

## RULE UTILITARIAN AND DEONTOLOGIST PERSPECTIVES ON COMPARISONS OF TORTURE AND KILLING

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International law,<sup>1</sup> multiple treaties,<sup>2</sup> and every state officially prohibit torture under all circumstances.<sup>3</sup> Following decades of near agreement, however, the debate on torture was resurrected. The events of September 11, 2001 and other acts of terrorism prompted many to doubt the wisdom of a total ban on interrogational torture.<sup>4</sup> The United States entered an unconventional war that demanded unconventional tactics.<sup>5</sup> When fighting an enemy that lacks comparable resources and destructive power, information often becomes more important than gaining territory or destroying the enemy, soldier by soldier. Torture supposedly forces the suspect to divulge information that could

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<sup>1</sup> See e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980) (“Having examined the sources from which customary international law is derived—the usage of nations, judicial opinions and works of jurists—we conclude that official torture is now prohibited by the law of nations.”).

<sup>2</sup> See e.g., United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2(2), Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 (“No exceptional circumstances whatsoever, whether a state of war or a threat of war, international political instability or any other public emergency, may be invoked as a justification of torture.”). As of May 2010, 146 countries have ratified the treaty.

<sup>3</sup> Despite official prohibition, torture remains widespread. According to a 2004 Amnesty International report, in 2003 at least 132 countries reported torture. Amnesty International Report 2004 Statistics Covering January to December 2003, available at <http://www.amnesty.org/en/library/asset/POL10/015/2004/en/5566f0b9-d5d6-11dd-bb24-1fb85fe8fa05/pol100152004en.html> (last visited Aug. 15, 2010). See generally ROBERT B. EDGERTON, *THE WORLDWIDE PRACTICE OF TORTURE* (2007); Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 *YALE L.J.* 1935 (2002) (showing that nations that sign treaties forbidding torture are no less likely to torture).

<sup>4</sup> I confine my analysis to interrogational torture: torture used as a technique to gather intelligence. Torture may also be used to gain sadistic pleasure, punish the victim, extract confessions, or terrorize an enemy group into submission. For a discussion of other purposes of torture, see David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 *VA. L. REV.* 1425, 1429-40 (2005).

<sup>5</sup> For an excellent discussion on the moral dilemmas of unconventional warfare, see MICHAEL L. GROSS, *MORAL DILEMMAS OF MODERN WAR* (2010).

save innocent lives. Given the potential value of torture militarily, scholars and politicians have crafted various arguments to justify torture legally and morally.<sup>6</sup> Among these arguments,<sup>7</sup> one asks why we fear permitting torture in designated circumstances when many legal regimes openly permit certain forms of killing.<sup>8</sup>

Although often unexamined, the argument raises a good point: what exactly makes torture unconditionally prohibited, while practices that inflict greater physical harm remain fixtures in many jurisdictions? Three forms of killing are currently legal. First, international law and nearly every moral theorist recognize some version of a “just war.” Second, several states impose capital punishment. Third, many jurisdictions allow law enforcement to use deadly force against fleeing suspects of dangerous crimes. Each of these practices involves legal killing. How, then, does one justify a regime that simultaneously bans torture and authorizes these killings?

In this Note, I provide potential replies for two important groups that support a universal prohibition of torture. Each arrives at the same conclusion by using different modes of analysis. Consequently, both groups must overcome different obstacles to distinguish torture and legal killing. Ultimately, both groups successfully defend their point.

In Section I, I describe the argument that torture should be permitted because it results in less physical harm than legal killing. However repulsive the practice may be, torture usually leaves the victim alive to see another day. If killing is sometimes permissible, analogical reasoning suggests that torture ought to be sometimes

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<sup>6</sup> See e.g., Mirko Bagaric & Julie Clarke, *Not Enough Official Torture in the World? The Circumstances in Which Torture Is Morally Justifiable*, 39 U.S.F. L. REV. 581 (2005); Eric Posner & Adrian Vermeule, *Should Coercive Interrogation Be Legal?*, 104 MICH. L. REV. 671 (2006).

<sup>7</sup> To avoid unnecessary complexity, I choose to ignore the dimension of the debate that focuses on what acts constitute torture. Many scholars and politicians capitalize on the inherent difficulties of defining torture to distinguish it from other coercive techniques, reasoning that forms of ill-treatment short of torture are perfectly legal. See e.g., Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II., Gen Counsel of the Dep’t of Def. 4-10 (Jan. 22, 2002), available at <http://www.tomjoad.org/bybeememo.htm>. For a thorough review of definitional issues, see GAIL MILLER, *DEFINING TORTURE* (2005).

<sup>8</sup> See, e.g., Alex Bellamy, *No Pain, No Gain? Torture and Ethics in the War on Terror*, 82 INT’L AFF. 121, 129 (2006); Sanford Levinson, “Precommitment” and “Postcommitment”: *The Ban on Torture in the Wake of September 11*, 81 TEX. L. REV. 2013, 2034-37 (2003); David Sussman, *What’s Wrong with Torture?*, 33 PHIL. & PUB. AFF. 1, 3 (2005); Posner & Vermeule, *supra* note 6, at 100.

permissible as well. From this comparison, many conclude that the law ought to allow officials to torture to prevent imminent catastrophes. This argument can be dissected into a six-step syllogism. It makes two claims and one important assumption.

In Section II, I present rule utilitarianism's reply to this argument. I describe how rule utilitarians analyze morality. Rule utilitarians conclude that torture must be banned unconditionally for two reasons. First, the benefits of allowing some torture are marginal and uncertain, while the costs are substantial, given the distinct likelihood of unnecessary torture. Second, allowing some torture might drive a slippery slope to torture in less justifiable circumstances. But why are rule utilitarians not similarly concerned about unnecessary killings and a slippery slope to more killing? What makes torture so different that it requires a universal ban?

Numerous inherent epistemic barriers and conceptual obstacles distinguish torture and killing. First, to interpret the preconditions for torture correctly, officials must overcome the modal problem of distinguishing possible dangers and actual threats, and then overcome—conceptual vagueness in the terms “imminence” and “catastrophe.” Second, our inability to distinguish false and truthful disclosures of subjects causes the infliction of unnecessary pain. Third, conceptual vagueness in the term “suspect,” only exacerbated by the frustration of war, makes torture more susceptible to the slippery slope. Finally, because prohibition of torture epitomizes the legal archetype of non-brutality, legalizing torture has a unique ability to affect other laws.

In Section III, I provide deontology's reply to the objection. I describe how deontologists analyze morality and how their analysis differs from rule utilitarianism. Deontologists forbid torture under all circumstances because it violates the victim's rights. Such doctrinal rigidity attracts much criticism, particularly in the face of catastrophic danger, but deontologists effectively expose the weaknesses of these criticisms. Responding to analogies to legal killings, deontologists present two arguments. First, the objection contains a hidden premise that deontologists reject, ultimately dismantling the syllogism. Second, using the moral criteria deontologists accept, torture and the state-sanctioned killings can be distinguished. Torture attacks the defenseless and specifically targets human dignity.

## I. THE OBJECTION

Although killing imposes a greater physical harm, the law provides stronger protections against torture. After all, torture victims usually survive. And the law prohibits torture unconditionally, yet allows killing under certain conditions. Many reject this apparent disconnect and conclude that, like killing, some circumstances warrant legal torture. Henry Shue famously articulated this argument's syllogism in comparing torture and just-war killings:

- A. Since (1) just-combat killing is total destruction of a person,  
 (2) torture is—usually—only partial destruction or temporary incapacitation of a person, and  
 (3) the total destruction of a person is a greater harm than the partial destruction of a person is,  
 then (4) just-combat killing is a greater harm than torture usually is.
- B. Since (4) just-combat killing is a greater harm than torture usually is, and  
 (5) just-combat killing is sometimes morally permissible,  
 then (6) torture is sometimes morally permissible.<sup>9</sup>

This argument makes two claims and commits one important assumption. The conclusion to stage A—step 4—states that killing someone in combat does more harm to him than torturing him.<sup>10</sup> The conclusion to stage B—step 6—makes a moral claim: torture should be permissible at least sometimes. Significantly, stage B of the syllogism commits an important assumption that leaves space for challenges. The hidden premise is that “whenever a greater harm is permissible, a lesser harm must also be permissible.” It assumes that the only consideration relevant to moral permissibility is the quantum of harm inflicted.<sup>11</sup> In other words, comparing the morality of two acts involves weighing only the

<sup>9</sup> Henry Shue, *Torture*, 7 PHIL. & PUB. AFF. 124, 125-26 (1978) [hereinafter Shue, *Torture*].

<sup>10</sup> While it is difficult to contest the reasoning that killing causes more harm than torture, some consider intense physical suffering worse than death. The practice of euthanasia demonstrates this preference among some individuals.

<sup>11</sup> Shue, *Torture*, *supra* note 9, at 126.

intensity of harms visited upon the victim; it disregards all other possible moral criteria.

Rule utilitarians and deontologists must respond to this challenge under the terms of their respective moral theories. In the final analysis, they can defend themselves to varying degrees against comparisons to legal killings. I will now present these positions on torture and how each would individually respond to the objection.

## II. RULE UTILITARIANISM AND ITS REPLY

### A. *Rule Utilitarianism and Torture*

Utilitarians assess the moral status of actions using the criteria of pleasure and pain.<sup>12</sup> Morally superior choices produce more pleasure and less pain than their alternatives. Act utilitarians focus on individual choices and evaluate whether particular actions maximize happiness.<sup>13</sup> Consequently, act utilitarians occasionally advocate breaking rules when the particular action maximizes happiness. By contrast, rule utilitarians attempt to maximize happiness by devising rules that must be followed universally.<sup>14</sup> Although violating a rule might produce better consequences in specific instances, rule utilitarians argue that maintaining the integrity of the rule outweighs whatever benefits result from defying rules in exceptional circumstances.<sup>15</sup> When confronting a particular moral dilemma, rule utilitarians resolve it simply by applying the rule, rather than re-engaging in utilitarian calculation before every act.<sup>16</sup> Relying on this analysis, rule utilitarians

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<sup>12</sup> Although often lumped together, utilitarianism and consequentialism are conceptually distinct. Utilitarianism represents a subset of consequentialist theories. Consequentialist theories weigh the state of affairs that actions yield. Utilitarianism, however, focuses only on pleasure, seeking to maximize the personal utilities of the state. Other consequentialist approaches are available, such as evaluating states by the utility of the worst-off individual. Consequentialist theories may even include states of obedience to moral norms and non-violation of duties in their calculus. See Amartya Sen, *Rights and Agency*, 11 PHIL. & PUB. AFF. 3 (1982); Michael S. Moore, *Torture and the Balance of Evils*, 23 ISR. L. REV. 280 (1989).

<sup>13</sup> See RICHARD MATTHEWS, *THE ABSOLUTE VIOLATION: WHY TORTURE MUST BE PROHIBITED* 103 (2008).

<sup>14</sup> See Posner & Vermeule, *supra* note 6, at 680.

<sup>15</sup> MATTHEWS, *supra* note 13, at 105.

<sup>16</sup> Moore, *supra* note 12, at 295.

supporting universal prohibition of torture have determined that the net costs of permitting some torture outweigh the net benefits.<sup>17</sup>

Posner and Vermeule argue that the debate<sup>18</sup> between act and rule utilitarians is reduced to determining whether a legal standard or rule produces the best result.<sup>19</sup> A legal standard that permits torture in designated circumstances might prevent a catastrophe if officials correctly identify those circumstances and conduct the torture effectively, forcing the subject to disclose information needed to extinguish an imminent threat. However, this legal standard carries a substantial risk that officials will erroneously interpret the standard and torture unnecessarily. On the other hand, a black-letter legal rule forbidding torture avoids the risk of needless torture, but loses the benefits of torture in exigent circumstances. In weighing these opportunity costs, rule utilitarians find the black-letter rule morally superior.

But how could a utilitarian endorse a law that bans torture unconditionally? After all, torture harms only an individual and might produce information that could save millions of innocent lives. Rule utilitarians offer two reasons why a black-letter legal rule is superior to a more flexible legal standard. First, the benefits of a flexible standard are marginal and doubtful, while the costs are substantial, given the distinct likelihood of unnecessary torture. Second, a standard allowing some torture might drive a slippery slope to more torture.

### *1. Rule Utilitarian Arguments Against Torture*

First, a legal standard allowing some torture invites grave costs and yields only marginal and uncertain benefits. Unnecessary torture—the deliberate infliction of enormous pain without any return—is no small cost for a utilitarian. Rule utilitarians emphasize how often this would occur. For torture to be necessary and effective, officials must make a series of correct judgments

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<sup>17</sup> See, e.g., Sherry Colb, *Why Is Torture “Different” and How “Different” Is It?*, 30 CARDOZO L. REV. 1411, 1421 (2009); Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481, 1496 (2004).

<sup>18</sup> I confine my analysis to whether act or rule utilitarianism produces the best result, rather than between groups of rule utilitarians. Because hardly any rule utilitarians advocate a rule obligating torture in all circumstances, the more appropriate analysis becomes whether our legal system should permit some torture in exceptional circumstances or no torture at all.

<sup>19</sup> Posner & Vermeule, *supra* note 6. Note that Posner and Vermeule ultimately conclude, however, that a legal standard—permitting torture in some circumstances—ultimately produces the best result.

without lengthy investigation. Officials must correctly determine that (1) an actual terrorist threat exists, (2) the threat is imminent, (3) the threat is sufficiently dangerous to justify torture, (4) the suspect possesses information necessary to extinguish the threat, (5) torture will be effective in forcing the victim to disclose information,<sup>20</sup> (6) any information disclosed will be reliable, and (7) the torturer will be able to differentiate truthful and false information, if disclosed at all. If any of these seven determinations prove incorrect, officials tortured unnecessarily. Officials must make these determinations quickly, often without any opportunity to find corroborating information. They must blindly guess whether a particular suspect possesses reliable information and will divulge it through torture. Even if the suspect discloses information, any contingency plans established by a terrorist organization that alters its attack following a member's capture would render the information useless.<sup>21</sup> In short, a legal standard that allows some torture will likely cause much unnecessary torture, and unnecessary torture is a grave cost to utilitarians.

Torture also yields only marginal benefits. One person rarely possesses all of the information necessary to prevent an imminent catastrophe.<sup>22</sup> It is much more likely that each individual captured and tortured will only be able to reveal a fragment of a complicated puzzle, if anything at all.<sup>23</sup> Because officials acquire information from torture in piecemeal, the opportunity for unnecessary torture multiplies exponentially. Moreover, to obtain any real benefit from torture, the quantity and quality of information acquired from torture must exceed the quantity and quality of information acquired from alternative investigative methods. If the same information could be acquired by less costly means, why torture at all? Why inflict enormous pain—a great moral cost to utilitarians—when equally effective means of obtaining information are available? Available alternatives include informants, spies, bribery, gaining the suspect's trust, planting recording devices, and hacking the enemy's computer system.

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<sup>20</sup> One of the strongest arguments against permitting torture is that torture fails to produce reliable information in a timely manner. Many claim that torture is simply ineffective. Little evidence exists and we are forced to rely largely on anecdotal information. For a discussion on the effectiveness of torture, see Philip N.S. Rumney, *Is Coercive Interrogation of Terrorist Suspects Effective? A Response to Bagaric and Clarke*, 40 U.S.F. L. REV. 479 (2006).

<sup>21</sup> GROSS, *supra* note 5, at 124.

<sup>22</sup> *See id.* at 125-26.

<sup>23</sup> Sophisticated military and criminal networks limit their exposure by withholding information from those in the lower rungs of the chain of command, revealing the complete plan to only a few select members.

Second, allowing some torture might drive us down a “slippery slope” to its use in less justifiable circumstances. Rule utilitarians assert four varieties of slippery slope arguments. First, a legal standard allowing some torture might lead to progressively more frequent use in combating terrorism. The argument asserts that permitting some torture shatters the taboo against it. The fear is that, with time, officials will develop a greater preparedness to torture, and torture will eventually become normalized, used more frequently, and embraced as a legitimate means to obtain information, rather than an exception reserved for catastrophic emergencies.<sup>24</sup> Second, a legal standard permitting torture might lead to its use in achieving other security objectives. After all, if countering terrorism justifies torture, surely other objectives justify torture. Reasoning by analogy, lawmakers may allow torture in investigating the drug trade, kidnappings, or any other threat. Third, because the prohibition on torture serves special symbolic purposes, removing the ban on torture may affect other laws as well.<sup>25</sup> If we suddenly lift the long-standing ban against torture, even if only for extraordinary circumstances, it signals diminished value for human dignity and the inviolability of the human body.<sup>26</sup> Finally, legalizing torture in the United States might spread legalization to other nations. Foreign leaders may reason that if the superpower United States cannot maintain security without committing torture, weaker and more embattled nations cannot be expected to defend themselves without torture.<sup>27</sup> At the very least, members of terrorist organizations that the United States tortures will be justified in torturing captured citizens of the United States.

Rule utilitarians provide both empirical and theoretical support for these slippery slope arguments. First, history presents numerous examples of nations legalizing some torture but eventually using it too frequently and with progressively weaker justifications.<sup>28</sup> Second, rule utilitarians reason that the infrastructure necessary to maintain institutionalized torture contributes to its normalization.<sup>29</sup> To properly assess the costs of a

<sup>24</sup> See, e.g., MATTHEWS, *supra* note 13, at 120-134.

<sup>25</sup> See Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1718-39.

<sup>26</sup> Gross, *supra* note 17, at 1504-05; accord Waldron, *supra* note 25, at 1718-39.

<sup>27</sup> See, e.g., Henry Shue, *Torture in Dreamland: Disposing of the Ticking Bomb*, 37 CASE W. RES. J. INT'L L. 231, 235 (2006).

<sup>28</sup> See, e.g., Matthew Lippman, *The Protection of Universal Human Rights: The Problem of Torture*, 1 UNIV. HUM. RTS. 25, 37 (1979); Luban, *supra* note 4, at 1445-52. See generally EDGERTON, *supra* note 3.

<sup>29</sup> See, e.g., MATTHEWS, *supra* note 13, at 120-34; Jean Maria Arrigo, *A Utilitarian Argument Against Torture Interrogation of Terrorists*, 10 SCI. &



particular regime, we must also assess the practices necessary for its implementation.<sup>30</sup> For torture to serve its purposes, it must be effective.<sup>31</sup> The state must perform extensive scientific research on how to force someone to disclose valued information through torment.<sup>32</sup> Then, the state must train and maintain a stable of skilled torturers, requiring further research to determine how to train torturers.<sup>33</sup> These institutions would require legal support and defense from public officials.<sup>34</sup> In short, the costs of torture are not confined to the torture chambers and exist even if we torture only infrequently.<sup>35</sup> Torture necessitates a surrounding institutional apparatus and ideological support structure that promotes its normalization.

Beyond the two major arguments set forth above, rule utilitarians also list a number of other factors that weigh against permitting torture. First, legalizing torture degrades the reputation of the state in the international community. States that legalize torture lose the moral high ground against their enemies.<sup>36</sup> Second, torture alienates and radicalizes the tortured population, particularly if misused.<sup>37</sup> Third, torture affects the torturer: the torturer usually suffers severe psychological trauma.<sup>38</sup>

## 2. Criticisms of Rule Utilitarian Arguments Against Torture

Three major objections challenge the rule utilitarian position. First, rule utilitarians adopt an inherently unprincipled position.<sup>39</sup> On one hand, utilitarianism seeks to maximize happiness. On the other, rule utilitarians declare rules applicable in all circumstances, even in instances where happiness would not be maximized. When

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ENGINEERING ETHICS 543 (2004); Jessica Wolfendale, *Training Torturers: A Critique of the "Ticking Bomb" Argument*, 32 SOC. THEORY & PRAC. 269 (2006).

<sup>30</sup> See, e.g., MATTHEWS, *supra* note 13, at 14; Arrigo, *supra* note 29, at 540.

<sup>31</sup> MATTHEWS, *supra* note 13, at 107.

<sup>32</sup> *Id.* at 122-27.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Arrigo, *supra* note 29, at 564.

<sup>36</sup> Posner & Vermeule, *supra* note 6, at 693; accord Kenneth Lasson, *Torture, Truth Serum, and Ticking Bombs: Toward a Pragmatic Perspective on Coercive Interrogation*, 39 LOY. U. CHI. L.J. 329, 345 (2009).

<sup>37</sup> See e.g., MATTHEWS, *supra* note 13, at 134; Lippman, *supra* note 28, at 37; Sussman, *supra* note 8, at 12.

<sup>38</sup> Lippman, *supra* note 28, at 37.

<sup>39</sup> See Moore, *supra* note 12, at 296.

faced with an anomaly like the ticking time bomb scenario, the rule utilitarian must abandon cost-benefit calculation and simply apply the predetermined rule. Such “rule worship,”<sup>40</sup> in the supposed context of utilitarianism is inherently irrational and even contradictory. If purporting to employ an ethical theory based on cost-benefit analysis, a rule utilitarian should be able to deviate from predetermined rules in a ticking time bomb scenario.

Second, rule utilitarianism’s empirical arguments rely on factual realities that are capable of change.<sup>41</sup> It is always possible that the world could change enough that rule utilitarians’ position loses favor. The threat of terrorism may one day loom so great that the costs of unconditional prohibition outweigh the benefits, favoring a legal standard rather than a black-letter legal rule.

Third, the slippery slope arguments asserted by rule utilitarians meet three objections. First, the slippery slope arguments lack empirical support. Proponents of a slippery slope argument have the burden of identifying the mechanism by which the initial policy choice leads to adverse consequences and providing empirical evidence suggesting this mechanism does, in fact, exist.<sup>42</sup> Often, rule utilitarians fail to provide empirical support beyond mere speculation.<sup>43</sup> The analogous state-sanctioned killings have not been driven down a slippery slope. There is no evidence of more wars, capital punishment, or killings of fleeing suspects.<sup>44</sup> Warfare and capital punishment require an institutional and ideological support structure as vast as torture yet these have not led to normalization. Second, slippery slopes can be avoided if we recognize when superficially similar positions are relevantly different.<sup>45</sup> If we simply recognize the difference, allowing torture to stop an imminent attack will not lead to torture used to prevent unexceptional crimes. Third, legalizing and regulating torture might actually reduce the amount of torture rather than open the floodgates. Legalization forces public officials to be held

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<sup>40</sup> Gross, *supra* note 17, at 1496.

<sup>41</sup> Posner & Vermeule, *supra* note 6, at 681.

<sup>42</sup> *Id.* at 688. See generally Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985); Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003).

<sup>43</sup> Posner & Vermeule, *supra* note 6, at 689-90.

<sup>44</sup> *Id.*

<sup>45</sup> See Eric Lode, *Comment: Slippery Slope Arguments and Legal Reasoning*, 87 CAL. L. REV. 1469, 1486-87 (1999).

accountable.<sup>46</sup> When conducted illegally, as it is today, officials escape scrutiny.<sup>47</sup>

### *B. Rule Utilitarianism's Reply*

Rule utilitarians thus offer two explanations for why a black-letter legal rule forbidding torture is superior to a flexible standard that allows torture in designated circumstances. First, the benefits of a flexible standard are marginal and uncertain, while the costs are substantial, given the likelihood of unnecessary torture. Second, a standard allowing some torture might drive a slippery slope to more torture. But why do these same concerns not also persuade rule utilitarians to ban legal killing?<sup>48</sup> A flexible legal standard allows killing in designated circumstances. Unnecessary killing and a slippery slope to more killing are certainly possible. What is so special about torture that makes it more susceptible to unnecessary use and the slippery slope, and therefore amenable only to an unconditional ban? How are torture and legalized killing different?

Rule utilitarians focus on the inherent conceptual difficulties that distinguish torture and killing. They offer two reasons for why torture is more likely to result in unnecessary pain and two reasons for why torture is more vulnerable to slippery slope problems. First, to interpret the preconditions for torture correctly, officials must overcome the modal problem of distinguishing possible dangers and actual threats and the problem of conceptual vagueness in the terms "imminence" and "catastrophe." Second, officials must inflict unnecessary pain because of their inability to distinguish false and truthful disclosures of subjects. Third, torture is more susceptible to the slippery slope because of conceptual vagueness in the term "suspect," which is only exacerbated by the tense circumstances surrounding war and the difficulty of identifying suspects who possess helpful information. Finally, because prohibition of torture epitomizes the legal archetype of

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<sup>46</sup> Alan Dershowitz, *Torture Without Visibility and Accountability Is Worse Than With It*, 6 U. PA. J. CONST. L. 326 (2003).

<sup>47</sup> Alan Dershowitz, *The Torture Warrant: A Response to Professor Strauss*, 48 N.Y.L. SCH. L. REV. 275, 283 (2004).

<sup>48</sup>As an initial matter, rule utilitarians value the cost of death as greater than the pains of torture. Calculating the extent to which a rule utilitarian attributes a greater value meets certain epistemic barriers. For example, how do we compare pain and death? See MATTHEWS, *supra* note 13, at 109-13. Nevertheless, we may assume death is worse than torment, even if we cannot ascertain degree.

nonbrutality, legalizing torture has a unique ability to affect other laws.

### 1. *Preconditions for Torture and Legal Killing*

Inherent epistemic barriers obstruct interpretation of three common preconditions for torture: that the threat is real, imminent, and sufficiently dangerous. These conceptual difficulties complicate interpretation of any legal standard allowing some torture and make unnecessary torture much more likely, if not inevitable. No such complications plague interpretation of preconditions for legal killings, rendering a legal standard allowing killing in designated circumstances more justifiable. First, legal killings respond to past observable events, while torture responds to mere risks. Second, torture requires interpretation of vague terms, allowing greater opportunity for cautious intelligence agencies to broadly interpret the terms and torture unnecessarily. Interpretation of the preconditions for legalized killing affords fewer opportunities for error.

First, officials face a modal problem in distinguishing potential and real threats.<sup>49</sup> Threats are always possible until they materialize into harm. If officials could torture in response to any threat or danger, they could torture at all times. Assuming that we desire at least some limitations on the availability of torture as an investigative technique, we must distinguish merely possible dangers and real threats, and allow torture only in response to the latter. But how exactly do we identify a “real threat?” “Real threat” is an oxymoron “Threat” denotes potentiality and not actuality. Ultimately, identifying a “real threat” requires somehow differentiating between possibilities that have not yet occurred but would occur without intervention, and possibilities that will not occur. Officials contemplating torture must determine that an event yet to materialize will, in fact, materialize, a process more complicated than merely responding to observable events that have already occurred. These complications invite mistake, the cost of which is unnecessary torture.

Moreover, officials rarely obtain just enough information to conclude that a bona fide threat exists, but not enough information to stop that threat without torture. If the information is robust enough to justify the assertion that the threat is real rather than merely possible, that information would also be sufficient to

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<sup>49</sup> MATTHEWS, *supra* note 13, at 77-80.

extinguish the threat in the first place.<sup>50</sup> The narrow window of information that justifies torture suggests how ineffective the practice is.

The second and third preconditions for torture—that the threat is imminent and sufficiently large—are conceptually vague. Requiring imminence—that the “threat” will materialize soon, presumably before alternative measures can be taken—triggers the sorites paradox.<sup>51</sup> Intuitively, we understand what imminence means, but reflection on the choice of determining what exactly qualifies as imminent (hour, day, week, month?) reveals the term “imminent” is hopelessly vague.<sup>52</sup> Attempts at line-drawing inevitably produce arbitrary results. Not only must “imminence” be defined arbitrarily, but interpreting whether a threat falls within that definition is nearly impossible. Even if officials agree on the meaning of “imminence,” they face grave difficulties in determining whether a particular threat at hand might materialize within the defined timeframe. Riddled with these conceptual problems, it is doubtful that cautious intelligence agencies will limit torture to imminent threats.<sup>53</sup> More likely, they will interpret the meaning of the precondition “imminence” too broadly.

Likewise, any requirement specifying the nature and magnitude of the threat raises the same conceptual problems of arbitrariness and interpretation. A “catastrophe” might mean ten, a thousand, or a million lives. Once “catastrophe” is arbitrarily defined, officials encounter difficulties determining whether a particular threat meets that standard. They will likely err on the side of “caution,” torturing when the threat is unjustifiably small.

By contrast, decision-makers interpreting the preconditions for just war, capital punishment, and the killing of fleeing suspects face fewer inherent conceptual difficulties. First, legal killings respond to events that have already occurred, rather than fears of something that only *may* occur in the future. Wars follow attacks, executions follow murders, and fleeing suspect deaths follow dangerous crimes and attempted escapes. Torture, however, follows a determination that a perceived threat will soon become a catastrophe. Thus, torture requires interpretation of the possible

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<sup>50</sup> See *id.* at 84; see also Wolfendale, *supra* note 29, at 271-72.

<sup>51</sup> The sorites paradox is a problem that arises from vague predicates. If one million grains of sand are a “heap,” and a heap minus one grain is still a “heap,” then repeated applications forces one to eventually accept that just one grain of sand is still a heap. Surely, just one grain is not a heap, so we must draw an arbitrary line.

<sup>52</sup> See MATTHEWS, *supra* note 13, at 74-77.

<sup>53</sup> *Id.* at 75.

future while legal killings require interpretation of the past, and interpreting potentialities is often more difficult than interpreting past real events.

Second, conceptual vagueness plagues interpretation of torture but not legalized killings. None of the preconditions for state-sanctioned killings contain conceptual vagueness. Parties may dispute whether the defendant killed the victim or possessed the requisite intent defined by statute, but neither kill nor intent is vague. Law enforcement may accidentally shoot the wrong person when pursuing a fleeing suspect, but “fleeing” is not vague. We understand the terms, articulate principled definitions for them, and dispute only their application in particular cases. Interpreting the preconditions for torture requires arbitrarily defining the vague predicates “imminence” and “catastrophe,” and then somehow determining from pieced-together information that a potential future event satisfies that definition. We do not understand the terms, cannot articulate principled definitions for them because of the sorites paradox,<sup>54</sup> and dispute their application.

## 2. *Administration of Torture and Legal Killing*

Inherent epistemic obstacles prevent efficient administration of torture, but no such difficulties prevent efficient administration of state-sanctioned killings. Even if the three preconditions for torture—that the threat is real, imminent, and sufficiently dangerous—are satisfied and officials are justified in torturing suspects, interpretive barriers make unnecessary torture inevitable. Officials must inflict more pain than necessary to achieve their objectives. Inefficiency results from officials’ inability to recognize reliable information once disclosed.<sup>55</sup> Presumably, some suspects possess relevant information, and torture will effectively force them to divulge it. But common sense suggests that during torture, many terrorists—committed to their cause—deliberately give false information to mislead the torturer. Many more suspects simply do not possess any relevant information and will say anything to stop the torment. Although suspects may provide true or false information during torture, officials inherently cannot distinguish the two.

Unable to discriminate between truthful and false disclosures, officials must inflict unnecessary pain in two ways. First, officials must torture more people than necessary. Even if the first suspect

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<sup>54</sup> *Supra* note 51.

<sup>55</sup> MATTHEWS, *supra* note 13, at 87.

apprehended and tortured discloses all the information necessary to extinguish the threat, a very unlikely scenario, the torturer cannot know that for sure. The individual suspect cannot corroborate his admissions when tortured.<sup>56</sup> The torturer, suspicious that he has received false information, needs to check the suspect's credibility before diverting valuable resources to act on the tip. To verify the information disclosed, officials need to torture *at least* one other person unnecessarily. Most likely, they need to torture dozens of additional suspects to receive matching information and gain enough confidence to act on the tip.

Second, officials must torture each individual for an unnecessarily long period of time. The torturer never knows whether the victim disclosed *all* the information they possess. To ensure the victim admits everything known, the torturer needs to continue for at least a little longer after the suspect completes the admission. The need for trust, particularly in a situation that breeds intense suspicion, creates an inherent barrier to efficient torture.<sup>57</sup>

A third reason that officials must inflict unnecessary pain is the failure to understand pain. Pain is a very complex phenomenon.<sup>58</sup> Tolerance to pain varies substantially between individuals. Individuals react very differently to the same stimuli. The intensity of injury inflicted bears no direct relationship to the intensity of pain experienced. We experience several types of pain that bear complicated relationships to each other. Somehow, torturers must overcome these difficulties to calculate how much pain, what type of pain, and the proper method of inflicting pain that will force each unique individual to divulge information. Given the myriad variables, it is nearly impossible to inflict just enough pain to compel the subject to disclose information but no more. More likely, torturers will adopt a one-size-fits-all approach, inflicting maximal pain to ensure that every individual reaches the breaking point. Unnecessary pain, a great moral cost to utilitarians, is nearly inevitable.

By contrast, no such inherent epistemic barriers prevent efficient administration of state-sanctioned killings. To be sure, mistakes may occur, causing unnecessary death; in war and the killing of fleeing suspects, there may be collateral deaths, and in capital punishment, innocent individuals may be executed. But nothing *necessitates* inefficiency. Unnecessary deaths result from missing the target, erroneously interpreting the law, and applying

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<sup>56</sup> Sussman, *supra* note 8, at 7-8.

<sup>57</sup> *Id.*

<sup>58</sup> For an excellent discussion on torture and pain, see DARIUS REJALI, TORTURE AND DEMOCRACY 447-53 (2007).

the facts to the law incorrectly. Various controls limit potential for these errors. Assuming a just war, decision-makers purposefully formulate strategies that minimize collateral deaths. Juries, the appeals process, and executive pardon limit the potential for executing innocents. In either case, it is at least possible that the state inflicts no unnecessary pain. But the torturer, unable to distinguish between truthful and false disclosures from terrorists, *must* torture an unnecessary number of individuals for unnecessarily long periods to obtain corroboration.

### 3. *The Slippery Slope in Torture and Killing*

Conceptual difficulties and the tense circumstances surrounding torture make it especially vulnerable to the slippery slope. First, conceptual vagueness in the terms “terrorist” and “suspect” provide opportunity for broad interpretation.<sup>59</sup> We intuitively understand what “terrorist” means, but attempts at defining which individuals qualify as terrorists produce arbitrary results. Is it only those who actually participate in attacks? Or do we extend the definition to those willing to participate, anyone providing shelter, couriers, political leaders, ideological supporters, journalists, financiers, etc.?<sup>60</sup>

Second, officials charged with identifying individuals that meet the definitions for “terrorist” and “suspect” are likely to take advantage of opportunities for broad interpretation and torture more frequently with time. They are likely to do so for two reasons. First, they interpret these terms under stress from impending danger.<sup>61</sup> Second, the inevitable racial and political connotations of the term “terrorist” create prejudices that encourage mistakes. Torturing only members of a certain class predisposes us to treating the entire class as less-than-human.<sup>62</sup> Especially when under pressure from threat of attack, these prejudices might make officials identify suspected terrorists progressively more liberally and select individuals solely by skin color or political affiliation.

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<sup>59</sup> See MATTHEWS, *supra* note 13, at 88-94.

<sup>60</sup> *Id.* at 90-91.

<sup>61</sup> Frustration clouds judgment. Under threat of attack, we can reasonably expect decision-makers to become more desperate, less diligent in screening suspects, and more likely to needlessly torture. Because torture is presumably only committed during times of stress, when moral judgment gradually dissipates, allowing some torture invites slippery slope problems.

<sup>62</sup> *Id.* at 128.



Although just war killings and the killings of fleeing suspects are also committed in times of tension and danger, they are distinguishable from torture. A natural limitation controls fleeing suspect killings: these killings must follow dangerous crimes and therefore cannot occur more frequently unless dangerous crimes are committed more frequently. This precondition prevents slippery slope problems.

Just wars admittedly face *some* of the same slippery slope problems as torture. Protracted and costly wars tend to become less “just” with time. Racial prejudices against the enemy population develop in war and may result in slippery slopes to more killings. But wartime killings and torture differ. In any conflict, soldiers must identify their opponents. In a designated battle, soldiers capture or kill opponent soldiers. In other forms of conflict, they capture or kill insurgents and terrorists, a more difficult task that requires interpretation and is therefore more prone to mistake, especially as prejudices develop. Even worse, identifying which individuals to torture—those possessing information regarding an upcoming attack—requires another layer of interpretation. Rather than merely distinguishing between enemy and non-enemy, soldiers must first recognize the enemy and then differentiate between them to ensure that they torture only enemies with knowledge of imminent attacks. Another layer of interpretation affords another opportunity for prejudice to progressively blur the lines.<sup>63</sup>

#### 4. *Torture and Other Laws*

Jeremy Waldron argues that because of torture’s significance in the law, legalizing it would affect other laws.<sup>64</sup> He claims that the prohibition of torture is a legal archetype that epitomizes and expresses an important underlying principle of the law: “the law is not brutal in its operation.”<sup>65</sup> Waldron defines a legal archetype as a “particular provision in a system of norms which has a significance going beyond its immediate normative content, a significance stemming from the fact that it sums up or makes vivid to us the point, purpose, principle, or policy of a whole area of law.”<sup>66</sup> Prohibition of torture is archetypal of the policy that the law does not rule through fear and terror.<sup>67</sup> As evidence, Waldron

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<sup>63</sup> See GROSS, *supra* note 5, at 12.

<sup>64</sup> Waldron, *supra* note 25, at 1718-39.

<sup>65</sup> *Id.* at 1726.

<sup>66</sup> *Id.* at 1723.

<sup>67</sup> *Id.* at 1726.

cites three areas of law that reference this principle of nonbrutality: the Eighth Amendment, procedural due process, and substantive due process.<sup>68</sup> Undermining this legal archetype by permitting some torture, even if only in limited circumstances, unravels surrounding law that also embodies this principle of nonbrutality.<sup>69</sup> Waldron thus argues the *reverse* of a slippery slope. Rather than claiming that removing some lesser law makes it easier to remove more important laws, Waldron argues that lifting the prohibition on torture makes it harder to defend the lesser laws.<sup>70</sup> After all, if torture is permissible, how can we argue that flogging prisoners, coerced confessions, pumping someone's stomach to obtain narcotics evidence, or police brutality is wrong?<sup>71</sup>

### III. DEONTOLOGY AND ITS REPLY

#### A. *Deontology and Torture*

Deontologists, like rule utilitarians, devise rules that must be followed universally. Deontologists and rule utilitarians differ only in what criteria they use to formulate these rules. Rule utilitarians use only pleasure and pain. They hold that any act that maximizes pleasure and minimizes pain when applied universally is good. Deontologists evaluate actions under an entirely different rubric than rule utilitarians,<sup>72</sup> often focusing on the mental state of the actor or whether the act violates another's rights.<sup>73</sup> If it violates another's rights, it is strictly forbidden, regardless of the consequences.<sup>74</sup> Deontologists tend to treat each individual

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<sup>68</sup> *Id.* at 1730-34.

<sup>69</sup> *Id.* at 1733-35.

<sup>70</sup> *Id.* at 1735.

<sup>71</sup> *Id.*

<sup>72</sup> There are many varieties of deontology, some more agent-centered and others victim-centered. To avoid unnecessary complexity and focus on comparing torture and legal killings, I choose to ignore the differences within deontology.

<sup>73</sup> See e.g., MATTHEWS, *supra* note 13, at 144; Moore, *supra* note 12, at 297; Posner & Vermeule, *supra* note 6, at 676; see also Christopher Kutz, *Torture, Necessity, and Existential Politics*, 95 CAL. L. REV. 235, 255-57 (2007).

<sup>74</sup> Note that deontologists generally do not ignore consequences. They simply hold that consequences remain subordinate to the highest good. Deontology merely sets limits to consequentialist reasoning. MATTHEWS, *supra* note 13, at 12; Alon Harel & Assaf Sharon, *What is Really Wrong with Torture*, 6 J. INT'L CRIM. JUST. 241, 245-48 (2008). Matthews reasons that Immanuel Kant's rule is that we should never act in a way in which we would not want everyone to act, no one desires a universal law that ignores consequences, and therefore deontology does not ignore consequences. MATTHEWS, *supra* note 13, at 12.

separately as an end in itself.<sup>75</sup> Applying this analysis, many deontologists forbid torture under all circumstances.<sup>76</sup> They see torture as a particularly repugnant violation of individual rights. It requires specific intent, deprives the victim of dignity, and invades the victim's physical and psychological integrity.

Provided grave enough consequences, this uncompromising position represents a fanaticism<sup>77</sup> and "moral fundamentalism,"<sup>78</sup> that is difficult to defend. Hardly anyone finds it acceptable to rigidly adhere to an abstract moral principle—no matter how sound the principle appears in isolation—when doing so results in the death of hundreds or thousands of people.<sup>79</sup> Deontologists allow catastrophe and mass death to occur to protect a single individual simply because torture violates his or her rights.

The infamous "ticking time bomb" hypothetical illuminates these objections. In this scenario, a bomb is located in a crowded city. If detonated, it will destroy the entire city and millions will die. The bomb's location is unknown, and there is not enough time for a general search. Law enforcement apprehends one of the bomb's planters who knows the bomb's location and how to deactivate it. If the terrorist divulges the information, law enforcement has enough time to disable the bomb. Given these facts, few would adhere to principle; most would torture the individual in order to extract information that would save millions. This hypothetical presses deontology to its ideological limits. Once the prohibitionist admits he would allow torture in this situation, he concedes that his opposition to torture is not based on principle alone, but on something else.<sup>80</sup>

Deontologists respond with both logical and empirical objections to the ticking time bomb hypothetical's seductive simplicity. First, as Richard Matthews points out, the argument may be valid, but it is unsound, and therefore it cannot seriously undermine any position on torture.<sup>81</sup> The ticking bomb argument sets forth an "if-then" conditional: if these facts exist, then a reasonable person would torture.<sup>82</sup> If the antecedent holds, the consequence follows. But the hypothetical assumes the

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<sup>75</sup> See e.g., Harel & Sharon, *supra* note 74, at 247; Kutz, *supra* note 73, at 257.

<sup>76</sup> See e.g., Colb, *supra* note 17, at 1420; Gross, *supra* note 17, at 1492-93; Luban, *supra* note 4, at 1430; Moore, *supra* note 12, at 297-98.

<sup>77</sup> Gross, *supra* note 17, at 1517; Posner & Vermeule, *supra* note 6, at 676.

<sup>78</sup> Harel & Sharon, *supra* note 75, at 246.

<sup>79</sup> Posner & Vermeule, *supra* note 6, at 676-77.

<sup>80</sup> Luban, *supra* note 4, at 1430.

<sup>81</sup> See MATTHEWS, *supra* note 13, at 71.

<sup>82</sup> MATTHEWS, *supra* note 13, at 13-14.

antecedent's truth without providing any proof. Valid but not sound, the hypothetical proves nothing. If we accepted mere validity, *anything* could be proven.<sup>83</sup>

Second, deontologists point out how unlikely it is that the antecedent facts would ever simultaneously exist in the real world. Although each premise has an empirical likelihood of being false, the hypothetical assumes that (1) an actual terrorist threat exists, (2) the threat is imminent, (3) the threat is sufficiently dangerous to justify torture, (4) the apprehended suspect possesses any information relevant to the threat, (5) only a single individual possesses all of the information necessary to extinguish the threat, (6) the individual participated in the attack or is a wrongdoer, (7) torture will be effective in forcing the subject to disclose information, (8) the information disclosed is truthful, and (9) the torturer can distinguish truthful and false information simply by observing the subject. The distinct unlikelihood that all nine elements will simultaneously exist in the real world renders the example almost irrelevant, useful only as a thought exercise.<sup>84</sup>

While these criticisms expose the assumptions in the ticking time bomb hypothetical, they ultimately avoid the issue. While it might be extremely unlikely that such factual circumstances will ever exist, it is not conceptually impossible. The fact remains that rigid deontology allows the bombs to go off in that scenario, however unlikely. Deontologists allow the world to explode to avoid violating the rights of a single individual.

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<sup>83</sup> Matthews provides the following example:

- (1) If there are little green men from Mars, they are dictating war plans to the current administration.
- (2) There are green little men from Mars.
- (3) Therefore, they are dictating war plans to the current administration.

If (1) and (2) are true, we must accept (3). But no one accepts (1) and (2). In the same way, the ticking time bomb hypothetical merely asserts that if a certain set of premises are true, we must arrive at a conclusion. But until we can accept the ticking time bomb hypothetical's premises, it has no argumentative force.

<sup>84</sup> The hypothetical also assumes a single, ad hoc decision made by one individual. In the real world, we decide the most appropriate policy choice or protocol for a complicated administrative agency. See MATTHEWS, *supra* note 13, at 22; Luban, *supra* note 4, at 1445. Because multiple people in an agency must make independent decisions, there is greater opportunity for error.

*B. Deontology's Comparison of Torture and Legal Killing*

*1. The Argument Relies on a Disputed Premise*

The argument that torture ought to be permissible because some forms of killing are permissible relies on a premise that deontologists reject. The argument's syllogism contains a hidden premise between steps (4) and (5). It assumes that moral permissibility turns on the quantum of harm visited upon victims, asserting that "whenever a greater harm is permissible, a lesser harm must also be permissible." It follows *modus ponens*: a greater harm (killing) is permissible, therefore the lesser harm (torture) should also be permissible. Without this hidden premise, the ultimate conclusion—that torture should be permissible on account of just war killing's permissibility—does not follow. A more accurate second stage of the syllogism would read:

- B. Since (4) just-combat killing is a greater harm than torture usually is, and
  - (\*) whenever a greater harm is permissible, a lesser harm must also be permissible,
  - (5) just-combat killing is sometimes morally permissible,
- then (6) torture ought to be sometimes morally permissible.

Deontologists reject the hidden premise. Rather than simply comparing the relative consequences of actions, many deontologists first determine whether an act violates someone's rights. Because deontologists constrain consequentialist reasoning in this way, acts that produce lesser harms may be impermissible while acts that produce greater harms may be permissible. Thus, because of the concern for the victim's rights, it does not follow that a lesser harm is permissible simply because a greater harm is permissible. Deontologists remain unscathed by this objection.

Even without turning to the objection's syllogism, evaluating the strengths and weaknesses of deontology reveals that this objection cannot affect their position. The ticking time bomb hypothetical exposes the position's biggest problem: adherence to unconditional prohibition of torture might allow mass death. But many deontologists brush off this criticism and point out that fashioning moral rules involves more than simply comparing relative consequences. Given this refusal to yield to the ticking time bomb hypothetical and compare the consequences of torture and mass destruction, it seems silly to think that deontologists

would permit torture simply because it produces less harmful consequences than legally permissible acts.

## 2. *Killing and Torture Are Distinguishable*

Applying the moral criteria that deontologists accept, torture can be distinguished from legalized killings. As argued above, deontologists reject the hidden premise and claim that the objection fails to undermine their argument for unconditional prohibition of torture. But refuting one objection does not necessarily prove their position. Deontologists must still justify a legal regime that accepts certain killings and forbids torture. They must distinguish torture from just war, capital punishment, and the killing of fleeing suspects. When deontologists analyze the act of torture, the analysis reveals that the nature of the interaction between the perpetrator and victim differs substantially from that of state-sanctioned killings. First, unlike just war killings and killing fleeing suspects, torture is an assault on the defenseless. Second, unlike nearly any other physical assault, torture specifically targets the victim's dignity.

As Henry Shue famously pointed out, torture attacks the defenseless.<sup>85</sup> One of the most basic principles incorporated in the law of war is the distinction between combatants and noncombatants.<sup>86</sup> Not only does this rule minimize destruction by limiting the pool of people assaulted, but it differentiates the *type* of acceptable casualties.<sup>87</sup> Ordinarily in war, at the instant of death, both the killer and the victim could kill each other; each serves as a threat to the other until someone dies. In contrast, in torture, it is not a "fair fight."<sup>88</sup> The torture victim no longer serves as a threat; he is captured and detained.

Admittedly, this conception of both war and torture oversimplifies matters. The torture victim, while obviously not a direct threat in the sense that he might fight back, supposedly possesses information that can relieve a significant threat. In the same way that killing a combatant on the battlefield dispels a threat, torturing to extract information also relieves a threat. Further, it is possible to conceive the torture victim as not having surrendered until he discloses the relevant information.

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<sup>85</sup> Shue, *Torture*, *supra* note 9, at 124.

<sup>86</sup> *Id.* at 127; accord Bellamy, *supra* note 8, at 140; Levinson, *supra* note 8, at 2034-37.

<sup>87</sup> Shue, *Torture*, *supra* note 9, at 128.

<sup>88</sup> *Id.* at 129.

Nevertheless, the torture victim remains defenseless in many important respects. First, the torture victim who is truly committed to his cause will not disclose the information.<sup>89</sup> Compliance means betrayal and betrayal, particularly self-betrayal, cannot be conceived as a meaningful escape.<sup>90</sup> Second, unlike in battle, the torture victim cannot shield himself or retaliate in any way not already set in motion before capture.<sup>91</sup> The torture victim has no prospect of surprising the tormentor.<sup>92</sup> Indeed, torture victims are utterly at the mercy of the torturer.<sup>93</sup> Third, in addition to being physically defenseless, the torture victim cannot resist legally or morally.<sup>94</sup>

Second, torture specifically targets the victim's dignity.<sup>95</sup> While killing destroys the entire person, it at least keeps the victim's dignity intact.<sup>96</sup> Torture, on the other hand, specifically targets humanity and autonomy.<sup>97</sup> Torture intentionally inflicts torment in ways that force the victim to use his own agency against himself.<sup>98</sup> Through the deliberate and calculated infliction of pain, torture seeks to undermine "the very capacities constitutive of autonomous agency itself."<sup>99</sup>

#### IV. CONCLUSION

Both rule utilitarians and deontologists successfully distinguish between torture and legal killings and defend themselves against charges of hypocrisy and inconsistency. Rule utilitarians argue that inherent interpretive barriers make unnecessary torture inevitable, while no such obstacles plague interpretation of legal killings. Unlike most utilitarian arguments, which are empirical in nature, this argument relies on innate conceptual difficulties not subject to

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<sup>89</sup> *Id.* at 135-37.

<sup>90</sup> *Id.*; accord Sussman, *supra* note 8, at 18.

<sup>91</sup> *Id.* at 6.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> See MATTHEWS, *supra* note 13, at 46-59.

<sup>96</sup> The intentionality of torture also differs from killings. First, while one can accidentally kill, accidental torture is impossible. See Sussman, *supra* note 8, at 5. Second, assuming a just war, any collateral deaths are unintentional. See Levinson, *supra* note 8, at 2036. Third, while we ordinarily recognize the right to kill in self-defense, the right to torture in self-defense seems nonsensical. See Sussman, *supra* note 8, at 15.

<sup>97</sup> *Id.* at 13.

<sup>98</sup> *Id.* at 14.

<sup>99</sup> *Id.*

mutable factual realities. Deontologists maintain that analogizing torture and state-sanctioned killings fails because deontologists do not simply compare consequences when evaluating moral actions. Using the criteria they accept, they distinguish torture because it attacks the defenseless and specifically targets human dignity.

However, merely distinguishing torturing and killing does not defend unconditional prohibition of torture. Whether unconditional prohibition of torture is justifiable and whether torturing and killing can be distinguished are distinct questions. This Note only provides analysis of the latter inquiry, a mere piece of the puzzle in the broader torture debate. In its defense, this Note identifies many of the strongest arguments supporting rule utilitarians and deontologists. It also provides analysis that may eliminate a subset of the debate.

Three questions remain unanswered. First, how do utilitarians and deontologists survive attacks from each other? This Note addresses how each group perceives and overcomes challenges of hypocrisy using the analytical tools of their respective moral theories. For the most part, it overlooks the meta-ethical problems in deciding the more appropriate moral theory between the two. Second, how do these theories compare to other permutations of consequentialism and deontology? For example, some philosophers support “threshold deontology,” in which potential catastrophes trigger consequentialist considerations.<sup>100</sup> Finally, how do these theories compare to the various extra-legal solutions to the problem? Philosophers and jurists have argued for judicial warrants,<sup>101</sup> civil disobedience,<sup>102</sup> ex-post ratification,<sup>103</sup> necessity defenses,<sup>104</sup> and necessity excuses.

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<sup>100</sup> See Kutz, *supra* note 73, at 255; Sen, *supra* note 12, at 187-223; Posner & Vermeule, *supra* note 6, at 677.

<sup>101</sup> ALAN DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* (2002).

<sup>102</sup> See e.g., Gross, *supra* note 17.

<sup>103</sup> See e.g., *id.* at 1526-34.

<sup>104</sup> See e.g., Thomas Crocker, *Overcoming Necessity: Torture and the State of Constitutional Torture*, 61 SMU L. REV. 221 (2008); Paolo Gaeta, *May Necessity Be Available as a Defense for Torture in the Interrogation of Suspected Torturers?*, 2 J. INT'L CRIM. JUST. 785 (2004); Moore, *supra* note 12.