially in urban areas. Legislation like the Patriot Act and the added precaution that settled over the land since 9/11 has constricted would-be terrorists' freedom of maneuver somewhat but has not fundamentally changed the country's vulnerability, one shared by most other advanced Western societies. The main impediment to a catastrophic terrorist strike at the American homeland is the difficulty these groups may have acquiring WMD and then getting them across U.S. borders. If this can be accomplished, the execution of the attack is much less likely to confront major hurdles. The United States is a target rich environment and, as I conjectured in the previous section, the immediate death and destruction of an attack will be only part of the total loss.

The covert means by which the 9/11 attacks came, and future attacks are likely to come, prompted the Bush administration to formulate a strategy that "adapt[s] the concept of imminent threat to the capabilities and objectives of today's adversaries."[5] Again, setting aside the Iraq War as probably a misappropriation of the revised concept of imminent threat, the administration's logic, at least, seems compelling and in some respects consistent with principle of self-defense contained in just war doctrine. If an impending attack at time t is not signaled by the visible mobilization of enemy forces at $t - 1$, then the last opportunity for preemptive self-defense—if there is any opportunity at all—will come sometime before $t - 1$, when the attack is in fact not imminent. Luban (2004, 230) puts it this way: "The trajectory of the rogue state makes it an 'imminent' attacker, provided that we characterize imminence in probabilistic rather than temporal terms." We assume the attack will come, eventually, once this last opportunity to prevent it passes (unless we are lucky). Thus, even before our attackers are at the doorstep, we may have "a general situation in which waiting, or doing anything other than fighting, greatly magnifies the risk" (Walzer 1977, 81).

The more significant departure from just war theory and customary international law is the latitude the Bush administration claims with respect to the targets of preemptive self-defense. That the concept of imminent threat needs to be adapted to take into account the destructive potential of enemy attacks, and the covert means of delivering them is compelling. But the *National Security Strategy* also includes a great many statements and assumptions about our adversaries and their intentions. Rogue states—epitomized

by the "axis of evil": Iraq (under Saddam Hussein), Iran, and North Korea—"reject basic human values and hate the United States and everything for which it stands . . . We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use WMD against the United States and our allies and friends." If a sufficient threat to the nation may not be visible until it is too late, then preemption can only be based on some earlier manifest intent to injure. In the case of Israel's anticipatory attack in 1967, not only was there a visible mobilization, but Israel had ample reason to believe that the frontline Arab states intended to do it harm. In the case of the 2003 Iraq War, an analogous claim by the Bush administration was much less believable. What was more believable, though not necessarily true, was that the Iraqi regime had, or intended to develop, weapons of mass destruction and was willing to provide them to al Qaeda, which really did intend to do harm to the Americans. Even if it was true, there is little in just war theory or international law that would sanction the war as an act of preemptive self-defense.

Prevailing conceptions of *jus ad bellum* do change over time, but if the Bush administration was interested in seeing its revised principle of preemptive self-defense become the basis for a new international legal norm, then invoking self-defense to justify regime change in Iraq did that aim a disservice. A large portion of the international community, and a majority within the UN Security Council, did not believe that the Ba'ath regime constituted a sufficient threat to the security of the United States, or any other state, and the information that came to light after the occupation, especially the absence of WMD programs, only added to the skepticism. Still, as Drumbl (2003, 424) suggests, the international community does seem receptive to the idea that the traditional criteria for legitimate preemption need updating. "There is more going on here that the United States going its own way through the aspirations of one particular administration. For a variety of reasons, many states in diverse parts of the world support a more liberal use of violence to curb terrorists and mitigate the risk that rogue states may assist them."

The danger here, as illustrated by the Iraq War, is that an assessment of "the nature and motivations of these new adversaries," as the *National Security Strategy* puts it, and not just their active preparation to attack, becomes the smoking gun, a subjective criterion that is obviously subject to abuse. Little in just war doctrine or international law provides guidance for establishing evil intent, or the aiding and abetting of those with evil intent, aside from visible actions. When the "nature and motivation" of our adversaries becomes a just cause for war, *jus ad bellum* has probably been stretched beyond recognition.

Emergency Ethics

American society is at risk, the U.S. government maintains, and although such warnings are often packaged for public consumption, I think (but cannot prove) that there is more to this than simple fear-mongering. It seems to account for the Bush administration's insistence on greater latitude for the exercise of self-defense, and similar fears motivate other governments' receptivity to a revised conception of preemptive self-defense, even if some view the Iraq War as a misapplication. Analogous developments are evident as well in the norms governing the conduct of war, *jus in bello*.

The central pillar in *jus in bello*, and the foundation of international humanitarian law (the law of war), is the principle of discrimination, or noncombatant immunity. From this general prohibition—that those, like civilians, who are not members of the opposing armed forces (or armed partisans) should not be targeted—comes the set of rules regulating the treatment of captured combatants. For enemy soldiers, once captured, no longer present a danger to us or our armed forces and, in effect, have become noncombatants. The U.S. military campaigns in Afghanistan and Iraq were criticized for causing an undue number of civilian deaths, despite the widespread use of discriminating smart weapons. Confirmed numbers are hard to come by, but if the U.S. invasion force was guilty of transgressing just war limits, those are the limits set by the principle of proportionality, which would encompass unintentional civilian deaths. There are probably few cases in which the military took deliberate aim at civilian targets. In any event, I want to focus on the treatment of prisoners.

There is no public document, like the *National Security Strategy*, laying out the Bush administration's strategy or tactics for collecting information pertinent to the war on terror, but there is evidence that the administration means to push the limits of international humanitarian law, and perhaps also human rights law. The controversy over the Afghan detainees held at the U.S. military base in Guantánamo Bay, Cuba, provided the first indication. The relocation of captured fighters from the theater of war to another site outside the territorial United States raised suspicions that the U.S. military viewed the detainees as something other than prisoners of war with rights defined by the Third Geneva Convention (1949). The Bush administration's response was that the Taliban and al Qaeda fighters in Afghanistan were considered "unlawful combatants" and therefore were not entitled to POW status when captured. The balance of international legal opinion disputed the administration's classification of Taliban fighters as unlawful combatants; they were clearly members of Afghanistan's regular armed forces. Al Qaeda fighters, on the other hand, generally failed to

meet the lawful combatancy requirements for irregular forces—operating under a chain of command, wearing distinctive insignia, carrying their arms openly, and observing the laws of war—which otherwise allow opposing forces to distinguish them from noncombatants immune from attack. Taliban fighters who conducted themselves so as to blur such distinctions may be tried for war crimes, but they did not forfeit their status as lawful combatants and, once in captivity, POWs.

In asserting maximum latitude in the treatment of detainees, the Bush administration's aim was to avail itself of every opportunity to extract information. Unprotected by POW rights, the captives could be interrogated, and the conditions of captivity and the methods of interrogation, the administration hoped, would not be subject to the same strictures as would apply in the territorial United States. U.S. courts did rein in the administration somewhat, asserting their own jurisdiction on certain matters, but the executive branch nevertheless retained a good deal of leeway. Nothing, however, could strip the detainees of their basic human rights, which are not contingent on meeting the requirements of lawful combatancy or noncombatancy. They should not be murdered; they should not be tortured.

The Guantánamo detentions and the Abu Ghraib prison scandal, as well as the apprehension of terrorist masterminds Ramzi bin al Shibh and Khalid Sheik Mohamed, generated the sort of public debate on the pros and cons of torture that was taboo before 9/11. Alan Dershowitz, who was perhaps most responsible for bring the discussion to the surface, has floated the idea of a court-issued "torture warrant" allowing the application of extreme force, medically supervised, designed to extract information from a "ticking bomb terrorist"—an individual who has set in motion an attack that will kill a large number of innocent civilians and who possesses the information necessary to avert it (Dershowitz 2002, ch. 4). If asked, many of us—probably more than care to admit it—would affirm the use of torture in such cases. But even among those willing to see torture used to stop this kind of attack, the notion of a court-issued warrant causes unease.

One reason for the unease is the presence of moral dilemma that Walzer (1973) and others have labeled "dirty hands." Torture is bad; most countries, including the United States, have signed an international convention saying so and have pledged not to do it. Bombing innocent civilians is also bad, and we may be prepared to tolerate one evil to prevent another, but are we prepared to license it? Dershowitz believes we are hypocrites if we do not make some attempt to regulate by law what we all suspect has gone on in places like Camp X-Ray, Abu Ghraib, Bagram Air Base, and other detention centers doubling as outposts for the collection of intelligence. "Rendering" suspected terrorists to other countries, such as Egypt or

Pakistan, whose intelligence services may have fewer qualms about the use of torture is not, morally speaking, any better. When we look the other away, we say that torture is not, in fact, categorically wrong; it depends on the circumstances, which we hope are rare, and the likelihood that interrogators will get the information they need. Now we can leave it to the intelligence services to determine the circumstances and estimate the likelihood of success, in which case we continue to look the other way. Or we can create a system in which a judicial magistrate makes the final call by issuing, or refusing to issue, a torture warrant.

Critics of Dershowitz's proposal worry about the slippery slope: if today we are willing to license torture in situations of extreme emergency, then tomorrow we may want to use it to confront less extreme dangers; and if today we are willing to torture the "ticking bomb terrorist," then tomorrow we may try it on the probable terrorist, or the probable terrorist's loved ones. But a criticism from the standpoint of "dirty hands" is somewhat different. Torture is wrong, always. If we are forced by emergency circumstances to resort to torture, so be it; but that does not make it right, even under those circumstances. Perhaps we have managed to save many innocent lives, but we still have dirty hands, and that should bother us. Any form of legal sanction, torture warrants included, permits us to be unbothered, to do bad things with clean hands.

The same moral dilemma has presented itself in the more familiar context of interstate war. Walzer's (1977) example, a controversial one, is the Allied bombing of German cities during World War II. He argues that from 1940 to 1942 Britain faced a "supreme emergency." The emergency existed because the prospect of Britain's defeat by German forces was clear and present; British defenses were on the verge of collapse. The emergency was supreme because, from the perspective of those contemplating defeat, "Nazism was an ultimate threat to everything decent in our lives, an ideology and a practice of domination so murderous, so degrading even to those who might survive, that the consequences of its final victory were literally beyond calculation, immeasurably awful" (Walzer 1977, 253). This compound prospect, namely the disaster of Nazi victory and its imminence, left the British no other choice but to bomb German cities, an unambiguous violation of *jus in bello*. Walzer's position is that a supreme emergency may provide an excuse for the commission of a wrongful act, but not a justification. Those who justify such acts fail to see their dirty hands.

Critics of Walzer's position on the Allied bombings either refuse to admit exceptions to noncombatant immunity or dispute his assessment of the Nazi danger as an empirical matter. As a principle, though, supreme emergency sets the bar very high. The U.S. bombing of Japanese cities did

not clear it, in Walzer's view, nor did the Allied bombing of German cities after 1942 when Britain's defeat no longer loomed. Applied to the question of torture, the closest approximation is indeed the case of the ticking bomb terrorist. However, although "ticking bomb" implies an imminent threat and therefore an emergency, there is nothing in the hypothetical example suggesting that the consequences of a consummated attack, as terrible as they may be, necessarily qualify as "supreme" in Walzer's sense. It is when entire political communities are in jeopardy that we have a supreme threat: "For the survival and freedom of political communities—whose members share a way of life, developed by their ancestors, to be passed on to their children—are the highest values of international society" (Walzer 1977, 254). Whether the survival of subsets of political communities, in whatever numbers, can excuse such acts as torture would seem to require the kind of utilitarian calculation he wants to avoid.

Even if we are willing to depart from the deontological position that torture is always and everywhere wrong, then the conclusion, from the consequentialist position, may well be that it is practically always and everywhere wrong.[6] If we are to license torture, by court order or some other mechanism, the good ends requiring bad means will depend on a joint probability estimate being sufficiently high. There must be a high probability that (1) the individual subject to interrogation has information, (2) which can be divulged by means of torture, and (3) when acted upon, will either prevent or mitigate a catastrophic human loss. Those willing to defend the use of torture under these circumstances may also want to require a high probability that a candidate for torture bears some guilt for the impending attack, otherwise we may be tempted to torture the innocent (e.g., the guilty party's loved ones) in order to get the information we need; but this is not necessary for consequentialist argument. Without the guilt requirement, and assuming that the other three probabilities are estimable, an 80 percent probability of each—that the information is possessed, extractable, and actionable—yields a 50/50 chance of averting the loss. My guess is that most people affirming the emergency use of torture would expect better than even odds of success, but maybe that depends on the nature of the disaster one is asked to contemplate.

I have argued that we should take seriously the possibility that the Bush administration estimates the total cost of potential terrorist attacks on the American homeland to be an order of magnitude above the cost of 9/11, especially considering the economic reverberations and social paralysis that could follow. If this is the administration's honest assessment, and not just hyperbole, and if imminence is understood not in strictly temporal terms but as a closing window of opportunity to avert catastrophe, then we may

be in a situation aptly described as a supreme emergency. Those who would excuse the use of torture as offering one of few remaining means of escaping these dire straits make a reasonable argument, I think. The problem is that very many of those who do excuse torture do not honestly believe that today we confront a supreme emergency. The public discourse—as sampled in college classrooms, around dinner tables, and on television news shows—suggests that many of us have set the bar rather lower than supreme emergency. If it were otherwise, then changing the hypothetical torture victim from the ticking bomb terrorist to, say, the terrorist's innocent children would not lead to so many defections from the pro-torture position. Given what we know (as a public), our situation has not gotten so desperate that we are ready for such distasteful utilitarian calculations. Our readiness to talk torture, in my view, has more to do with the guilt we assume that is attached to the terrorist suspects held in captivity. This has important implications for the applicability of just war doctrine to the war on terror, which I address in the last section.

Irrespective of the prevailing view within the U.S. government as to the magnitude and proximity of the threat to the country, many have accused the Bush administration of seeking to loosen the confines of international human rights law. A now infamous memorandum from Assistant Attorney General Jay Bybee to White House Counsel Alberto Gonzales argued thus:

> [K]nowledge alone that a particular result is certain to occur does not constitute specific intent . . . Thus, even if the defendant [i.e., the accused torturer] knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith. Instead, a defendant is guilty of torture only if he acts with the express purpose of inflicting severe pain or suffering on a person within his custody or physical control. (Office of the Assistant Attorney General 2002, 4)

Put differently, if the objective is to extract information from a detainee, and the infliction of severe pain merely the means to do so, then there is no intent to commit torture. Even when there is specific intent to torture, "the victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result. If that pain is psychological . . . , these acts must cause long-term mental harm" (Office of the Assistant Attorney General 2002, 13). Otherwise, the infliction of severe pain has not risen to the level of torture. Other memos circulated by

administration lawyers argued that the president's authority as commander in chief allowed him to approve any technique, including torture, as was necessary to safeguard the nation's security; neither international nor domestic anti-torture law constrained that authority.

President Bush and his cabinet officials distanced themselves from such positions, insisting that they were merely exploratory and, yes, the administration was committed to upholding laws against torture. Nevertheless, it is probably fair to say that these legal analyses, like the discussion of torture warrants, are indicative of our government's and our society's willingness to contemplate actions that before 9/11 we once agreed were beyond the pale. This becomes easier if dirty hands don't look so dirty.

Crossing Just War Boundaries

Just war doctrine establishes boundaries that states should not cross when they have disputes and armies should not cross when they are called upon to fight. The most important of these are codified in the UN Charter and international humanitarian law. Although the U.S.-led war on terror is not exactly the type of war that just war doctrine and international law evolved to regulate, a common view—not only among those outside government, but also inside government—is that crossing just war boundaries is a very serious matter. Yet the principles delimiting them are under pressure; the boundaries are being pushed outward in an effort to provide for "self-defense" and "military necessity" in an unfamiliar context. This is certainly a cause for concern. At the same time, it is somewhat reassuring that the most controversial elements of the Bush administration's war on terror—the reconceptualization of preemptive war and prisoners' rights—have sought to redefine the boundaries rather than reject them outright.

Another, more fundamental boundary in just war theory may also be in danger, that separating *jus ad bellum* and *jus in bello*. And if this one disintegrates then we really will find ourselves on unfamiliar moral terrain. The *National Security Strategy* identifies our new adversaries as terrorists and rogue states whose nature and motivations are unlike those we have confronted in the past. That our enemies are described in such terms is unremarkable; ongoing wars, hot and cold, are often accompanied by images of the enemy as inherently evil and bent on our destruction (e.g., Dower 1986). In traditional interstate wars, however, and in just war theory, we distinguish between those with aggressive designs and those who are merely the agents of aggression. The agents of aggression, those who do the fighting, can and do inflict harm, so they may be killed or held captive. Our own fighters, who we are inclined to see as the agents of our self-defense,

also inflict harm, and therefore may be killed or held captive by our enemy. Soldiers on both sides, when they are fighting, have lost their right to life. Likewise, when they have stopped fighting—because they have been captured or otherwise incapacitated—they regain their right to life, and other basic human rights as well. Those are the rules of war we have settled on.

The rules are not always followed, of course. Supreme emergencies test our commitment to the rules, which is sometimes lacking. Our willingness to cross *jus in bello* boundaries on the battlefield suggests that the evil designs of our enemies cannot be put totally out of mind. Those who do the fighting bring on emergencies; the nature and motivations of their political leaders are what make the emergencies supreme. Thus, when we suspend the rules of war, denying noncombatants their rights even for a short time, it is hard to escape the conclusion that we now attach to them some of the guilt normally reserved for political leaders who commit the crime of aggression. Walzer (1977, 21) says: "War is always judged twice, first with reference to the reasons states have for fighting, secondly with reference to the means they adopt." But in supreme emergencies we seem unable to make those judgments independently: the means we adopt are justified (or perhaps only excused) by the reasons we have for fighting. We have crossed a boundary at the very core of just war doctrine (Orend 2000, 127–133).

In the war on terror, we find this boundary easier to cross, especially when it comes to stateless terrorist organizations. After all, terror networks like al Qaeda are composed not of conscripts or professional military personnel, but of enthusiastic jihadists who are anxious to do us harm, and in ways we find reprehensible. They don't follow the rules, why should we? Are the rules even relevant? We can't judge this war twice. Their side consists only of willing combatants, and they are not always the kind of combatants (lawful or unlawful) that the Geneva Convention recognizes, for the war on terror is not always the kind of war the Convention recognizes. Their zealotry and the covert nature of their combat means that, even in captivity, terrorists continue to fight by virtue of their silence; only after we make them talk have they ceased doing us harm.

These are common sentiments on our side, and they are perhaps not wholly unreasonable in a society traumatized by 9/11. They do, however, contribute to an erosion of the moral foundations of just war theory as applied in this admittedly unfamiliar context. The laws of war extend privileges to lawful combatants—POW rights, most notably, but also others—that are denied to unlawful combatants, who are criminals not because (or only because) they violate *jus in bello*, but because they are not licensed to fight in the first place. Yet the laws of war do not suspend unlawful

combatants' basic human rights. However egregious their offences, international law says that such detainees may not be murdered, mutilated, or tortured.[7] If the war on international terrorism really does require a new set of rules, are we prepared to rewrite this one as well? If during truly supreme emergencies, and even not-so-supreme emergencies, we have become willing to cross the line that now exists, we ought to be troubled by the direction we are heading.

When the war on international terrorism is extended, justly or unjustly, to rogue states like Taliban-ruled Afghanistan and Saddam Hussein's Iraq, we are squarely on the familiar ground of *jus in bello* and international humanitarian law. Fortunately, U.S. transgressions—epitomized by the Guantánamo detentions and the debacle of Abu Ghraib—have met with near-universal condemnation, and profound skepticism was a common response to the Bush administration's claim that blame was not to be found up the chain of command (Danner 2004; Hersh 2004). Dirty wars are fought, and directed, by people not bothered by dirty hands. Our enemies, according the *National Security Strategy*, "reject basic human values and hate the United States and everything for which it stands." The challenge is to defeat them without sacrificing anything for which we stand.

Notes

My thanks to Bruce Russett and Craig Carr for comments on an earlier draft.

1. All quotes from the *National Security Strategy* come from chapter V: "Prevent Our Enemies from Threatening Us, Our Allies, and Our Friends with Weapons of Mass Destruction."
2. Studies of the economic costs of the 9/11 attacks are summarized by the General Accounting Office (2002).
3. Luban (2004) argues that preemptive war can be seen as a special case of preventive war. A preventive war is directed against a probable attacker, given its intent and power trajectory. A preemptive war is directed against a probable attacker, whose intent and power trajectory have culminated in its preparation to strike imminently.
4. Walzer, like most other just war theorists, rejects even this relaxed criterion as a justification for the 2003 war against Iraq. See, e.g., Walzer (2004, ch. 11).
5. Although Gaddis (2004) argues that this looser notion of imminent threat, and therefore the right of preemption, has been part of U.S. national security doctrine since the administration of John Quincy Adams.
6. For a useful recent philosophical discussion of why torture is wrong, if not always then almost always, see Sussman (2005).

7. These are among the "fundamental guarantees" found in the 1977 Geneva Protocols governing international and noninternational armed conflicts (see Article 75 of Protocol I and Article 4 of Protocol II). Although the United States has not ratified the Protocols, it considers most of the provisions binding as customary international law (Erikkson 2004, 276).