Toward a Political Ethics of Torture

By

Steven E. Torrente

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	Paul Schumaker, Chairperson
	Brent J. Steele
Committee members	Mariya Omelicheva
	Thomas W. Heilke
	Mark Joslyn
	Dave Tell

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The Dissertation Committee for Steven E. Torrente certifies
that this is the approved version of the following dissertation :

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_____

Paul Schumaker, Chairperson

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Abstract

The current torture ethics debate comprises a dispute about the moral status of torture and a parallel dispute about the right way to do ethics. The first dispute receives much attention, while the the second dispute is obscured or even suppressed. As a result, scholars have developed highly idiosyncratic approaches to torture ethics that cannot be meaningfully compared. These moral evaluations of torture rest on contrary assumptions about the definition of torture, the right way to do ethics, and the facts of the situation, and therefore they are not really answers to the same moral question. I respond to this dilemma by analyzing torture ethics as a *social* rather than ethical problem. I use Bruno Latour's Actor-Network Theory (ANT) to reimagine two things: what kind of conceptual object torture is, and the structure of the social group that is considering torture. This approach puts disagreeable actors on equal footing, based on their real associations. It does not force an unjustifiable resolution to their normative and metaethical differences. I then use the controversies in the torture ethics debate as raw material for developing new descriptions of torture that do not re-engage proprietary ethical frameworks. These advances make possible a more inclusive and robust political ethics of torture.

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Part I

The Current Debate

Chapter 1

Introduction

1.1   On What Sort of Problem Torture Is

When Eurystheus sent Heracles to kill the Lernaian Hydra, the hero initially struggled with the task. The nine-headed beast grew two new heads in the place of each one Heracles destroyed. Heracles could easily calculate that the Hydra could not be killed with a conventional strategy. He needed help from his nephew Iolaos, who burned the regenerating stumps so that Heracles could defeat the Hydra.[1] Eurystheus did not even credit Heracles for his labor, because Iolaos had helped. The real key to defeating the Hydra, however, was not enlisting Iolaos but recognizing and then countering its head-regenerating ability.

The problem of torture ethics, like the Hydra, only reveals itself to those who step back and consider it as a whole. In its current high-stakes context of counter-terrorist interrogation, though, torture provokes strong reactions. Stepping back from it has proven difficult. The danger of the current torture ethics debate is that failing to properly assess the problem can make things worse, as it did with the Hydra.

Today's torture ethics debate focuses on some version of the practical question "is torture morally permissible?" In more applied terms, the question becomes "is it morally permissible

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[1] In Greek mythology, the slaying of the Hydra was the second of Heracles's Twelve Labors (Apollodorus and Hyginus, 2007, 30-33).

to torture suspected terrorists in order to prevent a terrorist attack?" Since 2001 many scholars have given their own answers to this question. The premise of this dissertation is that the phrase "is torture morally permissible?" is not really a single question, nor can it be the origin of any answer. It is merely the symbolic face of a dense cluster of interrelated questions that can only be addressed, not answered. I will argue that the question of torture's moral status has no meaning in itself, apart from related questions concerning what torture is, the facts of the situation where it is being considered, and the right way to make ethical judgments. Those are not three additional questions, but three *categories* of additional questions. The total number of related questions is much higher.

The current torture ethics debate focuses on the symbolic question of torture's moral status, at the expense of the interrelated questions. When scholars in the torture ethics debate address related questions about what torture is and the right way to do ethics, they are primarily stating premises and assumptions rather than arguing the issues. In general, such statements are necessary and normal preludes to making any argument at all. The reason it causes so much trouble with torture ethics is that scholars disagree about too many of the related questions in the cluster. As a result, they can hardly be said to be addressing the same problem. When scholars give one answer to the definition of torture, two more questions sprout from it like heads from the Hydra. The same goes for other associated questions, some of which are both arcane and difficult. Are moral judgments objectively real, or are do they arise in human interaction? That question could occupy professional philosophers for a long time, and it is not clear what sort of authority exists today that could validate an answer. This makes the task of addressing torture ethics an almost bottomless philosophical problem.

Because scholars differ so much on the related questions, there is very little basis for comparing the results of their different approaches. In an effort to break out of the resulting deadlock, this dissertation addresses the cluster of questions around torture ethics rather than the isolated symbolic question about torture's moral status. It simultaneously considers a specific moral judgment *and* the disputes about how to make that judgment. The specific moral judgment concerns the moral

status of torture, and the disputes about how to make that judgment are myriad. In terms of ethical theory, I tackle the practical ethics, normative theory, and metaethics of torture together, as one holistic problem. As Heracles did with the Hydra, this requires stepping back from the problem so it can be understood in a new way, and then responding appropriately to that understanding.

In this dissertation, I argue that the current torture ethics debate comprises a tangle of inter-related questions. The question of torture's moral status *has no meaning in itself*, apart from the related questions, even though it appears to be the crucial question. The related questions concern, for example, the definition of torture, the ability of torture to produce information, and the right sort of normative reasoning to apply. The torture ethics debate is just as much a debate about how to make ethical judgments—and about the facts of the situation—as it is about the moral status of torture.

The answers to these questions usually serve as prior assumptions in any particular argument for torture ethics. I argue that diverse voices answer these questions in ways that are not only different, but impossible to compare. Each set of answers is *incommensurable*, meaning that they cannot be compared to each other.[2] This applies to accounts of torture ethics even more than to the competing scientific paradigms to which the label is usually applied. The cluster of questions that bear on torture ethics is complex, and the answers vary in ways that "cut across" the major normative traditions like consequentialism and deontology.[3]

The headline of every account of torture ethics may well be its verdict on the permissibility of torture. However, the approaches are so idiosyncratic that they are not really for or against the same thing at all. For this reason, this dissertation *does not* attempt to add, improve, or synthesize another

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[2]Thomas Kuhn proposed the "incommensurability thesis" to dispute the scientific standard of *falsifiability* advanced by Karl Popper. Incommensurability occurs when "a new paradigm brings new concepts, and, crucially, new standards for the evaluation of theories" (Larvor, 1998, 42). As a result, "there is no universal yardstick" for comparing incommensurable theories.

[3]In this way, the situation in ethics resembles that in International Relations, where major approaches may, as Jackson and Nexon argue, "*lack* shared incommensurable content; some of the better candidates for sources of incommensurability in the discipline, by contrast, cut across them" (2009, 908, emphasis in original). In their view, theories of International Relations like realism or constructivism are not internally consistent enough to be incommensurable with each other. They argue that this means "we should not use Kuhnian and Lakatosian accounts of theory choice to evaluate these aggregates" (2009, 908). The review of torture ethics in chapter 2 of this dissertation shows that approaches to torture ethics are even less consolidated than the major theories of International Relations.

approach to torture ethics. I also largely avoid debunking or deconstructing others' approaches. Instead, it presumes that ethical frameworks will continue to be not just incommensurable, but highly idiosyncratic.[4] The question I do attempt to answer is how a political community can make ethical choices in the absence of a uniform, or even widely shared, ethical framework. It certainly seems likely that no existing account of torture ethics will dominate the debate sufficiently to guide the community's action. Ethical concerns are thus abandoned to whoever has the power or functional position to make and implement choices.. In the United States this has come to mean the Chief executive and associated staff, at least concerning security matters.

Against this, I contend that political communities can still act ethically even with a variety of conflicting ethical frameworks. This dissertation theorizes how such a *political ethics* can be possible for torture. The dissertation also draws the conversation onto common conceptual ground that accommodates various ethical frameworks, and thereby denies easy exits to self-contained moral universes. The dissertation is about the torture ethics debate as much as it is about the morality of torture itself.

To assess torture ethics in this way requires two things. The first is to make torture ethics sociable, and the second is to make it possible to talk about in shared terms. Making torture ethics sociable means working toward an ethics that can be shared. This task becomes more complicated if one assumes, as I do in this dissertation, that the right answers to the associated questions cannot be imposed on disagreeable members of the political community—at least not as a premise of torture ethics. Any sociable approach to torture ethics has to presume that a harmony, or even a decent consensus, is very likely to elude it. Most people who are not professional philosophers do not even *have* detailed and firm commitments to specific ethical frameworks, and the more they do have such commitments, the less likely it is that a harmony or consensus can be achieved.[5] One

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[4]The notion that one ethical framework will win a following sufficient to become *the* framework is far-fetched in practical terms. The picture of the current torture debate in chapter 2 attests to this. Ethical theories based on Continental philosophy make an even stronger claim that imposing a "collective ethos" that is "no longer shared" requires "violent means" (Butler, 2005, 4).

[5]Of course, most people do have ethical commitments in the sense that they make decisions about whether to do drugs, vote, get an abortion, pay their taxes, or help their neighbors. What I am saying here is that most people do not have thoroughly worked out answers to the many questions that bear on their overall moral frameworks. The discussion of Matthew H. Kramer's ethical framework in section 2.4.3 goes into this issue more deeply. I am not even

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way to put the central question of this dissertation, then, is to ask how political communities can make ethical judgments at all, where their members have such diverse ethical frameworks. Another way to put this is that the dissertation concerns the *political* ethics of torture.

The second requirement for such a holistic approach to torture ethics is to make it possible to *talk about* torture ethics in common terms. The language and concepts that are available now for talking about torture are often closely connected with the proprietary ethical frameworks mentioned above. For example, from the utilitarian perspectives in section 2.1, the most relevant feature of torture is the quantity of harm that figures in the ethical calculation. Concerns about the tortured person's autonomy and rights generally have no relevance to utilitarians, so descriptions of torture that use rights language and talk about autonomy will not resonate with them. The fact that torture is illegal in multiple ways further complicates attempts to talk about it. Culpable government officials rarely consider themselves torturers, even when they present themselves as serious people who take tough and necessary actions.[6] In the minds of officials, whatever they did must not have been torture. Thus the conceptual and linguistic environment around torture ethics is a challenging one. The concepts constituting torture may themselves still be serviceable for the analysis I engage in here. What has to be avoided are differences that render the same concept incompatible to opponents. To that end, the dissertation develops language about bodies, space, information, and security that can be shared by people who continue to disagree on the right way to justify (or prohibit) torture.

1.2   What is in the Dissertation (contents)

The dissertation begins with a review of the past decade or so of torture ethics research. Since the Abu Ghraib scandal in the spring of 2004, torture scholarship in general has seen explosive

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suggesting that fully working out such a framework is feasible or desirable. My point is that most people and groups choose courses of action on some less elaborate basis than a fully-specified moral framework.

[6]See for example *Hard measures: how Aggressive CIA Actions after 9/11 Saved American Lives* by former CIA official Jose Rodriguez (2012), who ran the CIA interrogation program but does not consider himself a torturer (Thiessen, 2013).

growth. For a long time before that, it had been a fringe topic occasionally visited by adventurous philosophers or political theorists interested in authoritarian regimes. Chapter 2 looks at works that directly address the question of torture's moral status. The chapter outlines the major utilitarian and deontological argument and delves into their complexity.

I critically assess this research at the level of the whole debate, but refrain from too much specific critique of the individual arguments. Hardly any of these works consider the ethics of torture as the cluster of questions I have described above. Chapter 2 should give readers a sense of how problems multiply in these attempts to answer the question of torture's moral status in its nonsensical isolated form.

Chapter 3 develops a method for addressing torture ethics as the complex cluster of questions I am arguing it is. Specifically, I use the work of philosopher Bruno Latour to describe torture as a complex problem. More importantly, I follow Latour's lead by resisting the impulse to reduce, refine, and clarify the problem. Instead, I adopt Latour's Actor-Network Theory (ANT) for its strength in handling just such problems.[7] Regarding the first task of proposing a *sociable* ethics of torture, I use Latour to theorize how people can be united in a political community despite enduring differences in their ethical frameworks. That is, I assemble the actors as they are—or as *we* are, since the network extends to me and to other readers. For the second task of creating concepts and language that can be shared by such different people, I apply what Graham Harman (2009) has started calling Latour's "object-oriented philosophy." When combined with empirical knowledge of post-2001 interrogations, this allows me to talk about torture in ways that can be shared with those who do not share the same ethical framework.[8]

Although it is difficult to describe in advance, using so much of Latour's philosophy also changes what it means to engage critically with the torture debate. By analyzing torture ethics as a cluster of interrelated questions, I am not setting out to unmask or debunk what other people

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[7]I rely on an array of Latour's work, but primarily *We Have Never Been Modern* (1993) and his methodological treatise *Reassembling the Social* (2005).

[8]Such knowledge has become more and more available in the form of leaked and officially released documents. In chapter 4, for example, I make use of the memorandum that describes the interrogation of Abu Zubaydah by the U.S. (Bybee and Yoo, 2002).

have said about it. I do not believe they are wrong, so much as I believe the diversity and variety that characterize their answers cannot lead the political community anywhere. More precisely, even if I could point out everything that is wrong with some torture ethics scholarship, I argue that such understanding would *not* help in the community facing the ethical choices in concrete cases.

The remaining chapters (4-6) address specific aspects of the torture ethics debate. Chapter 4 uses ANT to trace the connections of people and objects in the current torture debate. I then use the spatial theory of Henri Lefebvre (1991) and the record of violent interrogation techniques approved by Bybee and Yoo (2002) to describe what is happening in a torture interrogation. There I am concerned with what is happening in the torture situation, how the various actors are connected to it, and how to talk about it. Chapter 5 first examines the different ways of understanding how bodies relate to life-saving information in torture ethics debate. The chapter asks what participants in the torture debate think about whether bodies contain, produce, or excrete information.

These areas of concern stem from the central theme of torture in counter-terrorist interrogations, which is that causing pain to certain bodies produces information, that in turn produces security. The concluding chapter discusses how those developments make possible a political ethics of torture that overcomes the disadvantages of the current torture ethics debate.

The scope of the dissertation is concentrated on counter-terrorist torture by or on behalf of the U.S. since 2001. In the future, the arguments developed here can be adapted to other instances of controversial torture or torture-like treatment, for example in extreme incarceration techniques. The networked quality of Actor-Network Theory makes it possible to follow links from one controversy to another, and even encourages this.[9] The scope of the dissertation is limited for practical and conventional reasons, while remaining theoretically flexible. In addition, the scope of the dissertation is somewhat broader than the U.S. counter-terrorist torture because the torture ethics debate itself is part of the data. Steinhoff (2013), for example, claims to be most concerned about child kidnapping cases and disdains the current torture debate's counter-terrorist aspects. Those who do focus on torture in counter-terror interrogations, too, often define their object of study by

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[9]Ackerman (2015) describes such a connection in the person of Richard Zuley, a notorious Chicago police lieutenant who also worked as an interrogator for the U.S. at Guantanamo Bay, Cuba.

distinguishing it from other kinds of torture. Thus while this dissertation is mostly concerned with the case of interest, these other connections need not be denied.

One final note on terminology. I use the term "torture" in reference to the acts that most readers are now familiar with. Stress positions, sleep deprivation, waterboarding, and the other techniques associated with what U.S. officials have called "enhanced interrogation" are, in my view, torture. I understand that this is still vigorously contested—though mostly by those whose own criminal culpability is on the line. I hope readers will not be distracted by such a liberal use of the term, and note that Chapter 4 especially is devoted to describing those acts in terms that can be shared even by those who disagree about whether the techniques constitute torture. If I am successful, then everyone will have improved language to use in the ongoing debate over what counts as torture. However, to avoid the unwieldy strings of phrasing like "torture and enhanced interrogation" or "torture and contested acts that may or may not be torture," I generally call it torture throughout the dissertation.

1.3   What is in the Dissertation (outcomes)

I hope that readers will find value for themselves in reading this dissertation. What's in it for readers is, firstly, a good grounding in the current torture debate. Readers with an interest in torture have probably found themselves talking to someone who disagrees with them about it. If my own experience is any guide, these conversations do not always go very well. Readers who have been surprised to find that someone they know well is a craven torture supporter—or alternatively, found that someone is too squeamish about torture to prevent the deaths of thousands of innocents—will benefit from a deeper understanding of the various arguments and complications. Secondly, the dissertation provides a new way of engaging torture ethics that puts disagreeable people back on the same playing field. Like it or not, John Yoo, the CIA interrogators, President Bush, President Obama, myself, the Center for Constitutional Rights, readers, and even the prisoners still at Guantanamo Bay are all associated in the same network around the issue of torture. This dissertation

salvages something from that social collection of entities, who can finally dispute torture on shared terms. Thirdly, and perhaps more ambitiously and speculatively, the dissertation models a way for dealing with other divisive issues of public ethics. For scholars interested in Bruno Latour's social theory, this dissertation begins to theorize an ethics that corresponds to it.

If the United States is going to torture suspected terrorists, it ought to be on the basis of a vigorous political debate—one that many people can participate in, where the language is not proprietary and exclusive, and a debate that is not won by unjustifiably imposing one's ethical framework on others.

Chapter 2

Contemporary Torture Ethics

This chapter reviews literature that directly concerns the moral status of torture. For the most part, the works cited here were written during the latest chapter of the debate, beginning after the 2001 terrorist attacks in the United States. That event changed everything, as some say. Readers can use this chapter in a number of ways. The first is to familiarize themselves with the prominent lines of argumentation about torture ethics—some supporting its use, some opposed, and some rather ambiguous. Readers may also begin to consider what it might take to say something useful about the debate as a whole, given the complexity of the views that are relevant to it and the way these views conflict with each other. Finally, the chapter aims to persuade readers to entertain something quite different, rather than another argument along the similar lines to the existing ones. To that end, readers who are already well-versed in the current debate might focus their attention on certain parts of this chapter: the Critical Assessment (2.3), the latest research (2.4), and the conclusion (2.6).

The works included here all focus squarely on the moral status of torture. They are trying to *answer* the open question of torture ethics. From one point of view the question obviously *is* open, as it has been vigorously contested for a decade. However, there are some ways of answering the associated questions around torture that tend to present the question of torture ethics as settled. For example, the United Nations Convention Against Torture (UNCAT) has some positive elements[1]

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[1] A positive element that suggests the ethical debate is now closed can be found where the declaration states that

that place the moral status of torture in the past, as well as natural elements[2] that place it in the world or in human beings. In neither sense does torture appear to be a question worthy of further debate. From the point of view of the UNCAT and other formal instruments like the Geneva Conventions and the torture prohibition in the U.S. Code, the question is indeed *closed*. Such claims do rest rather dangerously, however, on meta-ethical assumptions that are not always acknowledged or well understood in the torture debate—like what sort of truth status a moral judgment can aspire to, and whether such judgments relate to "facts" given by the world or human nature.[3]

Of course, that is not the end of the story, as the continuing dispute attests. Indeed, the premise of this dissertation is that the question is as unsettled as ever, despite the hard work scholars have been doing to write the final word on torture ethics. Today's vigorous torture debate features new reasons to torture and new reasons not to. Transhistorical background beliefs that locate the resolution of torture ethics in the past tend to detract from the dynamic action of ethical debate in specific cultural and temporal contexts.[4] The current torture debate has links to both the recent and distant past, but also has its own specific characteristics. With few exceptions, the authors below address the specific context of torture in counter-terrorist interrogations.[5]

"Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world, *Have agreed as follows . . .*" (UN, 1984, emphasis added)

[2]"Recognizing that those rights derive from the inherent dignity of the human person. . ." (UN, 1984)

[3]In analytic metaethics, the "truth-aptness" of moral claims divides cognitivists, "who think that moral judgments are capable of being true or false," from non-cognitivists, who "think that moral judgments express non-cognitive states like emotions and desires" (Miller, 2013, 3). Cognitivists themselves disagree about the source of moral truths: for naturalists, "a moral judgment is rendered true or false by a natural state of affairs," whereas non-naturalists think that moral judgments "are not identical with or reducible to natural properties" (3f.). These two questions only hint at the complexity of meta-ethics entirely within the Anglo-American analytic tradition, and do not even touch on the additional divergence with ethical approaches based in Continental thought. For example, Judith Butler and Simon Critchley each independently developed strongly relational visions of ethics that go much further than (for example) Matthew Kramer's (2014) inclusion of an agent-centered element in his torture ethics. Butler (2005) argues that ethics actually arises in the vulnerable encounter between subjects who cannot fully account for themselves, rather than in a shared ethical ethos. The relational ethics in Critchley (2012) come about because subjects cannot account for the fundamental ethical commitments they make, and are, in effect, taking on an asymmetrical relation they cannot fulfill. Ethics are thus *Infinitely Demanding*, as his title suggests. The sort of talk in which Phil "comes into existence" as an ethical subject because Sue demands that he account for himself, or as a result of the infinite demand placed on Phil by the ethical commitment to Sue that he cannot account for, is out of bounds in the kind of philosophy that dominates the torture ethics debate. The torture ethic arguments reviewed in the rest of this chapter do not generally delve into the how Phil, Sue, or any of the characters "come into existence," only what they do to each other. Gordon's virtue ethics (2014) and Slahi's prison memoir (2015) are the two possible exceptions.

[4]Historian Lisa Silverman notes how treating torture as a "cross-cultural and transhistorical phenomenon" can cloud analysis by sweeping up puzzles and details into an overly generalized concept (2001, 16-20).

[5]Uwe Steinhoff (2013) is specifically interested in police interrogations of child kidnappers, and he tries to distance

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What I do not review here are works where something other than the ethical question is most at issue. This includes the many forensic studies that emerged after Abu Ghraib in 2004, and again in 2009 when many additional documents had become available. Examples include Christopher Pyle's (2009) *Getting Away with Torture* , Karen Greenberg's (2009) *The Least Worst Place: Guantanamo's First 100 Days*, and Jan Honigsberg's (2009) *Our Nation Unhinged*. Pyle details the emergence of the Bush administration's detention and interrogation policy, Greenberg focuses on the military activity establishing the detention facility at Guantanamo Bay, and Honigsberg attends to the judicial features and legal events at Guantanamo. In none of these, however, is the ethical question itself directly addressed. Both Pyle and Honigsberg are professors of law, and torture remains illegal under U.S. and international law now as it was before 2001. Their works recount, politically and legally, *how the torture prohibition was violated*. Greenberg does the same for the institutional, geographical and architectural part of the story.[6]

These works and others like them are undoubtedly related to the torture debate. However, they take the torture prohibition for granted. This can also be the case for works that view torture and violent interrogation favorably, but because torture is illegal these works must argue that they describe something short of torture, or argue that the moral and legal prohibitions are somehow wrong.[7] The former interpretation holds that the law has not been broken, so nothing has happened and no justification is needed. The latter position that U.S. and international law are wrong on the matter of torture requires some reason why, which means they cannot prefigure their ethical positions. In other words, pro-torture arguments are refuting a standing legal prohibition, so they wind up confronting torture ethics even as they try to dismiss the question.

The review in this chapter also skips certain arguments from International Relations scholar-

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himself from the U.S. interrogation program. There is no reason to doubt Steinhoff's sincerity on this point, but I do not think he is successful. His self-defense argument is compatible with certain ticking-bomb terror scenarios, and can be appropriated for and circulated in the debate about terrorism and U.S. interrogation techniques.

[6]Greenberg's other works—the *Torture Papers* compilation of original documents edited with Joshua L. Dratel (2005), and her edited volume *The Torture Debate in America* (2006)—bear more directly on torture ethics, as a source of data and collection of argumentation, respectively. For still another perspective—that of an army interrogator under pressure to use increasingly harsh techniques in Iraq—see Lagouranis (2007).

[7]*The Interrogators* (Mackey, 2004) comes to mind as a positive view of interrogations in Afghanistan, as does the memoir of CIA covert operations chief Jose Rodriguez (2012).

ship, as well as policy documents at the center of the debate.[8] The International Relations scholarship is excluded here because the nature of the questions it asks are more complex.[9] This IR scholarship is considered later in the dissertation, during the discussion of social theory and the torture debate (3.3.1). Policy documents such as the "torture memos" (e.g. Bybee and Yoo, 2002) do confront the ethical question directly, but were intended for a different audience and have a different status than the scholarly debate. These too play a central role later in the dissertation (4.2). Official policy documents also must use euphemisms for torture or redefine torture very narrowly, in order to avoid culpability for criminal action. The actual justifications they use, however, are well-covered in the scholarly work reviewed below.

The story of torture ethics is a long and complex, even when considering primarily the most recent chapter that began around 2000. The boundary between works that belong in the torture ethics debate and works that don't can be drawn in a number of plausible ways. There is also more than one way to describe how the debate has unfolded. The following account of the course and content of the torture ethics debate is meant to reveal some specific features related to the critique I have sketched out above. The discussion about what to include and exclude will help clarify that the problem of torture ethics lies not so much in moral evaluation but in the competition between moral evaluations. The not-quite-linear account should help ground the abstract debate in real events and show that torture ethics are constantly and openly contested. The non-linear story also challenges various unacknowledged temporal assumptions about the phenomenon (rather than the ethics) of torture: that torture is a timeless evil, that it is an outrage from the past reintroduced into the present, or that it is progressively disappearing from human societies.[10] That is not to say that any of those assumptions are true or false, but rather that they provide another abstract and occluded question over which scholars can disagree, and which makes their respective accounts of torture

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[8]Following a common convention in the literature, I capitalize "International Relations" or use the abbreviation "IR" when referring to the academic discipline. I use lowercase "international relations" to refer to the phenomena of global politics.

[9]These are on the order of *what happened to the anti-torture norm?* (Foot, 2006; Linklater, 2007) and how Americans might *re-connect with the displaced anti-torture norm* (Steele, 2008).

[10]Steven Pinker (2012, 144ff.) makes the last claim—that torture is progressively and sharply declining—as part of his argument that violence is waning and humanity is improving.

ethics more and more difficult to compare. These comments about the content and progression of the torture debate should be kept in mind in the account that follows.

The contemporary torture ethics debate exploded in the spring of 2004 when reports of shocking abuse at the U.S.-run Abu Ghraib prison in Iraq began to leak, followed by even more shocking photographic evidence (Hersh, 2004). Although the Bush administration effectively led the media to re-frame Abu Ghraib as abuse by a small group of bad soldiers, rather than systematic torture underwritten by high-level policy changes (Bennett et al., 2006, 478-80), that has not made the issue go away. Instead, events such as document leaks, legal decisions, the release of government and non-governmental reports, films, and the publication of officials' memoirs all serve to periodically reinvigorate the issue. In the months leading up to this writing, the Senate Select Committee on Intelligence has released the 500+ page summary of its assessment of the CIA interrogation program (SSCI, 2014), a man tortured and still held at Guantanamo Bay has published a prison memoir (Slahi, 2015), and the *Frontline* television series has broadcast a report criticizing the film *Zero Dark Thirty* for its close access to CIA officials and their preferred version of the events.[11] Although this dissertation was prompted by assessments like my own that the torture ethics debate is not making progress in its current form, the debate is set to continue as the persistent unresolved issues repeatedly find their way back into the public discussion.

2.1 Utilitarian-Consequentialist Accounts

2.1.1 Dershowitz

Before the gruesome reality of the Abu Ghraib photographs radically transformed the torture debate in the U.S, the discussion of torture was limited to innuendo and tough talk. Legal scholar Alan Dershowitz (2002) made an early and prominent case supporting torture for the purposes of interrogating suspected terrorists and averting terrorist calamities. "Before September 11, 2001,

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[11]The film was directed by Kathryn Bigelow (2013). The *Frontline* episode "Secretes, Politics, and Torture" was broadcast on May 19th, 2015 and is now available at http://www.pbs.org/wgbh/pages/frontline/.

no one thought the issue of torture would ever reemerge as a topic of serious debate" in the U.S. (134). As his book shows, however, torture had been a serious issue in Israeli counter-terrorism leading right up to 2000. Dershowitz explains how his own views on torture changed over the course of his visits to Israel during the 1980s and 1990s (139-42). "In Israel, the use of torture to prevent terrorism was not hypothetical; it was very real and recurring" (140). In the U.S after 2001, the same seemed to be the case. Despite some concern that official use of torture by the U.S. would have bigger international implications that Israel's actions had, his argument carries over the terror-torture connection and utilitarian logic of the Israeli experience to the post-9/11 U.S. case (142).

Dershowitz (2002, 8) argues that for years before 9/11 terrorists had been insufficiently deterred—even coddled—and that terrorism must be denied any and all success. "Not only must terrorism never be rewarded, the cause of those people who employ it must be made—and must be seen to be made—worse off as a result of the terrorism than it would have been without it" (23). An amoral, dictatorial regime could fight terrorism without restraint (107ff.), but countries "that are truly committed to the rule of law" would have to act with more restraint than dictatorships. They would still have to make compromises to fight terrorism, but Dershowitz expresses confidence that "the feel of freedom will persist, even for those whose rights are restricted" (127). Crucially, for Dershowitz this balanced compromise in democracies can include the torture of a "ticking bomb" terrorist, though he qualifies the scenario as "both simple and simple minded" (142).

Dershowitz refers to Jeremy Bentham for a utilitarian argument that by now is familiar to most observers of the torture debate. "If the torture of one guilty person would be justified to prevent the torture of one hundred innocent persons, it would seem to follow—certainly to Bentham—that it would also be justified to prevent the murder of thousands of innocent civilians in the ticking bomb case" (Dershowitz, 2002, 143). He asks readers to speculate what might have happened if one of the 9/11 hijackers had been subject to torture, and if that image is not convincing enough he notes that "we can always raise the stakes" of the hypothetical-but-believable scenario (144). Dershowitz acknowledges that the utilitarian case against torture cuts both ways, since the "legiti-

mation of torture by the world's leading democracy would provide a welcome justification for its more widespread use in other parts of the world" (145). However, Dershowitz agues that the fear of spreading or worsening torture stems from Bentham's *act* utilitarianism, which considers the relative consequences of isolated incidents (146). Dershowitz says that "the single-case utilitarian justification for torture is simple-minded in that it has no inherent limiting principle," and that without limits, "morality by numbers" can justify almost anything—including terrorism (146). He therefore tries to strengthen his own justification by noting that it is objectively worse to be killed than tortured, yet killing is legitimized in capital punishment and in some police apprehensions (148). Still, Dershowitz seems to prefer the harder test provided by rule utilitarianism, which "considers the implications of establishing a precedent" rather than judging the case (or act) by itself (Dershowitz, 2002, 146). His main practical recommendation is that governmental agents contemplating torture should be required to attain judicial warrants. This is consistent with the rule-utilitarian concern for including the probable precedent in the utilitarian calculation.

Dershowitz cements the link between terrorist threats and the need for torture-like interrogation, and he articulates the basic shape of the utilitarian justification of torture. However crudely Dershowitz (2002, 144) executes it, a kind of "cost benefit analysis" lies at the core of many contemporary torture arguments. It communicates very well to the public, who do not have the resources or patience to work out their own comprehensive ethical frameworks in detail. However, his proposed judicial torture warrants, which he thought would "maximize civil liberties" in the likely event that torture would continue to be practiced (141), were not seriously considered by policy makers.[12]

Despite the continued popularity of utilitarian torture justifications, Dershowitz's argument has a number of vulnerable points. Bentham himself never published the torture justification that

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[12]By the time Dershowitz's book was published in 2002, the Bush administration had already established a different orientation toward violent interrogations. The administration's interrogation program was kept secret and restricted to narrow groups under executive authority. The CIA sought and received assurances, including Bybee and Yoo (2002), from the Department of Justice saying that certain desired actions did not violate U.S. laws prohibiting torture. Dershowitz's approach would have required Congress to pass a law, which the President would follow in consultation with the courts. By the time he proposed it, a solution had already been worked out entirely within the executive branch.

Dershowitz uses (Morgan, 2000, 192). Bentham's remarks on torture remained obscure until Twining and Twining reproduced them in "Bentham on Torture."[13] Rod Morgan (2000, 188) has objected to Bentham's version of the utilitarian justification on the grounds (a) that the possession of life-saving knowledge by the suspect is simply asserted, not known, and (b) torture "corrosively delegitimizes the state" for anyone who fears being sacrificed to the greater good (193). These concerns are not addressed by Dershowitz, who focuses on the proliferation problem and proposes the torture warrant solution.

Whatever the merits of Morgan's criticisms, one general problem of utilitarian justifications for torture concerns the inputs, outputs, and structure of the utility calculation. Much of the present torture ethics debate concerns torture used in interrogations that are intended to prevent calamitous terrorist attacks. However, assumptions about what a suspected terrorist knows and the probability and effects the calamity are arguably unreliable.[14] In other words, the practical application of utilitarian torture faces some obstacles in staying true to the rigors of the reasoning that justifies it. The internal critique among utilitarians about how to judge torture is not, however, one I intend to press here. They engage in it with each other, as the rest of this section shows. As I show in the rest of this chapter, that internal utilitarian conflict is one small example of the general problem with torture ethics that stems from from the wide variety of incommensurable approaches.

2.1.2 Bagaric and Clarke

It is important to remember, though perhaps difficult to recapture, the discursive environment that Dershowitz was addressing. Neither the abusive torture in the Iraq war, nor the secret CIA torture that was being narrowly justified behind the scenes by the Justice Department and Bush adminis-

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[13]The Twining and Twining article appears in the *Northern Ireland Legal Quarterly*, Autumn 1973 (cited in Dershowitz, 2002, 250 fn.).

[14]This risk of making incorrect judgments about the captive's knowledge is demonstrated by the case of Abu Zubaydah, who is a subject of chapter 4. In their legal defense of the CIA interrogation techniques to be used on Abu Zubaydah, Justice Department lawyers restate the facts of the situation as provided by the CIA. These include that "the interrogation team is certain that he has additional information" about "terrorist networks within the United States" and "plans to conduct attacks within the United States" (Bybee and Yoo, 2002, 1). However, within a week of applying those techniques to Zubaydah, the CIA interrogators "stated that it was 'highly unlikely' that Abu Zubaydah possessed the information they were seeking" (SSCI, 2014, 42-47).

tration, were part of the discussion. The vivid confirmation of what was (arguably) torture gave a new concrete reality to the referent acts of subsequent torture arguments. Because torture was widely condemned and illegal in a number of ways, it was at least somewhat surprising that the scholarly response to Abu Ghraib included strong pro-torture arguments. The least ambiguous of these are "Not Enough Official Torture: The Circumstances in Which Torture is Morally Permissible" (2004) by Mirko Bagaric and Julie Clarke, and their follow-up book *Torture: When the Unthinkable is Morally Permissible* (2007).

Bagaric and Clarke (2004, 596) argue that both deontological and consequentialist logic support the use of torture, but that only the latter can provide guidance on the right justifying circumstances. They add that "only consequentialist theories, however, that provide a logical framework within which it is possible to demarcate the circumstances in which torture is permissible."[15] They are generally dismissive of deontological ethical theories for that reason, and also because for them, "the concept of non-consequentialist rights is vacuous at the epistemological level."[16] Instead they choose the "most cogent" of the consequentialist theories, which is "hedonistic act utilitarianism."[17] They acknowledge that utilitarianism has been criticized for failing to "safeguard fundamental individual interests," and thus may lead to "horrendous outcomes" (605).

In part, they respond that such situations rarely arise in real life (Bagaric and Clarke, 2004, 606). Their preferred response, however, combines an appeal to a sort of realism with a reassertion of utilitarian logic. Life, it seems, forces people into tough choices, and utilitarianism at least provides a basis for judging that is not vacuous.[18] Bagaric and Clarke (2004, 608) are satisfied

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[15]See Bagaric and Clarke (2004, 596-97). Another way to put this is that consequentialism provides good tools for justifying torture.

[16]The authors use "deontological" and "non-consequentialist" interchangeably. See Bagaric and Clarke (2004, 602) for their judgment of deontological ethics. However, although they prefer utilitarianism, they do briefly introduce the idea of a pro-torture deontological argument based on self-defense rights. Uwe Steinhoff (2013) develop that idea much more extensively (see section 2.4.1 below).

[17]They describe this as a theory in which "the morally right action is that which produces the greatest amount of happiness or pleasure and the least amount of pain or unhappiness" (Bagaric and Clarke, 2004, 605).

[18]The specific people that Bagaric and Clarke (2004, 581) intend to address are not specified. However, both teach in Melbourne Australia at the Deakin Law School , the article appears in the *University of San Francisco Law Review*, and they open by noting concerns about torture of people the U.S. suspects of terrorism (582). Regarding tough choices, Dershowitz (2002, 132) describes making his law students "choose among evils." When they object, he says, "I force them back onto the rails of my hypothetical dilemma." (133). The assumption, though, is that *real life* will generate unavoidable choices among evils. Utilitarianism, of course, positions itself as the ideal way to decide in such

that "at least the level of harm has been minimized." They argue that the "decisions we do actually make in a real life crisis are the best evidence" of the values behind hard decisions (608). In a crisis, "we *do* take the utilitarian option," and "it is felt that this is the option we *should* take."[19] Satisfied that utilitarianism is the correct approach, Bagaric and Clarke argue confidently for the moral permissibility—even the requirement—of torture when certain conditions are met, and they offer a mathematical formula for assessing its permissibility. For utilitarians, the permissibility of torture is enhanced by factors such as reliably knowing the person to be tortured is guilty, the number of lives expected to be lost in the calamity, and knowing that the person possesses the calamity-averting information. The permissibility of torture is reduced when the amount of time available for averting the calamity is large, and the when other means are available for averting it.[20]

When the conditions meet a sufficient threshold, Bagaric and Clarke argue that torture is not only morally permissible, it is morally required. In fact, they characterize "life-saving torture" as a "humane practice," because it minimizes harm (Bagaric and Clarke, 2007, 49). Stubborn advocates of the lone suspect's interests do not give sufficient weight to the threatened multitude, and are derided for their "moral nihilism" (50). The authors wonder what such narrow-minded torture opponents could offer to the relatives of those who die in a preventable calamities: "A copy of the Convention against Torture, even if framed, would surely not suffice" (70).

2.1.3   Responses within Utilitarianism

Those who agree with Bagaric and Clarke that hedonistic act utilitarianism is the right approach to making moral judgments, and with their other assumptions about the suspect and the looming adverse event, will likewise share their enormous confidence that torture is morally justified.[21]

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conditions.

[19]They add that the "view that punishing the innocent and torturing individuals is the morally correct action in some circumstances is consistent with and accords with the decisions we as individuals and societies as a whole readily have made and continue to make when faced with extreme and desperate circumstances" (Bagaric and Clarke, 2004, 605).

[20]The formula and its explanation appear in Bagaric and Clarke (2004, 613f.) and Bagaric and Clarke (2007, 38f.)

[21]Recall that hedonistic act utilitarianism is "the morally right action is that which produces the greatest amount of happiness or pleasure and the least amount of pain or unhappiness" (Bagaric and Clarke, 2004, 605). Those pleasures

Indeed, utilitarianism strives to clearly demonstrate the relative value of courses of action, so that the better choice is apparent to anyone who can "do the math."[22] With torture, though, every component of the equation is contested: the probability and severity of the expected calamity, whether the suspect has knowledge, whether the torture will elicit the information, and more.[23] Jean Maria Arrigo recognizes that utilitarian thinking is strong among security elites who will not be responsive to torture prohibitions that depend on deontological principles, especially when those elites are facing existential threats. She considers four models of information production that could be at work in a torture interrogation and finds their outputs much more ambiguous than the confident utilitarian torture supporters have acknowledged (Arrigo, 2004, 562-63). In other words, "*the actual causal mechanism of torture interrogation in curtailing terrorism must be elucidated by utilitarian advocates rather than simply presumed.*" (563, emphasis in original).

Arrigo wants them to *show*, in other words, that torture produces the necessary information *and* that the information curtails terrorism. Good data about how effectively torture extracts life-saving information, however, is very hard to come by.[24] In order to judge the effectiveness of torture without access to empirical data, John W. Schiemann (2012, 3) developed a formal model directly from arguments of Dershowitz and Bagaric and Clarke. As a game theorist, Schiemann can, nevertheless, account for an important empirical condition: uncertainty. The interrogator does not know if the suspect has information, and the suspect does not know if the torturer will stop when the information is provided.[25] In the conditions for justifiable torture specified by utilitarian

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and happiness do not need to be of a base nature, so hedonism here does not necessarily mean self-indulgence or debauchery.

[22]The imperative "You do the math" comes from Uwe Steinhoff (2013, 52).

[23]In the discussion of Dershowitz, I mentioned how the CIA badly overestimated the information Abu Zubaydah was believed to be withholding. See especially SSCI (2014).

[24]I am not suggesting that no data at all exists, but that it is very hard to come by in the current torture debate. The concepts are unclear and contested, and certainly not operationalized as variables. When effectiveness does become an issue in the torture debate, it is very often as something to be explained, rather than an explanation. In her study of judicial torture in early modern France, Lisa Silverman treats effectiveness this way (2001, 89-90), even with access to far better records than can be expected out of the U.S. interrogation program in the foreseeable future.

[25]The interrogator also does not know whether the suspect who provides information still has more, and is resisting (Schiemann, 2012, 5). More precisely, Schiemann's analytical model employs three moments of uncertainty. The detainee may be *strong*, *weak*, or *innocent* (possessing no information), the interrogator may be *pragmatic* or *sadistic* (not stopping after receiving information), and the detainee may *provide* information or *not provide* information (5-6). In addition, the interrogator may ask leading or open-ended questions (6-7).

theorists, Schiemann (2012, 15) finds that that innocent detainees who possess no information, and detainees who have information but provide all of it, will both be tortured—and that even then the valuable information that is sometimes produced will be mixed with worthless information. His conclusions challenge the necessary assumptions of effectiveness that Dershowitz (2002, 137) and Bagaric and Clarke (2007, ch. 6) use to support their utilitarian justifications of torture.[26]

These works show that contradictory conclusions about torture ethics can reasonably arise entirely within a single normative tradition. Though all the authors employ utilitarian reasoning, they differ on other important assumptions in ways that have no apparent resolution. Bagaric and Clarke (2005, 708) dismissed early critics by arguing that "perfect knowledge as a precondition" for torturing a suspect is an unreasonably and even ridiculously high bar. They argue that the instances of torture condemned by their critics are not consistent with the sort they have justified, and castigate their "non-responsive" critics for "intellectual sloppiness" and misrepresentation for questioning their assumptions.[27] Schiemann explicitly builds his formal model around exactly those assumptions, and finds that the "outcome predicted by the pragmatic defenders of interrogational torture—valuable information extracted by (the threat of) torture from a knowledgeable detainee but no torture to innocent detainees—*does not occur in equilibrium*" (Schiemann, 2012, 15, emphasis added). If torture is justified by utility, it would have to be on the basis of the less-productive equilibrium outcomes that can actually occur. In Schiemann's model, only one of those outcomes produces any valuable information, but "the conditions supporting it are empirically unlikely" (15). Remarkably, Bagaric and Clarke (2005, 706) concede that the "circumstances in which lifesaving torture are justifiable will occur infrequently—perhaps never." They persist not out of concern for the actual torture that has spurred the contemporary debate, but because the "supposed ban on torture highlights much that is wrong with contemporary moral thinking," namely what they believe is an overly-narrow focus on the rights of the suspect (706).

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[26] A different formal analysis from Wantchekon and Healy (1999) suggests a problem with escalation that might also affect the outcome. See Mialon et al. (2012) for another model suggesting that torture may displace other important security measures, thereby reducing security.

[27] "To our knowledge, *no incidents* of torture that have been committed would *fall within our criteria*." (Bagaric and Clarke, 2005, 704, emphasis added)

Despite the persuasive analysis by Schiemann, the utilitarian arguments of Dershowitz and Bagaric and Clarke remain important in the current torture debate.[28] They can still argue that *under the conditions* they specify, and *according to the normative framework* they have adopted, torture is justified. Schiemann's analysis shows that their presumed conditions are dubious and their justifying outcome is impossible, but perhaps only for those who can pay the steep acquisition price for understanding his game-theoretic analysis. Bagaric and Clarke can maintain that their critics misunderstand things about utilitarianism, the world, and the details of their proposal. The normative controversy about the right way do utilitarianism, and the epistemological controversy about the assumed inputs and outputs of utilitarian torture, are both likely to continue. Ethical judgments about torture are thus quite idiosyncratic even within the confines of utilitarianism, and Arrigo's strategy of challenging utilitarian justifications for torture on utilitarian terms is not the only approach. When other normative traditions are introduced, the problem of incommensurable approaches to torture ethics multiplies.

2.1.4 Beccaria: Utilitarian Disagreement across Time

Today's utilitarians disagree about the way utilitarian judgments should work, which is a question of normative theory, and they disagree about important facts of the situation. They also disagree early modern utilitarians who first helped assert individual rights against traditional political powers. Cesare Beccaria (1995), a political economist, originally published the legal manifesto *On Crimes and Punishments* in 1764.[29] His opposition to torture fits within a larger project of rationalizing criminal law, which lagged behind the political and economic "progress we owe to this enlightened century" (8). Beccaria understood sovereign authority in utilitarian terms that limit the right to punish (10). Individuals need society but will only give up the minimum amount of freedom needed to form it. "The sum of these smallest portions constitutes the right to punish; everything more than that is no longer justice, but abuse" (11). Punishment is for "nothing other

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[28]See also Mialon et al. (2012) for additional challenges to the view that torture can increase utility.

[29]His first publication was *On the Monetary Disorders and their Remedies in the State of Milan in 1762* (Beccaria, 1995, xiii) and his collected papers were published as *Elements of Political Economy* (xv).

than to prevent the offender from doing fresh harm to his fellows and to deter others from doing likewise" (31).

Torture that occurs during judicial processes does not deter. It establishes guilt through the use of punishment, of the innocent as well as the guilty. That cannot be appropriate for utilitarian justice, which depends on a precise relationship between crime and punishment. Like Arrigo and Schiemann, Beccaria casts doubt on torture's ability to generate truth.[30] Torture measures strength and weakness, not guilt or innocence: the "hardy fellow" will be acquitted and the "feeble fellow" will be convicted. (Beccaria, 1995, 43) What Beccaria emphasizes more than current utilitarians is the relationship at the heart of utilitarian ethics. Specifically, its reciprocal character: "whilst every individual is bound to society, society is likewise bound to every individual member of it by a pact which, by its very nature, places obligations on both parties" (12). Beccaria does not anticipate the sort of imminent future crime, perpetrated by a captive, that drives the ticking bomb case. That does not rebut his concern about the capacity of torture to produce truth, though. Nor does it dismiss his concern that arbitrary and excessive punishments will destroy social bonds. Beccaria remains relevant today because parts of his argument endure, and more importantly through contemporary appropriations of his work that highlight the social theory behind it (see section 3.3.1).

2.2   Torture and Deontology

Dershowitz (2002, 134) noted, perhaps with rose-colored historical glasses, that before 2001 "no one thought the issue of torture would reemerge," but by 2004 the United States was fighting terrorist threats and two large wars. It was no longer torture that provoked outrage, but rather any suggestion of restraint in the prevention of terrorist attacks against the U.S., or finding "the big piece of intel that would save American and Iraqi lives" in the Iraq war (Lagouranis, 2007, 29). As prominent utilitarian arguments in favor of counter-terrorist torture emerged in 2002 and intensi-

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[30]The current debate focuses largely on torture that is intended to elicit information from suspected terrorists. The early modern debate focused on judicial torture intended to produce true testimony in trials. Truth and life-saving intelligence thus play analogous roles in the forms of information-seeking that characterize different types of torture.

fied after Abu Ghraib in 2004, some scholars like Arrigo disputed those views in utilitarian terms. Recall that consequentialist thought, which includes utilitarianism, judges courses of action solely based on the outcomes or consequences they are expected to produce. Bagaric and Clarke (2004, 605) espouse hedonistic act utilitarianism, in which "the morally right action is that which produces the greatest amount of happiness or pleasure and the least amount of pain or unhappiness." Happiness, measured in pain and pleasure, is the relevant consequence.

Not everyone was moved to adopt utilitarian ethics, either as strategy or because of a perceived fundamental change in circumstances after 2001. The dominant alternative to consequentialism,[31] in ethics generally and particularly with respect to the contemporary torture debate, has been deontological or nonconsequentialist ethics. Very generally, scholars using deontological theories find the ethics of torture in the act itself, rather than its expected consequences.[32] Indeed, torture had been outlawed using the language of rights, not consequences.[33] After 2001, however, public and policy attention shifted sharply away from rights and toward security. Jeremy Waldron remarks the strange solitude he experienced when he undertook a defense of the torture prohibition at a time when the purported "new reality" of 21st-Century wars led other scholars of reputation and rank to line up—however regrettably—on the side of torture.[34] Waldron and others thus found it necessary to re-articulate, update, and improve their principled objections to torture.

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[31]Other alternative normative approaches that will eventually bear on the torture debate include virtue ethics (Gordon, 2014) and those that draw on Continental philosophy (e.g. Butler, 2005; Critchley, 2009, 2012).

[32]I am not being overly precise here for several reasons. First, there are varieties and disagreements within deontological ethics, just as with utilitarian ethics. Second, although the competition between consequentialism and deontology has been very important in normative ethics, "in the course of time the line between these two traditions has become increasingly blurry" (LaFollette and Persson, 2013, 7). This is visibly demonstrated by the "threshold deontology" approaches of (Kramer, 2014) and Steinhoff (2013) considered below. Third, not every scholar who engages torture ethics fully specifies their ethical framework—in fact, most do not. Finally, this dissertation is heading toward a critique that emphasizes just how varied and individualized ethical approaches to torture are, and abandons the project of picking a winner among them in favor of a different approach. In other words, efforts to precisely specify ethical frameworks are one of the mechanisms by which the particular Hydra of torture ethics grows new heads.

[33]The United Nations Convention Against Torture (1984, emphasis added) refers to "the *principles* proclaimed in the Charter of the United Nations," the "equal and inalienable *rights* of all members of the human family," and "the inherent dignity of the human person," but not to consequences or happiness .

[34]Waldron (2010, 7-10). Jean Bethke Eshtain supports torture in some circumstances, but regrets it (cited in Waldron, 2010, 8).

2.2.1 David Luban's Liberal Theory of Torture

David Luban (2005, 1430) zeros in on the puzzling failure of many American liberals to oppose torture, which "is a microcosm, raised to the highest level of intensity, of the tyrannical political relationships that liberalism hates the most." To understand the problem, he develops a "liberal ideology of torture" that allows liberals to believe torture should be permitted (1427), and proceeds to show that the liberal approach to torture is not a valid justification but a "dangerous delusion" (1461).

Luban argues that "putting cruelty first" is an important component of liberalism, and he identifies four categories of torture that liberals easily rule out.[35] These are torture in conflict for the purpose of "victor's pleasure," political torture for the purpose of "terrorizing people into submission," torture for the purpose of punishment, and torture for "extracting confessions" (Luban, 2005, 1432-35). Luban argues that liberals are susceptible to the fifth purpose of torture, intelligence gathering. Luban argues that "liberalism's insistence on limited governments that exercise their power only for instrumental and pragmatic purposes" at least appears to be compatible with torture (1436). Liberalism is a complex political philosophy, not a precise ethical framework. Some of its features, like the abhorrence of cruelty Luban notes, are overtly incompatible with torture. Yet other features of liberalism have some affinity with the same utilitarian thinking that underlies the arguments of Dershowitz and Bagaric and Clarke. Eventually, "it will dawn on reluctant liberals that the torturer's goal of forestalling greater evils is one that liberals share" (1439). Putting torture in the context of intelligence gathering "transforms and rationalizes the motivation for torture," and allows liberals "to think of torture dissociated from cruelty" (1436). Thus even though liberals have good reasons to oppose torture, they can come to see it as "almost heroic" (1436). Luban's "liberal ideology of torture" features torture for intelligence purposes, a looming catastrophe, and the liberal rationality that provides a point of compatibility with the torturers.[36]

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[35]Luban (2005, 1428-29). "Putting Cruelty First" is title of the essay in which Judith Shklar (1982) introduces that idea.

[36]To clarify, what matters for the liberal theory of torture is its compatibility with the utilitarian defenders of torture, though Luban does not put it in those terms.

Luban (2005, 1440) argues that "liberal ideology will crystallize all of these ideas in a single, mesmerizing example: the ticking bomb," that Dershowitz and Bagaric dutifully employ.[37] The function of the ticking bomb example is "to force the liberal prohibitionist to admit that yes, even he or she would agree to torture in at least this one situation," after which "all that is left is haggling about the price" (1440). The ticking bomb also ennobles the torturer, who becomes a "conscientious public servant," and thus "clinches the divorce between torture and cruelty" (1441). The ticking bomb scenario is much contested in the torture debate, but Luban doesn't find the scenario plausible. Elaborating on an example that Dershowitz (2002, 137) offers as successful torture in a ticking bomb case, Luban (2005, 1442) notes that the Philippine authorities tortured the suspect *for weeks*, during which time they didn't know about any specific al Qaeda plot." Just as a minority of utilitarians do, Luban questions the empirical plausibility of the ticking bomb scenario (1442-43). Any assumption that those conditions are commonly-found begins to raise larger questions about threat and security. When "all military threats and adversaries that menace American civilians" are considered to be ticking bombs, the concept is considerably weakened (1443). Therefore, the ticking bomb scenario "should not for the point of reference" in judging the morality of torture (1444).

Utilitarians and threshold deontologists can respond that Luban has conceded their point.[38] If there really is a ticking bomb scenario, Luban's empirical objection would not apply. The possibility of such scenarios, not their probability, satisfies them. Luban (2005, 1446) is left with his social objection to "the normalization of torture" and the "moral corruption" that comes with it. Note the difficulty of comparing utilitarian ethics directly to deontological ethics. The "moral corruption" and "cruelty" that anguish Luban leave the utilitarian unmoved, or even puzzled. Utilitarians think it is cruel to let thousands of innocents die to protect an evil person from temporary pain. Luban argues that torture does not produce life-saving truths and entails high social costs. The moral and

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[37]See Dershowitz (2002, 142ff.), Bagaric and Clarke (2007, 583f.), and Bagaric and Clarke (2007, 2f.).

[38]Pro-torture threshold deontologists like Uwe Steinhoff (2006; 2013) also make this objection. Theoretically, they cross the threshold because some imminent calamity obviates the principle in question, not to maximize the average net utility. However, neither the threshold nor the utility can be located with much precision. Ticking bombs lead to calculations that do not need to be sweated over with pencil & paper.

legal prohibition of torture should therefore remain in place. Both camps claim the moral high ground. Neither can answer for the chasm in between.

2.2.2 Oren Gross and Henry Shue Haggle over the Price

Not every deontological approach leads to anti-torture conclusions. As with utilitarianism, it takes a more detailed set of normative, metaethical, and epistemological assumptions to support a moral judgment. Oren Gross (2004, 229) recognizes that deontologists and some utilitarians may express "absolute" opposition to torture. Gross appears to oppose torture, but he is troubled by the poor quality of the discussion surrounding it. The "absolutist point of view does not accept the permissibility or the usefulness of talking about the possibility of using torture," in any circumstances (230). Supporters of an absolute ban on torture have little room for discussion with supporters of a "conditional ban approach," who think torture should be banned *except* in certain circumstances (231). Gross takes an intermediate position between "absolutists" and "conditionalists." His proposal keeps the absolute legal ban, but allows for "official disobedience" in extreme cases (231). These officials might face legal consequences, or they might be "legally (if not morally) excused ex post" (231).

This is counterintuitive. Gross (2004, 231) argues that "the prospect of extralegal action supports and strengthens the possibility of formulating (and maintaining) an absolute ban on torture." He finds the absolute legal ban desirable, but also impractical and theoretically vulnerable (233). Gross supports official disobedience of the torture ban as a pragmatic concession in catastrophic cases. Like Dershowitz, Gross is worries that torture will find its way from extreme cases to ordinary ones. Dershowitz wants to stop that possibility through the legal mechanism of torture warrants, but Gross (2004, 240) thinks such official mechanisms are "extremely dangerous" because they are subject to abuse.[39] The official disobedience approach limits torture to real catastrophic cases through the prudential judgment of public officials, who anticipate the eventual moral and

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[39]Kramer will note that the mechanisms of state violence are already in place. Since state violence is already institutionalized, the specifics of the rules do not really change the danger.

legal judgment of their communities.

In Gross's approach, public officials become tragic heroes who violate law to protect their law-abiding people. Then they face the possibility of judgment. In light of the past decade, this view looks somewhat naive. Public officials may have accepted or even sought the role of hero, but they have eschewed tragedy. They took *Hard Measures* like those described by former CIA clandestine service chief Jose Rodriguez (2012), but deny that they broke the law.[40] Gross could bolster his argument by showing in more detail how having the option of official disobedience supports the legal ban, since it appears to simply do away with it.

Despite its problems, Gross's argument remains important. By pulling back from "absolute" opposition, at least in exceptional circumstances, he prefigures the more recent direction of the debate. That is, he advocates a threshold deontologist account in practice, if not in name. Threshold deontologists make moral judgments on principled constraints rather than consequences,[41] but believe that no principled stand is worth a cataclysmic sacrifice for threshold deontologists.[42] The concession that disasters might trump principles is what make's Gross's outlook tragic. As Gross construes it, this concession might give away more than he hopes. He accepts several assumptions of the consequentialist argument, including the concrete reality of the looming calamity and torture's ability to avert it. He also views deontological torture opponents as unreasonable, out of touch. The term "absolutist" will soon devolve into a slur for Steinhoff (2013), or a badge for Wisnewski (2010, 3), but it clearly divides the debate into disparate camps.

Although Gross tries to chart a middle path between utilitarian support for torture and abso-

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[40]Bush administration officials generally insist on two things about their counter-terrorist interrogation program. First, they deny that the techniques, including waterboarding, constitute torture. Second, they emphasize their belief that the techniques produced valuable intelligence. This is apparent from Norah O'Donnell's April 2009 interview with Liz Cheney (O'Donnell, 2009a,b). The remarks of Jose Rodriguez, the former Director of the National Clandestine Service of the CIA, to the American Enterprise Institute in 2013 show the same pattern. Speaking about the film *Zero Dark Thirty*, Rodriguez said "I did not like the fact that it made a false link between torture and intelligence successes, because I also think that torture does not work. And our program worked because it was not torture" (Thiessen, 2013). Contrast with Gross's (2003, 1522) presumption that public officials will "consider the possibility of acting outside the legal order while openly acknowledging their actions and the extralegal nature of such actions."

[41]Two more threshold deontologists are considered shortly: Uwe Steinhoff (2006; 2013) and Matthew H. Kramer (2014).

[42]"If constraints may sometimes be permissibly transgressed to produce a sufficiently great good, there will be a threshold to their applicability. This yields what is called 'threshold deontology.'" (LaFollette and Persson, 2013, 263)

lute deontological opposition, his concessions to the former are decisive. In his best case, public officials engage in disobedient torture when they decide circumstances are extraordinary, and then expose themselves to public and legal consequences. In theory, those consequences restrain the prudential reasoning of those faced with making decisions about whether or not to use torture. In practice, officials are keen to avoid such restraints. Much hangs on the judgment of the public officials and the response of the public.[43]

Unlike most others, Henry Shue has written in two different eras of the torture ethics debate. In his article "Torture," Shue (1978) wonders if torture can still be justified amidst widespread moral and legal constraints.[44] The continued practice of torture, as revealed by groups like Amnesty International prompts his question.[45] Shue seeks to identify the badness of torture with greater precision than it had been previously. One thing that makes that task difficult is that some things appear to be obviously worse than torture, and yet they are sometimes permitted. For example, torture can be compared to justified forms of killing.[46] Shue proposes that since killing is sometimes justified, and most torture is not worse than killing, some justified torture is plausible.[47] Shue deflects the proposal in part by noting that there is more to morality than "the amount of harm done" (126). He then inquires into whether "torture is sometimes justified, provided that it meets whichever standards are satisfied by just-combat killing" (126).

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[43]Public officials have some influence on when extraordinary circumstances require unusual action. In the parlance of the Copenhagen school in International Relations, fighting terrorism allows public officials to "securitize" interrogation rules, meaning to place them beyond the reach of normal political action. Securitization theory is generally a social constructivist approach, in which states of affairs are determined by what people say. However, Michael C. Williams (2003) shows how securitization melds social constructivist with Realist thought. Gross's thinking that the threat *really* exists, and the public official *decides* when, is not inconsistent in that light. Such a view, however, puts great emphasis on the interplay between official claims of extraordinary circumstances and the public reception of those claims. Gross believes that "the need to obtain *ex post* ratification from the public" will generate risk for public official—and therefore prudent reflection. If he is wrong about the need or its effects, public officials will simply be outside the law.

[44]The only present-day strictures that were not yet in place in 1978 are the Convention Against Torture (1984) and the country-level laws that CAT signatories were obliged to pass.

[45]Shue (1978, 124) cites a 1975 Amnesty report. As Rejali (2007) documents at great length, torture did not disappear between 1978 and 2007.

[46]Steinhoff (2013, 18ff.) goes to the greatest lengths, in this regard.

[47]See Shue (1978, 125-26). Of course, even though it comes up uncontroversially in the torture debate, pacifists reject the premise of justified killing. Others too might have more to say about the scope and meaning of justification when it comes to killing. Kramer (2014), below, stands out within the torture debate for his nuanced handling of competing moral obligations.

Shue (1978, 127) seeks the "proper conduct of the killing of other people" in the *jus in bello* part of the laws of war.[48] The laws of war distinguish between good and bad killing based in part on who is engaging in combat and who is not. Generalizing from the principle of noncombatant immunity, Shue argues that *defenselessness* distinguishes bad killing (129). Killing the defenseless is unfair because they do not have "a reasonable chance to survive by killing instead."[49] Torture is the continuation of a fight by one party after it is over for the other, and thus "a cruel assault upon the defenseless" (130). For Shue, this means that torture fails the standard applied to justified combat killing.

Shue (1978, 130) then considers whether a captive person could be carrying on the fight by more abstract means. Torturers often want "something beyond the initial surrender" (130). This does not quite make torture a fair fight, but theoretically this kind of torture is subject to captive's actions. This is "constrained" torture in which "the victim of torture must have available an act of compliance which, if performed, will end the torture" (130). Shue is not persuaded that even torture constrained in this way can be just. What he calls "terroristic torture" is designed to intimidate others, and therefore "there is no particular reason not to make the suffering as great and as extended as possible" (132).[50] Since there is no end to what the torturer may want, this torture is not constrained and does not give the captive a real chance to end the treatment by complying. Shue concedes that "interrogational torture" has a "built-in end point" (133). "A pure case of interrogational torture, then, appears able to satisfy the constraint of possible compliance," so it might

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[48]*Jus in bello* indicates right conduct in war, and is one of three categories of concerns in the just war tradition; *jus ad bellum* concerns the criteria for going to (a just) war, and *jus post bello* deals with right conduct after a conflict (Johnson and Patterson, 2015, 1).

[49]See Shue (1978, 129). I am elaborating Shue's reasoning, though this point faces some challenges. In some cases, presumably just combat killings certainly appear to afflict defenseless people. Can an infantry soldier defend against aerial bombing? And torture victims need not be completely defenseless. Steinhoff (2013, 7-8) imagines a torture scenario involving a robber with a special pain-inducing device that he uses against an armed jeweler. Appiah (2008, 197f.) and Pincoffs (1971) warn that employing such scenarios reduces ethics to problem solving. More realistically, an interrogator might work in wartime conditions where the scene is poorly controlled and where even a captive enemy still presents some danger. The defenselessness principle also faces criticism from Sjoberg (2006) and Carpenter (2005) for the uneven ways that noncombatant immunity affects people. In general, I am content to let the works reviewed here attack each other on this point. My broader point remains that it will be difficult to definitively choose between them.

[50]See Shue (1978, 132). Shue's focus on terroristic torture, practiced for "general intimidation of others, or deterrence of dissent," as the dominant type is a sign of the era that no longer fits today (131). After 2001, emphasis in the torture debate shifts back to interrogation.

be justified (134). Shue is still circumspect due to two further concerns. First, the empirical conditions of torture are unlikely to meet his description of "constrained torture."[51] Secondly, Shue (1978, 135-36) notes that compliance might require self-betrayal, or the betrayal of comrades or a cause. This undercuts the captive's ability to choose escape through compliance .

Generally speaking, Shue comes down against torture for these reasons. However, he notes that his argument from defenselessness is "not the only, or even in all cases the overriding, moral consideration" (Shue, 1978, 137). In the case of terroristic torture, he finds it implausible that any "morally good" and "supremely important" purpose would arise that torture was the "least harmful means" of fulfilling (137). He also finds ideal cases of interrogational very implausible. Significantly, however, he does find them *imaginable* (141). In other words, he can imagine the ticking bomb scenario. And he "can see no way to deny the permissibility of torture in a case *just like this*" (141, emphasis in original).

What Shue could probably not have imagined was how radically his concession would be exploited two decades later. It is a core assumption of nearly every torture justification that *no one would deny* that torture is justifiable when the only other option is some enormous harm. Even deontologists must admit this, lest they be considered moral monsters. Throughout his essay, Shue sounds more skeptical than Gross about the plausibility of justified torture. Yet in the ticking bomb case, Shue's 1978 argument leads to the same conclusion as Gross and the utilitarians. They only differ in the fine print—where, as Luban puts it, they are haggling over the price.

By 2005 the ticking bomb argument had been thoroughly exploited in torture justifications, and Shue sought to clarify his argument. Even in 1978, Shue found cases that were "just like" the ticking bomb enough to justify torture were implausible: "Notice how unlike the circumstances of an actual choice about torture the philosopher's example is" (Shue, 1978, 142). Shue did not then think that real situations would satisfy his assumptions about the victim's guilt and knowledge, the predicted calamitous effects of his action, or the clinical conditions specified for justifiable torture (142). Thus Shue (2005, 232) sees his more pointed later essay "Torture in Dreamland: Disposing

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[51]See Shue (1978, 134-35). Schiemann's (2012) game-theory analysis makes this point more emphatically.

of the Ticking Bomb" as a re-statement rather than a change of view.

This more recent essay now states that all torture is inexcusable, and that the ticking bomb examples "mislead in two different ways that compound the error: idealization and abstraction" (Shue, 2005, 231). Shue attacks some prominent "idealized" features of the ticking bomb scenario, including the presumption of having "the right man" who certainly has life-saving information, the belief that clear and useful information will be quickly obtained through torture, and that the use of torture will remain "rare and isolated" rather than systemic (233). Shue (2005, 234) now states emphatically although the high stakes of the ticking bomb scenario are realistic, its "other features are all too good to be true, especially to be true in conjunction: the right man and the prompt right result and the judicious decision to refrain from all further torture until the next genuine catastrophe looms."

Shue turns the improbability of the ticking-bomb assumptions into an attack on balanced or reasonable positions on torture, like Gross's. "The moderate position on torture is an impractical abstraction—it is torture in dreamland" (Shue, 2005, 237). This statement captures normatively what Schiemann (2012) found through his formal model. An outcome in which torture produces some valuable information is "possible, but the conditions supporting it are empirically unlikely" (15). Even then, "interrogational torture fails to satisfy the necessary reliability condition" (15). These inefficiencies give torturers incentives to intensify the torture (16). Shue intuitively reasons his way to a similar conclusion that moderate, useful, limited torture is a fantasy sustained by the imagery of the ticking bomb scenario. Shue can still be described as a threshold deontologist.[52] He is willing to consider compromising his principled opposition to torture in the face of real catastrophic consequences. However, in 1978 and again more explicitly in 2005, he argues that the conditions that would make torture justified are patently implausible, existing only in "dreamland." For others, it is enough that the conditions *could* exist.[53] Once again, the permissibility of torture hangs on sharp differences on a related question.

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[52]Neither Shue nor Gross use the term "threshold deontology," though. Gross (2003, 1488) discusses thresholds, but only in the context of the boundary between bad treatment and torture.

[53]Especially Steinhoff (2013).

2.2.3 Sussman and Self-Betrayal

David Sussman's principal contribution to the torture debate is his thorough development of the concept of betrayal. Where Henry Shue talks about betrayal, his main concern is that it cuts off the tortured person's possibility of giving the torturer desired information. That analog for escape might have made torture justified in rare circumstances by making it similar to combat killing. Shue (1978, 135-36) does not consider betrayal of a true cause to be a real equivalent of escape. He argues that "betrayal is no escape for a dedicated member" of a group for whom complying with the torturer would mean "denying his or her highest values" (136). Sussman has a much deeper concept of betrayal in mind.

Sussman recognizes that after 2001, concerns about terrorism raise the question of torture's moral status in a fresh way.[54] Like many in the current torture debate, he is primarily concerned with interrogation: torture as "the sort of violence that can be permissible as part of the prosecution of a just war or legitimate police action" (Sussman, 2005b, 3). Sussman's account of what makes torture a "distinctive kind of wrong" centers on the claim that "torture forces its victim into the position of colluding against himself through his own affects and emotions, so that he experiences himself as simultaneously powerless and yet actively complicit in his own violation" (3-4). This torture as "forced self-betrayal" exceeds, as a concept, the betrayal of comrades or values that Shue discussed (4).

More than the others, Sussman brings the connection between what torture is and what is (or isn't) wrong about it to the surface. In other words, self-betrayal is both what's wrong with torture and what makes it different from other kinds of violence. Torture involves the "intentional infliction of great pain," but also "a distinctive kind of social setting" (Sussman, 2005b, 6). There is an almost total asymmetry between the torturer and the tortured, who are "completely at the mercy of their tormentors" (6). That asymmetrical relationship creates "the experience of a kind of forced passivity in a context of urgent need" (2005a, 227). In addition to the infliction of intense pain and the asymmetrical social setting, both the torturer and victim have some awareness of their

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[54]He also mentions kidnapping, a central concern of Steinhoff (2013).

respective positions (2005b, 6). This mutual recognition sets up a kind of give and take that is, nevertheless, predetermined by the power asymmetry. Therein lies room for the betrayal.

To help describe what he means by betrayal, Sussman (2005b, 9) places torture in the middle of a continuum between coercion and brainwashing. He characterizes coercion as "hard bargaining by means of threats," while brainwashing does not "appeal to its victim's rational judgment at all." Therefore, coercion involves an overt contest of wills, while brainwashing involves the substitution of the other's will for one's own (10). This distinction has some drawbacks, but it does help illuminate why torture forces a betrayal.[55] Sussman argues that "in torture the victim must confront his own feelings as a problem, as something he must respond to, where this response is something for which he may see himself to be in some way accountable" (10). Thus the betrayal Sussman is talking about exceeds any simple kind of giving in to pressure. Instead, the tortured person reflects on a "dilemma about submission or resistance" in which they become an active participant (2005b, 10). And the dilemma may become deep and unavoidable, because the torture is able to create "something like the opposite of life" for the victim, and then sustain that condition (2005a, 230).

Sussman's argumentation is at times overdrawn. The asymmetry of the relationship is "absolute," and the victim cannot even "orient himself" in the world (Sussman, 2005a, 228). However, that does not undermine his finding that the badness of torture is somehow attached to the "forced self-betrayal" in which the victim winds up "colluding against himself" (2005b, 4). While Steinhoff (2013) will make much of Sussman's excesses, Kramer (2014) will salvage the concept of betrayal as a central feature of his more sophisticated account. Unlike nearly everyone discussed so far, Sussman breaks out of the calculations of relative harm that constrain both utilitarian and (proto-) threshold deontological accounts. Sussman *describes* the harm suffered by the tortured person, not in a gratuitous or graphic way, but in a way that gets at what is really loathsome about

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[55]Without a doubt, this is a troublesome distinction, especially in the not-uncommon event that the tortured person does not really have the information that the interrogator is certain they have. In such cases, it is impossible to make sense of a "contest of wills," because the will of the tortured person has been profoundly misunderstood. Coercion could thus collapse into brainwashing, as the tortured person tries to work out some way to stop their treatment. Both Slahi (2015) and Asadi (2011) describe their efforts to come up with stories—false to them—that would satisfy their torturers.

it.[56] Torture uses the materiality of the body to force painfully-considered self-betraying acts by its victims. Sussman's description of torture therefore casts some doubt on the magnitude of negative value that attaches to torturing the victim. In both the utilitarian and threshold deontological arguments for torture, the quantity of harm to the victim is considered small in comparison with the calamity to be prevented. By elaborating the *quality* of the harm to the tortured person—and its central feature of self-betrayal—Sussman's work suggests that the quantity of harm must be more thoroughly considered in the calculations that purport to justify torture.

2.2.4 Waldron: Torture as Legal Archetype

Jeremy Waldron stands apart from the other participants in the torture debate for the scope of his engagement. The essays collected in *Terror, Torture and Trade-Offs: Philosophy for the White House* (2010) cover torture and several related issues: the security/liberty opposition, terrorism, the right to security, torture and theology, and international law. Two of the essays, "Torture and Positive Law" and "Cruel, Inhuman and Degrading Treatment: the Words Themselves" deal most directly with the definition and moral status of torture. Waldron deserves praise for addressing torture as part of a *comprehensive* political and ethical vision. Unless that comprehensive view is widely shared, however, his torture ethics encounter similar difficulties as those already considered: others may adopt alternative and even incompatible moral visions. Still, Waldron deserves mention for his novel "legal archetype" argument and his attempts to assert firm meanings for the associated terms of cruel, inhuman, and degrading.

The legal archetype argument arose out of Waldron's (2010, 186-87) particular disappointment that the "legal and political background set by discussions among lawyers and other officials in the White House" allowed the abuses at Abu Ghraib and Guantanamo Bay, which were just becoming known when he began the article. Waldron argues that lawyers like Alan Dershowitz, John Yoo, and Jay Bybee who supported or authorized torture or torture-like interrogations after 2001.[57]

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[56] Compare to the lengthy, gratuitous digression Steinhoff (2013, 30-32) makes into the effects of bodily decomposition to try to show that death is worse than torture.

[57] Jay Bybee and John Yoo are the authors of the so-called "torture memos," one of which (Bybee and Yoo, 2002)

Waldron argues that the legal and moral status of torture did not change after 9/11, even if security and political considerations did (1f. and 189). He is critical of attempts to "narrow or modify the prohibitions on torture" that threaten to damage the legal profession and the "Rule of Law," and especially disappointed that this maneuver came from within the professional legal community.[58]

The notion that legitimizing torture—either by narrowing its definition or enshrining it in law—might affect the law itself leads Waldron to the archetype argument. He says, first, that torture is not just bad but "repugnant" to the law (Waldron, 2010, 223). Torture "*could* be introduced into our law," directly or indirectly, but doing so "would be contrary to the 'genius and spirit' of our law" (223, emphasis original). Waldron goes further to say that torture can be considered "alien to *any* system of law," at least those existing today (224, emphasis original). For Waldron, the laws prohibiting torture serve two functions simultaneously. They act as straightforward statutes, and they also operate in the background as a sort of paradigm of those laws concerned with rights. The torture prohibition is "one provision in the cluster which by virtue of its force, clarity, and vividness expresses the spirit that animates the whole area of law" (227). That background function makes it a legal archetype. As an archetype, the torture prohibition "has its own direct legal effect," and also "epitomizes something" beyond itself (229).

Specifically, the torture prohibition "is archetypal of a certain policy having to do with the relation between law and force, and with law's forcefulness with regard to the persons it rules"

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features centrally in the chapter below on the torture, the body, and space (4). Both men worked in the Justice Department's Office of Legal Counsel (OLC), and were asked by various administration and agency officials to provide interpretations of U.S. and international laws pertaining to prisoner status and treatment, including torture. On the Bybee-Yoo co-authorship of the memos, see Waldron (2010, 189 fn.)

[58]See Waldron (2010, 190). Waldron's professional view of the law thus has a more civic focus. Speaking of the "particular dismay" that the architects of the Bush Administration interrogation/torture policy "studied and sometimes teach at the country's most elite law schools," Mark Osiel (2009, 430) submits that elite lawyers see the exploitation of legal uncertainties as their *job*, not a perversion of their job. "Only at less distinguished law schools" do students learn to master and apply "a settled body of rules" (430). If memos like Bybee and Yoo (2002) are bad legal products, Osiel is arguing that it is not because of the way they treat the law. They treat the law just the way elite law schools trained them to. Regarding John Yoo, Osiel (2009, 431) says "one may question his professional competence here more than his professional ethics, except perhaps insofar as competence is the first duty of legal ethics." Osiel usefully cautions critics of pro-torture (or pro-violent interrogation) lawyers that complaining about "loopholes" is like "accusing a fellow lawyer of being lawyerly" (423). However, Waldron clearly thinks there is more to the law than exploiting legal uncertainty to the maximum advantage of one's client. Some other prominent attorneys agree with Waldron that the practices legitimized by the torture memos did threaten the legal profession, if not the Rule of Law itself. For an account of the professional ethics investigation into Bybee and Yoo, see Lauritzen (2013, ch. 3).

(Waldron, 2010, 232). Remembering that Waldron is addressing a U.S. audience, the principle is that our sort of law is predicated on is dignity, especially when encountering the force of law. The torture prohibition "is vividly emblematic of our determination to sever the link between law and brutality" (233). To weaken or undo the torture prohibition is to risk this essential principle of American law. Thus the torture prohibition does non-statutory background work in areas like the rules of punishment and prisons, rights of due process, and the "culture of law enforcement" (236-42). If torture were an official practice, the "character of our legal system would be corrupted" in the sense that the "repudiation of torture would become a *technical* matter, rather than a shining issue of principle" (246). Since that principle is what makes American law what it is, and that in part makes the United States what it is, Waldron (2010, 247ff.) laments the decline of the torture prohibition.

In response, one might charge Waldron with inverting the question without actually saying what is bad about torture itself. Instead of providing an answer to the question "why is torture morally bad and legally forbidden?", he asks what law or morality would mean in the event that torture was legitimized. For those who agree that torture is wrong, Waldron provides a rich account of why, as well as new ways of talking about it. For Waldron (2010, 259f.), the legal archetype is a "way of thinking" through which he reached "a clearer and more substantive sense of what we aspire to in our jurisprudence: a body of law and a rule of law that renounces savagery." Whether others—particularly the utilitarian defenders of torture—are inclined toward such a reflection is doubtful. It is not clear that there is any basis for forcing them to do so, either, because Waldron's principles do not make sense given the way that utilitarians calculate preferred moral outcomes. Like most of the approaches to torture ethics considered here, Waldron's is fairly convincing on its own terms. It is the difficult dispute between those terms that this dissertation tries to reveal and address.

2.3 Critical Assessment

What do these arguments amount to in the aggregate? This section assesses the debate in two ways. First, I give an informed analysis of the current debate and its relationship to contemporary torture. Then I discuss the futility of such an analysis, or any other offered along similar lines. I follow that with a second assessment of the current torture, which outlines its troubling features that suggest a significantly different approach is needed. The subsequent section (2.4) reviews the three additional works that have had the advantage of taking in the entire debate from 2001-2013 to see if they overcome the problems I describe here.

2.3.1 Limits of Assessment in the Current Debate

One thing that all of these torture ethics accounts agree on is that calamities need to be dealt with—prevented if possible, or at least minimized. These authors are all asking if torture is permissible in cases like the ticking bomb scenario. Some adopt this view for the sake of argument and others, like Dershowitz, presume it is a feature of frequent real-world decisions about employing torture. The assumptions that make the ticking bomb scenario *possible* can be stated in weak terms, but they are nearly always stated in strong terms. The attack is imminent, the suspect has relevant information that torture will successfully extract, and the information will save lives. When restating his case, Shue (2005, 235) argues intuitively that the conditions of such ideal ticking bomb scenarios are so improbable that treating the scenario as possible is disingenuous: "My honest judgment is that stories that are too good to be true are not true rarely, but false." In the decade since then, the unconvincing evidence offered for torture's effectiveness has been the further undermined by the accumulation of more information.[59]

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[59]After the Obama administration released the "torture memos" in spring of 2009, former Vice President Dick Cheney requested the release of two classified documents that in his view showed the effectiveness of the interrogation program. The documents "describe several plots disclosed by detainees who were subjected to harsh questioning but do not specifically attribute the revelations to the use of those techniques" (Smith, 2009). See also United States Central Intelligence Agency (2012). More recently, the summary report of the Senate Select Committee on Intelligence has called into question the veracity of the documents Cheney saw as proof of the life-saving effects of violent interrogation (SSCI, 2014). Among other things, the report finds that the CIA "significantly overstated" the importance and knowledge of terror suspect Abu Zubaydah, whose case is central to the official justification for the program (21).

These intuitive and empirical judgments are bolstered by Schiemann's formal analysis. In my view, Schiemann shows decisively that the principal outcome promised by utilitarian torture justifications *does not occur*. Under real-world conditions consistent with the ticking bomb scenario, the utilitarian approach will yield "frequent and harsh torture without much useful information" (Schiemann, 2012, 16). The same applies to the threshold deontologists who support torture in limited cases. Threshold deontologists may use judgment rather than calculation to determine when the threshold is definitively crossed, but the resulting structure of calamity-averting torture is the same. It is, therefore, subject to the same criticism from Schiemann.

It is not very useful, though, to say that the utilitarian and threshold-deontological cases for torture are fantasies based on dubious assumptions about the tortured person, the torturer, and the world. That kind of response plays into a dispute about the relevant facts of the situation, including some of that are infinitely contestable. Later in this dissertation I will argue for a shift of attention from "matters of fact" to "matters of concern," as Bruno Latour (2005) advocates. For the moment, note that the ease with which holes can be poked in the torture-legitimizing arguments does not apply universally. For their part, the utilitarian and deontological opponents of torture have their own vulnerabilities. Chief among these is that a perfect ticking bomb scenario is *imaginable*. The photographic images of torture from Abu Ghraib compete with images of the burning and falling Twin Towers in the memories of relevant observers. For those who find the latter image to be stronger, the issue of torture may well be securitized, or removed from the normal arena of political contestation.[60] If so, the reasoning that leads me to prefer Schiemann and the deontological opponents of torture to the utilitarian torture advocates will have little impact on the public torture ethics debate.

My assessment of the torture debate is limited because, as I said in the introduction, that de-

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That the CIA also held Zubaydah for 47 days without questioning undermines claims of imminent threat (27f.). For reasons I explain later in the methods chapter (3), it is important not to get diverted into an competition of debunking facts. I note these developments here only to support my initial assessment, which I believe has limited use anyway.

[60]Michael C. Williams (2003, 525) has noted that the "speech-acts" that can securitize issues "are inextricable from the image-dominated context in which they take place and through which meaning is communicated." He thought at the time that securitization theory's "presentation of security as a speech-act is potentially too narrow" in the emerging image-intensive environment (528). That situation has only intensified in the years since his article.

bate is definitely not restricted to a single question. While the primary question addresses torture's moral status, most of the action in the debate concerns other questions about the facts of the situation, the chosen systems of ethical evaluation (normative theories), and claims about the nature of moral arguments and statements (metaethics). In order to perform this brief assessment, I have had to make my own choices about the answers to those associated questions. However, my choices are just as idiosyncratic as the choices in all of the works featured above. I am not likely to garner much more agreement than anyone else has.

The bad news for readers, as well as for aspiring torture ethics scholars, is that your own view faces the same challenge. To anyone who has found themselves discussing and disagreeing about torture with others, the problem is apparent. If the associated questions are answered *on the way* to producing a judgment on torture, there is every likelihood they will lead to different places. That is why I develop a method in chapter 3 that is designed to apprehend the cluster of associated questions in the torture debate at once.

2.3.2 Features of the Current Debate

Given the dangers of assessing the current torture ethics debate in the mode of a judgment, another way of assessing them is needed. What is called for is a description of the features of the debate and its constituent arguments, not a comparison or synthesis of incompatible answers about torture's moral status. One feature of the debate is already visible: none of the arguments mentioned so far approach the whole cluster of questions around torture ethics together. Instead, most answers to the associated questions act as premises and assumptions in the background of each approach to torture ethics. Sometimes this has to do with the identity of the researcher, as Waldron clearly sees himself as a lawyer and legal philosopher in relation to the law. Bagaric and Clarke choose consequentialism because in their view deontological rights have no sound foundation.[61] Among consequentialist theories they specifically choose hedonistic act utilitarianism because it

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[61] "When examined closely, the concept of non-consequentialist rights is vacuous at the epistemological level" (Bagaric and Clarke, 2004, 602).

is the "most cogent" and "most influential" (Bagaric and Clarke, 2004, 605). Arrigo chooses utilitarianism not because she *is* one, but because she wants to respond to pro-torture utilitarians on their own terms. I have called both Gross and Shue proto-threshold deontologists because they oppose torture in principle (not consequence), and yet both are willing to consider overriding those principles in the face of a calamity. However, Shue (2005) reiterates his sharp disagreement over the factual question about the plausibility of the ticking bomb scenario. To simply say that these thinkers *disagree* about the moral status of torture is to *leave out most of what they disagree about*. They disagree about a full set of answers to a dense complex of questions. The permissibility of torture is simply the most apparent one.

The torture debate also produces complex and diverse results that defy categorization. Some utilitarians support torture (Bagaric and Clarke, Dershowitz) while other utilitarians oppose it (Arrigo and Schiemann). Among the utilitarians who support torture, rule utilitarian Dershowitz advocates torture warrants and act utilitarians Bagaric and Clarke do not. There are deontologists who oppose torture (Waldron, Shue) and other deontologists who make an exception in the ticking bomb case. The torture debate ends in this ambiguous outcome even when it is limited to ethical approaches rooted in Anglo-American analytical philosophy. Adding virtue ethics and approaches based in Continental philosophy will complicate the picture even more.

To see how this failure is possible, torture ethics must be viewed as a complex cluster of interrelated questions, not a single question. Firstly, the arguments reviewed above disagree on factual claims that are their *inputs*. They disagree on the probability of the expected adverse event, and on its claimed imminence. They disagree on how the desired information and the adverse event are related. They disagree on what the torturer knows about the tortured person and vice versa. Waldron and Shue, to some degree, question the entire enterprise of judging torture in the context of looming catastrophes. Secondly, many of torture ethics approaches disagree on the *outputs* of torture interrogations. Ideally, those outputs should include the crucial information and the successful prevention of the calamity. Without the assumption that torture produces valuable disaster-averting information, neither the utilitarian justification nor the threshold deontological one could be sus-

tained. Thus Arrigo's (2004, 563) demand that utilitarian torture advocates elucidate "the actual causal mechanism of torture interrogation in curtailing terrorism." Although Schiemann's formal analysis deals a serious blow to the information-producing assumption about torture, some utilitarians might still disagree. The right piece of information that stops a suitably large calamity might still achieve a very high utility, even when inefficiently produced through torture. That would require strong assumptions about the calamity and the prisoner's information, plus a rather doctrinaire form of act utilitarianism. However, it is precisely my point that those assumptions cannot be policed in the torture ethics debate as it is currently formed. Other people will make their own assumptions. That applies just as well to disagreements concerning different ethical traditions. Choices of normative tradition, specific approaches within normative traditions, and meta-ethical justifications all impact the resulting torture ethics, and each person can make many different choices in the course of their ethical considerations.

The question *is torture morally permissible?* makes no sense in itself, apart from the cluster of questions that arise along with it. The above list does not exhaust these disagreements, and they are not trivial philosophical points. The lack of consensus on torture's definition is another such question that causes a practical problem for torture ethics scholars. Given these disagreements, comparisons of different torture ethics arguments become not only difficult, but also inappropriate. These scholars only appear to be answering the same question. When the cluster of associated questions is forced into the background, as it usually is, this hides the ways in which each scholar is engaged in a somewhat different enterprise. So far, it is not clear that anyone has recognized this as a problem, much less as *the* problem of torture ethics. The approach developed in this dissertation, beginning with chapter 3, attempts to put everyone on the same footing—not by imposing some uniform set of answers to the associated questions, but by theorizing the social structure in which their differences can coexist. Before doing so, however, there are a few more torture ethics approaches worth considering.

2.4 The State of the Art in Torture Ethics

The latest torture ethics scholarship has matured, as scholars have benefitted from the accumulation of previous work for ten years. Having digested all of the above arguments, Steinhoff (2013), Gordon (2014) and Kramer (2014) can offer both thorough assessments of the previous work and more mature arguments of their own. Each makes an important contribution, but none addresses the problem I have begun to outline above. In addition, I consider Mohamedou Ould Slahi's (2015) prison memoir. Slahi's book is not an example of torture ethics itself, but it the voice and experience of a tortured person to debate that has been lacking it. The contrast between the tortured persons's voice and the full range of torture ethics arguments raises the question of how well the concept of torture in the torture ethics debate fits the phenomenon of torture.

2.4.1 Uwe Steinhoff: Absolute Self-Defense

Uwe Steinhoff's *On the Ethics of Torture* (2013) makes an affirmative case for torture based on the right to self-defense.[62] This is a departure from the torture justifications offered by Dershowitz (2002) and Bagaric and Clarke (2007; 2004). By using a different ethical structure based on rights, Steinhoff avoids some objections to utilitarianism and forces opponents to respond to the right to self-defense.[63] Steinhoff (2013, 45) identifies as a threshold deontologist, for whom "rights are trumps, but they are not absolute." Steinhoff also adopts threshold deontology in a more explicit way than Shue and Gross by using and explaining the term, rather than just intuitively acknowledging that their principles can encounter tough limits.[64] He emphasizes that for threshold deontolo-

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[62] Steinhoff (2013, ix-x) denies that he or his book are "pro-torture," but that is a fair characterization of his position concerning the child-kidnapping and ticking bomb cases that he believes are justified.

[63] Utilitarians also have to contend with problem of deciding how the utility of outcomes is measured. In contrast to Dershowitz and Bagaric and Clarke mentioned above, Rod Morgan (2000) makes a utilitarian case *against* the use of torture. Calculating the consequences of potential future events is contentious, especially with the charged politics, security concerns, and secrecy that surround most contemporary torture. For his part, Steinhoff (2013, 46-52), who does not identify as a utilitarian, presents a terse argument that torture is justified on utilitarian grounds: "You do the math."

[64] The way Steinhoff identifies as a threshold also contrasts with the pragmatic way Arrigo (2004) adopts utilitarianism. Arrigo does so in order to refute torture in terms that utilitarian torture advocates should appreciate. As I discuss below (5), Arrigo is only partially successful. Her strategic agreement to utilitarian calculus cannot overcome the factual disagreement over whether or not torture produces life-saving information.

gists, rights matter, not utility, until the potential outcome becomes so undesirable that it crosses a threshold (43f.). By maintaining their principles in the face of lower utility, but not calamities, threshold deontologists try to avoid the perverse outcomes that both cold, unprincipled utilitarianism and rights absolutism might lead to. Steinhoff (2013, 7) agrees that ordinarily people have the right not to be subject to "the knowing infliction of continuous or repeated extreme physical suffering for other than medical purposes," as he defines torture, but only up to a point. However, his book is really about idealized "aggressors" and "defenders" rather than ordinary people, and he finds that defenders have a strong moral basis for action.[65]

The central claim of the self defense argument is that people "have a right to defend themselves or others from wrongful aggression, particularly if the aggression is life-threatening" (Steinhoff, 2013, 11). When *under attack*, one is permitted to do what is necessary to stop it, and necessity is generously interpreted.[66] Gross disproportionality must be avoided, but there is no strict proportionality requirement (12f.). Self-defense is understood to include other-defense, meaning third parties can exercise it on behalf of the person who is actually being attacked (12). Finally, an attack may be considered underway even when the attacker is in custody (13). Therefore, Steinhoff argues the police can justifiably use torture to force kidnappers to disclose the locations of their victims (14). More generally, for Steinhoff the torture of culpable aggressors is justified by the self-defense rights of those at whom the aggression is directed. Steinhoff argues for legalization of the self-defensive torture he has sketched out, but against any thorough institutionalization of torture, for example torture warrants.[67]

This deontological rights-based case for torture is a significant innovation. Those who reject Steinhoff's conclusion that torture is morally justified in "Dirty Harry" and "ticking bomb" cases

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[65]The reduction of the cast of characters to only aggressors and defenders is most vivid in Steinhoff (2006), but see also Steinhoff (2013, 75f.).

[66]Steinhoff (2013, 12) notes that German law "does not require one to retreat from the aggressor if it one could safely do so." He does not address controversies surrounding self-defensive justifications for violence arising from so-called "stand your ground" laws in the United States, for example in Florida (Hundley et al., 2012).

[67]See Steinhoff (2013) chapters 4 and 5. Recall that torture warrants are a central recommendation of Dershowitz (2002, 146 and 152f.), in part because his utilitarian argument seems to generate a need for some restricting mechanism, and in part because Dershowitz thinks that legal practice should not be willfully ignorant of or inconsistent with the de facto practice of torture.

must now account for rights, including self-defense rights exercised by a third party.[68] Steinhoff also sharpens important points about defenselessness and morally justified killing. Shue (1978, 127ff.) used the defenselessness of tortured persons to distinguish the special badness of torture from morally justified combat killing. Steinhoff emphasizes those cases in which defenseless captives still pose threats that activate the self-defense rights of others. Taking the moral force out of defenselessness makes the comparison of torture to justifiable *killing* especially relevant again. For Steinhoff (2013, 18-25), any captive person who poses a significant enough threat to be killed in self-defense can surely also be tortured. Captives who are still attacking can be treated like any other attacker, and sometimes killing attackers is just.[69] Steinhoff (2013, 54) wields this like a club throughout the book to show why—if one adopts his premises—torture is justified: "Would you prefer death to 30 minutes of waterboarding? Or even a whole day of waterboarding?"

In response to Steinhoff, one might question which situations merit characterization as instances of aggression and self-defense. One can also question the characterization of death as worse than torture. Regarding self-defense, he says that situations "in which it is justified for the police to torture someone *are enormously rare*" (67, emphasis in original). On the other hand, he draws a close parallel between kidnappers and suspected terrorists, as the "ticking-bomb terrorist and the child kidnapper . . . *are* attackers" (37, emphasis in original). In practice, ticking-bomb logic has been broadly applied to suspected terrorists, with no standards of accountability. Steinhoff roundly dismisses the need to be certain about threats before justifying self-defense, but says nothing about how to apply his alternative standards, which are reasonable belief and objective fact.[70]

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[68]*Dirty Harry* is a film in which Clint Eastwood plays a police detective who tortures an admitted child kidnapper in an attempt to save the child. Steinhoff (2006, 342ff.) adopts Dirty Harry as the name for the child kidnapping cases on which he focuses. Steinhoff (2013, 13f.) also discusses a real-world case from Germany, in which a police threatened a kidnapper with torture and he revealed the child's location. In both the movie and real life, the children were found dead, though Steinhoff reported the film case as a life-saving triumph in his essay (2006) and had to correct himself later (2013, 163 fn. 5).

[69]The ticking bomb scenario encapsulates the idea of a captive who is still attacking. Note that this requires some displacement of time, matter, and agency. The method I develop later (3) using Bruno Latour's work is specifically suited to tracing such displacements, whereas Steinhoff is stuck simply asserting them.

[70]With respect to reasonable belief, he says "*Nothing* is certain," and argues that as instances of self-defense, "the knowledge requirement can be satisfied in the ticking bomb case, since the interrogators can obviously have a justified true belief that a suspect has planted a bomb" (142-43, emphasis in original). With respect to objectivity, he says that

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Beyond that, Steinhoff's torture/death comparison can be challenged by an inquiry into suicide. Many Guantanamo prisoners have gone on hunger strikes, only to find themselves painfully force-fed (Savage, 2011). Suicidal urges give torturers new vectors of control, which they can exploit to deepen the pain and humiliation of their captives. Since the turn to "clean" techniques torture has been designed to make life unbearable *while simultaneously sustaining it*.[71] In short, despite Steinhoff's (2013, 30-32) graphic discussion of bodily decomposition, his insistence that death is worse than torture is open to question. Kramer (2014) criticizes Steinhoff more narrowly, in connection with the implications of exceeding a the deontological threshold. In keeping with my review of earlier works and the contours of my assessment, I do not want to trade blows with Steinhoff on specific arguments here. What limits Steinhoff's argument in this context is that it too cannot refer to any authority regarding his answers to the associated questions. "I am a threshold deontologist," says Steinhoff (2013, 45), and good for him. Why anyone else should be, he does not answer.[72]

2.4.2   Gordon's Virtue Ethics: Torture as a False Practice

Rebecca Gordon's virtue-based approach to torture ethics sets *Mainstreaming Torture* (2014) apart from the dominant utilitarian and deontological arguments. Gordon also stands apart for her recognition that the contradictions between approaches make the current torture ethics debate, as a whole, a different kind of problem. What is not clear, however, is how her alternative virtue ethics proposal solves that problem.

Focusing on virtue shifts the focus of ethics from the judgment of isolated acts to providing guidance for living well. Gordon therefore needs to define torture as a practice, and then show

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if "the defender *is* under attack, then necessary and not grossly disproportionate countermeasures are justified" (18). The emphasis on "is" in the original text shifts the standard of knowledge from belief to objectivity.

[71]The turn is motivated by human rights monitoring, according to Darius Rejali's *Torture and Democracy* (2007, 39ff.).

[72]Steinhoff (2013, 45-46) does not discover this part of the problem despite his consideration of utilitarian and strictly deontological arguments. He finds torture justified in both cases, as he did for his preferred approach of threshold deontology. If in one case he had found that torture was *not* justified, he might have discovered the problem to which this dissertation is addressed.

that United States (her case of interest) has practiced torture by that definition since 2001. While others have discussed torture as an ordinary practice, Gordon uses the term technically to indicate community practices designed to sustain and fulfill the purpose of living well.[73] Building on Alasdair MacIntyre's updated version of virtue ethics, Gordon characterizes torture as an "evil" or "false" practice—one that destroys rather than creates virtue in the community and its members.

Gordon (2014, 14-35) defines torture at greater length than anyone except Kramer. In her expanded definition, Gordon is able to add phenomenological and political dimensions to the usual legal definitions of torture. The phenomenological element introduces the *experience* of torture Gordon's definition, in order to supplement the legal definition that "hardly exhausts the meaning of the term" (25). Gordon attempts to close the gap between the abstract concept of torture and the experience of it—an experience that is otherwise largely missing from the torture ethics debate. However, Gordon's phenomenological definition is couched in ontological claims- regarding "the intentional unmaking of a human being's world" that can expect a chilly reception from analytic philosophers.[74]

Gordon (2014, 29f.) also adds a political component missing from many definitions of torture—particularly those that focus on counter-terrorist interrogations. For Gordon, torture is not simply an isolated act designed to avert a specific catastrophe. Instead, such catastrophes should be understood within a political context. This political dimension captures, for example, what International Relations scholars will recognize as struggles over the securitization of catastrophes. Gordon's political definition focuses more on domestic political control than international security, but that does not diminish the relevance of her point: the events that torture interrogations are intended to avert do not happen in a vacuum.[75] Instead, those events are shaped by specific political contexts. Gordon's inclusion of political and phenomenological elements in her concept of torture serves as an implicit critique of the more abstract definitions that fail to consider the political context or the experience of the tortured person.

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[73] See Arrigo (2004), Shue (2005), Luban (2005) andSussman (2005b).

[74] See Gordon (2014, 25). Gordon gets this idea from Scarry (1985).

[75] Gordon (2014, 30ff.) discusses Foucault's views on punishment and William T. Cavanaugh's sociological account of torture in Latin America.

Gordon then makes the case that the U.S. has used torture, as she has defined it, since 2001. Since her book was published, more evidence has accrued in the form of the Senate Select Committee's report (SSCI, 2014) on CIA interrogations and President Obama's admission that "we tortured some folks" (Obama, 2014). This point remains contested, but primarily by those who insist on different definitions of torture. After arguing that the U.S. has in fact tortured, Gordon (2014, 80) goes on to review the dominant consequentialist and deontological arguments, as well as theological and political approaches. She also includes a content analysis of the media debate. Though the latter element is limited to just two newspapers, it does suggest that the media differs from both the scholarly debate and public opinion, and thus deserves further analysis in its own right (91ff.).

Gordon does more than broaden the torture debate to include some previously neglected elements. Her deeper critique aims at the uncertain outcome of the debate as a whole. While there are numerous ways to approach the ethics of torture, there seems to be no sufficient authority for choosing among them. In other words, disagreements over torture ethics are largely metaethical. Gordon applies Alasdair MacIntyre's revision of Aristotelian virtue ethics to address the problem. From this perspective, ethics is a matter of practices that over time produce virtues, which in turn tend to fulfill a human goal or *telos* of living well (Gordon, 2014, 104-09). Virtue ethics is not a matter of judging the rightness of a specific action against standards of principles or utility. Instead, virtue is a quality of human action that tends to produce the Good in communities that cultivate it. *Telos* is a more communal and uniform property of human communities than the individualistic calculations and principles operating in utilitarian and deontological ethics. Thus it has the potential to resolve the chaotic ethics surrounding torture, so long as the community approves of the *telos*.

Unfortunately, virtue ethics as conceived by MacIntyre only pertains to practices that pursue the Good (Gordon, 2014, 118f.), while torture is obviously *not good* in this context. To apply MacIntyre's structured virtue ethics to torture, Gordon must account for a practice that generates a *bad*. To do this, Gordon characterizes torture as a "false" practice—one that "is a complex, collab-

orative, socially and historically embedded human activity that is also a locus of the formation of habits and character of mind," like any other practice, but which produces "the opposites" of virtue (120f.).

Gordon's virtue ethics contends that torture destroys virtue. It therefore also destroys the possibility of living well together, which is the *telos* of any political community.[76] Because its basic structure is rooted in the goal of living well together, a virtue ethics of torture is more explicitly social than deontological or consequentialist accounts, in which the social is subsumed into the individual unit. Gordon's account also militates against reductions in the torture debate that strip both its political context and the tortured person's experience. Gordon describes the central dilemma of the torture debate, which is metaethical disarray and the lack of a common theoretical framework for the debate. Her virtue ethics of torture offers a possible solution, but they require adopting the view that communities have purposes. Without wide acceptance of that assumption, virtue ethics becomes just one more alternative in an already-crowded metaethical environment. Gordon does well to show that torture is a virtue-destroying practice, but does not show why one should choose a virtue-based outlook on torture over a deontological or utilitarian one. The adoption of virtue ethics *only* resolves the chaotic metaethical situation *if one adopts it*.

2.4.3   Matthew H. Kramer's Comprehensive Account

Matthew H. Kramer's *Torture and Moral Integrity* (2014) is an ambitious attempt to comprehensively address torture ethics. Kramer begins with a thorough and precise specification of his metaethical choices and philosophical definitions. Like Steinhoff, Kramer is a threshold deontologist. Unlike Steinhoff, Kramer argues that crossing the threshold does not dismiss the original moral obligation: "Although the public-safety officials are morally obligated to secure the lives of citizens against calamities that are preventable and reasonably foreseeable, and although the officials' obligations are extremely weighty when the dangers are immense, those obligations do not

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[76]Waldron uses different language to state something similar about torture destroying the rule of law, and thus the American way of life (see section 2.2.4). However, Waldron focuses on identity, rather than the *telos*.

cancel or suspend any moral duties with which they conflict" (13). Kramer does not assume his work is over once a calamity looms, because calamities do not dismiss the prior moral obligation against torture. Instead, he works to pinpoint the location of torture's moral wrongness amidst an environment of competing yet durable moral claims.

Kramer (2014, ch. 2) devotes *86 pages* to defining torture, culminating in a definition that itself exceeds 180 words. He adopts a strategy for defining torture that is flexible and does not inadvertently exclude relevant acts by including unnecessary elements.[77] Kramer goes beyond broad categories to build an elaborate taxonomy of torture types, from numerous varieties of interrogational torture, to "extravagantly reckless torture" (74), and even "edifying torture" (98). These types of torture are constructed around the reasons and circumstances that could potentially justify the infliction of severe pain in each case. Kramer's definition centers on the infliction of severe pain, for various purposes, usually without consent, and outside the control of the tortured person (114). He makes such features typical rather than required in order to preserve the definition's flexibility.[78]

Having outlined the structure of his moral system and then defined torture, Kramer is finally in position to isolate the wrongness of torture. He carefully constructs a case against torture using two elements already present in the debate. First, he stresses the intimate and all-consuming nature of severe pain. Second, he incorporates the idea that the "distinctive form of self-betrayal that is forced upon any victim of torture" (Kramer, 2014, 161). Both parts of the argument feature prominently in Sussman (2005b), and many others make severe pain a central feature. Kramer (2014, 168f.) cautions against overstating these claims—which is not uncommon in torture discourse—because that has the effect of narrowing the applicability of the resulting moral arguments.

For Kramer, this combination of the all-consuming pain with the special self-betrayal of torture rules out a wide range of torture as impermissible. Still other types of torture were already ruled out

[77]For example, the UNCAT specifies that torture is done by state agents (UN, 1984). However, Kramer does not want to exclude possible instances of torture from his ethical inquiry on that basis.

[78]See Kramer (2014, 114). In contrast, Gordon (2014, 32) excludes private violence from consideration by making state agency part of her definition. If Gordon also objects to torture by private individuals or non-political groups such as criminal syndicates, her definition does not cover it.

due to morally impermissible purposes. Kramer has thus already excluded a very large proportion of potential torture as illegitimate. However, some non-trivial hard cases still need consideration. Kramer does not think this combination of arguments alone is sufficient to rule out all instances of torture. One such case is "ephemerally incapacitative torture" intended to stop a harmful act.[79] Kramer therefore bolsters his case against torture with the addition of a perpetrator-focused constraint. In other words, tortur*ing* is morally wrong for the perpetrator, regardless of the status, qualities, or situation of the victim (188). This provides the supplemental source of the wrongness in those marginal but important cases where the all-consuming pain and self-betrayal of the victim are insufficient.[80] Kramer thus rules out much potential torture based on impermissible purposes, rules out even more potential torture based on the infliction of severe pain and self-betrayal, and finally rules out the remaining potential cases with the agent-centered argument.

Kramer (2014, 212, emphasis added) thus comes to the conclusion that is at once simple and complex: *moral optimality is possible without moral permissibility*. Even in a situation where torture leads to the optimal outcome, it may not be a good outcome. The optimality of torture in such cases certainly does not vitiate the moral wrongness of torture. A lesser evil is not a good, and choosing it does resolve any moral conflicts. The real choice in such a situation is not between right and wrong, but between two wrongs. One choice is to forego the bad-yet-optimal outcome by refraining from torture, possibly leading to a calamity. The other choice is to commit a still-morally-impermissible act by torturing. The latter choice will have moral implications regardless of its practical outcome, because torture remains immoral. Kramer (2014, 214) directly addresses Steinhoff as having produced such an optimal-but-*impermissible* outcome. For his part, Steinhoff believes torture is justified.

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[79] See Kramer (2014, 186). This would indeed be "self-defensive torture," though Kramer construes it more narrowly than Steinhoff. Kramer differs sharply from Steinhoff on the moral relevance of the act/omission distinction, which Kramer (2014, 77-97) emphasizes and Steinhoff rejects. According to Steinhoff (2013, 81), the "attack *has not yet stopped* just because the terrorist is strapped to a chair," and therefore a "ticking-bomb terrorist *is* committing a wrong: not disclosing where the bomb is" (97).

[80] The idea that "the moral basis for our abstention from the use of torture against wicked terrorists is not about the terrorists but is instead about us," which Kramer (2014, 188) borrows from John McCain, is a curious result for positivist analytic philosophy. At least to me, it resonates more with developments in continental philosophy that ground the formation of ethical subjects in relation to the other, of which Judith Butler's *Giving an Account of Oneself* (2005) and Simon Critchley's *Infinitely Demanding* (2012) are two prominent examples.

Still, Kramer's refutation of Steinhoff, if it can be called that, rests on precise philosophical distinctions. In fact, no other author comes anywhere near Kramer's level of detail. Tracing Kramer's argument in reverse shows just how fundamental, and even arcane, his differences with Steinhoff (and with utilitarians) are. Kramer (2014, 28) concludes that "Even in an unimaginably dreadful situation of urgency where the use by officials of interrogational torture fulfils public-safety obligations that are more stringent than the officials' duties to eschew any use of such torture, their actions are seriously wrong." Kramer believes those officials must be subject to legal sanction, even if the competing moral obligation mitigates the severity of the sanction (28). That conclusion stems from Kramer's understanding of the structure of morality. Kramer begins with Michael Moore's "tripartite" moral structure, which features a "bottom tier" of consequentialist concerns in the background that guide a person's action (25). The second moral layer consists of deontological principles that compel or restrict action, and unlike the consequentialist concerns, are *obligatory* (25). The third and final tier qualifies those deontological principles, where "beyond some unspecifiable threshold as the consequences of adhering to duty *D* become more and more dire, *D* ceases to be binding" (26). Kramer agrees with Moore about this three-tiered moral structure, *except* for the final claim that *D* ceases to be binding. Kramer argues that instead, duty *D* is "locked in a conflict with a diametrically opposed moral requirement; the deontological duty-not-to-φ is countervailed by a consequentialist duty-to-φ" (26). The disagreement with Moore on this point stems from Kramer's strongly objective view of morality (14-28). Objective moral obligations cannot simply *go away* in the presence of competing consequentialist concerns, even if the latter are "very weighty."[81] This is also the basis for Kramer's distinction between "overtopping" and "overriding" moral obligations. An overridden obligation "involves cancellation or supersession or suspension," while an overtopped obligation "retains its full force" even though it is "exceeded in importance or stringency" (10f.).

The above reflects only a partial account of Kramer's overall ethical framework. His normative theory specifies a particular vision of threshold deontology. In turn, his normative theory depends

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[81]See Kramer (2014, 26). Another term for belief in the objectivity of moral claims is *moral realism*.

on specific metaethical commitments like the objectivity of moral obligations. In torture ethics, a great deal can hinge on such a seemingly small disagreement. Steinhoff, for example, clearly believes that the obligation not to torture is *dismissed* once a competing moral obligation sufficiently activates someone's right to self-defense. One can say that their disagreement about the moral status of torture stems from a disagreement over the objectivity of moral claims. Yet even philosophers find this point arcane, unless they are ethics specialists. Steinhoff sees no need to elaborate the "general structure of morality" in the course of *justifying torture*, even though the question "can we torture this suspected terrorist?" is non-trivially related to question "are moral claims features of reality?" If I am correct that the question of torture ethics is not one question but a cluster of related questions, then the hopes of comparing torture ethics arguments on any kind of level playing field are dim.

2.5   First-person Accounts

By design, this look at of the current torture ethics debate has focused on works directly concerned with the moral status of torture. I have also argued that torture is a cluster of associated questions, not a single question. One very troublesome associated question is just what torture *is*, or more narrowly, how torture is defined. The problem of torture's definition merits a longer treatment in chapter 3. With respect to the current debate, however, the voice and experience of the tortured person have been largely absent from everything included so far. Only Gordon (2014, 25) attempts to include the tortured person, through the phenomenological component of her definition. Otherwise, the experience of the tortured person has been ignored by the current torture ethics debate. To the degree it is present in the current debate, the real experience of torture is mediated through abstract concepts that have more to do with the work of philosophers than with the situation faced by tortured person. A thorough sense of the current torture ethics debate therefore requires some exposure to the tortured person. Such works might not answer or even address the cluster of questions in the torture ethics debate. They do report what happened, however, and they warn scholars

about a serious gap between their concepts of torture and its reality.

2.5.1   Slahi Speaks from Guantanamo

Mohamedou Ould Slahi is a captive of the United States government, not a moral philosopher. *Guantanamo Diary* (2015) has been widely reviewed but not *peer*-reviewed. The blacked-out redactions attest to what editor Larry Siems calls "the manuscript's previous editing process" by another kind of authority (Siems in Slahi, 2015, xii). Slahi's prison memoir is empirically valuable for its first-hand account of American torture after 2001. It also compels researchers to reflect on the scholarly enterprise of torture ethics. Torture and the voice of a tortured person come through vividly in this book, despite the heavy editorial hand of the state.

Slahi (2015, xxi-xxv) is a Mauritanian born in 1970 who won a scholarship to study at the University of Duisberg in Germany. He interrupted his studies in 1991-1992 to fight the communist regime in Afghanistan, and then finished his degree in Germany. He moved to Montreal in 1999, where to his great misfortune he attended the same mosque—though not at the same time—as Ahmed Ressam, the person caught entering the U.S. to execute the "Millennium Plot" in 2000 (xxiv). After Canadian authorities questioned him about the Millennium Plot, Slahi decided to return to Mauritania. On his way, he was detained and questioned in Senegal and Mauritania, and also questioned by the FBI (97-104). He was released without charge in February of 2000, arrested again in late September of 2001, and released again.

He was arrested once more that November, and secretly rendered a week later to Jordan (Slahi, 2015, 120-1). He was interrogated, hidden from the ICRC,[82] and threatened with torture.[83] Slahi praises the Jordanians—faintly—as restrained, practical torturers, who "must have reason to practice heavy physical torture" (178). Slahi was neither charged in Jordan nor sent home to Mauritania, but rendered to Afghanistan and then Guantanamo Bay, Cuba in August of 2002—just days after the Justice Department's Office of Legal Counsel had given CIA and White House lawyers

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[82]The International Committee of the Red Cross (ICRC) visits prisoners under the guidelines of the Geneva Conventions (Slahi, 2015, 168).

[83]Slahi was told he would be sent to the "Shark Pool," (Slahi, 2015, 183-4).

its favorable views about harsh interrogation techniques.[84] With little firm evidence against him, Slahi seems to have been undone by the appearance of his associations with family, acquaintances from ten years earlier in Afghanistan, and people who attended the Montreal mosque.

He was interrogated for nearly a year at Guantanamo Bay before an especially intense phase of violent interrogation began in the summer of 2003. As Slahi (2015, 218) puts it, for "the next seventy days I was denied the sweetness of sleeping: interrogation 24 hours a day, three and sometimes four shifts a day." The ICRC was again denied access, as they had been in Jordan (219). During his continuous interrogation, he was forced to stand for long periods while shackled to the floor (224-5, 230, 240, 242). Often he was not permitted to pray (231, 235, 246). After his transfer to Camp Echo he was forbidden to pray at all, and denied the call to prayer and the *Kibla* indication that would permit him to face Mecca (265). He was not permitted to fast, and was even force fed during Ramadan (231). Slahi was badly beaten during a staged abduction that was meant to suggest he was being rendered again to a Egypt or Jordan.[85] During that transfer his body was packed with ice (259), and at other times he was chilled in cold rooms or soaked in cold water (242f., 244, 245). He was also sexually assaulted by pair of female interrogators (230). For all that, Slahi appears to have yielded little or no intelligence—certainly none that averted a terrorist calamity. He has never been charged.

Slahi's *Guantanamo Diary* is less acutely horrifying than Iranian journalist Houshang Asadi's *Letters to My Torturer,* but Asadi (2011) wrote from far beyond the reach of his former captors. Slahi's story is more subtle but no less alarming. Scholars and policy makers alike should be most worried about its implications for truth and justice. Whether one believes Slahi or believes the government, the grounds for those beliefs are badly compromised. Slahi was interrogated for 18 months, plus the final months of round-the-clock interrogation at Camp Echo, before providing a very questionable confession. The questions he was repeatedly asked could plausibly have provided the information Slahi needed for the urgent task of formulating a confession. He understood that interrogators would not be satisfied with simple admissions: "One of the hardest things to do

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[84]The memo by Bybee and Yoo (2002) is dated August 1, 2002.

[85]He was actually just moved to the Camp Echo section of Guantanamo Bay (Slahi, 2015, 251f.).

is to tell an untruthful story and maintain it, and that is exactly where I was stuck" (Slahi, 2015, 232). Somehow, Slahi came up with something that made the torture stop, and the interrogators got their confession.

To value the information from such a brutally coerced confession requires a belief in a certain relationship between bodies and truth. I take up that relationship in chapter 5. Slahi's account reveals how central and difficult the information issue can be, even at the empirical level. His continued detention also raises questions of justice and security, particularly for scholars who think torture can be justified in specific security circumstances. If Slahi's case does not conform to the conditions specified in the justifications of Dershowitz, Bagaric and Clarke, or Steinhoff, then they should be the first to acknowledge it. Otherwise, their pro-torture arguments may be contributing to abuses they do not really support.

First-person experience is not the best or only way of knowing about torture, but it should be taken into account. Otherwise, the philosophical concepts circulating in torture ethics become less and less applicable. Most scholars who tackle torture ethics will not be torturers or tortured persons themselves, or have ready access to them. Whether scholars find ways to represent those voices, or instead try to deal with the absence of those voices, the voice of the tortured person has something to say about torture ethics.

2.6   Final Words on the Current Debate

Despite the advantage of digesting ten years of prior work, the latest research on torture ethics is not converging on an answer to the key moral question. If anything, the moral status of torture is becoming more unclear and more divisive. Only Gordon (2014) even recognizes that conflicting ethical frameworks present a serious problem for torture ethics. Unfortunately, Gordon's analysis only raises the issue, and does not make it central. Moreover, Gordon's approach can only resolve the incommensurability problem at the cost of insisting that everyone adopt virtue ethics. This is a cost that others seem loath to pay, and at any rate, the others are busily insisting on the correctness

of their own approaches. Steinhoff insists on threshold deontology, which differs from Kramer's. Bagaric and Clarke insist on hedonistic act utilitarianism, which differs from Dershowitz's rule utilitarianism, and so on.

The dilemma persists even though authors of these recent torture ethics works pays much closer attention to their normative and metaethical commitments than their predecessors did. Steinhoff identifies threshold deontology specifically. Gordon explains virtue ethics, and then develops it further by arguing that torture is a false practice. Kramer specifies his moral framework in more detail than most people will care to absorb. Their resulting arguments are more *clearly and firmly divided* than the raft of previous works. When the full range of questions around torture ethics is considered, these authors are not finding common ground. Instead, they are digging deeper valleys and finding higher, more disparate peaks on which to plant their respective flags.

At the same time there is a fundamental risk and weakness in the torture debate concerning the gap between the phenomenon and experience of torture and the concepts scholars use to discuss it. Kramer's analysis is at once staggeringly comprehensive and devoid of actual torture. However fair and competent torture ethics scholars have been, the voice and experience of tortured persons has eluded them. Gordon's inclusion of a phenomenological component in her definition of torture is laudable. However, her account fails to approach the power of Slahi's (2015) firsthand report. Scholars need not (and should not) resort to grisly and graphic descriptions of torture. Instead, the gap I am describing between concept and phenomenon calls for careful reflection by researchers on what is happening to the tortured person.[86] In the event that such first-hand material is inaccessible or difficult to incorporate in ethics arguments, scholars can at least be more creative and sensitive to its absence when thinking about what torture is.

The impulse to offer a better ethics of torture—a novel one, or an improvement or synthesis of the above approaches—should by now be viewed with some apprehension. To proceed in more or less the same way that other scholars have done will invite similar problems. The most devastating of those is that because every approach to torture ethics is composed of answers to a complex

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[86]For an explanation of the difference between political science concepts and actual political phenomena, see Voegelin (1987, ch. 1-2).

cluster of questions, any new approach will almost certainly be incommensurable with the others. That has not stopped participants in the debate from criticizing each other. However, shifting attention to the level of the whole torture ethics debate shows that quite often there is not enough of a shared theoretical basis to ground those mutual attacks. Only philosophers—and not even all of those—seem to have thoroughly worked out the details of their ethical frameworks. But political communities are not made of philosophers. Scholars in other fields, not to mention ordinary people, are unlikely to hammer out the intricate details of their own metaethics, nor persuade their entire communities to adopt them.

Part II of this dissertation confronts the likelihood that the members of political communities cannot be forced to harmonize their complex, idiosyncratic normative and metaethical commitments. Nor can one expect them to agree on answers to the other questions associated with torture ethics. I contend that it is not only impractical to impose a false uniformity or harmony on metaethical commitments, it may be unethical. By what right do I insist that you give up utility for threshold deontology, or vice-versa? Another way to put this is that torture ethics is not an *ethical* problem. Given a complete enough set of metaethical principles and factual assumptions, anyone willing to do the work can formulate an ethics of torture. Torture ethics is instead a *social* problem, because idiosyncratic systems of torture ethics are very difficult to socialize. The questions stemming from this insight include: how to theorize a social group made up of people with disagreeable views on torture ethics without forcing them into an agreement, how such a group can understand torture, and how they should decide what to do about it. The rest of this dissertation takes on this task.

Part II

Toward a Political Ethics

Chapter 3

Developing a Method

I have argued so far that the torture ethics debate comprises a large number of highly idiosyncratic accounts. Each of these accounts is rooted in a different set of answers to the complex cluster of questions. Sometimes the answers are stated as premises of the torture ethics argument, such as the claim by Bagaric and Clarke (2004) that the evaluative capability of hedonistic act utilitarianism is much better than deontology. At other times the answers and premises connected with these related questions are obscured. The claim that torture can or does produce life-saving information, for example, is usually just asserted.[1] These different approaches to torture ethics are incommensurable in a sense that is even more grave than is meant by philosophers of science. Torture ethics arguments are not just difficult to compare. They cannot even be marshaled into internally consistent categories fit for programmatic comparison.[2]

The works reviewed in chapter 2, including the rights-based case for torture (Steinhoff, 2013), the legal archetype argument (Waldron, 2010), and the models of truth production (Arrigo, 2004) *do* advance torture ethics. However, each of these advances comes with the drawback that its spe-

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[1] Arrigo (2004) specifically questions this assumption, but others—including those who oppose torture—often adopt it for the sake of argument, and often without making much of it.

[2] It will not do, for example, to conceptually consolidate "utilitarian torture ethics" as a research program, and then judge whether it represents a consistently progressive theoretical shift over a similarly consolidated "deontological torture ethics." See Lakatos (1978, 47ff.) for the evaluation of scientific research programs, and Jackson and Nexon (2009) for the inapplicability of Lakatos's concepts to unsuitable categories (in Jackson & Nexon's case, certain International Relations theories).

cific premises are in broad and complicated conflict with the premises of the other torture ethics accounts. Because the torture debate is advancing in different directions based on those different premises, the debate as a whole provides little guidance for ethical action by the political community. Instead, the community divides along the lines of differing ethical frameworks. This problem cannot be overcome by a more thorough specification of those frameworks. Kramer (2014) outlines his ethical and factual commitments more comprehensively than any other contributor, but this only strengthens his account in light of those specific terms. His thorough treatment of his ethical framework only multiplies sources of controversy like heads of a Hydra. This makes his account *even more clearly incommensurable* with the others, including those who agree with his conclusion about torture.

This chapter looks for a way forward that still respects the limitations of the torture ethics debate. It proceeds on two assumptions. One is that a uniform ethical framework cannot be imposed on the torture ethics debate. The other is that despite the lack of a uniform ethical framework, the resulting approach still has to address the broad community. In other words, it cannot be another approach predicated on terms that are largely incompatible with many others. Within the constraints of those two injunctions, the rest of this chapter theorizes a new approach to torture ethics. It must be suited to a community that does not agree about how to do ethics: a disagreeable community.

To accomplish this task, I first reimagine what kind of object of study torture ethics is. Next, I work toward a different understanding of the community or group to whom it matters. I rely primarily on the philosophy of Bruno Latour in this effort.[3] Finally, I apply the burgeoning approach to two preliminary questions in need of attention before moving on to talk about torture ethics. First, I consider the limitations of specifying a definition for torture. Second, I outline the structure of the ethical debate, and argue for a political conception of ethics.

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[3]Latour is a French philosopher who devoted much of his early work to studying the knowledge-producing practices of working scientists. Latour departed from the Strong Program of the Edinburgh school of science studies to develop his own social theory. See David Bloor's "Anti-Latour" (1999) and Latour's response (1999a). As will become evident, Latour's philosophy goes beyond social theory, and is getting some attention as a philosophical system of "object-oriented philosophy" (Harman, 2009).

3.1   Direct Critical Engagement Falters

Characterizing the torture ethics debate this way raises the danger that no standard at all will be applicable to the torture ethics debate. The purpose of this chapter is to find a way forward that will facilitate constructive talk about torture ethics, despite the challenging conditions. As long as torture ethics is nevertheless treated as a means to justify or prohibit torture, critical engagement will be a repetitive and futile struggle. With respect to torture ethics, direct critical engagement falters. This is not because critical engagement is too hard, but because it has become too easy. The authors of all the works in chapter 2 criticize each other extensively, but the debate as a whole has not progressed because of that struggle. The approach I outline in this chapter is designed to avoid the pitfalls of endless cycles of critique. It should also allow the recovery of the insights scholars have worked hard to produce in the current torture ethics debate, but which remain locked in their proprietary ethical frameworks.

In the works reviewed in chapter 2, torture ethics functions as a way to decide the moral status of torture. I have argued that the question of torture's moral status is not a question at all, but a symbol for a cluster of interrelated questions. The related questions are those such as how to define torture and how to assert a basis for moral claims. Conceived of in this way, any given approach to torture ethics is usually also a critique of some other approach. Because each approach answers the interrelated questions differently, the approaches to torture ethics cannot be compared. In this way, ordinary critical engagement with torture ethics leads to endless rounds of further critique.

For example, When the Obama administration released the "torture memos" in April of 2009, Liz Cheney appeared on MSNBC to deny that her father had played a key role in approving the interrogation techniques described in the memos. Interviewer Norah O'Donnell wanted to discuss former Vice President Dick Cheney's role in approving the techniques. Liz Cheney continuously directed the discussion toward the interrogation program's "incredible effectiveness" at producing "very important intelligence" (O'Donnell, 2009b). When O'Donnell used the word "torture", Cheney immediately interjected: "Well, it wasn't torture, Norah, so that's not the right way to lay out the argument." Cheney's points were that first, intelligence was produced, second, the program

was widely approved, and third, the specified techniques (including waterboarding) are not torture.

Although the first two points about effectiveness and approval are contestable, at least Cheney is prepared to support them with assertions and anecdotes. That does not matter much, though, because the third claim that "it wasn't torture" is a *premise* of her argument. Cheney's definition of torture apparently excludes whatever acts were authorized by Dick Cheney, and therefore O'Donnell's entire line of questioning is out of order. I do not mean to pick on pro-torture or pro-waterboarding arguments for adopting premises in this way. Torture opponents face a similar challenge in showing that waterboarding *is* torture. However, as long as O'Donnell and Cheney do not include a more comprehensive discussion of what counts as torture in their debate, they are not really talking about the same thing. Their mutual critiques disband the conversation into two monologues that only seem to be related.

Secondary discussion of the interview shows even more plainly that at least two completely distinct conversations are taking place. The liberal blog *Daily Kos* announces that "Norah O'Donnell breathes fire in torture interview with Liz Cheney" (kat68, 2009). *Daily Kos* contributor kat68 notes that Cheney "again and again claims torture was effective *without giving a single shred of evidence*" (2009, emphasis added). At the conservative *Red State* blog, however, Cheney "breaks" O'Donnell in the interview (Lane, 2009), and the *American Thinker* cheers that "Liz Cheney Gives a Debate Lesson" (McDevitt and Anderson, 2009). From one point of view, O'Donnell caught Liz Cheney without evidence, and thus incinerated her. Others observing the same event think Cheney defeated O'Donnell with her superior debating skills. At the level of the debate as a whole, *both* things happened. The mutual critiques are based on asserting different premises, and therefore are not sociable.

In the limited terms of each individual argument, this is not a mistake. Praising Cheney, *Red State* continues: "This is how you do it, by the way. You don't let them define the agenda; you certainly don't let them define the terms; you concede nothing" (Lane, 2009). The *American Thinker* team adds that Cheney "refuses to accept the premise of several of the questions" (McDevitt and Anderson, 2009). Again, I am not painting only the pro-waterboarding arguments as obtuse on this

count. O'Donnell rejects Cheney's premises too. Each camp *achieves victory* specifically by *controlling the premises*, but the victories remain hollow because no contest has taken place. Neither side—including both speakers and audiences—concedes the premises of the other.

This applies as much to scholars as it does to journalists and pundits.[4] In fact, the live face-to-face format forces the latter to be more forthcoming with their premises. When the goal of a torture ethics argument is to strengthen a given position on the use of torture, one should naturally adopt the premises make the strongest case for that position. A problem arises only when the torture ethics becomes a matter of public concern, and is thus drawn into a social environment. Then the adoption of two strong but incompatible sets of premises becomes a serious problem, because there are two unsociable views of torture ethics trying to socialize. As chapter 2 showed, there are many more than two unsociable views.

Thus there is a *need* for critical engagement of the torture ethics debate but no *basis* for that engagement. At least, there is not a basis that is sufficiently shared. Too many of the answers to the relevant questions seem infinitely malleable. In the case of torture ethics, the possibility of critique has "run out of steam" in the sense meant by Bruno Latour (2004). For Latour, the old critical tools have become cheap and ubiquitous, and now "what took great effort, occupied huge rooms, cost a lot of sweat and money, for people like Nietzsche and Benjamin, can be had for nothing" (2004, 230). That availability has also made those tools less useful, and even dangerous. Latour worries that while "entire Ph.D programs are still running to make sure that good American kids are learning the hard way that facts are made up,"[5] elsewhere "dangerous extremists are using the very same argument of social construction to destroy hard-won evidence that could save our lives" (227).

Latour argues that critics have been partially mistaken in their approach, especially to criticism of science and knowledge. The "mistake we made, the mistake I made, was to believe that there

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[4]Liz Cheney is in this case something more than a pundit, but something less than a central policy maker. As her introduction before the MSNBC interview indicated, she is a former deputy assistant secretary of state (O'Donnell, 2009b). However, her own role in the interrogation program was peripheral, and her presence on the show more had to do with being the Vice President's daughter (also noted in the MSNBC introduction).

[5]It does not appreciably dent Latour's argument to note that these American kids who are learning that "facts are made up" are almost certainly not in political science or International Relations PhD programs.

was no efficient way to criticize matters of fact except by moving *away* from them and directing one's attention *toward* the conditions that made them possible" (Latour, 2004, 231, emphasis in original). This is why critique has run out of steam. Latour suggests a renewed or "second empiricism" that goes beyond facts. "Matters of fact are only very partial and, I would argue, very polemical renderings of matters of concern" (232). Scientific facts themselves started out as resources for debunking in their own right, aimed at older authorities. Now they themselves have been undone by that "debunking impetus."[6]

In the torture debate, polemical facts are commonly asserted to squelch what really are persistent controversies: *it wasn't torture, Norah*. Each scholar has sufficient resources to debunk their opponents' facts while asserting their own. In such an environment it becomes difficult to establish an ontological fact like the definition of torture, or an ethical fact like the positive prohibition of torture. The debunking impetus and wide availability critical tools cuts in all directions in the torture debate. The same documents that debunked the pre-2001 consensus prohibiting torture (e.g. Bybee and Yoo, 2002) can be debunked themselves, if the political or judicial weather changes significantly. The same instability that allowed the torture prohibition to be marginalized after 2001 could swing the other way. This may give some hope to torture opponents, but it can only be an unstable hope.

For Latour, the current conditions demand that critique be able to *establish* knowledge, not just undermine it. With respect to the objects of scientific research, Latour bases his remedy on a concept that fascinated Heidegger: the "thing." Latour follows Heidegger in considering the thing both as an object and as a place of assembly or coming together.[7] Latour differs from Heidegger,

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[6]See Latour (2004, 232). Section 3.3 goes into more detail about Latour's "matters of fact" and "matters of concern." Political theorists are perhaps more used to seeing facts distinguished from values, particularly in discussions about what counts as political science and what makes it scientific. This is the sense of the word "fact" that Leo Strauss (1988, 18-27) meant when he criticized the fact/value distinction, and especially the way it tended to cast political philosophy as unscientific. Here, however, Latour uses the word "fact" in a more general sense of a settled piece of knowledge. This could include things on both sides of Strauss's fact/value divide. This is important because below I will reconsider what sort of objects of knowledge "ethical facts" are. While it may seem strange to consider ethical judgments as facts, this is actually what is happening in the torture ethics debate. For example, "murder is wrong" is an uncontroversial ethical fact, but things get murkier in other circumstances like war, or Steinhoff's self-defense situations.

[7]"We are all now aware that in all the European languages, including Russian, there is a strong connection between the words for thing and a quasi-judiciary assembly. Icelanders boast of having the oldest Parliament, which they call

however, regarding what counts as a thing in this special sense. Heidegger makes "as sharp a distinction as possible between, on the one hand, objects, *Gegenstand*, and, on the other hand, the celebrated *Thing*" (Latour, 2004, 233). Heidegger only granted the status of "thing" to those objects "cradled in the respectful idiom of art, craftsmanship, and poetry" (2004, 233). Latour sees no justification for this limitation. Latour (2004, 233) asks, "What would happen . . . if we tried to talk about the object of science and technology, the *Gegenstand*, as if it had the rich and complicated qualities of the celebrated *Thing*?" Latour accepts Heidegger's account of the *Thing* but rejects the exclusion of ordinary, industrial, or unromantic objects (233). For Latour *every* object is a gathering, is a *Thing*. We have all probably witnessed "the metamorphosis of an object into a thing," like the 2003 disintegration of the space shuttle *Columbia*:

> What else would you call this sudden transformation of a completely mastered, perfectly understood, quite forgotten by the media, taken-for-granted, matter-of-factual projectile into a sudden shower of debris falling on the United States, which thousands of people tried to salvage in the mud and rain and collect in a huge hall to serve as so many clues in a judicial scientific investigation? Here, suddenly, in a stroke, an object had become a thing, a matter of fact was considered as a matter of great concern. If a thing is a gathering, as Heidegger says, how striking to see how it can suddenly disband. (2004, 234)

What Latour suggests about scientific facts, I would like to extend to ethical facts. Torture ethics may not have been quite "completely mastered," but periodically the moral reasons not to torture have appeared to be stable. The United States eventually did ratify the United Nations Convention Against Torture (UN, 2014). As required, it also embedded the torture prohibition in its own law (USCode, 1996). The torture prohibition fit the description of a *Gegenstand* until 2001. Dershowitz says so, on his way to justifying counter-terrorist torture.[8] Like the *Columbia* disaster, the

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Althing, and you can still visit in many Scandinavian countries assembly places that are designated by the word *Ding* or *Thing*" (Latour, 2004, 232ff.).

[8]"Before September 11, 2001, no one thought the issue of torture would ever reemerge as a topic of serious debate in this country" (Dershowitz, 2002, 134).

torture prohibition after 2001 can be aptly described as "a sudden shower of debris falling on the United States." Participants in the torture debate—especially those trying to salvage pieces of the torture prohibition from the mud—commented on how the moral arguments and legal prohibitions suddenly disbanded.[9]

This applies to *all* of the "ethical objects" in the torture debate. The memos and even the public sentiments that protect the architects and agents of the American enhanced interrogation program are just as precarious as any taken-for-granted *Gegenstand*. They too could turn into sudden showers of debris, an unraveling *Thing*.[10] Each release of previously classified documents (SSCI, 2014) and investigative reports (Kirk, 2015) makes such an unraveling more possible. The goal here, however, is to say something constructive about torture ethics despite its incessant tendency towards debunking, unraveling, and disbanding. The pressing methodological question is what to do with an object of study, like torture ethics, that no longer holds together. Following Latour, the first step is to stop treating it like an unproblematic *Gegenstand*, when in fact it is a *Thing* that has gone to pieces. The methodological questions are then how to conceive of torture as an object of study, and what to do with it.

3.2 Torture Ethics is an Imbroglio

3.2.1 Imbroglios and the Crisis of Modernity

Today's torture ethics has specific deficiencies that lead it, at the level of the whole debate, to unravel. Critically engaging torture ethics in familiar ways aggravates this problem, because the debate lacks an authority strong enough to resolve the complex disagreements. The torture ethics

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[9]Jeremy Waldron (2010, 1-2) thus acknowledges "some things changed on September 11th, 2001," but insists that "some things did not change." The latter includes the torture prohibition: "The legal prohibition on torture was then and is now unequivocal and unconditional" (3). The 300-plus pages of Waldron's book attest to the disintegration of the torture prohibition, even as Waldron tries to restore it. Brent Steele (2008) also treats torture ethics as a more complicated sort of object by showing how it is subject to an ongoing competition of American ideals.

[10]If the CIA did not understand this, the lawyers who provided their legal protections did. "Our advice is based upon the following facts, which you have provided to us. We also understand that you do not have any facts in your possession contrary to the facts outlined here, and this opinion is limited to these facts. *If these facts were to change, this advice would not necessarily apply*" (Bybee and Yoo, 2002, 1, emphasis added).

debate does have resources, though. As the review in chapter 2 has shown, the torture ethics debate has many idiosyncratic, incommensurable frameworks for approaching torture ethics. It also has a large number of vigorously contested facts that serve as inputs to those ethical arguments. As an object of study, torture ethics comprises a vast collection of controversial parts. It is a *Thing* in the sense that Latour borrows from Heidegger; it is rich set of associations, a contingent coming-together.

Torture ethics is, in short, and *imbroglio*. In common usage, an imbroglio is "a confused heap" a "tangle" or a "delicate and intricate situation."[11] In *We Have Never Been Modern* (**henceforth WNBM**) Latour (1993) uses the term in much the same way to describe the phenomena he studied as a leading figure in the field of science studies. "Science studies" loosely describes those scholars who, for want of a better term "call ourselves sociologists, historians, economists, political scientists, philosophers, or anthropologists," yet always add the term "of science and technology" (3). The imbroglio concept enters Latour's philosophy through these interdisciplinary encounters with science and technology, and his point is broader than simply to extend Heidegger's notion of the *Thing* to all objects. For Latour, imbroglios are implicated in a crisis of modernity. The presence of so many imbroglios in the scientific fields that he and his colleagues studied shows that something about modernity is unraveling.

Latour sees the unraveling as a crisis of modernity, but not necessarily an apocalyptic one. Although real consequences are involved, the crisis of modernity is one of perception. Modernity is for Latour a way of apprehending the world that is very good at certain things and not as good at others. Specifically, modernity struggles to deal with "mixed-up affairs" that characterize so many problems of late modernity (Latour, 1993, 2). He gives a prominent example from 1993:

> The smallest AIDS virus takes you from sex to the unconscious, then to Africa, tissue cultures, and San Francisco, but the analysts, thinkers, and decision-makers will slice the delicate network traced for you by the virus into tidy compartments where you will find only science, only economy, only social phenomena, only local news, only

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[11]*The American Heritage Dictionary* (Evenson and Patwell, 1994, s.v. "imbroglio").

sentiment, only sex. (1993, 2)

For Latour, the imperative to compartmentalize mixed-up affairs into recognizable categories works against the nature of contemporary problems. Latour therefore sometimes finds himself attacked as anti-scientific. Both before and after *WNBM*, many scientists have erroneously lumped science studies in with radical critiques of knowledge, and then vigorously re-asserted the authority of scientific categories and rules. Yet science studies scholars find their objects of study exceeding and overflowing scientific categories and rules at every turn. The scientists, on the other hand, continue to evaluate science studies on scientific terms—a development that political scientists and International Relations scholars will recognize from their own battles over scientific validity.[12] The concern of the scientists is misplaced, since Latour is just as concerned with the goal of generating useful knowledge as the scientists are. His concern about the faltering power of critique in Latour (2004) demonstrates this. Nevertheless, years of studying scientists at work on their objects has led Latour to a re-configuration of objects, actors, and the world that the scientists take as a rejection of reality.[13]

Latour describes a two-part crisis of modernity in *WNBM*. The first part relates to the production of knowledge and the other part in political life in late modernity. Imbroglios arise from the first part of the crisis, in which pressing and interesting topics of study appear to overmatch the narrow disciplines that try to take them on. It has been the modern habit to work in deep disciplinary grooves, and this habit has generated tremendous power throughout modernity.[14] The same ways of working with knowledge that produce that power, however, make imbroglios unintelligible. The crisis arises because the actual problems of late modernity are mixed-up affairs—imbroglios. There is for Latour a dangerous mismatch between the knowledge-producing rules that modern

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[12]Compare for example the exchange between Latour (1999a) and David Bloor (1999) with the one between J. Ann Tickner (2005) and Robert Keohane (1998). Proper scientists often demand that others treat the world and its objects *scientifically*.

[13]Latour opens *Pandora's Hope* (1999b, 1-10) by recounting an experience of being asked, "Do you believe in reality?" See also his discussion with Graham Harman in Latour and Harman (2011).

[14]According to Wolin (2004, 396), from the early modern time of Francis Bacon, knowledge became identified with the ability to generate practical power. A new "political theory of science" enabled the "organization of knowledge and its conversion into practical inventions for the extraction of power from, and over, the material world" (397-98). Moderns work in disciplinary grooves of organized knowledge because it gets results. See also Latour (1993, 35-37).

science depends on and the actual problems facing society. Whatever has changed about the relationship of contemporary problems to the late-modern world they inhabit has left the scientific disciplines unable to cope with their objects. And ethics, at least when it seeks right answers, is a scientific discipline.

The second part of the crisis is political. Latour points to the rapidly fading dream of post-Cold War global transformation.[15] Related to the first crisis of knowledge, the power of previous critical stances has become dangerous, because their way of seeing obscures the currently relevant problems. Although the "liberal West can hardly contain itself for joy" at the fall of the Berlin Wall and all it symbolized, the "repressed returns" in the form of mass poverty and environmental danger (Latour, 1993, 8). As early as 1993, Latour sees that the side-effects of the political triumph over communism and the capitalist triumph over nature pose twin dangers that are unfortunately "invisible only in the rich Western democracies" (9). Twenty years on, one could add terrorism, wars in Iraq and Afghanistan, failed or precarious revolutions in the Middle East, and sharper ecological threats to the list of issues that are poorly addressed—and poorly apprehended—by segmented disciplinary approaches to knowledge.

The crisis of knowledge production and the crisis of political power combine to form a single crisis: the crisis of modernity.[16] For Latour modernity is not an era but a way of perceiving and living in the world that hinges on a stark conceptual separation of science and politics—of nature and culture. In *WNBM*, as in his 2004 essay, the "modern critical stance" plays a role of the crisis. Latour (1993, 9) finds no solace in the "antimodern" rejections of the ends of modernity, nor

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[15]This may seem like a dead issue over twenty years later, but it still circulates in International Relations. Not only is there still a crisis in world politics, some scholars think it is the same crisis. Harrison and McLaughlin Mitchell (2013, 1) argue that "The Arab Spring has reopened questions about global political change that have been salient since the end of the Cold War." They want to "reconvene interest in the sweeping visions of global order that followed the Cold War" (21). Outside of International Relations, too, the same problems Latour discusses in 1993 have persisted. Latour (2013) opens *An Inquiry into Modes of Existence*, for example, with the mixed-up problem of climate change, politics, and science.

[16]I have not capitalized *modern* because its meaning is too flexible to bear the weight or a proper noun. The ordinary word without quotes can be thought to refer to all the possibilities it symbolizes. I also have not placed it in quotes, because neither I nor Latour want to simply debunk modernity. When Latour (1993, 10) asks "what if we had never been modern?" as I am about to discuss, it is first of all an empirically-motivated question arising from his difficulties with troublesome objects. Secondly, the thrust of his argument is not so much *that* modernity is a convention, and a faltering one at that, but rather that understanding the structure and practices of that convention opens up new possibilities for studying those difficult sociotechnical objects—which are the only objects we have.

in the paralyzing indecision of post-modernity, nor in the frenetic delusions required to "remain resolutely modern." The antimodern, postmodern, and "resolutely modern" responses all fail to address the twin crises of science and politics. Instead, those three stances preserve what Latour sees as the central features of the crisis (9). That is, they all sustain the modern way life that Latour (1993, 13) calls the "modern Constitution." This is the case even though antimoderns reject that Constitution and postmoderns ignore it.[17]

Ultimately Latour will seek a way out of the modern crisis that is not antimodern, postmodern, or resolutely modern. There is competition, though, from within the resolutely modern stance that thinks it holds the solution to the crisis. Latour locates the critical stance *within* the resolutely *modern*, not the antimodern or postmodern.[18] He argues that this is not the case. The modern critical stance has three modes: naturalization, socialization, and deconstruction (6). These modes each offer powerful but very fractional views. The power of each mode depends on "feeding on the weaknesses of the other two" (6). For that to happen successfully, the modes have to be kept apart, such that "the epistemologists, sociologists, and deconstructionists remain at arm's length" (6). The modern crisis that Latour is so concerned about has come about in part because the problems, as imbroglios, now frequently exceed the capabilities of any single mode of the modern critical stance.

Latour (1993, 10) argues that "the word 'modern' designates two sets of entirely different practices which must remain distinct if they are to remain effective, but have recently begun to be confused." He says that "translation" practices create "mixtures between entirely new types of beings, hybrids of nature and culture" (10). "Purification" practices, on the other hand, carefully separate nature and culture, humans and nonhumans, science and politics, into "two entirely distinct ontological zones" (10). The modes of the modern critical stance—naturalization, sociologization, and

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[17]See Latour (1993, 9). Antimoderns become "reactionaries" either by deciding that "We must no longer try to put an end to man's domination of man," or alternatively by deciding "we must no longer try to dominate nature" (9). What Latour calls "the vague expression of postmodernism" cannot decide between modernism and antimodernism, and the postmoderns "remain suspended between doubt and belief" (9).

[18]It may seem odd to characterize critique as modern as Latour (1993, 5) does, because modernity often seems to be the subject of critiques and postmodernity is popularly associated with criticism. For Latour, the critical impulse itself is modern, and manifests in scientific, sociological, and linguistic/semiotic modes. While the antimodernism and postmodernism are critical in the sense that they reject modernism, they do nothing to change it.

deconstruction—are all *purification* practices. Latour uses the term "modern Constitution" to refer to a set of interlocking agreements that perform two important tasks. First, the modern Constitution keeps nature and culture—non-humans and humans—separate. Secondly, it keeps the work of purification visible and in the foreground, while *hiding* the work of translation (13 and 29f.). These two careful separations—first of nature and culture, and then of translation and purification practices—are what keeps modernity together. "So long as we consider these two practices of translation and purification separately, we are truly modern" (11). The modern Constitution holds modernity together but is seriously challenged by imbroglios that its modes of analysis cannot understand.

The modern way of looking at the world attempts to clear up, categorize, and straighten out complex problems instead of treating them as imbroglios. To be modern is to purify in one way or another, while ignoring the proliferation of hybrids.[19] Latour (1993, 12) says "the more we forbid ourselves to conceive of hybrids, the more possible their interbreeding becomes—such is the paradox of the moderns." Moderns have become incredibly good at purification, and achieved unfathomable things with it. Naturalization, it must be recalled, was once a radical new form of critique leveled against traditional powers of religion and superstition. "Freed from religious bondage, the moderns could criticize the obscurantism of the old powers by revealing the material causality that those powers dissimulated" (35). This had the effect of generating the temporal break of modernity, between the dark past and the "luminous dawn that cleanly separated material causality from human fantasy" (35).

In turn, the next mode of the modern critical stance leveraged "the newly-founded social sciences to destroy the excesses of naturalization" (Latour, 1993, 35). The methods of social critique clarified natural science by making it possible to "distinguish the truly scientific component of the other sciences from the component attributable to ideology" (35). Moderns are thus "solidly grounded" in both a "certainty of nature's laws" and a "certainty that humans make their own

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[19]Latour calls specific mixtures of nature and culture "hybrids." An imbroglio is a more general situation featuring a collection of hybrids. This impression should not be viewed too systematically, though, since that would cut against the spirit of understanding imbroglios.

destiny" (36). On both counts, they are equipped to "criticize and unveil, denounce and express indignation at irrational beliefs and indignations" (36). In this way, moderns have made themselves "invincible" (37f.).

The modern Constitution—which is, again, the separation of nature and culture, plus the separation of the work of purification from the work of translation—has "provided the moderns with the daring to mobilize things and people on a scale that they would otherwise have disallowed" (Latour, 1993, 41). Premoderns are distinguished by their mixing of natural and social orders, which leads to "the impossibility of changing the social order without modifying the natural order—and vice versa" (42). Modern societies do not have that concern, so they can operate on massive scales. Premoderns have to worry about changing one order when they change the other. However, from Latour's point of view, *we have never been modern*. The presence of so many imbroglios suggests that the two separations that keep the modern Constitution in place might not remain tenable anymore.

Latour seems to have nowhere to turn. He does not want to be antimodern, since a firm rejection of the modern Constitution tends to sustain it. He does not want to be postmodern, since suspension between modernity and antimodernity is ineffectual. "The antimoderns, like the postmoderns, have accepted their adversaries playing field" (Latour, 1993, 48). He does not even want to directly critique the modern Constitution using any of its own tools, since that would only exacerbate the problem.

Latour's (1993, 48) innovation is to imagine the "field of nonmodern worlds" that inhabits the middle ground between non-human and human, between nature and culture. The nonmodern dimension has apparently always been there, since the division between pre-modern and modern was invented by the modern Constitution in the first place. The nonmodern dimension is even familiar to philosophers in the sense that they have struggled for hundreds of years to bridge the conceptual gap between the "nature pole" and the "subject/society pole" in various ways (51). According to Latour, dialectics fails at this task because the relation it establishes between subject and object *expands* the separation between the work of purification and the work of mediation. By

"believing that he was abolishing Kant's separation between things-in-themselves and the subject, Hegel brought the separation even more fully to life. He raised it to the level of a contradiction, pushed it to the limit and beyond, then made it the driving force of history."[20] Latour says that semiotic approaches fail to bridge the nature-society gap because they separate language from both nature and society. "If one autonomizes discourse by turning nature over to the epistemologists and giving up society to the sociologists, one makes it impossible to stitch these three resources back together" (64). He argues that the philosophy of Being fails to bridge the nature-society gap because it makes being too specialized. Heidegger and "his epigones do not expect to find Being except along the Black Forest Holzwege" (65).

Latour does not find any of these solutions appealing. They intensify the modern crisis rather than solve it. Modernizers have "a clear objective" to cleanly separate society from nature, and "through increasingly terrifying revolutions, they have been able to tear themselves away from the past."[21] For Latour, there is less tension and more interesting activity in the middle, between the pole of nature and the pole of society. In other words, he does not denounce the work of purification in order to praise or substitute the work of mediation. Latour's solution is not to disavow those poles but to *reinstate* the existence of the middle ground, the nonmodern zone populated by hybrids of nature and society. He gives a precedent for his approach in the field of anthropology.

Latour (1993, 132) wants to retain "everything" from the moderns except their "exclusive confidence" in the work of purification. The Constitution "will need to be amended somewhat to include its lower half too" (132-33). The lower half means the work of mediation, the proliferation of hybrids. Purification is a convention that depends on the work of mediation. Latour rejects the modern insistence on suppressing knowledge of that connection. To overcome the crisis of moder-

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[20]See Latour (1993, 57). He adds that the dialectical philosophers achieve a false kind of mixture: "Hybrids are indeed accepted, but only as mixtures of pure forms in equal proportion" (56). An example of such mixtures might well be Jean-Paul Sartre's (1990, 178-83) highly dialectical concept of "worked matter." Sartre's concept of the social is so rooted in the philosophy of Being, however, that his worked matter remains a "mixture of pure forms" to the degree that Sartre keeps apart his pole of Matter and pole of Being. Latour explicitly seeks to work in space between such poles.

[21]Latour (1993, 130). He adds that once moderns fully break from the past, "we shall all be equally modern" and that "Certain modernizers continue to speak as if such a fate were possible and desirable." Such is the view of Harrison and McLaughlin Mitchell (2013).

nity, Latour wants to restore symmetrical attention to the two kinds of work, which really amounts to granting *recognition* to the work of mediation

3.2.2 Torture Ethics as an Imbroglio

Torture ethics is an imbroglio. The substantive focus on "sociotechnical" objects inherited from Latour's early work does not limit the reach of the concept. In *WNBM* Latour (1993) implicates imbroglios in a much larger philosophical project. Torture ethics mixes nature and society, non-human and human, object and subject just as much as any microbes, soil, power plant or transportation system that science studies scholars would more commonly take interest in.

As an object of study, torture ethics is obviously *social* in that it is concerned with the right course of action for a political community to take regarding torture. It is even social on multiple levels. There are additional social interactions between the torturer and the tortured person, and between the communities in conflict that have given rise to the type of torture that is the focus of the current torture debate. From any point in the phenomenon of contemporary torture, further social relationships can be traced to lawyers, writers, protesters, and myriad other relationships.

Torture ethics is also *natural*. This does not mean that it is "natural" to torture. Torture is natural in the sense that the non-human realm is involved. Indeed, the notion that torture dehumanizes its victims means that they are turned into matter. Torture ethics also belongs to the realm of nature through the factual and scientific claims that circulate through its arguments. The claim that torture forces people to divulge important information is a claim about the natural world. The stipulation in the ticking bomb scenario that the person to be tortured has the relevant information is also a claim about the natural world.

Thus, both natural and social elements are present in torture ethics. However, even the statements above are doing some work of purification, as Latour would say. The kind of mixture that Latour is talking about is characterized by a mixture of social and natural elements that is hard to disentangle. It is not a mixture of purities. The more complete presumption in the torture ethics debate concerns whether certain kinds of bodies, from certain social groups, located in other ge-

ographic territories, possess relevant life-saving information, and whether that information can be extracted through the application of intense pain. All of the these elements are mixed up in the torture ethics imbroglio.

Torture ethics faces a crisis analogous to the crisis of modernity that Latour is addressing. The problem of torture ethics exceeds the categories of the primary techniques used to attack it. Those techniques all do the work of purification, and thus express some element of the modern critical stance. Specifically, each approach reviewed in chapter 2 tries to naturalize torture ethics. The authors proceed as if there is a correct ethical approach to torture, which they intend to find by clarifying the issues around it. In the language of Latour's modern Constitution, they naturalize torture ethics. The problem, as I described it in chapter 2, is that they each naturalize it in a different way. The utilitarians purify torture ethics for a world where ethical objects get their existence from a value comparison. The deontologists purify torture ethics for a world where actions themselves have moral valences. The lone proponent of virtue ethics purifies torture for a world where living well together is the highest good. And this is not even the whole story of purification. The discussion in section 2.3 serves as a warning that many more purifications will be found within each of these broad ethical traditions.

More work of purification and more denunciations will continue to worsen the crisis of torture ethics. It will produce more complicated hybrid connections, and those connections will have to continue to be denied, hidden, and suppressed by the critical techniques of the various torture ethics approaches. The more those connections are denied, the more the Hydra-like imbroglio of torture ethics will continue to exceed and overrun the hard work of those trying hardest to wrangle and settle it.

The crisis of contemporary torture ethics might provoke the same sorts of responses that Latour saw for the crisis of modernity. Antimoderns might decide that we should "no longer try to put an end to man's domination of man" (Latour, 1993, 9). This is at the heart of the vague but powerful claim that "something changed" on September 11, 2001. For antimoderns, retaliatory violence is of little concern, since it was a mistake to think the world could be different. That event created

an opening for selective antimodernism: some people are not of the modern world, and should not enjoy its protections.

The resolutely modern have become enmeshed in an endless debate about torture ethics. The chief feature of the debate is the *suppression of relevant disagreements* about questions associated with torture ethics. That suppression sustains the illusion that torture ethics scholars are engaging in a common debate, when in fact they are not even talking about the same thing. Torture and the question of its moral status both symbolize something slightly different for each torture ethics scholar. The work of purification does not turn torture ethics into a concrete object of study. It turns torture ethics into many *different* objects of study that have the same name and are treated as one.

The approach taken in this dissertation follows Latour in drawing attention back to the work of *mediation* that connects the issues and entities associated with torture ethics. My basic assumption is that torture is, as an object of study, an imbroglio, and must be worked with as such. That means looking specifically at those points where the work of torture ethics runs into more and more controversies that are paradoxically caused by the hard work that is being done to clarify it.

3.3   Social Theory for Social Problems

One way that I have characterized the very diverse views on torture ethics is to say that *torture ethics are not sociable*. By this I mean that the *ethical course of action* as viewed from one person's ethical framework is basically not comparable to the right course of action from a different ethical framework. Imbroglios and the modern crisis that Latour situates them in are useful for thinking of torture ethics as a different kind of object of study. In other words, following Latour's recommendation to recover the work of mediation addresses the *torture ethics* part of my statement. The other aspect of the statement is the claim that torture ethics *are not sociable*. Torture ethics scholars have demonstrated that it is possible, if difficult, to develop approaches to torture ethics. They have shown that it is much more difficult, if not impossible, to socialize any one of those

approaches. Torture ethics needs more than just to be understood as a new kind of object of study. It needs a new approach to social theory. Without that, the work of re-imagining of torture ethics will remain at most a philosophical curiosity.

3.3.1   What Kind of Social Theory is Needed

Given what Latour said above about the modern critical stance, however, the turn to social theory should be taken with caution. Sociologization is one of the three prongs of the modern critical stance.[22] As a means of purification, social theory runs the risk of generating more and more hybrids and mixtures in the torture ethics debate, and then suppressing them. That has been the result so far with the naturalization approach, and also with the available sociological approaches to torture and torture ethics, which I have refrained from discussing up to this point. The existing encounters between torture and social theory are instructive for shaping a revision of social theory in torture ethics research. However, the available social approaches have not had the same goal I am focusing on here, which is to make torture ethics sociable.

A famous intersection of social theory and torture comes from Foucault (1995). In *Discipline and Punish: the Birth of the Prison*, Foucault is not engaging torture *ethics*. He is instead explaining the emergence and the form of modern penal institutions. The source of explanation he turns to is a significant change in the configuration of social and political power in early modernity. More generally, Foucault's analysis draws attention to the necessary presence of social theory in any account of torture ethics. Social theory is an important addition to the long list of interrelated questions associated with torture.

One interesting upshot is that Beccaria and other 18th-century liberal reformers can be re-read as social theorists. One narrative sees Beccaria's *On Crimes and Punishments* a a bright spot in his otherwise lackluster career. Monachesi (1955, 440 and 449) separates Beccaria's penal reform

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[22]Recall that Latour (1993, 10) names *sociologization* as one of the three modes of the modern critical stance, with the other two being naturalization and deconstruction. Sociologization roughly corresponds to purifying work (again, Latour's term) that invokes abstract aggregate formations as causal explanations. Naturalization roughly corresponds to science, and deconstruction corresponds to semiotic and linguistic critiques.

work from his early work on monetary reform that is "of no current significance," and argue that "[with] the publication of *Dei delitti e delle pene* Beccaria's literary productivity comes rather abruptly to an end." Monachesi (1955, 440) separates *Crimes* from Beccaria's political economy and ignores the latter.

Against this reading, Foucault reads Beccaria's penology *as* political economy.[23] Foucault (1995, 73ff.) uses torture as a to build his case that early modern liberal punishment demonstrates a change in the *economy of power*. Before modernity, torture and public execution decisively showed the "hand-to-hand fight between the vengeance of the prince and the contained anger of the people, through the mediation of the executioner."[24] But the danger of openly demonstrating this confrontation spurred a "rearrangement of the power to punish" in the form of "continuously distributed effects of public power" (80-81).

This reconfiguration of punishment and power tamed the dangerous and inefficient polarity between the prince's "super-power" and the petty criminal's "infra-power" by constructing a system of rational, liberal, penal relations between them (Foucault, 1995, 87f.). The rationalization of power that Beccaria advocated and Foucault describes constitutes a change in the social order. It was and is designed to strengthen the social power of the sate. "Nothing so weakens the machinery of law than the hope of going unpunished," so punishments must be known, predictable, and rational (96).

Although Foucault's book does not specifically address the ethics of torture, the relationship it poses between society and torture (or punishment) is instructive. That is, Foucault uses changes in the social configuration of power to *explain* the demise of torture executions and the emergence of rationalized punishment. Torture, or rather its decline, is the thing to be explained. This relationship of social thought and torture holds little promise for the problem under consideration in

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[23]Another treatment that links Beccaria's penology with his political economy scholarship and bureaucratic reforms more fairly comes from Richard Bellamy (in Beccaria, 1995).

[24]See Foucault (1995, 73). The word modernity here and in Foucault's book refers to the era—Beccaria's book was first published in 1764—and the ideas that distinguished it. Foucault is not giving the word "modern" the technical sense it picks up through Latour's philosophy and particularly the "modern Constitution." Note that the modern penal reforms Foucault discusses are consistent with the work of purification that Latour talks about, even though Latour's work post-dates Foucault.

this dissertation, though. As I have described at length above, there is no suitable generalization that can be made with respect to the social group debating torture ethics. The early modern rationalizing reforms of political power that Foucault refers to may not be entirely uncontroversial, but they are generally accepted enough for him to use as explanatory resources for his purposes. In the case of torture ethics, there is no uncontroversial account to accept. Instead, the intensity of the controversy is what needs to be explained. This dissertation is not trying to explain why torture is happening or receiving official justification now. Instead, the goal here is to describe the controversy in a way that makes it possible to imagine a how such disagreeable folks can *still* come to an agreement on an ethical course of action.

In William T. Cavanaugh's *Torture and Eucharist* (1998), social causes once again explain torture. In this case, torture serves as evidence of the dominant social form that the military dictatorship in Chile (1973–1990) sought to impose on its citizens. Cavanaugh lived in Chile in the 1980's, and returned to do research in 1993 (ix, 2). The usual narrative often faults the Catholic Church in Chile as too closely allied with the state and the Pinochet regime particularly. The bishops who did object to torture did so reservedly and privately, and the Church's active resistance came only after the worst abuses. Cavanaugh (1998, ch. 2) complicates this narrative to draw a parallel between state torture and the Eucharist. Torture is designed to destroy the political body of Christ—and indeed any body, organization, group, or assembly other than itself, while the Eucharist re-assembles that body.[25] Thus "[state] power is enacted in a liturgy of torture," but this can occur without Catholic resistance only because according to Cavanaugh, the Church misunderstood its social role (34).

Cavanaugh first establishes torture as a problem for the church's self-understanding. As the "liturgy" of the oppressive Chilean state, torture "is much more than an assault on the bodies of individuals; it is rather an assault on social bodies" (Cavanaugh, 1998, 22). A dictatorial regime like Chile's needs to be the only social body, in order to retain full state control, and it controls

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[25] See Cavanaugh (1998, 45). According to Cavanaugh, the Christian community gathers for the celebration of the Eucharist (or mass), which then becomes the "political body" of Christ.

citizens by fully atomizing them through the elimination of all competing social forms.[26] Thus for Cavanaugh, the state and the church in Chile represented competing social forces and forms. Torture and the eucharist are engaged in a "larger contest of imaginations" between church and state (65). Church and state compete over the predominance of two very different worlds: "A crucial difference in these imaginations is that the imagination of the church is essentially eschatological; the church is not a rival *polis* but points to an alternative time and space, a mingling of heaven and earth" (65).

For Cavanaugh, as for Foucault, social phenomena explain torture. Because Chile was a dictatorship, it required total social control of their individual subjects. The Pinochet regime used torture to exercise control over individuals, and used the public knowledge of their torture to exert social control. In order to respond appropriately, the Church, according to Cavanaugh, had to significantly reinterpret its own role as a social force within Chile. With respect to the problem under consideration here, Cavanaugh's social approach to torture is unsuitable. Cavanaugh features two social forces rather than the one large shift that Foucault used. But the riot of competing approaches to torture ethics cannot be socialized under two groups any more than it can under one. Furthermore, the complex social problem of competing torture ethics approaches *is* what needs to be explained.

International Relations scholars have also produced torture scholarship using social theory. Indeed, the resurgence of the torture debate after 2001 coincided with a period where social theory was, if not quite ascendant in IR, at least established as a relevant and interesting way of engaging with world politics.[27] It is now acceptable to talk about the role of social norms, in addition to power and state interests, in studying international conflict. As social norms go, torture is the paradigmatic case of an imploding norm: something that was thought to be firm and widely held

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[26]One problem with Cavanaugh's book is that he does not say whether torture is the underlying logic of *all* temporal states, and by omission leaves this possibility open. Put more moderately, he bases his argument for the church as a political body on the worst behavior by the worst kind of state. Clearly not all states are dictatorships that torture. Cavanaugh (1998, 71) does not say how the church as a political body should relate to a rights-respecting democracy, only that "the church knows as the body of Christ that it will inevitably come into conflict with the disciplines of the principalities and powers."

[27]Even Thucydides became a constructivist that year (Lebow, 2001), and then realism became compatible with constructivism (Barkin, 2003).

crumbled quickly instead. Rosemary Foot (2006) identified this normative collapse as the key issue issue in the torture debate, while Kennedy-Pipe and Mumford (2007) and Linklater (2007) have proposed ways to bolster or restore the anti-torture norm.

Ryder McKeown (2009) views the collapse of the torture norm as an important challenge for constructivist scholarship in International relations. McKeown (2009, 6) argues that constructivist IR scholars have focused on the emergence and effects of norms, and not paid sufficient attention to their "conditions of retrogression" or the "domestic processes through which norms either gain or lose salience." Using a slightly different social approach, Brent Steele (2008) views the compromised torture norm in terms of ontological security, and develops a different strategy for restoring the norm by playing competing experiences of national shame off of each other.

These IR scholars use social theory engage the torture ethics debate, but not quite as the kind of open question I specified to limit the review in chapter 2. The questions they try to answer concern the role of international norms in the prohibiting torture, unexpected changes in the global anti-torture norm, how norms can regress or collapse, and how norms might be restored. These IR works recognize a shift in the anti-torture norm, so in one sense the question of torture's moral status is open. In none of them, however, does the moral status of torture really appear to be what is at stake. Instead, the norm that *expresses* that moral status in world politics that is what is at issue. These works exhibit a more complex social landscape than either Foucault or Cavanaugh, and they are more centrally concerned with torture ethics. Yet they are still social visions that explain what is happening with torture.

The question I am asking in this dissertation is not about what happened to the torture norm or how to repair it. I am asking how a community can choose an ethical course of action when its members adhere to myriad different ethical frameworks. In other words, I seek to *explain* the peculiar *society* formed by people who disagree about torture ethics.[28] That explanation could then facilitate a kind of ethical reasoning appropriate to the environment. Scholarship in which *society*

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[28]Latour creates a bit of trouble by characterizing the problem as a confusion of the explanatory resource and what is being explained. As I hope to show in section 3.3.2, the explanation of society that arises actually takes more of a descriptive form.

explains something about torture, as is the case with Foucault, Cavanaugh, and the International Relations scholars mentioned here, can have many merits.[29] As described, however, supporting a torture ethics is not one of them.

3.3.2   Latour's Actor-Network Theory Approach

Latour (2005) offers an approach to social theory in *Reassembling the social* (**henceforth *RS***) that is suitable for the problem I have outlined. Latour (1993) appealed to anthropology as a model in *WNBM* because anthropologists proved capable of integrating their analyses of natural and cultural phenomena—at least so long as they worked outside modern societies.[30] In *RS* he grounds his approach more fully in social theory. When I described torture ethics as an imbroglio that is experiencing a crisis similar to the one Latour sees in the modern critical stance, I meant to illustrate *why* a new approach is necessary and how torture should be viewed as an *object of study*. Here, *Reassembling the social* provides the method.

The shift from anthropology in *WNBM* (1993) to social theory in *RS* (2005) hints at the way Latour and others have come to understand their imbroglios. They see imbroglios as *networks of associating objects and agencies*. In the terms from Latour (2004), the social group comes together in the *Thing*. We are gathered together in our objects, and an imbroglio is a collected and collective object. In that sense, the transformation of objects into imbroglios implies a matching transformation in social thought.

Actor-Network Theory (ANT), which is the name Latour and his colleagues have given their approach, focuses on the process of associating and assembling. It differs from more typical sociological work by rejecting the idea of a stable social material that can serve as an explanatory

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[29]To put this in more social-scientific terms, Foucault and Cavanaugh position society as an independent variable, and punishment (for Foucault) or torture (for Cavanaugh) as the dependent variable. In that arrangement, changes at the social level explain changes in punishment and torture. The difficulty with using that type of social analysis for torture ethics is that, as I have argued, the problem has to do with how dissimilar entities come together. From the point of view that Latour's ANT affords, the thing to observe is how society comes together. If society is already presumed, no ANT analysis is possible.

[30]See Latour (1993, 7). "In the works produced by anthropologists abroad, you will not find a single trait that is not simultaneously real, social, and narrated" (Latour, 1993, 7). He returns to anthropology in his most recent work (Latour, 2013), subtitled "an anthropology of the moderns."

resource for other phenomena. Latour takes his inspiration from those who "believed sociology could be a *science of how society is held together*, instead of using sociology to explain something else."[31] Chief among these is Gabriel Tarde (14f.). Tarde's approach differs from Durkheim's on the direction of social explanation, and according to Latour, most current sociological approaches have descended from Durkheim. The approach advocated by Tarde, which focuses on the phenomena of association, has mostly died out. Tarde says, "I explain collective resemblances of the whole by the massing of minute elementary acts."[32]

Latour's general complaint is that the dominant approach to social explanation obscures the actual material and activity of associating. Sociology "has confused the *explanans* with the *explanandum*: society is the consequence of associations and not their cause" (Latour, 2005, 238). That makes the dominant mode of social explanation ineffective for controversial issues like his science studies topics—and torture in this case. The sorts of things that Latour wants to understand motivate him to adopt this different approach to theorizing the social. Latour calls the dominant approach, in which sociologists invoke society as a source of explanation, "sociology of the Social."[33]

However, Latour is not simply advocating a shift to the local scale. Although "the global has no concrete existence," he says, "neither has the local" (Latour, 2005, 192). When local phenomena are closely analyzed, they become as uncertain as the Social, and therefore cannot serve as explanations in themselves.[34] Instead, local phenomena continually open up new connections and avenues to other actors and places. Therefore explanations that refer to the "individual" are just as suspect as those appealing to the Social, because face-to-face interactions are always subject

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[31]See Latour (2005, 11, emphasis added). As I mentioned in note 29 above, Foucault (1995) "uses sociology to explain something else" when he argues that changes in the way political power was understood by early modern rulers led to the demise of public torture-executions and the rise of prisons.

[32]Tarde is quoted in Latour (2005, 15). In Latour's hands the focus on "minute elementary acts," winds up ruling out explanations from the Social and the individual, although that is very difficult to grasp in this very abstract sketch.

[33]Latour (2005, 9). The approach Latour develops from Tarde should not be confused with "critical sociology." Critical sociology does not solve the problem Latour is concerned with, which is explaining the ways that things come to associate. Critical sociology "doesn't only limit itself to the social but replaces the object to be studied by another made of social relations." (Latour, 2005, 9)

[34]Latour capitalizes "Social" when referring to the sort of presumed aggregates that are not permissible in his approach.

to "interference by the action of others" (199). Local interactions seem to be "overflowing in all directions," so "the solid ground of the local" also vanishes (202). As a result, "subjectivity and objectivity are entirely reshuffled" (218). What is often found at the individual level are pointers to unified (and to Latour, impermissible) social concepts. The liberal individual subject, for example, contains and expresses a certain image of the social. Latour's criticism of the way that sociology of the Social misuses social explanation cannot be overcome simply by transferring the location of those social concepts to the individual level.

What remains for social investigation, Latour tells us, are three goals. The first is to *exploit social controversies* rather than explain them with social concepts (Latour, 2005, 16). The second is to *observe the traces left* as actors try to stabilize those controversies, and the third is to "*reassemble the social not in a society but in a collective*" (16). These three goals form the broad outline of Latour's approach to ANT. I apply these elements to the following investigation of torture ethics, with the emphasis on exploiting controversies and observing traces. By doing so, I reimagine the social arrangement of disagreeable participants in the debate.

In the first stage of Latour's ANT, controversies are exploited through a series of five "uncertainties" regarding the nature of groups, the nature of actions, the nature of objects, the nature of facts, and the type of studies (Latour, 2005, 22). Controversies are usually obstacles to research, because they prevent the analyst from getting the facts and rules well in hand. For Latour, controversies are actually the *stuff* the analyst works with.[35] Regarding the first source of uncertainty, for Latour groups cannot be abstract categories with general characteristics. Instead, groups are "the provisional product of a constant uproar" (31). Society is not defined by any overarching characteristic, boundary, or identity. Instead, the social group consists of anything connected by small but reliable traces of associations. There is "no relevant group that can be said to make up social aggregates, no established component that can be used as an incontrovertible starting point" (29).

[35]For example, the definition of torture is controversial. For most researchers, that controversy is an obstacle that delays them from getting to what they want to find out or say about torture. The definition needs to be established, or purified in Latour's terms. Section 3.4.1 argues that this controversy is more or less endless, and that the ways torture ethics scholars bracket or limit the scope of the problem leads to other difficulties. For Latour, such controversies provide enormous amounts of data through the five "uncertainties" discussed here.

This does not mean that groups don't exist, only that they continually come into existence through acts of association. From the ANT point of view, "if you stop making and remaking groups, you stop having groups" (35).

The second source of uncertainty views action as a radically under-determined phenomenon (Latour, 2005, 45). For Latour, action is local and particular.[36] Society cannot act in the way that sociology of the Social claims, since predetermined aggregates are ruled out by the first source of uncertainty. For Latour, action is not simply an exercise of will, but "action should rather be felt as a node, a knot, and a conglomerate of many forces, many surprising sets of agencies that have to be slowly disentangled" (44). Latour insists that "we are never alone in carrying out a course of action" (44). Actors never act alone because action is "overtaken" by other agencies (45). Crucially, and in keeping with the first source of uncertainty, it is not some *general* force that overtakes action. Action is overtaken because it can always be traced back, forward, and across to other actions and agents. I write these lines not only by my own agency, but in response to other agencies that work through me. Readers read them for the same reasons. The under-determination of action prompts ANT researchers to examine the networks of small agencies that come together in any particular action.

The third source of uncertainty builds on the second by extending agency to *non-humans*. That is not to grant "causal agency to technical objects," but rather to rediscover the real ways that objects "transport" and modify human actions (Latour, 2005, 70). Because ANT understands the social as the momentary coming together of entities, the entities themselves that come together are understood as non-social (65). Humans may be social animals, but for ANT the social is not a sort of zoo that the social humans live in. It is the contingent and momentary coming together of those humans. The ANT understanding of the social, therefore, allows for non-human elements to associate along with the humans. For Latour, "the questions to ask about any agent are simply the following: Does it make a difference in the course of another agent's action or not? Is there some

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[36]When Latour (2005, 202) says that the "solid ground of the local" vanishes, as I mentioned above, his emphasis is on the "solid ground" part, not the "local" part. In a sense, all Latour does is track local phenomena between actors. What he rules out in the comment just quoted is, instead, any chance of transporting the abstract social forces he's trying to avoid into individual or local phenomena.

trial that allows someone to detect this difference?"[37] Because both humans and non-humans can be actors, Latour prefers the term "actant" to describe the entities, both humans and objects, that act (2005, 54f.).

The fourth source of uncertainty substitutes "matters of concern" in the place of contested facts (Latour, 2005, 114). "After having doubted the 'socio' in the word socio-logy, we now have to doubt its 'logy'" (2005, 88). In his essay on critique, Latour (2004) appropriated Heidegger's notion of the *thing* and made it applicable to all kinds of objects, rather than only the romantic, rustic, "authentic" objects that appealed to Heidegger. Here, Latour incorporates that argument into his version of ANT social theory. Facts themselves are associations or "*gatherings*" (2005, 114). This view transforms *matters of fact* into *matters of concern*. It treats facts—objects of knowledge—as gatherings of material and agency. Facts come together in an act of association just like a car or a tennis racket gathers together a multitude small acts and pieces of material. This difference between Latour's account and the kind of "social construction" familiar in International Relations is that, due to the first source of uncertainty above, there is no aggregate society that constructs facts.[38] For Latour, the facts themselves are instances association where non-social entities gather socially.

It is because matters of fact express contingent, momentary comings-together that they become *matters of concern*. Facts are just matters of concern whose coming-together is holding up well against challengers and time. For this reason, Latour's shift of attention from matters of fact to matters of concern is fully consistent with his negative view of debunking. Matters of concern *do* create an enormous temptation to debunk dubious facts. However, that temptation is not just

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[37]See Latour (2005, 71). In *Pandora's Hope* Latour (1999b) gives a more concrete example of a non human actor that "makes a difference in the course of another agent's action," a gun. A gun is not a conscious actor, but when it comes in contact with a human, both the gun and the person are transformed. The coming together of the human and the gun facilitates "the creation of a new goal which corresponds to neither agent's program of action" (1999b, 178). "Which of them, then, the gun or the citizen, is the actor in this situation? *Someone else* (a citizen-gun, a gun-citizen)" (Latour, 1999a, 179).

[38]Constructivism has been widely debated in IR, and I do not want to divert discussion to IR constructivism here. It would be an oversimplification to caricature IR constructivists as arguing that an already-aggregated "society" constructs facts. As I noted above, McKeown (2009, 6) has argued that IR constructivists devote considerable effort to understanding norm emergence and diffusion, at least internationally. But even granting that IR constructivists think about emergence of norms, and not just their imposition by social aggregates, Latour's view here remains utterly distinctive.

tempered but fully vacated because *all* facts are potentially matters of concern. Focusing on matters of concern does not, therefore, license the wagging of fingers at others' shoddy facts. The purpose of focusing on matters of concern is to *see what is actually coming together*.

Finally, the report itself is the fifth source of uncertainty. For Latour, the "writing down of accounts" like this dissertation is part of the activity of tracing a networks of social activity (2005, 122). An account "is typically a *text*, a small ream of paper a few millimeters thick that is darkened by a laser beam" (122). More colorfully, it is a "report prepared under immense duress on a topic requested by some colleagues for reasons that will remain for the most part unexplained" (123). He characterizes "a good account as one that *traces a network*," and says "a good ANT account is a narrative or a description or a proposition where all the actors *do something* and don't just sit there" (128). The risky report is a story of associating actants—human and non-human nodes of agency and material—coming together and dispersing.

Latour's instructions for what to do with these sources of uncertainty are as follows. First, it is necessary to shift attention from the global to the local level. This is not a preference for a kind of localism, but an insistence on tracing concrete actions: "we have to lay continuous connections leading from one local interaction to other places, times, and agencies through which the local site is *made to do* something" (Latour, 2005, 173f., emphasis in original). The next instruction is to assess the shape of those connections without resorting to either a local or global frame of reference.[39] After shifting attention from the "global, the contextual, and the structural" to small nodes, and then making each of those "into the provisional endpoint of some other sites distributed in time and space," Latour has arrived at his full and final instruction of tracing networks. For Latour,

> Every time a connection has to be established, a new conduit has to be laid down and
> some new type of entity has to be transported through it. What circulates, so to speak,
> 'inside' the conduits are the very acts of giving something a dimension. Whenever a

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[39]See Latour (2005, 191ff.). "How far can we maintain a point of view that abstains from ever using the local/global or the actor/system repertoire? Once again, I am not trying to describe substantively or positively what the landscape is, but simply finding ways to *resist the temptation to make a break in its description*" (206, emphasis added).

locus wishes to act on another locus, it has to go through some medium, transporting

something all the way; to go on acting, it has to maintain some sort of more or less

durable connection. Conversely, every locus is now the target of many such activities,

the crossroads of many such tracks, the provisional repository of many such vehicles.

(Latour, 2005, 221f.)

3.3.3 Applying Latour's ANT to Torture Ethics

For social science, and especially on the disciplinary occasion of a doctoral dissertation, this is

heady stuff. A report using Latour's philosophy of imbroglios, non-modernity, uncertainties, ac-

tants and networks ought to come with its own beret and a pack of Gauloises. In my defense, I was

driven into Latour's arms, more or less, by the stubbornness of torture as a topic. For example,

every good researcher knows that defining terms is an essential and very preliminary task. Yet

defining torture turned out to be immensely difficult, and I eventually came to see it as counterpro-

ductive.

It happens that torture ethics is ideally suited for ANT analysis. It is composed much more of

controversies and uncertainties than of reliable facts. No over-arching social approach to torture

ethics can be imposed on the highly idiosyncratic ethical frameworks of the actors. *The failure

of all attempts to impose such a framework is the central problem of torture ethics*. Moreover,

that central problem is not susceptible to typical critiques. Instead, a straightforward critique that

stakes a position within the controversies and tries to resolve them will inevitably produce further

controversies that must then also be suppressed. By following Latour's approach, I can exploit

those controversies rather than trying—in vain—to resolve them. The controversies produce the

content of the social phenomenon of torture ethics; they are what is collected.

Latour's first source of uncertainty rules out the idea of a pre-existing social aggregate in which

the torture ethics debate could take place. This transforms torture ethics from a disagreement *within*

a group or *between* groups into a site where actants *come together* in a contingent social formation.

The torture ethics debate *is* the coming together, in a network, of the actors who disagree about

torture and the materials they bring with them. The second and third sources of uncertainty—the under-determination of all action, and the inclusion of non-humans as actors/actants—are what allows the tracing of action in the torture ethics network. Some of these connections are obvious, but Latour's thought here allows a whole range of other actants to come to life.

Memoranda, undisclosed locations, and even the extensive black-bar redactions in (for example) in Slahi (2015) and the Senate torture report (SSCI, 2014) reveal the network of action around torture ethics through the visible traces of their constituent acts and associations. To see facts as matters of concern, following Latour's fourth source of uncertainty, does not require much effort. I have already alluded to factual claims circulating in the torture debate that are, one could almost say objectively, "matters of concern." The fifth source of uncertainty is this very risky report itself. My goal is ultimately to describe the torture ethics debate in such a way that the political community, despite the disagreements of its members, can make a legitimate ethical choice about torture.

The object of study, as conceived in this dissertation, *is* the network of those associations surrounding torture ethics. The chapters that follow explore two areas that have exceptionally rich supplies of those associations. Because the current torture debate focuses on torture that is supposed to produce life-saving security information from suspected terrorists, I examine what happens to bodies in space during torture, and how bodies are thought to produce life-saving information through torture. As the discussion in chapter 2 shows, counter-terrorist torture interrogations are the main focus of the current torture ethics debate.

Networks are by their nature extensible, so the analysis in this dissertation is also relevant to other kinds of torture that are not the focus here. For example, the analysis could be applied to extreme incarceration techniques like long-term solitary confinement, restraint devices, and forced feeding of hunger strikers. However, any such effort would be an additional undertaking since it has its own agents, objects, and flows of activity, all of which would need to be traced. The limitation of this dissertation to counter-terrorist interrogation is thus arbitrary and practical, not theoretical.

3.4 Imbroglios and ANT in Action

Chapters 4 and 5 examine areas where sources of uncertainty arise in the current debate. In other words, they deal with counter-terrorist torture in the U.S. wars of the past decade and a half. Before that, however, there are two remaining general issues to elaborate. One is to explore more thoroughly why attempts to define torture fail, and thus also to compensate for the lack of a definition of torture in this dissertation. The other remaining issue is to state more clearly what is meant by ethics, how ethics might function in an ANT environment, and why I support a political ethics of torture.

3.4.1 On the Definition of Torture

When considering torture as an imbroglio, all definitions appear as the work of purification. Even as they clarify matters, they raise additional issues. According to Latour's fourth source of uncertainty, definitions should be viewed as matters of concern rather than as facts. An examination of the contested definitions of torture shows that they are far more consistent and sensible as matters of concern that they can be as matters of fact.

In his account of self-defensive torture discussed above (2.4.1), Uwe Steinhoff (2013, 7) defines torture as follows: "Torture is the knowing infliction of continuous or repeated extreme physical suffering for other than medical purposes." Steinhoff notes some of the inclusions and exclusions that mark his definition. For example, he leaves out any reference to "breaking the will of the victim" because he finds that concept unclear and "incidental" to torture (7). What is most interesting about his definition, however is his imagination of its limits. He supports his choice of an extremely concise definition by proposing that definitions of torture only vary in one dimension. A "wider" alternative definition includes more kinds of acts; wider definitions do not impact his arguments "for obvious logical reasons" (10). That is, those kinds of acts, by logical necessity, are less severe than the ones he believes his book successfully justifies. A "*narrower* definition might try to *exclude* things" that Steinhoff thinks are justified; he rejects such definitions, especially if

they incorporate "absolute unjustifiability" as a quality of torture (10). Steinhoff thus concisely defines torture, and then restricts the possible ways that the definition is allowed to vary. His approach has a lot of power, and is appropriate for threshold deontologists like himself (as well as many utilitarians) whose accounts of torture ethics hinge on a comparison of harms.

At the same time Steinhoff's clarification is giving power to his account of torture ethics, however, it is also generating innumerable controversies. This is especially so given the brevity of his definition and its constraining principle. For example, Steinhoff's definition does not come close to describing the experience of the tortured person. There is nothing in Steinhoff's definition that suggests what it might be like to be shackled at the wrists, waist, and ankles and made to stand with bent legs for hours upon hours, day after day, for months, as happened to Slahi (2015). Steinhoff's definition also strips away the contextual elements that accompany any particular instances of torture. Steinhoff excludes "breaking the will" from his definition because he doesn't see how it applies, and because he does not want to unnecessarily restrict his definition. However, that doesn't mean that all of his exclusions from the definition have such salutary effects.

One whole field that Steinhoff excludes from his definition is the law. He does speak about the law, but it has no place in his definition.[40] In contrast, the legal definitions of torture are *the* definitions for law professor Waldron (2010). Waldron begins his analysis with the relevant international laws and conventions that define torture (191-94). He then *criticizes clarifications of the definition* that he finds abusive (198-207). Against those whose purpose is to precisely locate the line for what counts as torture so that one can get as close as possible to that line, Waldron offers the following objection: "*There are some scales one really shouldn't be on*, and with respect to which one really does not have a legitimate interest in knowing precisely how far along the scale one is permitted to go" (205, emphasis original). Finally, Waldron argues against the use of torture by posing torture as an archetype, which epitomizes "a certain policy having to do with the relation

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[40]Steinhoff does *refer* to the law, and would probably object to my characterization. Steinhoff refers to German, British, and American self-defense law primarily to argue how easy it is to meet the self-defensive standard (2013, 12-17). Beyond that, he dispenses with the law and focuses on moral argument (2013, 17). He is, after all, making an ethical argument, rather than a legal one. But in doing so he suppresses the controversy that arises because torture, regardless of Steinhoff's moral justification, is *still illegal*.

between law and force" in the United States (232).

In a sense, for Waldron *torture defines the law* as much as the law defines torture. Waldron sees torture as a statute that holds some meaning for the entire system of law in which it is embedded. Beyond that, he sees that system of law as implicated in the entire society that has spent many years painstakingly building it. All of this is completely lacking from Steinhoff's definition. Of course, Waldron's definitions (the international legal definitions, plus his archetype argument) generate their own controversies. For example, there is no direct confrontation between self-defense and the torture prohibition. Instead, Waldron (2010, ch. 2) addresses the liberty/security question in a separate essay. Because Waldron's definitions rest on the international treaties and law, they are silent on non-state torture by groups or private individuals. Finally, as I mentioned in Section 2.2.4 above, Waldron's move does not resolve controversies about torture's definition so much as it inverts them. Making torture into a legal archetype might epitomize the rule of law, but that is different from defining torture.

Of all the works reviewed, Matthew H. Kramer (2014) goes to the greatest length to define torture. He devotes an entire 85 page chapter to the task.[41] Scholars such as Luban (2005) and Wisnewski (2010) have recognized the difficulty arising from the many definitions of torture, and used categories and typologies as ways to get a handle on the problem. Kramer engages the definition thoroughly enough to develop a strategy before constructing his own definition. Kramer argues for a number of elements in the definition.

The most important of the desirable qualities Kramer (2014, 55) seeks is that of capaciousness. For example, torture is typically carried out by state agents, but not always. A good definition of torture can recognize this by including this feature as typical but not necessary. The definition should also be "expansive" with respect to the qualities of the victim (55). For example, while scholars are most often concerned with the torture of humans with typical cognitive faculties, Kramer wants to be careful not to exclude consideration of people who cannot consciously understand what is happening to them—or animals for that matter. In one more move to extend

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[41]See Kramer (2014, 29-114). The first 25 pages of his chapter provide a good critical survey of all the torture definitions already in circulation.

the definition of torture, Kramer avoids restricting torture to presumptions of overcoming the resistance of the tortured person (56). Steinhoff made a similar exclusion, but for different reasons. Steinhoff doubted that the "will of the victim" was a clear or meaningful quality. Kramer is trying to keep track of potentially-torturous acts that, for whatever reason, do not attempt to "break" the victim.

In short, three of Kramer's five guidelines for defining torture intricately expand the types of cases he can consider. As a result, Kramer sets himself a formidable task of considering a great many possible outcomes. His taxonomy grows to include varieties that are likely familiar, like intimidatory torture, extortionate torture, act-impelling torture, punitive torture, and sadistic torture. However, it also includes some exotic variants like "extravagantly reckless" torture, "ephemerally incapacitative" torture, and even "therapeutic" torture (Kramer, 2014, 104).[42]

Of all the approaches to defining torture, Kramer's appears to be the least polemical. Kramer could even be credited with treating the definition much like a matter of concern, along the lines recommended by Latour. It might appear that he examines all the controversies, or at least as many as anyone can be expected to address. However, another look shows that every element of his definition is constructed around philosophical concepts, except for one. Kramer does prominently include the element of deliberate infliction of pain, a quality that pertains to the tortured person. Other than that, his concerns are about the intentions of the person doing the torturing. His definition, for all its nuance, expansiveness, and flexibility, is essentially a catalog of the torturer's possible goals and motivations.[43]

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[42]Kramer's typology is built mainly around features of the torturer that impact the act's moral quality. Sadism, for example, has a different moral value than extortion or intimidation. All of those qualities are purposes that the torturer might be pursuing. Extravagantly reckless torture is a non-purposive quality that might fit the torturer. Some of the types sound peculiar at first, like "edifying torture," that might mislead readers to think Kramer approves of torture, but he does not. Kramer ultimately finds all varieties of torture morally impermissible (2014, ch. 3).

[43]Kramer's full definition of torture is this. "Torture, if uninterrupted, consists in the infliction of severe pain or suffering. Almost always the pain or suffering is induced deliberately as a means or as an end, but in some exceptional cases it is induced instead through extravagant recklessness. Torture in its many varieties is perpetrated for any of the purposes enumerated in 2.2 of this chapter and listed in 2.2.13. Typically, the administration of torture lasts either until the purpose impelling it has been fulfilled or until the unrealizability of the specified purpose through the infliction of torture has become manifest. Save in some edifying contexts—and perhaps also in some sado-masochistic contexts— any administration of torture evinces indifference or hostility toward the basic physical and psychological well-being of its victim. Save in some of the contexts just mentioned, a victim of torture does not genuinely consent to being afflicted with grievous pain or suffering. Whenever the deliberate or extravagantly reckless infliction of pain amounts

For an act utilitarian, Kramer's definition might be problematic because so many of the qualities he advances make it harder to calculate the relevant utilities. The same applies for comparing Steinhoff's definition with Kramer's. In a sense, Steinhoff is right to insist on brevity, while Kramer is right to insist on nuance and flexibility. That is because, as I have been arguing, *they are not answering the same question*, even though they appear to be. There is no end to these controversies, except to cut them short with another plausible set of limitations. But then, every such attempt to cut short the progression of controversies turns the definition of torture into a polemical matter of fact, in ANT terms. From this point of view, the question *what is torture?* turns out not to be a question at all. Like the related question *is torture morally permissible?* it is instead a location where controversies about what torture is tend to proliferate. That does not mean that the definition offered by various scholars are useless or wrong. They all say something about what torture is, especially as they come together in the controversy of torture ethics.

Rather than define torture, in chapter 4 I develop ways of talking about torture through descriptions of what happens to the body in space. The last preliminary task is to say something about what I mean by ethics, and how that is affected by my adoption of Latour's ANT method.

3.4.2 On Ethics and Orders

In philosophical ethics, several categories exist that might apply to the complex questions in the torture ethics debate. LaFollette and Persson (2013, 2) identify practical ethics as those dealing with specific concrete situations: "when to tell the truth, under what circumstances can or should we go to war, how should we relate to the environment and animals?" Normative ethics deal with "the best way, broadly understood, to live," and "general principles, rules, guidelines that we should follow, or virtues that we should inculcate" (2). Metaethics concerns the "status of moral judgments," whether they are "statements of fact or expressions of attitudes," and if they are facts, whether they are "objective or subjective" (1-2). In his *Contemporary Metaethics*, Alexander Miller (2013) makes only a single distinction between normative theory, on one hand, and his

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to torture, the victim lacks any genuine control over the duration of the its infliction." (2014, 114)

chosen topic of metaethics on the other.

With respect to torture, a question of practical ethics could be "should suspected terrorists be tortured for information about imminent attacks?" The normative questions around torture should be very familiar from the discussion in chapter 2. Those disputes play out largely in terms of normative theory. The preference Bagaric and Clarke (2007) express for hedonistic act utilitarianism is really a specification of one type of normative theory against others, including other kinds of utilitarianism. Steinhoff (2013) and Kramer (2014) are both threshold-deontologists but disagree on the very fine point of what happens when the threshold is exceeded (2.4.3). The metaethical questions concerning torture are abstract and thus more difficult to perceive, or they are built into various normative theories. For example, Waldron (2010) works largely in the tradition of positive law, so for him ethical principles owe their existence to human reason. Kramer (2014) is a moral realist, meaning that morality exists independently of human mental states; it is objective.

Recall too that many scholars in the torture ethics debate do not specify their full ethical frameworks in precise detail the way Steinhoff and especially Kramer do. And that is among professional philosophers, who are not the only people participating in the torture ethics debate. Scholars outside of philosophy and ethics will have less comprehensive sets of answers to this wide variety of ethical questions, especially as that disciplinary distance from philosophy grows large. I am not arguing that scholars should fully specify their ethical frameworks at all levels before engaging in the torture ethics debate. Instead, my claim is that the torture ethics debate features controversies at all levels. I have adopted the ANT approach not to resolve those controversies, but rather to describe the situations where they arise.

The ANT approach also militates against organizing, clarifying, and systematizing this field of ethical inquiry. The stratification of ethics into practical, normative, and metaethical divisions was a dominant feature of 20th century philosophy, but as LaFollette and Persson (2013) note, it did not figure in the ancient approach to ethics and is less rigidly in force today. International Relations scholars who are familiar with the work of John G. Gunnell (1998), might consider organizing the

ethical divisions into "orders of discourse."[44] Practical ethics could then be considered a first-order practice, since it involves asking and answering practical questions about torture.[45] Normative theory and metaethics could then be considered metapractices, which Gunnell (1998, 20) says "[gain] their primary identity in terms of the fact that they have another conventional activity as their subject matter." Practical ethics, normative theory, and metaethics would then appear to form a neat hierarchy of ethical discourses, from the first-order practice of interrogation rules, to a metadiscourse that addresses how to treat enemies, and finally to a meta-meta-discourse about that metadiscourse. The way to judge the morality of torture might then be to choose a normative theory, sort out the metaethical issues, and apply it to the practical problem of torturing (or not) suspected terrorists.

That is, however, more or less a description of what everyone reviewed in chapter 2 is doing. I reject this temptation for both practical and methodological reasons. Methodologically, ANT networks cut across all such arbitrary divisions in the torture ethics debate. The practical problem that motivates that methodological choice is that the complex set of questions in the torture ethics debate cannot be easily separated. That is what I mean by saying that "is torture morally permissible?" is not a question. Making any judgment at all about torture's moral status necessarily gives rise to normative and metaethical controversies. The entire complex of questions arises *at once*, not as first-order, second-order, and third-order, but as a synchronic network of closely associated questions.[46]

The networked ANT approach overcomes another issue that normative theory and metaethics do not address. That is, not every associated in the complex around torture ethics is, strictly speaking, ethical. Interrogators face a practical problem of "making people talk," or think they do. However, the pressing need to make a person talk immediately raises the question of how to do so,

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[44]Schmidt (2002) makes exemplary use of Gunnell's orders of discourse in his (Schmidt's) re-examination of the historiography of the International Relations discipline.

[45]First-order practices are "modes of activity that are primordial and 'given' in that their various forms and historical manifestations represent functionally necessary elements of human activity." (Gunnell, 1998, 19) Practical torture ethics would belong to that primordial activity of deciding what to do and not do to suspected terrorists.

[46]There is an interesting parallel—not to be pursued here—between the synchronic time of Latour's networked non-modernity (most notably in Latour 1993) and the combination of past, present, and future in Cavanaugh's (1998) understanding of eucharistic eschatology.

and in the present conversation also the question of whether extreme pain makes people talk. At the same time, a question arises about the truth-value of statements made under extreme pain. Such questions abound in the torture ethics debate: when does pain become extreme? what protections apply to which people? whose interpretation of the moral and legal guidelines is authoritative? is the naval base at Guantanamo Bay, Cuba "in" the United States?

Following ANT, I argue that the best way to apprehend these questions is in a network, and that the questions that show the most associations with contemporary torture are the ones that belong most centrally to the part of the network under consideration. ANT allows the practical, normative, and metaethical questions to mix organically with other practical, theoretical, and metatheoretical questions. The controversies that swirl around torture ethics do not distinguish between their ethical dimensions and other factual or theoretical aspects, so neither should the analysis.

3.4.3   A Political Ethics of Torture

I have shown in chapter 2 that the torture ethics debate comprises a wide variety of highly idiosyncratic approaches to justifying or prohibiting torture. I also shown in sections 2.3, 2.4, and 2.6 that the different approaches to torture ethics differ in ways that cannot be resolved through more or different iterations of the same approach. Torture ethics arguments are highly idiosyncratic, and even incommensurable.

In sections 3.1 and 3.2 I argued that the complicated situation in torture ethics should prompt us to treat it as an imbroglio, as Latour advocates. The first step in dealing with imbroglios is to conceive of them as what they are. That is, imbroglios cannot be handled though techniques that continually try to reduce and clarify them. Those techniques belong to the work of theoretical purification, which will continue; but resolving imbroglios takes renewed attention on the work of mediation.

After having re-imagined torture ethics in the form of an imbroglio, I argued that the second element needed for addressing torture ethics was a revised social theory. What the torture ethics debate needed, I thought, was a concept of the social that was capable of assembling the disagree-

able participants that populated it. This had to be done without any one member, or some entity at the aggregate level, overruling other individuals regarding their ethical frameworks. I again followed Latour in his more mature methodological approach. Section 3.3 elaborates Actor-Network Theory (ANT). In this section (3.4) I have been been arguing that the definition of torture is an imbroglio that can best be understood through an ANT approach focusing on the controversies and uncertainties of torture ethics. I noted an additional benefit that ANT seamlessly integrates ethical and non-ethical questions. Finally, I have just argued the networked character of the ANT approach fits contemporary torture ethics much better than the usual ways of clarifying and refining ethical thought.

It is now possible to sketch what kind of torture ethics is possible. Using ANT will not allow me to answer the symbolic question of torture's moral status, nor even the complex set of questions that I have argued are always implicated by that symbolic question. If that seems disappointing— even rude—after readers have generously trudged through a hundred pages, I can only offer the following small consolation: *no one else has answered the question either*. Or rather, everyone has an answer. The answers offered for torture ethics range from the most baseless opinion that causes polite people to recoil at parties to the truly formidable achievement of Kramer's argument for moral integrity. Moreover, *none* of these answers are sociable. Instead, divisions in the social group open up according to whose answers one finds tolerable.

In the midst of this situation, a political ethics based on ANT offers a few innovations.[47] First, the phenomenon of torture and the ethical arguments surrounding it are permitted to remain as complex, entangled, and mixed-up as they actually appear. Second, the actors are allowed to remain as complex, entangled, and mixed-up as *they* are.[48] This means emphatically that the ANT approach does not force a follower of virtue ethics to become a utilitarian, or make a deontologist install a threshold. The ANT approach instead traces all the work that is actually being done by the humans, memos, airplanes, legislatures, contractors, journalists, and philosophers—not to mention

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[47]From here forward in this dissertation, the term "political ethics" refers to the entirety of the approach I have developed through Latour's response to imbroglios and his version of ANT.

[48]Or the actants, if you like: human and non-human agents.

graduate students and their beleaguered readers.

In other words, imbroglios and ANT do not allow me to propound any torture ethics at all. What the approach does make possible is a more robust and legitimate political ethics of torture. A political ethics arises in the coming together of otherwise ethically-disagreeable people around the question of torture. It differs from the *politics of torture ethics*, because due to its ANT basis it lacks both a right answer to the question of torture and an abstract social aggregate to which that answer could be assigned. An ANT ethics of torture describes the network of action and material around torture ethics in a way that is accessible to a wide range of people who are caught up in the network. An accessible description is also actionable. It is something people can do something with or about. Unlike other actions, though, the ANT approach to ethics is a practical morality, based on "negotiation or compromise," and without denunciation (Latour, 1993, 45). This approach is likely to be "scorned because it does not allow indignation," but also "active and generous because it follows the meanderings of situations and networks" (45).

As an anti-torture absolutist myself, a political ethics of torture poses a risk in that my preferred position may be overwhelmed. However, the risk is small when one considers that my position has already been so quickly and thoroughly routed that it spawned a massive torture ethics industry. Torture and violent-interrogation advocates are also at risk in the same way. With ethics, we are all always at risk of our preferred position unraveling. Rather than triumphantly restoring the global and American torture prohibition, legally and morally, the more modest goal of this dissertation is to support a vigorous political contention over torture that uses all the resources available from the ANT account. The last portion of the dissertation is thus devoted to recounting key portions of the torture ethics network. Having left the definition of torture indeterminate, the next chapter maps a set of associations that show what is happening to the tortured person's body in space. Following that, I examine the controversies between bodies and information. Referring back to the three major tasks that Latour sets for social research in *RS*, these chapters primarily exploit controversies and observe traces. They then provisionally reassemble the social around each chapter's particular corner of the torture ethics debate.

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Chapter 4

The Body in Space: What Torture Is

In section 3.4.1 I showed how defining torture can be perilous and indeterminate. All definitions, if they accomplish their task, are polemical. In contrast, this ANT-based account of torture ethics aims to provide the conditions for a political ethics of torture (3.4.3). There is still a need for some kind of description or account of torture, even if the ANT approach leaves torture's definition in its persistent controversial state. For a political ethics of torture to be robust, many members of the community must be included in the conversation. They need a way to talk about *what is happening* in torture without denouncing each others' views. Such an account of torture requires language that is not attached to polemical accounts of torture ethics.

This chapter develops concepts and vocabulary for talking about torture that satisfy the requirements of ANT and can begin to create conditions conducive for politically contesting torture ethics. To accomplish this, I turn to one of the so-called "torture memos" that describes the actual course of conduct that American interrogators wanted to apply to a captured Al Qaeda operative. The full title of the memo is "Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency: Interrogation of Al Qaeda Operative." (Bybee and Yoo, 2002) The memo recounts ten techniques for "enhanced" interrogation, including close confinement and waterboarding, that are by now familiar to many observers of the torture debate.

In ANT terms, the memo is an actant: it is a material object bristling with traces of associations

to other human and non-human actants. Actually, it is several material objects, one of which readers can access at http://dspace.wrlc.org/doc/bitstream/2041/70967/00355_020801_004display.pdf. Connecting to the actor-network of torture ethics is that simple. The associations in the document connect government lawyers in Washington, D.C. and at C.I.A. headquarters in Langley, Virginia to the wayward suspected terrorist, to a vast collection of factual claims about the suspect and the techniques, to unnamed experts who supplied those claims, and to elements of American and international law. The document also brings together a fascinating group of objects and plans of action. This chapter exploits the document to begin developing an account of what torture is.

To aid in this description the chapter uses spatial theory from Henri Lefebvre (1991) to begin crafting language for talking about the prescribed actions. These description are designed not to be gratuitous, graphic, or manipulative. Instead, they provide a way of talking about the controversially-torturous actions that can be shared by people who hold different ethical frameworks. The language and concepts developed here are intended as resources for the conversation that can produce a political ethics of torture.

From a conventional point of view, it may be problematic to use this memo and the techniques it describes as material for a description of torture, since I have not defined torture yet, and have even renounced the task of defining it. As I argued in 3.4.1, attempts that strive to settle that question only extend the problem by proliferating controversies. However, the acts described in the memo are largely the acts at issue. Even though the purpose of the memo is to characterize them as something other than torture, they are the acts at the heart of the current torture ethics debate. Whether they "are" torture, or instead they are only enhanced interrogation or abuse, does not change that. The aim here is to exploit the uncertainty surrounding these actions to reveal what torture is as a matter of concern.

4.1 Gathering the network

The memo is addressed to John Rizzo, then the Acting Chief Counsel of the CIA. It is dated August 1, 2002 and bears the signature of Jay S. Bybee, who was then an Assistant Attorney General in the Justice Department's Office of Legal Counsel (OLC), a division of the Department of Justice. I have attributed it to Bybee and also to Bybee's deputy John Yoo, who is widely regarded as the principal author of the memo.[1] Both Bybee's signature and Yoo's authorship link them to the memo and the actions it legitimizes, so I have credited both by citing the document as Bybee and Yoo (2002).

The first page of the memo names Abu Zubaydah as the person with whom it is centrally concerned. Abu Zubaydah is described as "one of the highest ranking members of the Al Qaeda terrorist organization, with which the United States is currently engaged in an international armed conflict following the attacks on the World Trade Center and the Pentagon on September 11, 2001" (Bybee and Yoo, 2002, 1). The memo indicates that Rizzo had asked the OLC whether certain actions would violate Section 2340A of Title 18 of the United States code (USCode, 1996), which prohibits torture. With respect to the things CIA interrogators wanted to do to Zubaydah, the memo finds that "the proposed conduct would not violate this prohibition" (Bybee and Yoo, 2002, 1).

The memo also refers to "a new interrogation specialist" as well as a "training psychologist" from the military Survival, Evasion, Resistance, and Escape (SERE) program (Bybee and Yoo, 2002, 1). Other unnamed people in the memo include "military personnel" who have undergone SERE training and "various individuals who have extensive experience with these techniques" (4). A few of the unnamed military trainees who had negative experiences with the training techniques are singled out, and explanations are offered as to why those negative experiences do not amount to evidence that the techniques violate the torture prohibition (4-5). The military trainees come from the Air Force and the Navy, and yet another unnamed SERE trainer claims to have experience with more than 10,000 such trainees (5). Another group of trainees who are said to have been subjected

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[1] See Waldron (2010, 189 fn. 9) concerning authorship of the memo. Bybee is now a judge on the 9th Circuit Court of Appeals, and reportedly "regrets" the memo (Vick, 2009).

to the techniques is numbered at 26,829 (5). More unnamed mental health experts" also appear (17). There are of course "terrorist networks in the United States or in Saudi Arabia," among whom "there is currently a level of 'chatter' equal to that which preceded the September 11 attacks" (1).

Usama bin Laden makes an appearance, so that Abu Zubaydah can be identified as his "senior lieutenant" (Bybee and Yoo, 2002, 7). An Inspector General of the CIA appears in the memo, in connection with incident investigations that, again, find the techniques do not cause serious harm (5f). Some actants in the report are not only unnamed but excised from it. "[Redacted] concluded that if there are any long term effects . . . "; "[redacted] also indicated that he had observed the use of the waterboard in Navy training" (6). The redactions draw attention to someone who is not mentioned (perhaps more than one person) but obviously present. That is, in addition to all the actants just mentioned, some unmentioned person blacked out the portions of text before the document was released to the public, someone struck the "TOP SECRET" designation at the top and bottom of every page, and someone had placed that designation there in the first place.

The ANT approach suggests looking at non-human actants involved in the state of affairs as well. Among the non-human actants, there is an insect that interrogators want to place in the confinement box with Abu Zubaydah.[2] There are many, many assertions of fact in the form of references to other memoranda (Bybee and Yoo, 2002, 9), case law (16), and most abundantly in the form of factual claims furnished by the person the memo addresses as "you." The text indicates that "you" refers to CIA counsel John Rizzo. It can be taken as referring to the unnamed psychological consultants too, since they are both Rizzo's source of information and the ones carrying out the interrogations. The factual claims have to do with the imminence of terrorist threats to the U.S. (1), the background of SERE training and how it has never produced effects that amounted to torture (4-6), Abu Zubaydah's toughness, cunning, experience, knowledge of resistance techniques, zeal, and desire to harm Americans (6-8).

The urge to debunk, unmask, and denounce here—and even to perversely enlist the tools of ANT in the process—is almost irresistible. For example, it is now possible to consult other docu-

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[2]"You would like to place Zubaydah in a cramped confinement box with an insect. You have informed us that he appears to have a fear of insects" (Bybee and Yoo, 2002, 3).

ments that identify the unnamed military psychologists as James Mitchell and Bruce Jessen (Risen, 2015), and to learn that they earned $81 million as contractors running the CIA interrogation program (SSCI, 2014, preface, p. 11). Furthermore, although "[neither] psychologist had experience as an interrogator, nor did either have specialized knowledge of al-Qa'ida, a background in terrorism, or any relevant regional, cultural, or linguistic expertise," (SSCI, 2014, 21) they became the primary interrogators of the most wanted terrorist suspects in U.S. custody.

Regrettably, that sort of denunciation is not the goal here. Following the ANT approach, the purpose of compiling the above list is to begin mapping all the actants who are coming together in this momentary, contingent social arrangement. The list also shows how the collection of actants, from John Rizzo to the thousands of military trainees, to the special insect for Abu Zubaydah's box, are all present in a single document—a paper object that really exists or existed.

That is only a partial account of the actants collected in this document, but it is a good start. Now that I am (mostly) refraining from denunciations, the ANT approach proposes a different task: observe what the gathered actants do with and to each other. The document collects the torturers, the person to be tortured, and many other actants, as well as one element I have not discussed yet: the actions themselves.

4.2 A Spatial Description of the Acts

Bybee and Yoo (2002) gives legal advice from the Justice Department, which prosecutes crimes, to the CIA, whose agents prefer not to be prosecuted. Through the lawyer John Rizzo, the CIA interrogators are asking what they can *do* to Abu Zubaydah in light of the U.S. law prohibiting torture. They ask about ten techniques ranging from the "attention grasp" to waterboarding. From an ANT perspective, the presentation of the techniques in clubby conversation between the Justice Department and the CIA cannot be accepted as matters of fact. Yet they also cannot be denounced as bogus misrepresentations. The ANT approach says to treat such claims as matters of concern.

What is needed is a way to critically engage the descriptions of the interrogation techniques

that is not beholden to an anti-torture or pro-enhanced-interrogation viewpoint. To accomplish this, I turn to the social theory of space developed by Henri Lefebvre. In *The Production of Space* Lefebvre (1991) re-conceptualizes space, with particular attention to bodies in space. Lefebvre challenges the Cartesian, scientific, rational concept of space, which he believes serves the hegemonic discourse of modernity and capitalism. At least in terms of space, he intends to "detonate this state of affairs" (24). Specifically, Lefebvre argues that the empty, seamless Cartesian spaces of such hegemonic discourses are actually *representations of space* (38). This abstract, conceptualized space is the "space of scientists, planners, urbanists, technocratic subdividers, and social engineers" and is the "dominant space in any society" (39). From a given origin, any body can thus be located in space at some coordinates x, y, and z with orientation ρ, θ, and φ.

Against this unified, homogenous space Lefebvre distinguishes two other elements of what he calls the production of space. *Spatial practice* is what "secretes that society's space; it propounds and presupposes it" (Lefebvre, 1991, 38). Spatial practice produces the real space of a society–which is *not* the abstract analytical space usually presumed by planners, engineers, social scientists, and even ordinary people (i.e. representations of space). Torture, as a policy of state, contributes to the spatial practices of societies that employ it, and thus to a particular secretion of space. For example, a place must be designated in which to carry out the torture, and the space must be arranged to facilitate some techniques. The space may be chosen for its optimal geographical or jurisdictional isolation. The third element of Lefebvre's tripartite vision of space is *representational space*, "space as directly 'lived' through its associated images and symbols, and hence the space of 'inhabitants' and 'users'" (39). This space is "dominated" and "overlays physical space, making symbolic use of its objects". A jogger, a subway rider, and a tenant of a walk-up apartment travel through representational space—as does everyone else.

These visions of space–spatial practice, representations of space, and representational spaces–diversify the possible ways of approaching a tortured body. For (Lefebvre, 1991, 170), space is *not* a container that holds objects, some of which happen to be bodies. Instead, Lefebvre argues that bodies *create* space. In his view, prior to sustaining itself, affecting its environment, or generating

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offspring, "each living body *is* space and *has* space: it produces itself in space and also produces that space" (176). Each body produces its own specific space, but these spaces may–will–come into contact, overlap, and penetrate each other. In fact, bodies seem to produce space by interacting with energies, forces, and objects around them (176). In other words, the abstract representational space also came with an abstract body, which Lefebvre is keen to complicate. Every body interacts continuously with its space, and is "reflected and refracted in the changes in its 'milieu' or 'environment'–in other words, in its space" (196).

The ANT approach to torture ethics can now be combined with Lefebvre's three-part conceptualization of space and the case of Abu Zubaydah's tortured body. The first two elements are linked by this risky report to the dense collection of actants and associations evident in the memorandum. It is now possible to describe what is happening to Zubaydah's body and evaluate its spatial ordeal—all in terms that should strive not to polemically exclude any participant in the torture ethics debate.

Abu Zubaydah has a body.[3] Its likely location, on the U.S. naval base in Guantanamo Bay, Cuba, is just one of the many problems of Abu Zubaydah's body. Abu Zubaydah's body provides a node, a point of leverage, a raised feature on the texture of the torture ethics debate. Other documents about other bodies have also been forced into public view, but the memo about Abu Zubaydah stands out for the density and quality of its agencies and connections, partially listed above.[4]

The techniques progress from mild to extreme, but the first one is already spatial. Called the "attention grasp", it involves "grasping the individual with both hands, one hand on either side of the collar opening, in a controlled and quick motion (Bybee and Yoo, 2002, 2). In the same motion as the grasp, "the individual is drawn toward the interrogator" (2). This spatial practice troubles

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[3]Regarding the appropriateness, of using Abu Zubaydah's experience, I acknowledge that Zubaydah, whatever he has done, is a human being who has been tortured. He has not agreed to serve as my example, even though he is a sort of public figure. Put another way, the connection established with Zubaydah through the memo is immediately troubled, as any connection to torture is likely to be.

[4]The power of the documents could be seen most dramatically so in Jenny Holzer's "PROTECT PROTECT" exhibit at the Whitney Museum of American Art (2009), which featured dozens of oversized facsimile paintings of such documents.

the boundaries between the spaces of the interrogator's and Abu Zubaydah's bodies. As a play of two body-spaces, the attention grasp reveals something that is invisible in abstract space: bodies require more space than is indicated by their biological interiority. Every body needs space outside of its skin *and expects* that space to be available. Although the attention grasp is mild, it goes to work directly on Abu Zubaydah's space.

The second technique, "walling", has Abu Zubaydah's body thrust against a false wall. A false wall is to be constructed in such a way that it flexes safely away from Abu Zubaydah, though it should still "create a sound that will make the impact seem far worse than it is" (Bybee and Yoo, 2002, 2). No instructions are provided for building this unique wall, but construction is a recognizable element of spatial practice.[5] During walling, a rolled towel is to be placed around Zubaydah's neck for safety, and his heels are to be placed against the wall before the thrusting. One wonders what Abu Zubaydah would make of these choreographic instructions as his body is arranged for the short thrust into the wall, but at this point the important concern is that every element of the technique, including the loud noise, interferes with Abu Zubaydah's space.[6]

The facial hold and insult slap—techniques three and four—continue the attack on Abu Zubaydah's body and space. The "facial hold is used to hold the head immobile. One open palm is placed on either side of the individual's face" (Bybee and Yoo, 2002, 2). The insult slap "makes contact with the area directly between the tip of the individual's chin and the bottom of the corresponding earlobe" (2). In both cases, care is taken to avoid the eyes. Noting the spatial character of these assaults may seem pedantic, but the precision of the spatial instructions does communicate something. Although the initial attacks are not too intimidating, they escalate in ways that should alarm Abu Zubaydah. Each technique is more intrusive and painful than the last. The techniques have

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[5]The precise technical language that Bybee and Yoo (2002) use to describe the techniques sometimes obscures how under-specified the actions are. This applies to the complex dance of the walling procedure, and also to the way the box sizes are specified. How big a box Abu Zubaydah could "sit down in" is anyone's guess. Speaking at a panel discussion about the film *Zero Dark Thirty*, former CIA official Jose Rodriguez complained particularly about the portrayal of the small box, which he thought was too small (Thiessen, 2013). To me, the fictional box appeared to be smaller than a coffin. With apologies for engaging in denunciation, I must point out that if the 92 interrogation videotapes that Congress had subpoenaed still existed, the actual box could probably be portrayed exactly (see SSCI, 2014, 455).

[6]Lefebvre complains that the modernist understanding of space forgets that space "is first of all *heard* (listened to) and *enacted* (through physical gestures and movements)." (Lefebvre 1991, 200)

moved from the collar to the back (in walling), to the head, and now the face. Even if the first four techniques do not scare him, the spatial progression deeper into Abu Zubaydah's space is clear.

The fifth technique escalates considerably. Abu Zubaydah will be placed in one of two boxes. The sizes are specified negatively: "[in] the larger confined space, the individual can stand up or sit down; the smaller space is large enough for the subject to sit down in" (Bybee and Yoo, 2002, 3). The boxes are also dark, reducing Abu Zubaydah's visual space. The memos say time in the boxes should be limited to 18 hours for the large box and two hours for the small one.[7] The boxes invade the space necessary for normal operation of the Abu Zubaydah's body. In the ninth technique, which is directly related to the fifth, the "[interrogators] would like to place Zubaydah in a cramped confinement box with an insect" (3). The insect has access to his body surfaces–skin, eyes, ears, nose, and mouth–while Abu Zubaydah's own movement is inhibited by the box.

Wall standing, the sixth technique, puts Abu Zubaydah's body "about four to five feet from a wall, with his feet spread approximately to shoulder width."[8] His arms reach forward, with his "fingers resting on the wall" (3). Though his fingers are resting, they "support all of his body weight." He is not allowed to move his hands or feet. This technique, like the others, manipulates Abu Zubaydah's body in space in a way he would never create for himself. The seventh technique, use of stress positions, does the same. In one position, Abu Zubaydah is seated on the floor with legs outstretched and arms shackled above his head. The other position has him "kneeling on the floor while leaning back at a 45 degree angle" (Bybee and Yoo, 2002, 3). Wall standing and stress positions reveal another necessary feature of lived, representational spaces: they cannot be static. The memo's interrogation techniques exploit the body's need for movement by forcibly freezing that movement. Holding a fixed position may appear to be innocuous, but the true point of attack on Abu Zubaydah's space is the necessity of movement. In addition, despite the precise-sounding language these positional techniques are not fully specified. It is not clear which parts of Abu

[7]See Bybee and Yoo (2002, 3). Different maximum times are provided for the small box on pages 3, 13, and 14 of the memo.

[8]Despite the similar terminology, wall standing should not be confused with walling. In walling, interrogators thrust Abu Zubaydah into the specially designed wall. In wall standing, Abu Zubaydah himself is obliged to hold a leaning position.

Zubaydah's body are supposed to form the 45 degree angle, for example. It will depend on the agent who implements the instructions.

The two remaining techniques are the most intense. Gone are the stage slaps and cop-show outtakes. The eighth technique would deprive Abu Zubaydah of sleep for up to 11 days at a time. In Lefebvre's diversified concept of space, sleep is spatial. In abstract space a sleeping body does not differ from a wakened one, except perhaps in its position. One of the orienting angles might change by 90 degrees, and the rates of change for the other locating variables will be lower. Lefebvre's spatial concept of sleep differs. For Lefebvre (1991, 208), sleep is where "the body gathers itself together, building up its energy reserves by imposing silence on its information receptors. It closes down, and passes through a moment with its own truth, its own beauty, its own worth." Sleep is thus part of the complex space that is constantly and necessarily produced by every body. Sleep-space also allows dream-space, in which the body's "broken rhythms are reconstituted," and the self is repaired and enjoyed (209). If Lefebvre's description sounds too figurative to qualify as space, consider the concrete imperative quality of sleep. The force with which sleep imposes itself on us does not diminish, even though it lacks visible coordinates and dimensions.

Sleep deprivation intrudes into a space that is not usually recognized as a space. This helps the technique appear to be mild from the perspective of abstract space. In the *lived space* of the sleep-deprived person, however, the intrusion is real and violent. The tenth technique, called the waterboard, aims for maximal intrusion into Abu Zubaydah's body. Here "the body is bound securely to an inclined bench," while "the individual's feet are generally elevated" (Bybee and Yoo, 2002, 3). Zubaydah's face is covered with a cloth, and "water is then applied to the cloth in a controlled manner" for 20-40 seconds (4). Using a "canteen cup or watering can," the water is "applied from a height of twelve to twenty-four inches" (4). Waterboarding attacks the intimate boundary between the human interior and exterior. Lefebvre (1991, 176) argues that although each body makes itself distinct by separating inside from outside, "this barrier is always relative and, in the case of membranes, always permeable." The mouth, airway, and lungs are such sensitive

membranes that nature has placed them "inside" the body. The interrogators hope that by pressing on them, they will activate an imperative in Zubaydah to talk.

Torture is a profoundly spatial practice. The interrogators introduce themselves to Zubaydah's space with the grasp and walling. They contact his head and face. They restrict his movement with boxes, and then grant an insect access to Zubaydah's body while he is immobile. They manipulate his body in space, intrude on his sleeping interior, and finally touch the most basic, life-supporting membrane.[9]

In terms of abstract space, these techniques may appear benign. From the perspective of lived space—space as produced and required by (Lefebvre, 1991, 176) Zubaydah's body—the techniques described here progressively intrude to the highest and most intimate degree. The techniques leverage the difference between their relatively benign appearance and the spatial reality, in order to create and sustain intense pain without violating the body in more recognizable ways. Waterboarding is only a toothbrush away from appearing hygienic.[10] Readers who have bodies that produce and live in space–that is, all readers–can approach Zubaydah's experience of torture through this spatial description. To do so, however, space has to be understood in Lefebvre's more complex formulation. Otherwise it is possible to continue overlooking the vector of attack.

4.3 Resources for Political Ethics

This chapter has shown two things. First, the controversial torture/interrogation techniques at the heart of the current torture debate are connected to large numbers of people and objects by a network of associations. The (contested) torturous acts are not abstract ideas or isolated incidences. Instead, their activity can be traced by the means of small, reliable associations to a myriad of actants. These human and non-human actants vary in importance by the number and strength of their associations. For example, John Rizzo, Jay Bybee, and Abu Zubaydah are the most thoroughly

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[9]83 times (Shane, 2009).

[10]Understanding torture in lived space may help resolve the problem Darius Rejali (2007, 44) identifies as "clean torture", wherein states devise new techniques so they can keep torturing even while they appear to be complying with monitoring and accountability regimes.

connected actants in the area of the torture ethics network around Bybee and Yoo (2002). The writer of this report, and readers, are more distantly connected. They are, nevertheless, part of the network. By following the sturdy, small connections, readers can move from their computers to the document archive, then to the document itself, the interrogation room and finally Abu Zubaydah's body.

Second, the chapter shows how language for describing the techniques can be enriched with spatial theory. Zubaydah's lived space is under a sustained, progressive attack by the interrogators. They press the attack all the way to the most sensitive barrier between his interior and exterior. Because our imaginations are dominated by representations of space, rather than lived space, it is easy to miss the power of the spatial attack on Zubaydah. The chapter did not aim at fixing the problem outlined in section 3.4.1, in which the torture ethics debate fails to arrive at a definition of torture. Instead, the *descriptive resources* in this spatial account of torturing a body in space can be used to reassert how the definition of torture is a matter of concern, and will stay that way.

By avoiding denunciations and polemical assertions, this enrichment of descriptive language can be accomplished in a way that makes any debate that uses it more inclusive. This chapter begins to show not only how people with incommensurable ethical frameworks can come together in a social arrangement, but how they do come together. That is, not in agreement, but in acts of association (and note that an obstruction or rejection of association is also an association).

The participants in the torture ethics debate can now engage with each other in shared terms. The network of associations and the spatial description of torture in this chapter cannot be used to help win the torture ethics debate by leveraging the "right answers" to associated questions about what torture is. Instead, all participants are drawn onto a small area of shared conceptual ground. There, matters of concern like how hard to press on suspect bodies, and how far such actions can be legally distinguished from serious crimes, must be settled politically.

Chapter 5

Torture, Bodies, and Information

The previous chapter focused on developing a new kind of description for some centrally-contested techniques in the current torture debate. This chapter shifts the attention to a related matter of concern: the claim that such techniques can produce life-saving information. This claim is absolutely essential in the current torture ethics debate. Presently, no one is arguing that torture should be revived for the purposes of public punishment or political control that figure in the accounts by Foucault (1995) and Cavanaugh (1998), respectively. Without the perception of an enormous need to obtain life-saving information that has been fueled by the American conflict with al Qaeda (and just prior to that, Israeli counter-terrorism), torture ethics would probably have remained a marginal topic of occasional interest to philosophers. The renewed interest in in torture and its ethics stems directly from claims about how certain bodies are related to life-saving information.

In the ANT account of contemporary torture ethics, the claim that bodies yield information under torture is a crucial matter of concern. So far, however, it has been incorporated mostly as a matter of fact. Or rather, a matter of facts. The claim that torture *does not* produce information can be asserted as a matter of fact, just like the claim that torture *does* produce information. That both facts can be asserted makes it a matter of concern. This chapter revisits the arguments of the current torture ethics debate discussed in chapter 2, and specifically develops the information-production claim as a matter of concern. I also discuss related claims in the words of a tortured person (Slahi,

2015).

5.1   Views of Torture and Truth

Life-saving information is only one kind of utterance that has, over time, been sought by torturers. It is probably unfair to consider truth and confessions, which have previously been the goal of torture interrogations, as similar to intelligence. However, the problems are analogous. Life-saving information, bearing true witness, and giving confessions are all attempts to meet challenges of validity from some concerned party. The judge hopes for true testimony. The confessor hopes for a true confession of faith or sins. The counter-terror interrogator hopes for life-saving information. To develop the connection of torture and information in the current torture ethics debate, it will first be useful to consider how others have approached the general problem of the validity of tortured utterances.

According to Augustine (1994, 147), who was a Christian bishop in fourth-century Roman Africa, jurists are "unable to judge the consciences of those whom they judge."[1] Therefore, judges "are frequently compelled to investigate the truth by torturing innocent witness concerning a case that is not even their own" (147). Augustine grants that judges can have the best intentions of carrying out justice, and yet still "execute, through wretched ignorance, one who is both innocent and tortured, one whom the judge had tortured in order that he might not execute an innocent person" (147). Augustine also argues that a criminal with a robust constitution can withstand torture, while a weak but innocent person might falsely confess (148).

More than 1200 years later, Beccaria (1995) echoes some of these same concerns. However, unlike Beccaria, Augustine is not advocating reforms to harmonize punishment with rational state power. Augustine's goal is to distinguish the earthly, human city from the city of God. It is only incidental that the deficiency torture as a mode of truth production in justice procedures helps him illustrate his point. Because Augustine believes that torture is a faulty truth-producing mechanism,

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[1]The entire discussion of torture appears in Augustine's *The City of God*, Book XIX, chapter 6. Above I use page numbers in the cited modern edition.

he argues that Roman judges are forced to commit sins in the pursuit of justice. Roman judges torture "because of the necessity imposed by not knowing," but this produces "the misery of man" (Augustine, 1994, 148), not justice. He thus refutes the notion that such human justice fulfills any virtuous purpose.

Augustine's arguments sound persuasive, especially to myself and other opponents of torture. I have little doubt about the horror of Roman judicial torture. However, the ANT approach does not allow Augustine to proffer the failure of torture as a simple matter of fact. From the ANT point of view, there is actually a matter of concern about the relationship of torture and truth built into Augustine's argument. If Roman judges had really doubted that torture produced truth, they wouldn't have tortured. The terrible situation Augustine describes actually comes about because the judges don't know whether or not torture produces truth. Augustine (1994, 148) resolves the problem by assigning the realm of justice to God, and lamenting human laws as necessary but evil. Instead of cutting the Gordian knot in that way, this ANT analysis focuses on those very controversies.

Lisa Silverman (2001) examines a similar problem of judicial torture in early modern France. Her analysis is unique in that it discloses and describes how the understanding of the relationship between bodies, pain, and truth shifted at that time. Silverman argues that "torture was at one time a meaningful cultural practice as well as a functioning legal practice" (4). Torture "rested on an implicit consensus concerning the nature of pain, of truth, and of the body," that broke down over time (4). When it did, "torture became an indefensible practice" (4).

It was beliefs about the body that had to change for the practice of torture to be undermined. The chief opponents of torture at that time were Enlightenment writers, who "asserted not that the will and the truth were opposed, but that the will and the body were opposed, that pain and personal agency could not coexist in the same body" (Silverman, 2001, 9). The idea that truth was "a static reality awaiting perception" that could be revealed by torture was institutionalized in the legal training system that produced court officers in France (63-64). Despite the durability of tradition in that profession, though, the lawyers "failed to theorize a relationship between" pain,

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the body, and truth that could stand up to the new ideas of the Enlightenment thinkers (68). And when "pain ceased to produce meaning, torture became a meaningless activity" (68).

One aspect of the problem that preoccupies Silverman is what she sees as the slow and uneven decline of the practice of judicial torture in 17th and 18th-century Tolouse, where she conducts her analysis. She does not assume, as some of today's commenters on violence do, that some kind of steady progress happened or could be expected.[2] The change in thinking that relocated truth from inside to outside the body took a century, despite the overwhelming ideas of the Enlightenment.

In the case of judicial torture in Toulouse, Silverman (2001, 117) argues that the perceived relationship of pain and truth was sustained for a time by the exceptionally strong social force of Catholic lay confraternities. Her documentation shows that a "surprising engagement of *parlia-mentaires,*" who comprised the judges, officers, and clerks of the court system, "with elite confraternities of Toulouse" (117). She suggests that "judicial involvement in confraternal life lent epistemological support to the practice of torture and that as judges gradually abandoned painful practices in their religious observations . . . so did they gradually abandon painful practices in their legal work" (150).

Silverman's analysis does much to reveal the way that perceptions of body-truth relationship affect torture practices. However, from an ANT perspective it is limited. She makes an argument from the social aggregate: the *social* understanding of the body-truth relationship, rather than individual associations, does most of the work. Silverman's work is most useful in the types of social concerns—including the penitent groups—that she considers in explaining the fitful demise of French judicial torture. In short, Silverman provides the motivation to look at the torture-truth relationship as a matter of concern, and ANT provides a way to follow that motivation that is consistent with the goals of this dissertation.

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[2]See Pinker (2012, 144-149).

5.2 Effectiveness: Torture and Information Today

The current torture ethics debate focuses on life-saving information, rather than judicial testimony or religious confessions. While today's debate is dominated by notions of the ticking bomb scenario and similar imminent calamities, that may not mean that scholars adopt the same understanding of how bodies and information are related. Currently, the question of how torture makes bodies reveal life-saving information falls under the banner of *effectiveness*.

Utilitarians and those threshold deontologists who support torture argue, or sometimes just assert, that *torture effectively produces information*. This point is essential to either the utilitarian calculation of relative harms or the activation of the threshold that overcomes deontological commitments. Bagaric and Clarke (2007, 12f.) say that the "main beneficial feature of torture" is the production of information, and this feature arises because people "have an intense desire to avoid pain, no matter how short term, and most will comply with the demands of the torturer to avoid pain." They concede that many examples can be found in which torture does not produce information (53). In response, they argue first that "None of the instances of torture" their opponents criticize "are similar to the circumstances" or the means of torture that they advocate (53). In other words, they are saying that none of the examples advanced by the torture opponents match the circumstances they have specified for justified torture. One of those circumstances is, of course, that the person has relevant information. Gathering that information is the purpose of such examples of torture. Their second response is that "it is easy to give just as many contrary examples where torture was effective" (54). They dislike comparing anecdotal evidence, even though that is the best they find available (58f.).

They state their conclusion once with the claim that "all the information from past instances of torture reveals only the following: sometimes it has resulted in suspects divulging information to security officials who have used officials to save other people; sometimes it has not" (Bagaric and Clarke, 2007, 59). Yet another matter of concern makes an appearance here: the claim that security officials can or do use the information to save lives. They restate their conclusion in two parts. First, "[there] is no evidence that torture cannot work in the circumstances we outline," and

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then "[there] is no logical basis for demanding perfect knowledge" (60).

Dershowitz (2002, 137) agrees, saying that the "tragic reality is that torture sometimes works." He adds that it is "precisely because torture sometimes works that it still exists in many parts of the world and has been totally eliminated from none" (138). Like Bagaric and Clarke, he is limited to anecdotal data. Steinhoff (2013, 17) similarly rejects any certainty requirement for knowing that the tortured person has relevant life-saving information. Recall that for Steinhoff, when some situation activates self-defense rights, nearly all other constraints are vacated (see section 2.4.1). This leads him to argue that "even if torture were highly unreliable, this would not matter" (14).

Arrigo (2004) chooses exactly this issue—the information-producing ability of torture—to focus her argument. In lieu of the unsatisfying anecdotal comparisons that the other utilitarians and Steinhoff complain about, Arrigo engages four different models of information production. The "animal instinct" model is thought to produce information when the "animal instinct of the subject overrides the human will or reason of the subject," who then complies with the torturer (547). However, the "animal instinct model ultimately fails because the physiological experience of pain is mediated by individual and cultural interpretation." In the "cognitive failure model of truth telling," the tortured person divulges information when they become so overwhelmed by their treatment that they cannot mentally organize their own resistance (550). The "data processing model" depends on large numbers of interrogations to generate sufficient data for a large scale analysis (554). Arrigo provides counter arguments for each of these potential mechanisms of information production. By focusing on the potential causal mechanisms that would allow torture to produce information, Arrigo adopts a different standard of reasoning about the effectiveness of torture.[3] Effectiveness remains a matter of concern, however, because she may not be able to impose those standards on others. Steinhoff, for example, does not particularly care: once self-defense is invoked, the person who is being attacked has very wide latitude to try almost anything.

As I mentioned in section 2.1.3, John W. Schiemann's game theory analysis of torture shows some promise in answering the utilitarian arguments for torture, even in the form of a modern

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[3]In Arrigo's analysis, none of the potential causal mechanisms support the claim that torture produces information (Arrigo, 2004, 546).

critical approach. The reason is that Schiemann explicitly adopts the utilitarian conditions for his analysis in a way that Arrigo does not. Arrigo uses utilitarianism as a strategy for responding to utilitarians. However, she differs from the other utilitarians in a fairly subtle way. She uses a different standard for judging whether or not torture produces information. If her animal instinct, cognitive failure, and data processing models do not interest her opponents, her response is unlikely to persuade them. Schiemann, on the other hand, builds his model around the formula and conditions proposed by Bagaric and Clarke.[4]

I argued in section 2.3.1 that Schiemann seems to have the utilitarians cornered here. It would be difficult, if not impossible, for them to argue Schiemann did not adopt their exact conditions. From an ANT perspective, however, what matters is that Schiemann's argument, like all arguments, is rife with closures and clarifications that someone who really wishes to disagree could exploit. For example, his view of rationality or the parameters he uses to assess the reliability of information that might be provided. Also, Steinhoff insists that as a threshold deontologist his argument is simply not susceptible to utility calculations, including Schiemann's. Steinhoff is not interested in utility functions at all—as soon as a person is attacked, they may respond in almost any way they wish that is not grossly disproportionate.

Gordon's virtue ethics account (2.4.2) eschews torture for reasons unrelated to effectiveness. For Gordon, torture is an evil practice. It is wrong because it destroys the virtues conducive to living well in the community. Kramer rules out the vast majority of torture types for moral reasons not related to effectiveness. For Kramer, the wrongness of torture itself is robust enough to stand up to the reasons advanced for using it. Kramer's theory accommodates moral conflicts, and the torture prohibition is rarely overridden. When faced with calls for ephemerally-incapacitating torture to prevent calamities, Kramer objects to torture on agent-centered grounds. Kramer and Gordon differ from the others in that their torture ethics arguments do not fundamentally depend on the claimed information-producing capability of torture.

After examining the various ways that torture ethics scholars work to close off the question

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[4]See Bagaric and Clarke (2007, 38) and Schiemann (2012, 3 and 5-7).

of whether torture produces information. The utilitarians argue that the anecdotal evidence is inconclusive, and therefore torture should be understood as sometimes effective. This seems to be enough for them. Because Steinhoff argues from self-defense rights, his standards for effectiveness are very low. People under attack may defend themselves even by ineffective means, in his view. Arrigo challenges the information-production function on terms that other utilitarians seem unlikely to accept. Schiemann challenges the utilitarian assumptions of torture's effectiveness on terms they probably have to accept, because he adopts exactly their terms in good faith, more or less. However, one can still hope to avoid what one cannot accept. They may decline to engage Schiemann's arguments.

By using an ANT approach to make torture's ability to produce information a matter of concern, rather than a matter of fact, this analysis actually shows the power of the modern critical stance. For moderns, there are high stakes in establishing effectiveness as a matter of fact. If one can establish *as a fact* that torture is ineffective, honest utilitarians would abandon torture immediately, as Bagaric and Clarke freely admit.[5] If one can establish *as a fact* that torture effectively produces life-saving information, then deontological opponents of torture become the cartoonish moral monsters they are sometimes painted as, polishing their principles while blood runs in the streets.

On the other hand, from the ANT perspective it is possible to see the high costs points scored using polemical facts. They shatter the community that is ostensibly trying to make an ethical decision. Getting one's facts in order makes one's case stronger but also narrower and more exclusive. It cuts off access to those disagreeable people who are fashioning their own stronger, narrower arguments from their own facts.

In the actual practice of torture, fighting over facts can actually turn them into matters of concern related to bodies and information, perhaps irrevocably. Mohamedou Slahi (2.5.1) embodies several distinct but related matters of concern. There is a dispute over whether or not he has engaged in terrorist acts, another dispute over whether he knows or knew any relevant life-saving

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[5]"Certainly if this objection was valid we would change our minds and not countenancet orture in any circumstances." (Bagaric and Clarke, 2007, 53)

information, and finally a dispute over the truthfulness of the information he did eventually provide after being tortured.

Recall that Slahi had been interrogated continuously for a year and a half before the most intensive torture techniques were applied. Under pressure from weeks of round-the-clock interrogation, Slahi was consumed with making the treatment stop. As he understood it, what he needed to do to please his interrogators was "tell an untruthful story and maintain it," which he found difficult to do (Slahi, 2015, 232). It is neither hyperbole nor advocacy when Larry Siems writes in the introduction to Slahi's book that the "truth is confusion" (Siems in Slahi, 2015, xxxii).

For adherents of the modern critical stance, Slahi's book is instructive. It was written by the tortured person but also delayed and redacted by CIA editors. The CIA still has physical control of Slahi today. As torture accounts go, the Slahi book offers very high quality empirical data. Yet it really is impossible to determine whether Slahi is telling the truth or the CIA is. In an almost objective sense, all that is left in the Slahi case, with respect to the truth, is a matter of concern.

5.3 Torture and Information as a Matter of Concern

No ANT account of torture ethics can stipulate an answer about the effectiveness of torture in producing information, in either direction. In ANT torture ethics this is not even desirable. Instead, a sustained engagement with the effectiveness question as a matter of concern begins to show the features of the issue. The ANT account of this matter of concern gathers together a collection of disagreeable people and their facts. One thing that is apparent from this view is how little interest the human actants have had in engaging others on shareable terms. Arrigo does strive for shareable terms on one important count by adopting utilitarian framework, but she misses on another by questioning the information-producing ability of torture. Schiemann stands out as doing well in this regard. The others express little interest in debating on truly shared terms.

In the spirit of ANT, I do not say this to chastise the participants in the torture ethics debate. Within the modern critical stance, they have been doing their jobs to marshal matters of fact—about

the ability of torture to produce information, in this case—and strengthen their own approaches to torture ethics. What they cannot see from that stance is how their hard work narrows the appeal of their strengthened torture ethics arguments and alienates the others to whom they find themselves politically connected.

From the ANT perspective, one can also see from this analysis how the facts being asserted in this particular area are pretty shabby all around. Only Schiemann's facts have much punch, and he achieves that effect by adopting assumptions that others already share—their exact assumptions, actually. ANT is not in the business of proving anything, but the analysis at least suggests that long and intense fights over matters of fact might yield only very beleaguered and compromised facts. The matter of of torture's information-generating power can only lead to more division and disagreement when treated as a pursuit of fact. The ANT approach feeds off beleaguered facts and turns them into matters of concern—which become resources for politically contesting the issue of effectiveness. In other words, an ANT analysis along the lines of the above can be used to establish a shared ground for politically contesting torture in a way that respects each disagreeable person's ethical principles. To accomplish this, people must recognize their connection in a political community, and be willing to dispute torture ethics politically and on shared terms.

Chapter 6

Considerations for a Political Ethics of Torture

6.1   From the Politics of Ethics to Political Ethics

The foregoing account has described the problem of torture ethics in a new way. I have argued for revised concepts of both what torture ethics is as an object of study, and also for a new understanding of the social structure in which the torture ethics debate takes place. An important consideration throughout the dissertation has been the fragmented landscape of torture ethics. The trend to date has been that each person charts a fairly unique path through many complicated issues before arriving at a moral judgment of torture. As a result, I have aspired to develop an approach to torture ethics that includes disagreeable members of the community in a single conversation without imposing an unjustifiable order on their ethical frameworks.

The strategic decision behind the dissertation has been to trade away the possibility of a scientifically or philosophically correct moral evaluation of torture for the possibility of a better political evaluation of torture. By better I do not mean that the answer goes one particular way or the other, although I personally oppose torture. Better, in this context, means a more inclusive, thorough, and informed political debate about the use of torture. The ANT approach makes that possible

by disclosing the number and character of the competing torture ethics approaches, by showing community members how they remain associated with each other even when they would rather dissociate into separate sub-groups with matching ethical frameworks, and by providing language and concepts for the conversation that are not subordinate to any particular ethical framework.

I call this sort of torture ethics a *political ethics of torture*. It grows out of and is supported by the ANT approach. In this political ethics, the actants are on equal ground with respect to their ethical frameworks and the language they use to speak about torture and torture ethics. The actants involved in political ethics can even be described as *stuck* on equal ground. They see the costs of trying to exit the networked conversation among disagreeable equals and returning to the old denunciations. The political ethics of torture emerges as a better option when people begin to doubt the old denunciations, which have lost their bite because using them cuts the association with whomever they want to attack. Instead, the actants working toward a political ethics of torture work toward a compromise using shared concepts and language. They do not have to agree with each other on all the related normative, metaethical, and other metatheoretical question, nor can they require others to adopt a different ethical framework.

I am not introducing the political ethics of torture as a technical term, a new concept, or a piece of jargon. Instead, I use it as a descriptive term for what is left over once one accepts that the battle over torture ethics cannot be decisively won in philosophy or related scientific disciplines. The term "political ethics" here indicates that the political community must choose a course of action without a right answer. I am arguing that, at least in the case of torture, that is the truest ethics to which political communities can aspire. Everything else is at best out of reach, and at worst the continued pursuit of such a right answer—validated by something more than a legitimate political process—creates additional serious problems. In a sense, this amounts to a claim that as torture ethics are only political.

Political ethics of torture is my alternative to what I think has been going on. I call that currently-dominant view *politics of torture ethics*. In politics of torture ethics, a number of powerful and refined torture ethics arguments compete for victory as the right course of action. Because

these arguments cannot really be evaluated against each other, they vie for supremacy by denying the worlds in which the competing arguments live. Each approach rests on its own highly idiosyncratic ethical framework and set of factual assumptions. As the individual approaches to torture ethics get stronger and more clear, the politics of torture ethics undermines the community's ability to make the ethical choice that was at issue to begin with. Instead, sub-communities form around the different approaches and engage in conflict. Again, I do not wish to invent a piece of jargon or a technical term here. By calling this view the politics of torture ethics, I want to bring attention to the relationship of politics and ethics. In this case, the assumption is that there is a right moral evaluation of torture out there, independent of politics. In the politics of torture ethics, politics is merely the arena in which people champion their own right answer. The goal is victory rather than compromise.

Since 2001, scholars, policy makers, journalists, and the public have been engaged in the politics of torture ethics. This is hardly a criticism, since as I mentioned above, for many of these people their job demands that they do so. Jeremy Waldron should be commended for his efforts to restore the moral and legal prohibition against torture. Uwe Steinhoff, for his part, has pointed out important weaknesses and inconsistencies in some anti-torture arguments. My motivation for writing this dissertation has been the growing sense that powerful thinkers like Waldron, Steinhoff, Gordon, and Kramer appeared to be moving further apart as their respective arguments got more clear and more forceful. I have written the dissertation out of despair for any political choice about torture, and in hopes of restoring one.

6.2   Objections

There are at least three sorts of objections that apply to this overall argument. First, important elements of the argument are not yet fully developed. The approach in this dissertation is not an easy alternative to follow in any case, and in particular, the "reassembly" aspect is lacking. The second objection comes from those who maintain that a right answer is still possible torture

ethics, at the group level as well as the individual level. Because a political ethics of torture makes political processes the determining factor for the ethical course of action, those holding out for a right answer may object that political ethics constitute moral relativism. Depending on the community, a political ethics of torture can be seen as an "anything goes" approach. The third sort of objection is that the ANT approach and resulting political ethics of torture do not overcome the same criticism that undermines the torture ethics debate generally. Just as there is no *authoritative* reason to choose Gordon's virtue ethics over Steinhoff's self-defense argument, or Waldron's legal archetype over Bagaric and Clarke's hedonistic act utilitarianism, there is no authoritative reason to choose ANT.

6.2.1   Relativism and Lack of Clarity

The first objection is accurate and compelling. As presented in this dissertation, the spatial analysis of torture and the inquiry into the body-information relationship do not quite offer a clear picture of what each controversy means in the torture debate. They do not reassemble the social very effectively, and therefore might only create additional confusion. Also, there is at least one other significant area of controversy that bears on the torture ethics debate: the relationship of information to security.

However, chapters 4 and 5 do show the potential of the ANT approach. In particular, they begin to show how controversies can be more illuminating than right answers. The description of torture as a certain kind of action on a body in space develops language for talking about torture-like acts that is not gratuitously manipulative. That language also avoids strategically reducing the acts to hide aspects of the experience. Of all the works discussed in chapter 2, only Kramer pursues inclusiveness to a similar degree. Kramer is a threshold deontologist and moral realist, and his approach still cannot be socialized with some others that disagree on important but obscure points. Only the ANT approach grants people their own moral frameworks.

The conversation about effectiveness that features in chapter 5 can play an important role in the current debate, too. As readers now know, there is a great deal more to the story than the competing

claims that torture *does not* produce information and that it *does*. The issues that come up around this controversy are bound to be informative. For example, there seems to be very little information all around about this issue, yet it is absolutely central to most torture justifications circulating today. It simply *has* to be true for torture to have any chance of moral legitimacy. With such high stakes in the torture ethics debate, and especially after years of actually torturing people for information, readers might consider what knowledge (and perhaps beliefs) are required for the body-information connection to hold. The over-stressed relationship of bodies and information also raises questions about *other* ways of discovering security information that have recently been sidelined, and also about other factors (besides information) that affect security.These brief responses do not make up for the failure to fully realize the ANT approach, but they offer some evidence that more work will be productive—and more work is the way to overcome this objection.

The objection that a political ethics of torture leads to moral relativism is less troubling. A political ethics of torture might indeed degenerate into what the community thinks should be done about torture. However, I am not sure that this is as bad a problem as it seems. Recall that Latour's second source of uncertainty (3.3.2) considers action to be radically underdetermined, and his third source of uncertainty lets objects be agents. The actants in the political group cannot simply do whatever they want, because each one is subject to the agency of many other actors and objects.

At any rate, the risk currently does not appear to lie with the mob. Instead, the implosion of the anti-torture norm in the United States after 2001 was an elite coup carried out by some other elites who happened to be in charge. It happened over the objections of many others the former group was able to sideline and marginalize.[1] At the moment, torture ethics are subject to change at the whim of the president and the security services. If the Senate Select Committee report (2014), then the result can fairly be described as *abundant official torture, against the law, with no accountability*. It is not clear that the mob could do worse. The political ethics of torture is relativist in the sense that real associations between members of the political community are relative. From the ANT point of view, the mob is an impermissible concept in the sense that it emphasizes an invisible

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[1]Christopher Pyle (2009) and Peter Jan Honigsberg (2009) both offer forensic analyses of how this legal change came about in the case of recent U.S. torture.

social aggregate over the observable, traceable, and thus real actions among actants.

6.2.2 Why Bother with ANT?

The most serious objection that can be leveled at the political ethics of torture facilitated by ANT is that it is nothing special, and there is no reason to adopt it. This is an immanent critique of ANT ethics that subjects it to the same criticism as all the works in chapter 2. I cannot argue that there is no authoritative reason to adopt Steinhoff's approach or Dershowitz's, and then argue that there is an authoritative reason to adopt ANT. I have argued against the existence of such authorities, or at least I did not find any circulating in the current torture ethics debate. The modes of the modern critical stance that Latour talks about in *WNBM* operate not through the discovery of authorities but by cleverly cutting off the world in areas where authorities cannot be found. Like it or not, ANT and the political ethics of torture are subject to the same problem. I cannot coerce followers by saying that God, or Reason, or the General Will are on the side of ANT. Because this objection is so powerful, I deal with it here at some length. My response has two parts: first, by showing that there is something about ANT that allows it to function without a theoretical authority, and second by considering what the alternatives are if ANT fails in the same way as the other approaches.

6.2.3 Persuasion

Although ANT is equal to the torture ethics approaches found in chapter 2 2 in that it too cannot appeal to an external source of authority in its quest to become *the* right approach. ANT differs from those other approaches because it does not need to make such an appeal. Indeed, ANT is designed to operate without it. ANT is designed for *persuasion* in a way that other approaches, which continue to employ the modes of the modern critical stance, are not. As I argue in section 2.6, the tactics that other approaches use to strengthen themselves wind up restricting the range of people who can agree with them.

For example, a torture ethics argument that depends on a belief in the objectivity of moral claims loses some power with anyone who is skeptical of that requirement. Unlike Kramer, who

is moral realist, I do not believe that moral claims exist objectively in the world. Thus I admire Kramer because he makes a good argument and I agree with his final judgment on torture, not because we share a moral framework. If Kramer advocated torture, I might even attack him on that basis.

ANT-based ethics, on the other hand, get their authority from the density of their associations and from their inclusiveness. Latour (1999a, 158) says that an "entity gains in reality if it is associated with many others that are viewed as collaborating with it. It loses reality if, on the contrary, it has to shed associations or collaborators (human or non-human)." All of the standard approaches to torture ethics are *forced* to shed collaborators as they strengthen their arguments. Steinhoff shifts decisively toward self-defense rights in part because he finds them better supported by the law. However he loses any potential converts who support *both* the right not to be tortured and the right to self-defense, as soon as they realize that for Steinhoff, the latter totally overrides the former. ANT-based ethics accommodate incompatible ethical frameworks in a way that the other approaches. The other approaches to torture ethics invalidate divergent moral frameworks—in fact, that is their principal mode of persuasion. Therefore they exclude possible adherents through the theoretical moves that strengthen their arguments.

An aptness for persuasion may not be a good standard for ethics, though. In *Gorgias,* Plato (1987) criticizes oratory—or rhetoric, the art of persuasion—as a "knack" rather than a "craft" or *technē*. Plato recounts how Socrates criticizes the orator Gorgias, Gorigias's students, and derides oratory in general as a "kind of flattery" that has no beneficial content (463a). Socrates calls oratory flattery because it substitutes the *appearance* of a good what is actually good. Cosmetics, for example, make the body look deceptively good, while the practice of gymnastics is concerned with what is *actually* good for the body (464b). Because oratory has no content of its own, it can be used "defend injustice," and is therefore "of no use" (480c).

Later in *Gorgias,* Socrates argues with the character Gorgias's student Callicles about how to know what is just. Callicles that it is just for "the superior to take by force what belongs to the inferior," and that "the better should rule the worse" (488b). Socrates counters that strength cannot

be a standard basis of justice, because strength can secure both good and evil pleasures. In a straightforward reading of *Gorgias*, Socrates criticizes the arts of persuasion because they cannot distinguish what is really good, and are thus fully compatible with an "insatiable, undisciplined life" (493c).

Latour (1999a, 218-35) counters with an unconventional reading of *Gorgias*. Latour argues that while Callicles and Socrates appear to argue over "Might and Right," respectively, that "we forget to notice that Socrates and Callicles have a common enemy: the people of Athens" (219). The fight between Callicles and Socrates is actually bargain between two kinds of elites to stave off the threat that political rule in Athens will revert to the great mass of people. Between Callicles' appeal to strength and Socrates philosophical pursuit of the Truth, "the contest is about how to shut the mouths of the people faster and tighter" (229). Although the two characters are fighting, their fight actually hides the deal they have made to divide up the spoils of rule between themselves, while excluding the people (234).

If one adopts Latour's odd reading of *Gorgias*, the same triangular structure can be applied to the torture ethics debate.[2] Political leaders have position similar to Callicles. Aided by secrecy, they can often decide what to do with captured terrorist suspects. Scholars working to understand torture ethics play a role similar to Socrates, at least to the degree that they seek the right answer about torture's moral status. What has been ruled out in the contest between the Might answer, in which security officials do what they will, and the Right answer, in which they do what expert knowledge says is the ethical course of action, is a political engagement with torture ethics. If one doubts the settlement of Might and Right in the current torture ethics debate, recall that it is the seal of the Department of *Justice* that authorized the brutal torture of Abu Zubaydah, Slahi, and so many others in recent years.

The ANT approach is designed to facilitate a sociable ethics of torture, and to do so it re-engages all the actants and the disreputable (at least to philosophers) art of persuasion. The justification doing this is that the settlement, if it can be called that, between security officials doing what

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[2]See Latour (1999a, 228) the "triangular contest."

they will and scholars arguing over the right answer has broken down. The Socrates' of today's torture ethics debate cannot say what should be done about it any more than the Callicles'. The path offered by ANT ethics is to return the problem to the people—not as a mystical aggregate, but as an ongoing, contingent coming-together of actants associated with the problem of torture.

6.2.4 Alienation

The alternative to the ANT path of persuasion is alienation—not in a Marxist sense, but in the sense Carl Schmitt uses when discussing friends and enemies. Schmitt (2007, 26) says that the "political distinction to which political actions and motives can be reduced is that between friend and enemy." Schmitt is talking about national groups, not sub-national groups divided by their views on torture. However, there is a sense in which the distinction fits the torture ethics debate. For Schmitt (2007, 27), the enemy is defined not by evil but by its strangeness. The enemy is "in a specially intense way, existentially something different and alien" (27). And while neither the national level where Schmitt locates political conflicts, nor the concrete requirement that friend and enemy arise in combat apply here, the sense of extreme otherness is a characteristic of the torture ethics debate.

To my knowledge, no corner of the torture ethics debate has devolved into actual combat. However, at a more genteel level it is certainly possible to separate intellectual friend and enemy along the lines of someone's torture ethics. There is often something nearly impossible to understand about an opponent in the debate who reasons to an opposite conclusion about torture. Especially when this transgresses previously established feelings of respect, it prompts the question of how the other person could possibly even think that. In the torture ethics debate, intellectual friend and enemy divide along the lines of what other ethical frameworks each person can tolerate.

Proceeding as usual in the torture ethics debate, then, Uwe Steinhoff believes that self-defense rights authorize torture even with a wide range of uncertainty about the facts. To those he calls "anti-torture absolutists," Steinhoff might appear monstrous. However, to him, *they* are the moral monsters: they would *let a child* die while their cherished principles protect a despicable kidnapper

or molester. The endless rounds of mutual denunciation, that Latour encourages us to put to an end, make the offender an alien in one's chosen world. The works of sophisticated torture ethics scholarship in section 2.4 gets their individual power through specifying ethical worlds that are becoming more and more incompatible with each other. This is the best that the current debate can offer, not because the scholarship is bad, but because it is good.

6.2.5 Proceeding Without ANT

If one rejects the view that ANT overcomes lack of external authority by its facility for persuasion, then one falls back on the analysis in chapter 2. In other words, if ANT itself falls to the immanent critique, then that only confirms the fall of all the other options in the current torture ethics debate. The failure of ANT to offer anything new becomes a general failure of the torture ethics debate. That leaves two unattractive options.

One is to declare a winner in the torture ethics debate, or at least carry on as if there is a winner. The other is to withdraw from the question. There are a number of problems with declaring a winner. One is that the winning torture ethics position must then be enforced, which is not easy. Torture opponents lost a great deal of ground in the early 2000s by assuming the prohibition would simply *retain* its force. But enforcement in the absence of a widely-shared ethical framework leads to what Judith Butler (2005, 3-9) calls ethical violence: what is not shared must be imposed, even if it is "ethical." If I have been successful outlining ANT ethics above, it should be clear that the dissemination of a normative theory across a complex landscape of incompatible ethical frameworks would be violent, would require violence. This option does not appear to be appreciably better than endlessly arguing about torture ethics or, perhaps, trying the ANT approach.

The other option is to withdraw from the question. This is not difficult to do, since the difficulty of the question fends off many potential inquiries anyway. What Latour doesn't mention in his alternative reading of *Gorgias* is the possibility that the people are *in on* the settlement that Might and Right have arranged. That is, there is another settlement that grants Might and Right their battle, as long as certain conditions are met for the people. "Let the security services do what they

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do, and let the scholars say why the security services are right or wrong, but don't bother us," the people might say. In a sense, the people are not even invited to the discussion. That was partly the point of re-drawing the associations in section 4.1.

However, just as the Might-Right settlement is foundering, the elements that encourage the people to accept that settlement are no longer satisfying. The way of persuasion is at least worth a serious attempt. One can always return to denunciation later.

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