

CHAPTER 8

Ethics and the “War on Terrorism”

The purpose of this chapter is to explore some of the ethical issues associated with the “War on Terrorism” that was declared following the events of 9/11.

Establishing a normative and ethical approach toward countering terrorism may not seem to be salient to some in the face of the overwhelming events of 9/11. Nevertheless, as indicated in the first chapter of this volume, ethics is about how we “ought” to live, and “ethical considerations are central to decisions involving discretion, force and due process that require people to make enlightened moral judgments” (Banks 2004: 4). Just as there are normative standards about how to conduct wars (the so-called just war) and rules about what actions may be taken in time of war against combatants and civilians caught up in the conflict (the Geneva Conventions), so there are normative considerations applicable to the War on Terrorism.

This chapter will examine a number of the ethical issues arising out of the War on Terrorism that began on September 11, 2001. It will not address the issue of whether terrorism can ever be morally justified, an issue that has been the subject of scholarly comment elsewhere (see, for example, Corlett 2003; Frey and Morris 1991; Held 1991; Narveson 1991; Steinhoff 2005). Rather, the chapter will explore the following issues:

- The meaning of “terrorism”
- Why the United States responded to the events of 9/11 by declaring a War on Terrorism instead of treating the terrorist attack as a criminal justice or law enforcement issue
- The ethical boundaries of counterterrorist operations
- The issue of the morally justifiable constraints and restrictions that a government should be permitted to impose on its citizens in order to succeed in the War on Terrorism
- In the context of events post-9/11, the ethics of applying torture to suspected terrorists

Defining Terrorism

Fundamental to any discussion of terrorism is an understanding of the meaning and scope of the term. Unfortunately, the definition of terrorism is problematic, and there exist a number of “official” and legal definitions as well as those suggested by researchers and commentators. Some explanations of the meaning of terrorism focus only on terrorism carried out by individuals and groups and ignore state terrorism altogether, others emphasize the political objective of terrorist acts, and still others frame terrorist acts as criminal events and downplay the political motivations. One clearly understood factor amongst all of these approaches is that terrorism is a method or means of achieving an objective. It is not an aim or objective in itself.

One definition proposed by academic commentator Paul Wilkinson (2001: 12–13) is that

terrorism is the systematic use of coercive intimidation, usually to serve political ends. It is used to create and exploit a climate of fear among a wider target group than the immediate victims of the violence, and to publicize a cause, as well as to coerce a target to acceding to the terrorists’ claims.

Here, there seems to be a clear focus on the political nature of terrorism. By contrast, the United Nations Security Council in Resolution 1566 of October 2004, condemning terrorist acts, adopts more of a criminal perspective with no explicit mention of political objectives and also co-opts definitions in international agreements on terrorism:

Criminal acts, including those against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitutes offenses within the scope of and as defined in the international conventions and protocols relating to terrorism. (Wilkinson 2006: 2)

Terrorists are motivated by political objectives, and while criminals employ violence (often similar to that of terrorists like kidnapping, murder, arson) to achieve their ends, their motivation is quite different from that of terrorists, because criminals commonly act solely to secure a material gain. As discussed later, the United States regards terrorism not as criminal activity but as a “form of war” and “as a threat to national security” (Whittaker 2003: 262).

In the United Kingdom, terrorism is defined by the Terrorism Act of 2000 as meaning the use or threat of action designed to influence the government or intimidate the public where the use or threat is intended to advance a political, religious, or ideological cause (Wilkinson 2006: 3). Action constitutes terrorism if it involves serious violence against a person or serious damage to property, endangers a life, creates a serious risk to the health or safety of the public, or is designed to interfere or disrupt an electronic system.

The U.S. Code Title 22, Section 2656, avoids any reference to state terrorism, limits itself to violence, and introduces a separate notion of international terrorism:

The term terrorism means premeditated politically motivated violence perpetrated against noncombatant targets by sub-national groups or clandestine agents, usually intended to influence an audience. The term international terrorism means terrorism involving citizens or the territory of more than one country. The term terrorist group means any group practicing, or that has significant subgroups that practice, international terrorism. (Wilkinson 2006: 3)

The FBI relies on a definition in the U.S. Code of Federal Regulations that focuses on coercion, unlawfulness, and offenses against property and includes social as well as political objectives:

Terrorism is the unlawful use of force and violence against person or property to intimidate or coerce a government, the civilian population, or any segment thereof, in further of political or social objectives. (Kapitan 2005: 21)

The U.S. Defense Department defines terrorism as

the unlawful use or threatened use of force or violence against individuals or property to coerce or intimidate governments or societies, often to achieve political, religious, or ideological objectives. (Kapitan 2005: 21)

This definition includes a wider range of objectives than that used by the FBI and also encompasses threats as well as actual use of violence.

These multiple definitions demonstrate Freeman's (2005: 44) point that there is no "correct" definition of terrorism and that the term bundles together a multiplicity of acts and motivations. According to Paul Hoffman (2004: 938), the chair of the International Executive Committee of Amnesty International, the tendency to give a broad and expansive definition to "terrorism" has caused nonterrorist activity to be caught up within the prohibition and has provided a basis for repressive regimes to conduct so-called antiterrorist campaigns.

As an organizing concept, the term *terrorism* conveys a moral judgment about the illicit activity of a group of persons and the act of labeling a group "terrorist" transmits moral condemnation. Irrationality and fanaticism are also associated with terrorism, and these connotations tend to enhance the security threat and promote citizen solidarity in response to that threat. Both the media and government have deployed a new rhetoric of terror constructed from the events of 9/11. They represent and define terrorism as any activity that offends against the rules of legitimate political violence by ignoring the distinction between combatants and civilians and that employs methods that are unsanctioned, such as highjacking commercial airliners and murdering hostages (Kapitan 2005: 23). Acts of terrorism committed by states are excluded from this discourse even though, as Kapitan (2005: 27) notes, terrorism by states is a more prevalent and deadly form of terrorism than terrorism by groups. As Laqueur (1987: 146) observes, "Acts of terror

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carried out by police states and tyrannical governments, in general, have been responsible for a thousand times more victims and more misery than all actions of individual terrorism taken together.”

A discourse that demonizes all terrorists, whatever their motivation or strategy, denies an understanding of the terrorist point of view and means that government policies that might have contributed to the grievances of those who have adopted terrorism are not scrutinized. As well, it minimizes the likelihood of negotiating with any terrorists, even the more “traditional” terrorist groups, encourages the use of force and violence to counterterrorists, and enables governments to exploit the fears of the public and overrule any objections to the means employed to respond to and counter terrorists (Kapitan 2005: 27).

Thus, the intricacies of the legal definition of terrorism, the rhetoric associated with terrorism, and the contemporary discourse that shapes and represents terrorism so inadequately illustrate the complexity of explaining terrorism and therefore of developing strategies to counter it.

Warfare or Crime Control?

The United States has designated its counterterrorist strategy a War on Terrorism, and its plans and operations have been characterized as warfare rather than law enforcement. Unlike the “wars” against drugs, poverty, and crime proclaimed by various U.S. administrations, the War on Terrorism is a real war that incorporates elements of a conventional war but with significant differences. For example, traditional or conventional conflicts characterized as “wars” are fought against other states, have a definite duration, and conclude when one of the parties is acknowledged as the victor. In contrast, the War on Terrorism is directed not at states but at individuals and groups of persons who practice terrorism as a method of achieving their political and other goals. Also, the U.S. administration has indicated that the War on Terrorism will continue until terrorism is ultimately defeated. Given that the War on Terrorism is neither a metaphorical war like those concerning crime, poverty, and drugs, nor a conventional war, it generates a set of moral questions about how it should be conducted.

The War on Terrorism has adopted both warlike and law enforcement measures in its overall strategy. For example, while measures have been taken under the Patriot Act to strengthen crime control in the United States with the aim of preventing terrorist acts in the homeland, the administration has also conducted wars in Iraq and Afghanistan that employ conventional military forces and military strategies.

How should the War on Terrorism be viewed and conceptualized from the criminal justice perspective? Crank and Gregor (2005: 9) argue that “issues in counterterrorism in the U.S. are framed by the conflict between the competing justice perspectives of crime control and due process” and that the administration has opted for the crime control model. This is said to be evidenced by the enactment of the Patriot Act and its predecessor, the 1996 Antiterrorism and Effective Death Penalty Act. Collectively, these laws have weakened a variety of controls that previously ensured due process and privacy rights (p. 78) and have instead reinforced the kind of punitive crime control strategies outlined in chapters 6 and 7 of this book.

However, it can be argued that Crank and Gregor's (2005) perspective on the policy response to 9/11 is too narrow, because they locate counterterrorism only within the field of criminal justice and fail to recognize that issues in counterterrorism in the United States are framed by the notion of protecting national security and not by ordinary policies and programs of crime control at all.

For example, in response to the events of 9/11, the Bush administration enacted the USA Patriot Act of 2001. The act sought to enhance national security through what had previously been regarded as generic crime control measures. It introduced more than 1,000 provisions concerning surveillance on financial transactions and border control, as well as new criminal offenses and penalties against terrorism. The act is targeted at non-U.S. citizen terrorists (Mertens 2005: 285), was formulated to augment national security, and both conceptually and in policy terms is outside the conventional parameters of crime control legislation.

Crime control measures of the conventional kind such as increased penalties for offenses are integrated into the criminal justice system. In the War on Terrorism however, the criminal justice system has been judged inadequate or inappropriate. Thus, while the United States considers itself "at war," it does not regard many of those taken prisoner in that war as prisoners of war who are to be treated in accordance with the rules laid down in the Geneva Conventions (ICRC 2006), especially the Third and Fourth Conventions, which are concerned with the protection and treatment of combatants captured during an international armed conflict and with civilians who are involved in the armed conflict. Article Five of the Third Convention says that if there is a doubt about the status of persons, the issue has to be determined by a competent tribunal, and in the meantime the persons must enjoy the protection of the convention. Proponents of the convention approach to the war argue, contrary to the U.S. strategy, that prisoners arrested following 9/11 are to be considered prisoners of war (POWs) until a competent tribunal determines otherwise (Kanstroom 2007). The United States, however, has categorized prisoners as unlawful combatants with no Geneva Convention rights.

Thus, in the War on Terrorism prisoners captured in Afghanistan or in other countries have been labeled "unlawful combatants"¹ and interned without trial in a prison at Guantanamo Bay, Cuba, or in a selected number of U.S. bases overseas. According to a military order issued on November 13, 2001, prisoners who are not U.S. citizens and who are alleged to be terrorists are not to be tried in the U.S. federal courts but by a system of military commissions composed of military officers (Wilkinson 2006: 62). Military commissions are rooted in U.S. history and were employed during the American Revolution, the Mexican-American War, and especially during the Civil War. Guantanamo Bay itself, and the special procedures and processes that are being employed to bring suspected terrorists to justice, clearly stand apart from the U.S. criminal justice system.

1. Emcke (2005: 237) suggests that terming the prisoners unlawful combatants was a device to "avoid all the existing rules, laws, and conventions regarding prisoners of war or other prisoners" and that creating this new category meant that the U.S. administration need not concern itself with rights issues that would have restricted its ability to incarcerate, interrogate, prosecute, or torture those arrested.

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Why has the U.S. administration elected to wage a war in response to the events of 9/11 rather than pursue a law enforcement approach? Paul Hoffman (2004: 939) believes that the question of whether the War on Terrorism is a war, and if so, what is the nature of that war, are crucial questions in examining counterterrorist activity that challenges the international regime protecting human rights. As he puts it, “One of the characteristics of the War on Terrorism is a refusal to accept that any body of law applies to the way this ‘war’ is waged” (p. 939). He argues that the U.S. response to 9/11 has led to the attrition of rights, because by defining the War on Terrorism as a “war,” the United States eliminates many of the protections of international human rights law and international humanitarian law (p. 940). Hoffman further suggests that the war “exists in a parallel legal universe in which compliance with legal norms is a matter of executive grace or is taken out of diplomatic or public relations necessity” (p. 940). He therefore calls into question the morality of the U.S. counterterrorist strategy.

How then should a democratic government respond to terrorism if it is inappropriate to wage a war against it? Wilkinson (2001: 94–95) elaborates a “hard-line approach” that nonetheless remains within the boundaries of the criminal justice system. His model includes the following elements:

1. The government must avoid over-reaction and repression that could have the effect of eroding or even negating democracy.
2. The government must avoid under-reaction, as this would permit terrorists to control territory or otherwise determine the course of events
3. Both the government and its security forces must adhere to the rule of law, because failure to do so will undermine their legitimacy and diminish public confidence in the criminal justice system.
4. The government must conduct a successful intelligence war.
5. Intelligence agencies must be responsible to civilian authorities and fully accountable.
6. Special legislation needed to counter terrorism must be temporary or contain “sunset clauses” that make it subject to renewal by the legislative body.
7. Terrorists should be treated as criminals and not afforded any special status such as that of a political prisoner.
8. Terrorist propaganda must always be countered to avoid terrorists achieving their aims through political advocacy.
9. The government should avoid granting major concessions to terrorists, because this encourages a perception that government is weak in the face of pressure.

The U.S. president has explicitly abandoned a criminal justice strategy in countering terrorism. In his State of the Union speech given on January 20, 2004, the president stated,

I know that some people question if America is really in a war at all. They view terrorism more as a crime, a problem to be solved mainly with law enforcement and indictments. After the World Trade Center was attacked in 1993, some of

the guilty were indicted and tried and convicted and sent to prison. But the matter was not settled. The terrorists were still training and plotting in other nations and drawing up more ambitious plans. After the chaos and carnage of September 11th, it is not enough to serve our enemies with legal papers. The terrorists and their supporters declared war on the United States, and war is what they got. (in Ackerman 2004: 1871)

Clearly, the "war they got" bears no resemblance to the metaphorical wars declared by previous administrations, namely, the wars on drugs, on organized crime and drug racketeers, and on poverty, all of which were preceded by the cold war.² The U.S. administration simply took the position that the events of 9/11 were so horrendous that the appropriate response should be nothing less than a declaration of war, and it viewed the justice system as lacking the capacity to prosecute terrorism.

In considering the strategy of a U.S. War on Terrorism, it is appropriate to look at the experience of other states faced with similar threats to national security. In the case of the terror campaign mounted by the Irish Republican Army against the United Kingdom government in Northern Ireland, the role of the military was to support the police and civil authorities in countering the terrorist threat.³ As McEldowney notes, as in the United States, the effect of tough new antiterrorist laws in the United Kingdom has been to accrete power to the executive (2005: 773).

Ackerman (2004) argues that the U.S. response to terrorism is not a war but a "state of emergency," a concept located in the constitutions of many states in time of war or national emergency that permits derogations from guaranteed human rights provisions, usually for limited periods, to deal with the emergency. In Ackerman's view, public acceptance of a war against "something as amorphous as terrorism" lowers the bar for engaging in more conventional wars against actual states and avoids having to justify each engagement in the "war" as a separate and distinct war of its own. For example, Ackerman (2004) argues that the actions taken against Afghanistan and Iraq have been packaged as "battles" subsumed within the entirety of the amorphous War on Terrorism. As he points out, it is far easier in constitutional terms for the president to conduct mere battles without congressional authorization, because he can argue that he is simply exercising his powers as commander in chief.

In discussing a War on Terrorism that includes offensive operations and military reprisals against terrorists overseas, as well as their sponsor states, and that does not adopt the criminal justice approach, Wilkinson (2001: 128–129) points out several risks. For example, there is the danger that a military response could provoke a wider conflict involving a diminished focus on the relevant terrorist group in favor of a broader multistate strategy, the danger that the death of innocent civilians will diminish international sympathy for the victim state and shift the moral high ground away

2. Writing about the War on Crime, Alison Young notes that employing "a militaristic metaphor" shuts down debate, draws boundaries about which side is morally in the right and incorporates the belief in an ultimate outright winner" (Young 1996: 7).

3. In the United Kingdom, the events of 9/11 resulted in the enactment of the Anti-Terrorism, Crime and Security Act of 2001, granting powers to arrest and detain suspected terrorists without giving reasons and for indefinite periods (McEldowney 2005: 771).

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from that state, the difficulties associated with gaining and ensuring the continuing support of allies when military actions are taken unilaterally, and the danger that military action will give rise to false expectations of a total defeat of terrorism.

Using military forces to counter terrorism carries several specific risks including the probability of deaths or injury of members of the civilian population given the lethality of modern weaponry and firepower (Wilkinson 2001: 104). Morally, causing death or injury to civilians in countering terrorism seems to mirror the acts of the terrorists themselves, and thus targeting only terrorists and not civilians would be the most ethical approach. Of course, this raises the issue of the degree of certainty that a suspected person is in fact a terrorist. Wilkinson contends that war constitutes a greater evil than terrorism because of its potential to cause a far greater number of deaths and far greater destruction. This implies that a war against terrorism pursued internationally could potentially generate multiple wars not only against terrorist groups but also against states alleged to be sponsoring terrorism. Nevertheless, he acknowledges that the military warfare model does carry with it some advantages, including responding to public demands for tough action.

Overall, Wilkinson (2001: 125) favors employing a criminal justice model in countering terrorism and using law enforcement agencies as the spearhead. He notes that these agencies enjoy advantages over the military in handling terrorism particularly because of their legitimacy in the eyes of the public but also in relation to local knowledge, of their familiarity with the law and with techniques of criminal investigation, and of their access to international sources of assistance and cooperation through agencies such as Interpol.

In support of the warfare approach some commentators suggest that the kind of terrorism practiced by Al Qaeda is of an entirely different nature than that conducted by more “traditional” terrorist groups such as the ETA in Spain or FARC in Colombia or the IRA in Northern Ireland. Unlike those groups, Al Qaeda has explicitly embraced a strategy of mass killing, or as Brian Jenkins has written (in Wilkinson 2006: 5), terrorists in the 1970s and 1980s wanted “a lot of people watching, not a lot of people dead.”

The aims and objectives of Al Qaeda were announced on February 23, 1998, when Osama bin Laden issued a *fatwa* setting up a World Islamic Front for *Jihad*, announcing, “It is the duty of all Muslims to kill U.S. citizens—civilian or military, and their allies—everywhere” (in Wilkinson 2006: 5). Al Qaeda’s objectives are to expel U.S. citizens and other infidels from the Middle East, to topple Muslim governments that they believe fail to practice true Islam, and ultimately, to set up an Islamist caliphate comprising all Muslims everywhere. These may seem unrealistic goals, but Al Qaeda does not necessarily expect to achieve these aims within a short time span and is firmly convinced that these events will come to pass, because they have the support of Allah. Organizationally, the Al Qaeda network differs from other terrorist groups precisely because it is a network of other networks that provide the capacity to operate in some 60 countries. As Wilkinson (2006: 5) acknowledges, “It is the most widely dispersed non-State terrorist network ever seen, and this is what gives the movement ‘global reach.’” It is obvious that there is no basis for negotiating or compromising with a terrorist group that advocates mass killing to achieve its goals.

Wilson (2005: 30) proposes that under a criminal justice model, terrorist crimes ought to be categorized, not as acts of war, but as crimes against humanity sanctioned through national and international justice institutions. He suggests that a justice strategy would involve less abuse of detainees' human rights, because law enforcement agencies are trained in respecting suspect's rights.

What Are the Morally Justifiable Constraints and Restrictions That a Government Should Be Permitted to Impose on Its Citizens in a War on Terrorism?

Since 9/11, philosophers and terrorism theorists have been debating the extent of the permissible restrictions on rights and freedoms perceived "necessary" to prosecute the War on Terrorism. Essentially, the debate has centered on whether any restrictions at all should be imposed, and, if they are, the correct balance between rights and restrictions in a counterterrorist situation. Experience since 9/11 has shown that the U.S. public has become more willing to accept restrictions on rights and freedoms, and Messelken (2005: 58) explains that "the first aim of terrorist violence is the production of fear, horror etc. among a broad group of persons" and that the "terrorist calculation" relies on unpredictable random violence and the creation of insecurity and fear. Terrorist strategies can include rural and urban guerilla warfare and even full scale conventional war. These effects and the emotions generated by acts of terrorism can promote great public insecurity.

Wilkinson points out the belief that in the War on Terrorism, terrorists must be suppressed "with crushing military force" on the assumption that "the only good terrorist is a dead terrorist" (2006: 63). Thus, some advocate that the ends justifies the means, that terrorists through their actions have forfeited constitutional and human rights, that the criminal courts are inappropriate for these prisoners, and that even torture can be justified in some circumstances. Others argue that the ends do not justify the means and that abandoning due process protection under U.S. law conflicts with the values and principles that are the foundation of the democracy being defended against terrorist attack (p. 63). Wilkinson argues that abridging rights corrupts public officials and the military and promotes major injustices in the name of national security (p. 63).

In support of the notion that it is possible to defeat terrorism without seriously restricting rights, Wilkinson cites the example of measures taken in Italy during the 1970s when that country experienced significant terrorist activity by the Red Brigades. In 1975, the Italian minister for justice introduced legislation giving the police increased powers of arrest and search on suspicion of an offense and expanded the permitted use of firearms (Wilkinson 2006: 65). Additionally, the Italians promoted and established effective coordination between police and intelligence services under a newly created coordination office. This produced high-quality intelligence that enabled the justice system to disrupt and ultimately terminate the activities of the Red Brigades (p. 66). In the early 1980s judges were empowered to reduce sentences imposed on convicted terrorists who agreed to give testimony for the state under a so-called *pentiti* (repentant) law. This enabled the government to break open the Red Brigades' cells. Whether the events of 9/11 and

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subsequent events are congruent with the activities of the Red Brigades is perhaps open to question.

As noted above, the U.S. response to terrorism has included the enactment of the Patriot Act, which introduced restrictions on some democratic rights, including giving the FBI wide and unprecedented access to information previously kept private (a power that the FBI employed, using a so-called national security letter, to illegally accumulate intimate information about some 52,000 persons and store it in a database accessible to about 12,000 federal, state, and local law enforcement agencies) (Smith 2007). This voluminous law was passed only 6 weeks after 9/11.

As well, a package of measures forming part of the overall counterterrorist strategy impacted rights and freedoms. The measures are noted by Peter Manning (2006: 458) as follows:

- New visa and immigration procedures (which included detaining more than 1,200 immigrants of Middle Eastern descent following 9/11 based on no other factors than their origin)
- New screening procedures for passengers boarding aircraft
- Designing and integrating extensive databases covering visitors to the United States and U.S. citizens
- Consolidating data gathered at immigration and customs locations
- Establishing the Department of Homeland Security with some 170,000 employees
- Establishing the Transport Security Administration (TSA) within the Department of Homeland Security and thereby federalizing the business of airport security
- Establishing a federal directorate of intelligence

These measures were of course supplemented by the use of the U.S. facility at Guantanamo Bay, Cuba, to hold alleged terrorists; the use of extraordinary rendition to move terrorists from country to country for purposes believed to relate to their interrogation (allegedly through torture); and the invasions of Afghanistan and Iraq.

Some commentators believe it is misconceived to represent the issue of rights and restrictions or security and liberties in terms of achieving a balance. Ronald Dworkin (2005: 286) maintains that the appropriate response is to ask what justice requires. He contends that the government must treat everyone as having equal status and with equal concern, because every human life has an equal value. Thus, a system of criminal law should treat all equally in equal cases, and if it denies one category of suspects rights considered essential for others, it acts unfairly. If a system unfairly targets non-U.S. citizens, as does the Patriot Act, Dworkin judges that it must satisfy two requirements. First, it must acknowledge that it is differentiating suspects unjustly for security reasons, and second, it must diminish that injustice by permitting only the minimum curtailment of rights possible. Dworkin argues that the Patriot Act does not satisfy these conditions (in Mertens 2005: 286).

Where a terrorist event causes a government to take emergency action such as suspending habeas corpus, it runs the risk of alienating its citizens and playing into the hands of terrorist tactics (Wilkinson 2001: 23). More fundamentally, Wilkinson contends that

it must be a cardinal principle of a liberal democracy in dealing with the problems of terrorism, however serious these may be, never to be tempted into using methods which are incompatible with the liberal values of humanity, liberty, and justice. (2001: 115)

Thus, he argues, a liberal democracy faced with terrorism must follow a path between, on the one hand, the dangers of repression, and on the other hand, inaction. It is crucial that counterterrorist measures are limited to just that, countering terrorism, and that a government should not take advantage of a terrorist situation to abuse exceptional powers by using them for extraneous purposes. Thus, both politically and morally, a government facing a terrorist threat must avoid repressive overreaction (Wilkinson 2001: 115). As an example of overreaction, Wilkinson cites the use of emergency powers by the British government in Northern Ireland that authorized internment without trial. This measure is now widely regarded as having been counterproductive, because although it was originally introduced to protect witnesses, juries, and magistrates from intimidation, it was in practice used by the security forces to arrest large numbers of people who had no connection with terrorist operations (p. 116). According to Wilkinson (p. 116), internment without trial "should only be contemplated in the eventuality of a full-scale civil war, when all other means of curbing the escalation of violence on a massive scale have failed." In Northern Ireland, using internment promoted recruitment into the Irish Republican Army, motivated many Catholics to give support to the terrorist cause, and greatly increased the level of violence as well as funding support for the IRA from the United States.

Writing post 9/11, Wilkinson contends that those who claim that the world can no longer afford to ensure that measures to prevent and combat terrorism accord with the rule of law and principles of human rights are themselves "guilty of being soft on terrorism" (2006: xvi). He argues that supporting or condoning violations of human rights and liberal democratic principles undermines respect for international and national laws and places those who advocate or support such violations on the same moral level as the terrorists. As he puts it, "By suppressing human rights in the name of protecting national security they play into the hands of terrorists" (p. xvi). Simpson (2005: 204) agrees with Wilkinson that the justifications offered by the U.S. government for invading personal privacy are self-contradictory and counterproductive. He articulates his concern by asking, "How can the U.S. proclaim its goal in the War on Terrorism to be defense of the free and civilized world if its own domestic acts are denials of freedom and civilization?" (p. 204).

Wilson (2005: 6) sees a distinct policy dichotomy between security and rights, contending that following 9/11 "the Bush Administration advanced a formulation of international security that detached rights from security concerns." He claims that the U.S. government's hostility to the International Criminal Court is an example of this gulf between human rights and national security as is the emphasis in Afghanistan and Iraq on fighting terrorism rather than re-establishing the rule of law and human rights.

Luban (in Wilson 2005: 26) suggests it is wrong to focus on whether democratic freedoms should be sacrificed in the interests of national security. This approach assumes that the rights of others are being sacrificed for "our security," that favoring additional security demonstrates a tough-minded response to terrorism, that

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issues of guilt or innocence have to be decided by the president, and that exceptional measures to counter terrorism are necessary but will only be short term.

Freeman (2005: 53) observes that striking a balance between human rights and security in an age of terrorism is a complex matter and that we need to “analyze clearly which human rights are at stake under the threat of terrorism, and which risks we ought to take.” Since we, the general public, do not know the risks of terrorism, we rely on government for advice, and our government controls the information. Freeman (2005: 53) explains that while we should give the government considerable discretion, “democratic politicians should not be trusted too much.” Freeman points out that legislative and judicial oversight may not be sufficient to protect rights and advocates an active civil society as a counterbalance to the power of the state.

In his contribution to the debate on balancing rights and restrictions, Teson (2005: 64) argues that the balancing test should be that “a security measure is justified if, and only if, the amount of freedom it restricts is necessary to preserve the total system of freedom threatened by internal or external enemies.” He contends that threats to security almost never justify restricting personal liberties, because human rights are deontological concepts (see Chapter 9) and are conceived as trumping the pursuit of utility or the general welfare (2005: 64). Teson illustrates his argument with the following example (2005: 65–66):

A villain who asks me to shoot an innocent person says if I refuse he will shoot two innocent persons. If I refuse, I can justify my decision not to kill even with the certain consequence of the death of two others in two ways. Firstly, I may say the right to life is absolute and my duty not to kill an innocent person cannot be overridden by the consequences of complying with that duty even if the consequences are the murder of more innocent persons. Secondly, I can say that I am prohibited from violating the innocent person’s right to life by shooting her regardless of what others may do.

Applying this example to restrictions in the interests of national security, Teson (2005: 65–66) notes that a liberal would argue that violating individual rights is a graver issue than the government allowing deaths to occur by terrorist attacks. A second argument is that rights can be categorized in terms of their fundamental importance, so for example, the freedom against torture or against indefinite detention rank as being more vital than other rights. Thus, in the interests of national security, while other rights might be restricted, those ought not to be sacrificed to the general welfare (p. 67).

In a major contribution to this debate, Michael Ignatieff (2004: viii) explores the issue of how a democracy can respond to terrorism without destroying the values for which it stands. He takes a position between those who argue in absolutist terms that no restrictions on rights ought to be imposed or justified and those advocating a consequentialist approach who judge counterterrorist measures purely by their effectiveness. Ignatieff would prohibit certain torture, illegal detention, and unlawful assassination on the basis that they violate “foundational commitments to justice and dignity” (p. viii). He notes that democracies commonly permit derogations from guaranteed rights and freedoms in emergencies, so rights do not always

trump other considerations like national security, but ultimately, in his view, it is the task of the courts, the media, and the legislators to scrutinize such measures for justifiability. Ignatieff points out that in an emergency, like a terrorist attack, we have to trust our leaders to respond rapidly in our interests but that over the longer term, in determining the balance between security and liberty, we must rely on our democratic institutions to conduct oversight and scrutiny. Ignatieff's overall approach is a "lesser evil position" (2004: 8) under which, in a terrorist emergency, rights do not trump necessary measures, but neither do such measures trump rights. Instead, Ignatieff sets a series of tests for leaders as follows:

1. Do the proposed national security measures violate individual dignity? Within the concept of individual dignity, he includes rights against cruel and unusual punishment, torture, penal servitude, extrajudicial execution, and the rendition⁴ of prisoners to states that practice torture.
2. The national security measures must pass "the conservative test" (Ignatieff 2004: 24) that questions the necessity for the proposed measures. Ignatieff argues this test would bar measures such as suspension of habeas corpus, would require all detention to be subject to review by the courts, and would ensure that prisoners have access to counsel.
3. Applying a consequentialist approach (see Chapter 10) to counterterrorist measures means asking whether they will render citizens more secure in the long term. Necessary measures must function as a last resort in the sense that less coercive means must be judged as inadequate, and all measures should be capable of being sanctioned by the courts at some point in time.
4. Finally, the measures should be congruent with international obligations relating to rights and freedoms.

Ignatieff's view is that if the proposed countermeasures fail the above tests, the War on Terrorism will have to be waged without them, because, as he puts it, "It is the very nature of a democracy that it not only does, but should, fight with one hand tied behind its back" (2004: 24).

In his critique of Ignatieff's views, Wilson (2005: 19) notes that "Michael Ignatieff's 'lesser evil' ethics and over reliance on a consequentialist ethics places him much closer to the antirights philosophical tradition of utilitarianism than the liberal tradition of human rights." Philosophically and politically, "utilitarian

4. International rendition is illustrated by the case of Maher Arar, who was detained at JFK Airport in September 2002 while in transit to Canada, who is a dual Canadian/Syrian citizen, and was traveling on a Canadian passport. He was held in U.S. custody for 13 days, interrogated about his supposed links to Al Qaeda, and then transported on to Jordan and then Syria without notice to his family or to the Canadian consulate. In Syria he was held without charge for a year and was tortured and treated in a cruel and inhumane way (Hoffman 2004: 947–948). He was finally released by Syria.

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consequentialism is about as far from an ethics of human rights as one can travel" (p. 19). As Wilson explains,

Lesser evil reasoning makes a virtue out of lowering accepted standards and surrendering safeguards on individual liberties. In the hands of government officials, it enables unrestrained presidential authority and a disregard for long standing restraints on the conduct of war. (2005: 19)

In the debate on restrictions on rights and freedoms in the interests of national security and countering terrorism, the differing perspectives all seek the normative framework for government action. While some advocate no restrictions, arguing that governments will abuse special powers and that restrictions on liberty mirror the tactics of the terrorists themselves, others believe that we must place confidence in government and rely on oversight through the legislature and the judiciary. When governments impose restrictions, they can usually rely on public support, at least in the short term, but they must guard against overreacting and becoming too repressive. Thus, striking a balance is seen by many ethicists as a key issue, and many advocate no restrictions on rights they believe to be basic and inviolable such as the prohibition against torture. However these complexities are resolved, it is imperative that a government faced with a terrorist threat or campaign actually address the morality of measures that will restrict liberty instead of reacting with no real moral compass.

What Moral Restrictions Apply to the Conduct of Counterterrorist Operations?

Ethically, it is necessary that those combating terrorism refrain from indiscriminately killing, maiming, or imprisoning persons who are unrelated to the terrorist activities. Additionally, there are moral restrictions on means as well as ends. For example, the conduct of antiterrorist operations must take account of the risk to lives of innocent civilians (Bauhn 2005: 131). According to Bauhn (p. 132) antiterrorist activities that lead to operational excesses may nevertheless be morally justified under the principle of "double effect." This states that an unintended but foreseen morally bad effect of an action can be excused if both the action and the intended effect are morally permissible. Take the case of an act of self-defense where a person resists an assault on her life and at the same time accomplishes the morally bad effect of killing the aggressor. Here, the victim attacked only with the intention of warding off the assault. The attacker's death can be morally excused even if the victim may have been aware that the attacker's death would be a probable outcome of self-defense. Adopting this principle, however, could result in counterterrorist agencies classifying all innocent victims as unintended casualties in the war against terrorism.

Walzer (in Bauhn 2005: 132) has suggested that the principle of double effect should be modified so that members of the armed forces should not only refrain from intending to kill civilians who are noncombatants but should also intend to protect them from being killed, even if this means risking their own lives. Of course if this approach is adopted, it will require that counterterrorist agencies increase the risks for their own personnel in conducting terrorist operations in order to diminish the risks

for innocent bystanders. Bauhn (p. 132) suggests that this implies more ground and face-to-face encounters with the terrorists and less use of strategic and tactical bombing where "collateral damage" often occurs. He further suggests that antiterrorist operations are not only morally justified but also morally necessary in the same way that it is morally necessary for law enforcement to catch criminals. Thus, counterterrorist agencies are morally justified and indeed morally obliged to employ force to the extent necessary to terminate terrorist activity. Nevertheless, as indicated above, it is also necessary, he suggests, that the double effect principle be modified so that the risk of injuring innocent civilians is taken on by the counterterrorist forces (p. 133).

Coady (2005: 145) notes that responding to terrorism involves morality issues, because it "cannot permit morally unconstrained reactions." He views responses to terrorism that in themselves involve terrorism as immoral. For example, a casual or indifferent attitude toward collateral damage, in Coady's view, is immoral and "can exhibit a spirit close to that of terrorism" (p. 145). He advocates the use of means other than military might to deal with a terrorist threat, because that level of force is likely to engender widespread death and destruction. Therefore, in his opinion, the option of warfare should be the last resort.

Elements of a counterterrorism strategy can include the assassination of actual or suspected terrorists and their torture in order to obtain intelligence information. Is the counterterrorist technique of assassination morally justified? Khatchadourian (2005: 178) argues that assassination in the context of counterterrorism is never morally justified where the victim's life is taken, and no process of law is adhered to that enables him or her to bring a defense against alleged charges. As well, the outcome of an assassination is the termination of the victim's life by the assassin, who takes the law into his own hands to dispense punishment that is capital in nature and who in doing so becomes the judge of the victim's deeds. An assassination also violates the victim's right to life.

Rachels (in Khatchadourian 2005: 179) disagrees with this standpoint, arguing that the right to life can be forfeited to "eliminate great suffering" but not "merely to increase the happiness of already minimally contented population." Rachels gives the hypothetical example of Hitler suffering assassination for having violated the rights of so many others. According to Rachels, this consequentialist rationale is only justified if the following conditions are met:

1. The outcome of the assassination must be such in terms of the good achieved as to outweigh the act of destroying a human life.
2. The assassination must be the only or the least objectionable method of achieving the good results.
3. Out of all the possible actions available, it should represent "the best overall balance of maximizing good and minimizing evil" (p. 179).

Rachel's consequential theory is a form of rule utilitarianism (see Chapter 10). Khatchadourian argues, however, applying deontological theory (see Chapter 9), that while some nonabsolute rights can be overridden by stronger moral claims, the only absolute human right not susceptible to being overridden is the right to be treated as

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a moral being: "to be treated with respect and consideration as a person, not to be treated as a thing or an object" (p. 180). Khatchadourian points out that a rule utilitarian approach to assassination would cause the public to lose faith in the justice system and that this approach would never be adopted as a public policy or practice by a state (p. 184), because to do so would mean that the state was undermining the rule of law. It is more likely, then, that the state would adopt a policy prohibiting all assassinations in principle. Adopting a covert policy in those terms, he suggests, would not resolve the issue, because it is always possible that the covert would be made overt by domestic or foreign media. Another objection to this approach is the possibility of reciprocal action by another state, which might target the home state.

Simpson (2005: 202) asks how we are to "resist the evil of terrorism with good." His response is that we should counter terrorism with all the good we can command, but he points out that we also need to be aware of the nature of the force and any associated conditions and limits that may be used in resisting terrorism. He asserts that force will only be good if it has the promotion of the human good as its goal and that it may only be used as a last resort and for as long as is necessary (p. 202). Thus, a decision to use armed force in counterterrorism must be based on sufficient and compelling reasons in the sense that no other options are plausible or available. As well, the force used should be proportionate to the goal sought to be achieved. In particular, the force should not target the innocent and should aim to reduce collateral damage to the very minimum (p. 204).

Corlett (2003: 158) contends that the government response to an act of terrorism is typically a violent reaction seeking punishment for the terrorists as exemplified by the declaration of the War on Terrorism. While recognizing that such a response is the predictable outcome, Corlett argues that it is unreasonable and lacking in reflection. Instead, he urges a reaction based on reason, all available evidence, and the application of moral principles, including due process and the presumption of innocence, which, he argues, are so fundamental that not even a state of war should negate them. Corlett goes so far as to suggest that a society that ignores due process in responding to a terrorist attack "ends up being a rogue society bent on meting out what it thinks is justice when in fact it is simply reacting out of self-interested egoistic, self-serving emotion" (p. 159). He scorns the broad-brush approach to counterterrorism strategy, pointing to the many forms that terrorism takes and its motivations, which he believes call for a proper and rational assessment of each individual act of terrorism (p. 160).

As appears from the above discussion, the broad ethical framework for the conduct of terrorist operations is problematic, and specific measures all have their advocates. Assassination and torture have been sanctioned in the War on Terrorism, and a public debate on the use of torture has shown that many in the United States believe it is justified.

Is Torture Morally Permissible as a Counterterrorist Strategy?

In the war against terrorism, as well as in allegations of torture in the U.S. detainee facility at Guantanamo Bay, prisoner mistreatment has been identified in reports

written after the disclosure of abuses at Abu Ghraib prison, Baghdad. Instances of acts that could amount to torture included raping a female detainee, raping a 15–18 year old male detainee, beating a detainee with a broom and breaking and pouring a chemical light over his body followed by sodomizing him with the broom, and being assaulted by two female military police (Hooks and Mosher 2005: 1629).

In his written advice to the president, White House Counsel and later Attorney General Gonzales advised that "the War on Terrorism is a new kind of war . . . [that] renders obsolete the Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions" (in Hooks and Mosher 2005: 1634). In August 2002, the Justice Department advised that the Congress had no power to regulate the president's ability to detain and interrogate enemy combatants. In his opinion on the meaning of torture, the assistant attorney general, Jay S. Bybee, advised that the term meant "extreme acts . . . where the pain is physical it must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure . . . because the acts inflicting torture are extreme, there is [a] significant range of acts that, though they might constitute cruel, inhuman, or degrading treatment or punishment, fail to rise to the level of torture" (in Hooks and Mosher 2005: 1634). According to Hooks and Mosher then, this sets a threshold for torture far higher than that established under any international human rights conventions (p. 1634).

Title 18, Section 2340 of the U.S. Code defines torture as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control" (Massimino 2004: 75). Torture is a federal crime punishable by up to 20 years in prison and even death if the victim dies following the torture. This law applies to torture committed outside the United States but includes acts by U.S. citizens (Massimino 2004: 74–75).

Khatchadourian (2005: 192) argues that even an act utilitarian (see Chapter 10) would be unable to justify torture in practice and that a rule utilitarian approach would expressly prohibit torture in principle on the same basis that would cause a state to prohibit the practice of assassination. To torture a human being is to treat him or her not as a moral person but as an object, and according to Ronald Dworkin, a "core list of human rights" would include the right not to be tortured. In his view, torture constitutes "the most profound insult to (its victim's) humanity, the most profound outrage of his human rights" (2006: 38–39).

Khatchadourian (2005: 192) observes that the double effect principle cannot justify torture even by arguing that the pain and suffering inflicted is intended to produce a greater good and with the torturer claiming he intended only the good and not the bad consequences of the torture. The reason is that in the practice of torture it is impossible to isolate the intention from the act itself.

Michael Ignatieff argues that the prohibition against torture underpins the liberal democratic project and points out that eliminating torture as an affront to human dignity is the aim of a number of international instruments as well as being the domestic law of most states (2004: 137).

Nevertheless, the events of 9/11 have prompted some to argue that torture is justified as a national security counterterrorist measure in the interests of defending

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democracy. For example, Alan Dershowitz has suggested that torture might be applied and regulated by the judiciary through a “torture warrant” that would prescribe the kinds of torture to be inflicted and its limits, and federal Judge Richard Posner has written that anyone who doubts that torture “is permissible when the stakes are high enough should not be in a position of responsibility” (in Massimino 2004: 74). Ignatieff rejects this approach on the basis that legalizing torture would effectively render it a routine matter. John Kleinig (2005: 626) also opposes issuing warrants to torture, asking if there is any reason to suppose that judges will be discriminating in torture cases brought before them in light of their wholehearted support for issuing warrants under the Foreign Intelligence Surveillance Act.⁵ For Kleinig, as a matter of morality, authorizing torture by judicial warrant would be “pasting a veneer of moral respectability over practices that do not deserve it” (p. 627), and he argues for an absolute ban on torture as a matter of policy.

Some argue that torture is justified under the “ticking bomb argument.” They envisage a situation where, for example, terrorists have planted a nuclear device that will explode and devastate a huge city area within the hour. There is no possibility of saving many lives in the time available, but one of the terrorists has been captured. The argument goes as follows: Are we not morally justified in using whatever means are appropriate, even torture, to get our captive terrorist to reveal the location of the bomb, so it can be deactivated and save countless lives? Certainly many would agree that they would personally resort to whatever means are necessary in such a situation, but Kleinig (2005), among others, points to some of the issues raised by the ticking bomb argument:

- It suggests there is a known threat—not just a possibility or probability—but in practice such a high degree of certainty is unlikely to occur (p. 616).
- There is a need for immediate action, because it is certain that the bomb will explode—again, is this degree of certainty likely to be common in practice?
- The magnitude of the danger is enormous, and so it is said to be permissible to apply torture, but Kleinig argues that the moral status of any alternative decision is unclear. Similarly, there is no moral clarity about whether or not torture is justified, excusable, or regrettable in these circumstances.
- It is claimed that only the application of torture will secure the necessary information, but we cannot really be sure there are no other alternatives. Also torture ought not to be regarded as a kind of shortcut that is convenient in such circumstances (p. 617).
- It would seem essential that the person we intend torturing be the maker of the threat. This is so because, as Kleinig points out, the moral justification for torture seems much weaker if we encourage him to talk by, for example, torturing his child or his aging mother in front of him.
- It is said that the outcome of the torture will be the removal of the threat. It is assumed, then, that information gained from the torture will almost certainly dispel the danger, but can this be claimed with absolute certainty?

5. In 2002, 1,228 warrants were applied for, and all were approved; in 2003, 1,724 out of 1,727 were granted; in 2004, 1,754 out of 1,758 were approved, and none were denied (Kleinig 2005: 626).

As Kleinig points out, these assumptions can be given some weight but are unlikely to be found in the real world, and if they cannot be replicated, the case for torture is that much weaker. Even assuming that the ticking bomb scenario is accepted as a basis for torture, Kleinig and others would nevertheless maintain, contrary to Dershowitz and others, that the ticking bomb situation could never sanction a *policy* authorizing torture. Instead, each case where torture was contemplated would have to be justified by reference to the specific facts and circumstances (2005: 623).

Like Ignatieff, Kleinig fears the routinization of torture. As he points out, we are on a slippery slope once torture is accepted as a possible course of action, because the ticking bomb argument will inevitably lead to an expansion of the situations where torture is acceptable (2005: 619). For Kleinig, then, torture "threatens and undermines the very characteristics that constitute our human distinctiveness, and attacks them in a way that does not merely extinguish them—as killing does—but in a way that humiliates, degrades and perverts" (p. 619).

Significantly, the High Court in Israel has struck down practices that amounted to torture on the grounds that they offended human dignity. Torture, it held, could not be permitted even in a state preoccupied with national security, and no regulation of practices amounting to torture is permissible. While those prosecuted for torture may plead necessity in mitigation of any penalty, necessity may not be pleaded as a defense or as justification.

Is torture permissible in this "new kind of war"? Ignatieff (2004: 143) proposes that the practice of torture cannot be condoned in a war on terror; "for torture, when committed by a state, expresses the state's ultimate view that human beings are expendable."

Summary

This chapter has explored definitions of terrorism and the normative ethics of counterterrorism and has questioned why, following the events of 9/11, the U.S. administration declared a War on Terrorism instead of allowing the criminal justice system to respond to that act of terrorism. The discussion has revealed the complexity of the moral arguments and debates surrounding the application of torture, the ethical aspects of counterterrorist measures, and the extent to which citizens' rights ought to be restricted in the interests of national security.

A number of major themes have emerged from this discussion. They include, first, that there exists no single "correct" definition of terrorism and that the current terrorism discourse, which includes connotations of irrationality and fanaticism, has obscured the fact that most varieties of terror are conducted or sponsored by states that practice far more deadly forms of terrorism than groups or individuals. Second, the War on Terrorism is not a conventional war but is shaped almost entirely by the events of 9/11 and is a reaction to those events. Third, post 9/11, terrorism is perceived by U.S. strategists and policy makers as an issue of national security, not crime control, and therefore as calling for a response that is warlike but falls short of a conventional war. As well, protecting U.S. citizens against further terrorist attacks necessitates the creation of special courts and procedures, the abandonment of the U.S. criminal justice system, and probable violations of national

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and international law. Defending citizens also means that their rights and freedoms can legitimately be restricted, presumably for as long as it takes to “win” the War on Terrorism. Fourth, exceptional measures, including violently assaulting the integrity of the human person through torture, are regarded by many as justified and even imperative in conducting the war.

Antiterrorist strategies have been challenged on moral grounds. Charges have been made of abuse of government powers. It is said that the administration has acted unethically by rejecting customary legal rules and procedures in the pursuit of victory. Devices such as categorizing suspected terrorist prisoners as “unlawful combatants” have been employed, allegedly to avoid legal rules and enable incarceration and torture.

The morality of the War on Terrorism itself has been called into question on the basis that representing a counterterrorist strategy as warfare lowers the bar for engaging in more conventional wars against actual states. It also enables the United States to conduct events called “battles” subsumed within the entirety of an amorphous and unending War on Terrorism. As well, commentators have pointed out that ethically, causing death or injury to civilians in countering terrorism seems to mirror the acts of the terrorists themselves.

Thus, the War on Terrorism can be seen as constituting a greater evil than terrorism itself. In the face of such charges, is it sufficient to maintain that citizens must rely on judicial and legislative oversight to ensure that the administration’s excesses are corrected? Ultimately, the question may be whether condoning breaches of human rights and liberal principles in conducting a War on Terrorism also risks undermining respect for national and international laws that destroys foundational commitments to justice and human dignity.

DISCUSSION QUESTIONS

1. The definition of terrorism is problematic. How does this affect our view of terrorism?
2. Which is the better approach—to treat terrorism as a criminal activity or to fight terrorists as if they were enemies in a war? Explain.
3. Does the Patriot Act give the executive branch of government too much power in pursuing terrorism? What effect does the exercise of that power have on civil rights in the United States?
4. What measures should a democratic government take to respond to terrorism that are consistent with its ethical responsibilities?
5. Is it ever ethically acceptable to torture a person in the War on Terrorism? Explain.
6. What, if any, human rights should be suppressed in the interests of winning the War on Terrorism, and how would suppressing these rights contribute toward “victory”?