

**NORM REGRESS:
AMERICAN REVISIONISM AND THE SLOW DEATH OF THE TORTURE NORM**

by

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B.A., The University of British Columbia, 2006

**A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF
THE REQUIREMENTS FOR THE DEGREE OF**

MASTER OF ARTS

in

THE FACULTY OF GRADUATE STUDIES

(Political Science)

**The University of British Columbia
August 2007**

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ABSTRACT

This thesis examines the status of the legal and moral norm against torture within post-9/11 America in an effort to determine how one of the strongest international norms came to be significantly weakened by its most important proponent, and ascertain what this means for the status of the norm internationally. I argue that key members of the Bush administration should be considered norm revisionists who have actively sought to reshape America's interpretation of its obligations in regards to the norm through discourse and policy that frames torture as a necessary tool in the War on Terror. The net result of this revisionism has been the normalization of torture within the United States — where torture has now been widely accepted as a useful, necessary and acceptable weapon to use against America's enemies — which I argue represents a crisis of legitimacy in the norm within that country. That such normative backsliding could occur in a country with a long history of constitutionalism and the rule of law suggests that the moral norms many take for granted may prove shallow and fleeting; norm regress will occur if these norms are not protected. In this regard, I offer a theoretical model to chart this normative regression, and in doing so make a contribution to the constructivist international relations literature which has hitherto concerned itself only with questions of normative progress at the expense of recognizing the potential for the decay of these internalized norms. I argue that while there remains a high level of acceptance worldwide that the norm against torture is right, any future incidences of torture by liberal states may well bring about a crisis of legitimacy in the international norm itself. This realization should encourage all who care about such norms to defend them against revisionism.

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Introduction

The War on Terror has dragged torture out of the shadows and into the glare of scholarly and moral enquiry. Shocking revelations from Abu Ghraib to Guantanamo Bay and beyond have revealed US torture¹ practices to be systemic and widespread, reinvigorating an open debate on a topic usually discussed only in whispers. As Karen Greenberg reminds us, “the reintroduction of the word and practice of torture has an eerie quality, as if it is returning a spectre of the past,”² and the return of this spectre in a country long considered a moral authority on human rights and possessing a long history of constitutionalism and the rule of law raises serious questions. By what process has a liberal state descended into the most illiberal of activities and contravened a norm³ many considered “internalized”? What does this descent mean for the status of the moral and legal norm against torture — considered the “pre-eminent manifestation of a global commitment to civilized norms”⁴ — and moral possibilities in world politics in general? Is the torture norm suffering a crisis of legitimacy within America, and if so, does the contravention of the torture norm by such a key liberal state constitute a legitimacy crisis in the norm itself?

In this paper, I will attempt to provide such answers by examining how the post-9/11 American torture experience relates to constructivist literature on norms and

¹ I adopt the usage found within the UN Convention Against Torture: “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession...when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” United Nations, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984), Article 1.

² Karen J. Greenberg, “The Rule of Law Finds its Golem: Judicial Torture Then and Now,” introduction to *The Torture Debate in America*, ed. Karen J. Greenberg (New York: Cambridge University Press, 2006), 5.

³ I will follow Peter Katzenstein’s definition of norms: they “describe collective expectations for the proper behavior of actors with a given identity.” “Introduction,” in *The Culture of National Security: Norms and Identity in World Politics*, ed. Katzenstein (New York: Columbia University Press, 1996), 5.

⁴ Andrew Linklater, “Torture and Civilization,” *International Relations* 21, no. 111 (March 2007): 113.

legitimacy crises in world politics. I will show through a brief discussion of constructivist scholarship that it suffers from two weaknesses that weaken its explanatory potential for this issue. First, while constructivists have made great strides in showing how norms arise and spread,⁵ what qualities make norms particularly salient,⁶ and how norms can have causal force in world politics in such diverse issues as security, science, and human rights policies,⁷ they have not adequately theorized the conditions of the retrogression of seemingly “internalized” norms. Second, prominent constructivist literature has either treated the state as a unitary actor in the neorealist and neoliberal tradition,⁸ or focused on transnational processes of norm emergence and diffusion,⁹ at the expense of adequately theorizing the domestic processes through which norms either gain or lose salience.¹⁰ Work that has opened up the black box of the state to explore how international norms interact with domestic politics has also been overly-concerned with the emergence and spread of nice norms,¹¹ or has suggested that liberal Western states

⁵ Martha Finnemore and Kathryn Sikkink, “International Norm Dynamics and Political Change,” in “International Organization at Fifty: Exploration and Contestation in World Politics,” eds. Peter J. Katzenstein, Robert O. Keohane, Stephen D. Krasner, special issue, *International Organization* 52, no. 4 (Autumn 1998); Richard Price, “Reversing the Gun Sights: Transnational Civil Society Targets Land Mines,” *International Organization* 52, no. 3 (Summer 1998).

⁶ Margaret Keck and Kathryn Sikkink, “Transnational Advocacy Networks in International Politics: Introduction” in *Activists Beyond Border*, eds. M. Keck and K. Sikkink (Ithaca: Cornell University Press, 1998), 1-38.

⁷ For security, see Richard Price, “A Genealogy of the Chemical Weapons Taboo,” *International Organization* 49, no. 1 (Winter 1995); for science policy, see Martha Finnemore, “International Organizations as Teachers of Norms: The United Nations Educational, Scientific, and Cultural Organization and Science Policy,” *International Organization* 47, no. 4 (Autumn 1993); for human rights, see Kathryn Sikkink, “Transnational Politics, International Relations Theory, and Human Rights,” *PS: Political Science and Politics* 31, no. 3 (Sept 1998).

⁸ See Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999).

⁹ See Price, “Reversing the Gun Sights.”

¹⁰ Jeffrey T. Checkel, “The Constructivist Turn in International Relations Theory,” *World Politics* 50, no. 2 (Feb 1998): 332, 342.

¹¹ Jeffrey T. Checkel, “International Norms and Domestic Politics: Bridging the Rationalist-Constructivist Divide,” *European Journal of International Relations* 3, no. 4 (1997); and Andrew P. Cortell and James W. Davis Jr., “Understanding the Domestic Impact of International Norms: A Research Agenda,” *International Studies Review* 2, no. 1 (Spring 2000).

play a key role in socializing human rights norms into the domestic practices of *other* states,¹² and can thus say little about the weakening or disregard of the prohibition of torture within America. Recent constructivist work, however, has attempted to both move beyond this focus on nice norms to chart the normative regress that can occur concomitantly with moral progress,¹³ and explicate how this regress may interact with international “crises of legitimacy” in both actors and institutions.¹⁴ This paper will attempt to contribute to these new avenues of research and address previous constructivist omissions through an examination of how one of the strongest international norms came to be significantly weakened by its most important proponent.

I will springboard off constructivist scholarship on the emergence and diffusion of norms, in particular, Martha Finnemore and Kathryn Sikkink’s work on “norm life cycles,” to present a complementary “norm death series”—a necessary addition to explicate the process by which a so-called internalized norm loses salience and becomes *de-internalized*. Whereas Finnemore and Sikkink focus on “norm entrepreneurs,” or agents of moral progress, I will portray President Bush and his administration as “norm revisionists,”¹⁵ or agents of moral regress, intent on actively re-framing torture as an acceptable and necessary tool in the War on Terror. I argue that these revisionists and their accomplices successfully exploited the fear, anger and xenophobia present among

¹² Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink (eds.), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999).

¹³ Richard Price (ed.), *Moral Limit and Possibility in World Politics* (Cambridge University Press, forthcoming).

¹⁴ Ian Clark and Christian Reus-Smit (eds.), “Resolving International Crises of Legitimacy,” special issue, *International Politics* 44, no. 2-3 (March/May 2007).

¹⁵ The phrase, to my knowledge, is Tim Dunne’s. See, “The Rules of the Game are Changing: Fundamental Human Rights in Crisis After 9/11,” in “Resolving International Crises of Legitimacy,” special issue, *International Politics* 44, no. 2-3 (March/May 2007).

much of the American populace post-9/11 to declare a prolonged state of exception, and portray America's enemies as unworthy of moral or legal consideration, torture as useful and necessary to defend America's liberal identity, and the terrorist threat as ever-present and all-encompassing. While the open nature of American state-society relations¹⁶ should have allowed for earlier and more effective naming and shaming of the Bush administration's torture program, a press hesitant to directly challenge the President on issues of national security, and a surprisingly acquiescent public, gave the President considerable latitude to continue his torture policies *even after* they came to light, calling into question constructivist confidence regarding the exposure of hypocrisy as a useful tactic to change state behaviour.¹⁷ The unfortunate result was the successful re-framing of torture from a humanitarian to a security issue, and the regression of the torture norm.¹⁸

I will conclude with a return to IR theory and a discussion of what this case of norm regress means for theorizing about norms and legitimacy in world politics. I suggest that the revisionists and their accomplices have been surprisingly successful in their goal of normalizing American torture and have brought about what Christian Reus-Smit defines as a “crisis of legitimacy” in the torture norm within America, where the norm faces either “adaptation...or disempowerment.”¹⁹ This regrettable situation shows considerable backsliding of one of our strongest norms and proves normative change in

¹⁶ See Thomas Risse-Kappen, “Ideas do not flow Freely: Transnational Coalitions, Domestic Structures, and the End of the Cold War,” *International Organization* 48, no. 2 (Spring 1994).

¹⁷ See Keck and Sikkink, “Transnational Advocacy Networks in International Politics.”

¹⁸ In the spirit of making explicit the normative claims that lie behind this work, it is the author’s opinion, for a variety of reasons — not the least of which is a suspicion re: the efficacy of torture — that torture has no rightful place in the counterterrorist arsenal of any state, no matter who the enemy or what the circumstance.

¹⁹ Reus-Smit, “International Crises of Legitimacy,” in “Resolving International Crises of Legitimacy,” special issue, *International Politics* 44, no. 2-3 (March/May 2007): 167.

world politics to be disturbingly fragile, if not fleeting; thus, rather than considering norms to be irreversibly “internalized” by a state, it will be more useful to perceive them only as more or less salient. However, this crisis of legitimacy of the torture norm *within* America does not necessarily constitute a crisis of legitimacy for the torture norm internationally, for there still remains widespread agreement “that its normative precepts are rightful,”²⁰ and acknowledgement that American abridgement may have more to do with the nature of its current administration than the irrelevance or inappropriateness of the norm itself. While American actions have drastically eroded the salience of the torture norm within the United States, the international torture norm may be saved a full-fledged legitimacy crisis by the very fact that America is experiencing its own crisis of legitimacy, revealing some interesting overlap between legitimacy concerns in world politics. Nevertheless, to the extent that other (liberal) states begin to emulate American interrogation practices — which would push the regression of the torture norm disturbingly close to the termination point of my proposed norm death series — we may yet see a crisis in the legitimacy of the torture norm itself.

²⁰ Ibid., 159.

Constructivism's Promise and Shortcomings

The Nice Norms Bias

Constructivism's ability to address both material and ideational concerns should make it a perfect vehicle to explain American torture; however, in its current form, it suffers from certain constraints that prevent it from providing much leverage on the issue. Kathryn Sikkink, for example, suggests that there is something inherent in human rights norms such as the one against torture that leads to their widespread (and one can presume, continuing) acceptance by liberal states.²¹ Along with Margaret Keck, she proposes that “issues involving bodily harm to vulnerable individuals appear particularly compelling,” and “torture...[has] been more tractable than...other human rights issues.”²² Indeed, by *all* accounts, the norm against torture is one of the most “robust norms in the human rights regime,”²³ and is even partially constitutive of the identity of a liberal state;²⁴ thus constructivism will struggle to explain *American* torture.

This problem lies more with the focus of constructivist scholarship than with any inherent deficiency of the approach. While constructivists have made great strides in showing that ideas matter in a variety of ways and for a variety of issue areas, they have suffered from a bias towards “nice norms,” which has limited recognition that ideas can have negative and perverse effects in world politics.²⁵ Moreover, while constructivists have produced important and convincing scholarship cataloguing the processes by which

²¹ “Transnational Politics, International Relations Theory, and Human Rights,” 520, brackets mine.

²² Keck and Sikkink, “Transnational Advocacy Networks in International Politics,” 27.

²³ Dunne, “The Rules of the Game are Changing,” 276.

²⁴ Risse and Sikkink, “The Socialization of Human Rights Norms into Domestic Practices: Introduction,” in *The Power of Human Rights*, 8.

²⁵ Finnemore and Sikkink, “Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics,” *Annual Review of Political Science* 4, no. 1 (June 2001): 404. For some excellent attempts to address this oversight, see Price (ed.), *Moral Limit and Possibility*.

these nice norms take hold and spread, there has been little concomitant recognition that this moral change may prove shallow and fleeting. As a result, the norms literature has somewhat of a teleological flavour, and while some authors remain all too aware of the contingency of moral change,²⁶ many seem to view the creation and spread of norms as part of an irreversible historical progression towards a more civilized world.²⁷ To her credit, Sikkink has recognized this deficiency, recently challenging constructivist scholars to “evaluate the progressive versus the regressive outcomes of policies” and “specify more carefully under which conditions a more progressive or less progressive outcome is likely.”²⁸ This paper takes up that challenge.

Ignoring Domestic Processes

Much of the norms literature has also shown a tendency to view norms largely in the international arena — constraining, constituting, or socializing states²⁹ — at the expense of detailed analyses of how norms interact with agents within the state.³⁰ Richard Price, for example, notes that focusing solely on the state diverts us from other, transnational sources of agency and socialization, and suggests that “norm adoption through moral entrepreneurship and emulation...have often overtaken the more idiosyncratic workings of domestic politics.”³¹ Such a structural focus is not misguided

²⁶ See Price, “Genealogy of the Chemical Weapons Taboo.”

²⁷ See Finnemore and Sikkink, “International Norm Dynamics and Political Change.” In their discussion of the “norm life cycle,” which goes from “emergence” to “cascade” to “internalization,” they do not mention the possibility of an “internalized” norm such as torture backsliding. See also Alexander Wendt, who, while noting that it is not certain that the world will ultimately enjoy a “Kantian culture,” suggests that it at least will not likely move backwards, *Social Theory*, 251.

²⁸ “The Role of Consequences, Comparison, and Counterfactuals in Constructivist Ethical Thought,” in *Moral Limit and Possibility*, 428.

²⁹ See for example, Finnemore, “International Organizations as Teachers of Norms.”

³⁰ Checkel, “The Constructivist Turn in International Relations Theory,” 323, 340.

³¹ “Reversing the Gun Sights,” 615, 616.

— international processes surely play a major role in the diffusion of norms — but by its focus on international socialization through emulation, this approach threatens to neglect the messy processes within the state by which an established norm may gain or lose acceptance. While Price's approach seems very effective in dealing with the transnational civil society movement to ban landmines, it can offer little leverage in the US torture case, where the reason for American torture was surely not the emulation of known torturers like Syria, Egypt or Morocco. Luckily, despite the lack of directly applicable constructivist scholarship, existing work about norm progression can offer crucial insights for the regression of international norms as well.

How Deep Do They Go? The Life Cycle and Internalization of Norms

Finnemore and Sikkink suggest that norms go through at least three stages of life: first, they emerge and are proselytized by “norm entrepreneurs;” second, if the norms resonate with a large audience, they may “cascade” and be adopted by more and more actors who are driven by a quest for conformity and legitimacy;³² last, towards the end of this cascade the norms may be internalized.³³ Risse and Sikkink’s influential “spiral model” charts this final socializing process by which norms are internalized domestically: while norms are first adopted for instrumental reasons, they may ultimately achieve a “taken for granted” quality through processes of dialogue, persuasion, institutionalization and habituation.³⁴ There is nothing inevitable about the completion of the life-cycle or

³² The actors that Finnemore and Sikkink describe in the cascade are states; however, this implicitly presupposes a previous cascade – during what they deem the emergence -- where the norm is largely accepted by the *people* within a certain state. Alexander Wendt also notes that states, like people, are socialized through processes of “imitation” and “social learning.” See, *Social Theory*, 324-336

³³ Finnemore and Sikkink, “International Norm Dynamics and Political Change,” 888-908

³⁴ “The Socialization of Human Rights Norms,”

internalization process, and some norms may emerge and not cascade while others will not be internalized. Once internalized, however, norms become so powerful that they are never questioned and rarely broken; any abrogation will be accompanied by excuses or justifications that actually reinforce the appropriateness of the norm.³⁵

While these conceptualizations have great theoretical use, they do not adequately recognize the impermanence of internalization. While the “spiral model does not assume evolutionary progress toward norm implementation, but claims to explain variation and lack of progress,”³⁶ it does not explain norm regress. Similarly, while Finnemore and Sikkink recognize that talk of norm internalization threatens to slip into determinism, where the actors “are no longer choosing to conform [to the norm] in any meaningful way,”³⁷ the very fact that their norm life cycle has an *endpoint* suggests that they do not adequately theorize about the possibility of the regression — or de-internalization — of internalized norms.

Before seeking to rectify this oversight, a clarification is in order. Just who or what is (de)internalizing these norms? The word itself seems to imply an individual psychological process where certain attitudes or behaviors become adopted or rejected, yet Sikkink and Risse’s conception holds a norm to be internalized *by a state* when it is institutionalized to the point where compliance is taken for granted “irrespective of individual beliefs.”³⁸ In theorizing about the de-internalization of norms, then, it will be important to keep separate two distinct but interrelated processes: personal de-internalization and public de-internalization. The former involves the questioning of

³⁵ Finnemore and Sikkink, “International Norm Dynamics and Political Change,” 893-904.

³⁶ Risse and Sikkink, “The Socialization of Human Rights Norms,” 34.

³⁷ Finnemore and Sikkink, “International Norm Dynamics and Political Change,” 913, brackets mine.

³⁸ “The Socialization of Human Rights Norms,” 17.

deeply-held, previously unquestionable, individual beliefs about the appropriateness of a norm. The latter, as per Risse and Sikkink's formulation, is more of a public process; it involves policy choices and public debate which challenge the taken for granted, habitual status of the norm within a state.

While this latter type obviously depends largely upon levels of personal internalization — i.e., a norm will not long survive in a country if it is abandoned by the majority of its citizens — the two do not always walk hand in hand. For example, there could be a large subset of individuals within a state that has never internalized the norm, or has long-since de-internalized it. If this is not verbalized by influential actors, however, the norm will continue to be taken for granted in the public sphere, and the public internalization will not be challenged. This distinction is important for the U.S. torture case, for it is questionable that certain members in the Bush administration *ever* fully internalized the norm against torture, in which case it would make little sense to talk about personal de-internalization among the administration. Nevertheless, a large majority of Americans had personally internalized the norm against torture, and it was certainly also internalized in the public sense; thus in discussing the de-internalization of the torture norm within America, it is necessary to focus both on changing individual beliefs (measured most easily by public opinion polls), and the public status of the norm, measurable by public discourse as well as government policy. The two types become closely and reciprocally linked; challenges to the norm in the public sphere may contribute to personal de-internalization as well as vice versa.

The Salience of Norms

Andrew Cortell and James Davis Jr. have suggested that the “salience” of a particular norm will largely determine to what extent it matters in a domestic context, noting that “salient norms give rise to feelings of obligation by social actors and, when violated engender regret or a feeling that the deviation of violation requires justification.”³⁹ This term can be usefully employed to describe the level of internalization within a state, for it allows us to gauge the placement of the norm on a continuum of norm acceptance rather than the somewhat limiting binary distinction between internalization and de-internalization (ie., where a norm is either internalized or it isn’t). While comparativists often stress that one should measure the salience of norms by their institutionalization,⁴⁰ Cortell and Davis Jr. suggest that a more accurate way would be to measure changes in national discourse — including “declaratory statements by authoritative actors” — and national policies, as well as its institutionalization.⁴¹ The torture case seems to bear this out, for while torture remained illegal under both international and domestic law, American rhetoric, policies and practices all changed. To apply levels of norm salience to the norm life-cycle, then, the *emergence* of a norm through entrepreneurs shows its emerging salience, the *cascade* represents an increasing acceptance of the norm and an increasing level of salience, and the *internalization* signals that the norm has achieved the highest possible level of salience within a state.

³⁹ “How Do International Institutions Matter? The Domestic Impact of International Rules and Norms,” *International Studies Quarterly* 40, no. 4 (Dec 1996): 452.

⁴⁰ Finnemore and Sikkink, “Taking Stock,” 407.

⁴¹ “How do International Institutions Matter?” 456.

Issue Framing and Hypocrisy

Finnemore and Sikkink stress the importance of issue-framing in world politics, and find the “construction of cognitive frames” essential to moral progress⁴² — a view given further credence by Price who notes that transnational civil society had great success in re-framing landmines from a military to a humanitarian issue. Through forcing states to publicly justify their positions, transnational advocates shifted the burden of proof onto states, forcing them to prove that the over-riding military utility of landmines overrode the tremendous humanitarian cost in a moral calculus.⁴³ This technique proved very successful in penetrating the secretive security policies of states, and ultimately achieving significant changes in state policies.⁴⁴

It takes little imagination to observe that the (re)construction of cognitive frames can prove equally essential to moral regress, when revisionists strategically construct new standards of appropriateness — such as new standards for American interrogation procedures in light of the perceived unacceptable consequences of following the old ones. I suggest that the tactics of the Bush administration and their supporters, strangely enough, have much in common with the transnational campaign to ban landmines, only in this case, they have essentially re-framed a humanitarian issue as a security one to bring what I consider torture back within the purview of the state. While the President himself has never publicly endorsed a policy of torture, the important role of his administration in re-shaping the normative framework within America through inflammatory discourse, the obvious links between senior members of the administration

⁴² “International Norm Dynamics and Political Change,” 897.

⁴³ Price, “Reversing the Gun Sights.”

⁴⁴ Ibid., esp. 623-633

and American interrogation policy,⁴⁵ and the continued public defense of extreme interrogation in the war on terror, confirm his administration as norm revisionists. Not only might this show an effort by a powerful state to reassert its dominance over such policies, but it also suggests that cherished national identities — as a liberal state that does not abuse human rights for instance — may prove fragile in the face of crisis.

Constructivists have also suggested the importance of exposing the gap between state rhetoric and state action in pressuring the state to fulfill its moral commitments.⁴⁶ Exposing state hypocrisy, so the story goes, forces states who value legitimacy and moral standing in the world to move their actions closer to their rhetoric. Yet the torture case presents a challenge to this hypothesis, for even after full exposure of the Abu Ghraib scandal, and evidence that it was part of a systemic and widespread program that stretched far beyond Iraq, no high-ranking administration officials have faced legal sanction, and the Bush administration has continued to seek certain exemptions for CIA interrogation even while publicly defending a narrow interpretation of torture that permits techniques as extreme as water-boarding under the grounds that they are not *severe* enough to constitute torture. This may be the greatest shock of the torture story, at least for liberals (and I would argue constructivists as well⁴⁷): the system survived its

⁴⁵ The DoD commissioned Schlesinger Report into torture in Abu Ghraib, Afghanistan and Guantanamo Bay declared that “[t]here is both institutional and personal responsibility at higher levels.” Cited in David Bowker, “Unwise Counsel: The War on Terrorism and the Criminal Mistreatment of Detainees in U.S. Custody,” in *The Torture Debate in America*, ed. Karen J. Greenberg (Cambridge University Press, 2006), 194.

⁴⁶ See Keck and Sikkink, “Transnational Advocacy Networks in International Politics.”

⁴⁷ Price and Sikkink both note that often constructivists tend to be cosmopolitan liberals in their worldview, but nothing in the constructivist approach means this must be so. See for example, J. Samuel Barkin, “Realist Constructivism,” *International Studies Review* 5, no. 3 (Sept 2003).

disclosure!⁴⁸ It would seem that exposing hypocrisy becomes significantly less effective if the audience is unsure of the moral status of the shamed act, and I argue that over the course of the War on Terror, torture became less and less sacrosanct, considered by many as an acceptable, and indeed necessary, response to terrorism.

The Norm Death Series: Charting Norm Regress

This rich constructivist literature on norm entrepreneurs and norm diffusion should be brought to bear on questions of norm revisionists and norm regress. To this end, I recommend that the norm life cycle, which charts norm progress, be complemented by a norm death series which charts norm regress. The death series also consists of three parts, only it begins where Finnemore and Sikkink's model ends: norm internalization.⁴⁹ Here, certain norm *revisionists* (members of the state who actively seek to re-shape understandings of their country's relationship to the norm through changes in policy, practice and/or discourse) pose some sort of *challenge* to the heretofore taken for granted, and highly salient, norm. Their challenge does not need to be a direct public statement questioning the norm — indeed, there was no such statement from the Bush administration outright justifying torture — but can also consist of quiet changes in policy away from compliance with the norm. The challenge can be in discourse, policy, and/or practice or any combination thereof. However, if it is *only* a secretive change in practice, unaccompanied by any legitimating discourse, it will leave the prescriptive status of the norm intact, and the challenge will likely soon die out.

⁴⁸ Stephen Holmes, "Is Defiance of Law a Proof of Success? Magical Thinking in the War on Terror," in *The Torture Debate in America*, ed. Karen J. Greenberg (New York: Cambridge University Press, 2006), 129.

⁴⁹ In this regard, the whole concept of a norm death series is best thought of as merely rounding out the missing half of the norm life-cycle.

Depending on the strength and circumstances of the challenge and the receptivity of the relevant audience, or the *challenge resonance*, the norm may experience a *reverse cascade*; that is, the norm revisionists' challenge so resonates with the relevant audience that the norm loses salience. The reverse cascade itself has two parts. In the first, the norm loses salience domestically. This is a highly contested stage, where *defenders* of the norm seek to resist the new interpretation of the revisionists and their *accomplices* (non-governmental actors who spread and justify this revisionism in the public realm) in a discursive battle over the appropriateness/acceptableness of the discourse/policies/practices making up the challenge. This battle may occur both in public discourse or within government institutions such as Congress and the Courts. The prize of victory is not only the direction of policy, but also the opinions of the relevant audience; that is, the section of the public/media/government who are not actively engaged in either norm revisionism or defense.

Even the most salient norms will not be followed all the time, and can thus withstand rare and unjustified instances of norm-breaking; however, the purposeful creation of policy in contradiction to the norm, especially if accompanied by public justification for these policies, will pose a significant challenge to the strength of the norm and signal its declining salience within that state. It is important to note that, even if defenders are quite successful in rolling back some of the revisionists' gains, the norm will always lose some salience just in virtue of it being publicly challenged. I suggest that if a norm reaches the end of this stage in the death series — where public challenges to the norm have been largely accepted in much public discourse and this discourse has in

turned shifted much public opinion towards acceptance of revisionism — the norm will suffer a domestic crisis of legitimacy

In the second stage of reverse cascade, the norm loses salience in the international arena through a process of emulation by leaders of other states who note that the normative stigma for breaking the norm is now significantly reduced. In this stage, it is acceptable to anthropomorphize the state to a certain extent⁵⁰ because state identities will prove very important; not only will abridgement by respected liberal states⁵¹ do more damage to an international human rights norm, but emulation of non-compliance by states lacking moral authority will not erode international salience to the same extent as other liberal states. A norm such as torture should be able to withstand the non-compliance of certain pariah states with its legitimacy challenged but intact — indeed it has been withstanding these challenges all along! However, at the far end of the second stage of the reverse cascade, if the challenge is sufficiently echoed by other respected members of the system, the norm suffers an international crisis of legitimacy where the “rightfulness” of its precepts is questioned.⁵² If this crisis is not resolved, then norm regress reaches the final stage of the norm death series: the *expiration* of the norm.

I will now superimpose this death series onto the American torture experience to test the strength of this addition to the life-cycle. Not only should it prove a useful way in charting the process by which torture came about in the United States and help us predict the future of the torture norm, but it should help in explicating the processes by

⁵⁰ For example, in the sense of treating the state as if it has human qualities as many of us do in daily lives when we say that the United States is concerned with human rights, or North Korea does not care for international standards of morality. See Wendt, *Social Theory*, esp.194-196.

⁵¹ For human rights norms, the “critical mass of states” that Sikkink and Finnemore call “norm leaders” will necessarily be liberal ones, for they are the states “without which the achievement of the substantive norm goal is compromised.” See “International Norm Dynamics and Political Change,” 895, 899.

⁵² See Reus-Smit, “International Crises of Legitimacy,” 159.

which a supposedly “internalized” norm can be so grievously disregarded. I will conclude with a brief discussion about what this means for discussions of legitimacy of the torture norm, both within America and internationally, and suggest that theorizing about the erosion and death of norms provides leverage in theorizing about crises of legitimacy in world politics.

Death Series Stage 1: The Revisionist Challenge

The US and the Other

The Bush administration set the stage for torture through the constant use of a binary Us/Them, Civilized/Savage, discourse that presented the world as a moral hierarchy of order and chaos — a conception that resonated with the fragile nation after 9/11.⁵³ On September 17th, Bush called terrorists and those who house or encourage them, “evil-doers...barbaric people,” and Vice President Cheney consistently echoed the President’s conception that “we are dealing here with evil people” and that “this is a struggle against evil.”⁵⁴ In stark contrast, Bush presented America in glowing terms, representative of all that is pure and good in this world: “Our nation's cause has always been larger than our nation's defense. We fight, as we always fight, for a just peace — a peace that favors human liberty.”⁵⁵ Rather than consider the terrorist attacks as criminal acts on a massive scale, Bush considered them *acts of war* against America and its ideals, and constitutive of a veritable paradigm shift in the history of international affairs. This ‘war’ soon became an unprecedented type of war — a prolonged and international campaign against a ruthless, shadowy network which does not respect the norms and mores of civilization⁵⁶ — and this framing “directly bore upon the normative order within which the policy response would be framed and which would provide the normative

⁵³ Françoise Sironi and Raphaëlle Branch, “Torture and the Borders of Humanity,” *International Social Science Journal* 54, no. 174 (Dec 2002): 542.

⁵⁴ Quoted in Bowker, “Unwise Counsel,” 183.

⁵⁵ President George W. Bush, “Commencement Speech at West Point,” United States Military Academy, West Point, New York (June 1, 2002), <http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html>.

⁵⁶ Alfred W. McCoy, *A Question of Torture: CIA Interrogation, From the Cold War to the War on Terror* (New York: Henry Holt and Company, 2006), 108.

yardstick for evaluating the legitimacy of the countermeasures.”⁵⁷ The logic was thus: because the post-9/11 world is fundamentally different than the pre-9/11, previous rules simply do not apply, and a fundamental shift in tactics is required to match the fundamental shift in threat,⁵⁸ even if that means pushing the boundaries of prisoner interrogation and roughing them up a little bit.

Bush’s dichotomy between civilized and savage ensured that the interaction between self and other would remain physical at its core, with little chance for political dialogue or cultural understanding.⁵⁹ By invoking distinctions between “good” and “evil,” not only did the administration present itself as necessarily good, but it reinforced its framing of the response to 9/11 as a war: for “evil is not a crime but a sin; its origin is a mystery of theology, not poverty or political oppression, and one fights it; if one is lucky, one destroys it.”⁶⁰ This discourse fueled a widespread acceptance that tools of “barbarity” are sometimes necessary to maintain “civilization,” and in a war against evil itself, Americans must embrace a “healthy savagery of [their] own.”⁶¹ While the laws of war have traditionally been based on reciprocity, the great fear at an enemy willing to kill civilians — and themselves — for their cause instigated a new sort of mirror imaging, where Americans “abandon all restraints” to fight an unrestrained adversary.⁶² Recall Dick Cheney’s words: “[w]hen you think of...the merciless horror inflicted at the World

⁵⁷ Jef Huysmans, “Normativity, Inwardness and the Exception.” *Security Dialogue* 37, no. 1 (March 2006): 12.

⁵⁸ George A. Lopez, “The Style of the New War: Making the Rules as We Go Along,” *Ethics & International Affairs* 16, no. 1 (March 2002): 21-26.

⁵⁹ Huysmans, “Normativity, Inwardness and the Exception,” 20.

⁶⁰ Andrew Norris, ‘Us’ and ‘Them’: The Politics of American Self-Assertion After 9/11.” *Metaphilosophy* 35, no. 3 (April 2004): 252.

⁶¹ Holmes, “Is Defiance of Law a Proof of Success?” 127.

⁶² Ibid., 129.

Trade Center, *no punishment for the terrorist seems too harsh.*⁶³ In such a normative context, a new perverse reciprocity emerges that taps into American lust for revenge: the logic of an eye for an eye.

The Bush administration saw the defence of America as utterly reliant on timely intelligence, and in October 2001, with the FBI growing increasingly frustrated over the continuing silence of four suspected terrorists, talk in intelligence circles increasingly turned to torture.⁶⁴ Alfred McCoy notes that soon after 9/11 President Bush kick-started the dormant CIA torture program by giving the agency sweeping powers to pursue its counterterrorist program, saying “any barriers in your way, they are gone.”⁶⁵ It is not that Bush did not recognize that these powers — which included the extraordinary rendition of suspects to nations known to torture — contravened international law, but rather that he knowingly prioritized retribution over regulation, shouting at Defense Secretary Donald Rumsfeld: “I don’t care what the international lawyers say, we are going to kick some ass!”⁶⁶ With this goal in mind, Bush gave operational command of the war on terror to the CIA, with strict instructions to get results by any means necessary, in keeping with the nature of the times.⁶⁷ As former director of the CIA’s Counterterrorist Center, Cofer Black, told Congress: “there was a ‘before 9/11’ and there was an ‘after 9/11.’ After 9/11, the gloves came off.”⁶⁸ But the administration needed to know just how far it could legally press; thus lawyers would also play a significant role in the revision of the torture norm.

⁶³ Quoted in Bowker, “Unwise Counsel,” 184

⁶⁴ McCoy, *A Question of Torture*, 110.

⁶⁵ Richard A. Clarke, *Against All Enemies: Inside America’s War on Terror* (New York: Free Press, 2004), 24.

⁶⁶ Ibid.

⁶⁷ Ibid., 118.

⁶⁸ Ibid., 119.

Administration Lawyers Re-Interpret the Torture Convention

The international law against torture as embodied in the 1984 UN Convention against Torture and Cruel and Unusual Punishment is unambiguous.⁶⁹ Not only does it explicitly forbid states from engaging in such actions, but it grants no possible exceptions to this rule; cries of national emergency cannot legally relieve states of their obligations. While the United States signed and ratified the UN Convention, the law against torture is also what Rosemary Foot calls a “peremptory norm” — one considered binding on all states under all circumstances.⁷⁰ Torture is also clearly illegal and explicitly forbidden in all circumstances by all US domestic and military law,⁷¹ and it cannot be reasonably argued that torture by any American citizen for any reason is somehow legal. Nevertheless, soon after 9/11, renowned lawyers within the Justice Department set about in a systematic and unscrupulous effort to make some forms of torture permissible.

Following the President’s lead, and in contravention of military protocol,⁷² the Justice Department set out to both alter the status of al-Qaeda and Taliban prisoners, and significantly narrow the definition of torture. On January 9, 2002, in a now infamous memo from John Yoo of the Justice Department’s Office of Legal Counsel (OLC), the OLC categorized al Qaeda and Taliban prisoners as “unlawful enemy combatants,” a category “beyond soldier and civilian” to whom the Geneva Conventions barring cruel,

⁶⁹ What is somewhat ambiguous is the line between torture and cruel and unusual punishment; however, it of little consequence for international law because *both* are forbidden under all circumstances. See John T. Parry, “Escalation and Necessity: Defining Torture at Home and Abroad,” in *Torture: A Debate*, ed. Sanford Levinson (Oxford: Oxford University Press, 2004).

⁷⁰ Rosemary Foot, “Torture: The Struggle over a Peremptory Norm in a Counter-Terrorist Era,” *International Relations* 20, no. 2 (June 2006): 131.

⁷¹ McCoy, *A Question of Torture*, 118.

⁷² William Nash, “The Laws of War: A Military View,” *Ethics & International Affairs* 16, no. 1 (March 2002): 14-17.

humiliating and degrading treatment and torture do not apply.⁷³ This definition essentially leaves terrorists in a legal limbo, neither protected under the Geneva POW Conventions nor given due legal process — what Slavoj Zizek calls “legally dead while biologically still alive.”⁷⁴ In effect, it puts the binary discourse of the administration into policy: the framing of terrorists as villains so evil they almost defy categorization.

As well as defining certain prisoners out of the Geneva Conventions, the OLC attempted to justify more aggressive interrogation techniques by narrowing the scope of what constitutes “torture.” In an August 2002 memo for Alberto Gonzales, at that time legal advisor to the president, the OLC argued for an extremely restricted legal reading of torture provisions whereby physical torture “must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death,” and mental torture “must result in significant psychological harm of significant duration, e.g., lasting for months or even years.”⁷⁵ As a result, actions which do not rise to the level of torture under this definition — shockingly including the practice of water-boarding, where the prisoner is strapped to a board and made to believe that he is drowning⁷⁶ — are not strictly illegal and may be permissible. Because the federal statute does not impose criminal liability for *cruel and inhuman punishment*, these

⁷³ Quoted in McCoy, *A Question of Torture*, 113.

⁷⁴ See Slavoj Zizek, “Knight of the Living Dead,” *New York Times*, March 24, 2007.

⁷⁵ United States Department of Justice – Office of Legal Counsel, *Memorandum for Alberto R. Gonzales, Counsel to the President*, August 1, 2002,

<http://fl1.findlaw.com/news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf>. As Sanford Levinson perceptively notes “the addition by the United States of a requirement that mental harm be ‘prolonged’ also offers more than enough opportunity for apologists to deny that some act constituted ‘torture’ because the mental harm lasted ‘only’ a week, or a month, or three months.” Sanford Levinson, “The Debate on Torture: War Against Virtual States” *Dissent* (Summer 2003): 84. Thanks to Adam Bower for bringing this point to my attention.

⁷⁶ An open letter from over one hundred law professors to Alberto Gonzalez argued that water-boarding is indeed torture, and prohibited under both international and domestic law, see “Open Letter to Attorney General Alberto Gonzalez,” April 5, 2006. Available from Human Rights Watch , <http://hrw.org/english/docs/2006/04/06/usdom13130.htm>

memos served to minimize the risk of criminal liability for American officials.⁷⁷ Dick Cheney has since publicly defended this stance, saying that water-boarding *does not* constitute torture, and subjecting detainees to “a dunk in the water” is a “no-brainer” if it saves American lives.⁷⁸

The memo also shockingly suggested that the President has an *unlimited right* to interrogate suspects as per his constitutional powers as Commander in Chief.⁷⁹ Acting on such advice, and believing that federal district courts could not “properly exercise habeas jurisdiction over an alien detained” in Guantanamo Bay, Donald Rumsfeld felt little hesitancy denying these prisoners their rights under the Geneva Conventions,⁸⁰ noting that “[t]hey are treated vastly better than they treated anybody else over the last several years.”⁸¹ In December of 2002 he approved sixteen coercive interrogation techniques for Guantanamo Bay⁸² — including stress positions like standing for long periods of time — scrawling in the margins: “However, I stand for 8-10 hours a day. Why is standing limited to 4 hours?”⁸³ Of course, in the absence of rigorous inquiries into official culpability, which the administration has stonewalled at every turn, the direct causal link between OLC opinions, administration officials, and American torture proves difficult to explicate. This paper operates from the reasonable assumption that official discourse and

⁷⁷ Bowker, “Unwise Counsel,” 191.

⁷⁸ Human Rights Watch, “U.S. Vice-President Endorses Torture: Cheney Expresses Approval of the CIA’s Use of Waterboarding,” *Human Rights News*, Washington, D.C., October 26, 2006, <http://hrw.org/english/docs/2006/10/26/usdom14465.htm>.

⁷⁹ McCoy, *A Question of Torture*, 115.

⁸⁰ *Ibid.*, 114.

⁸¹ Rosemary Foot, “The Struggle Over a Peremptory Norm,” 138.

⁸² Stephen Gillers, “Legal Ethics: A Debate,” in *The Torture Debate in America*, ed. Karen J. Greenberg (New York: Cambridge University Press, 2005), 240.

⁸³ McCoy, *A Question of Torture*, 127..

policy that sought to strip prisoners of their rights and encouraged American personnel to “take the gloves off” are closely linked with the practice of torture.⁸⁴

By most serious legal opinions, the revisionist arguments put forth in these so-called “torture memos” are extreme and misguided.⁸⁵ Legal advisor to the State Department, William Taft, found Yoo’s arguments a contravention of national policy, as well as “incorrect” and “confused.”⁸⁶ David Luban calls it a CYA — “Cover Your Ass memorandum” — that “effectively places the executive branch above the law.”⁸⁷ Harold Koh notes that “the notion that the president has the constitutional power to permit torture is like saying he has the constitutional power to commit genocide.”⁸⁸ Yet to the extent that objections focus on the raw abuse of American power that these arguments represent, or even the deficiencies of the legal arguments, they threaten to miss a major point: the revisionists were not trying to either conform to standard legal logics or run roughshod over international law, but to radically reshape the law to fit the *exceptional* conditions in which America now finds itself. As Luban rightly points out, if these top lawyers created a legal laughing stock, it is only because they “proceeded from the assumption that the law as conventionally understood was simply unsuitable for the post-9/11 world.”⁸⁹

Successive attorney generals have not created a permissive environment for torture because they disagree with the moral and legal consensus that torture should be

⁸⁴ 51% of Americans polled share the belief that the memos *did* contribute to torture. See Program on International Policy Attitudes (PIPA), “Americans on Detention, Torture, and the War on Terrorism,” July 22, 2004, 17, http://www.pipa.org/OnlineReports/Terrorism/Torture_Jul04/Torture_Jul04_rpt.pdf.

⁸⁵ See Panel Discussion, “Torture: The Road to Abu Ghraib and Beyond,” 28.

⁸⁶ McCoy, *A Question of Torture*, 113.

⁸⁷ “Liberalism, Torture, and the Ticking Bomb,” in *The Torture Debate in America*, ed. Karen J. Greenberg (New York: Cambridge University Press, 2006), 55, 68.

⁸⁸ Philippe Sands, *Lawless World: America and the Making and Breaking of Global Rules* (London: The Penguin Group, 2005), 213.

⁸⁹ Luban, “Liberalism, Torture, and the Ticking Bomb,” 54.

prohibited,⁹⁰ but rather have attempted to show that these laws do not apply to *America* under these truly trying circumstances.⁹¹ At the heart of the legal attempts to allow torture lie two forms of exceptionalism: first, the fervent belief that the post-9/11 world is fundamentally different, as described above; and second, the belief that the United States is unique among the world's nations, both in its sense of moral purpose, and in its exceptional responsibilities.⁹² The re-definition of torture also reveals a desire to maintain America's moral standing, even if only in their own eyes, and represents a perverse logic: "Torture is wrong. We do not do wrong; but we use techniques X, Y, and Z. Therefore X, Y, and Z are not torture."⁹³ In other words, an act simply cannot be torture if committed by Americans. To return to the spiral model, the norm may retain some "prescriptive status" within America, but this is not the same as "rule consistent behavior."⁹⁴

Is a Secretive Challenge Still a Challenge?

Contrary to the above, Ian Hurd has suggested that the Bush administration has not directly challenged the torture norm because "the US has sought to operate in secret and has not provided a public legitimization narrative grounded in existing norms" like it

⁹⁰ Alex J. Bellamy, "No pain, no gain? Torture and ethics in the war on terror," *International Affairs* 82, no. 1 (Jan 2006): 123.

⁹¹ Holmes, "Is Defiance of Law a Proof of Success?" 126.

⁹² See Michael Ignatieff, "Introduction," in *American Exceptionalism and Human Rights*, ed. Michael Ignatieff, 1-26 (Princeton, N.J.: Princeton University Press, 2005).

⁹³ Luban, "Liberalism, Torture, and the Ticking Bomb," 59. Levinson calls this the X-A phenomenon; if X is torture, then America considers its own actions *merely* X-A, and therefore, not torture, "War Against Virtual States," 88.

⁹⁴ Risse and Sikkink, "Socialization of International Human Rights Norms," 30.

has in its attempt to challenge the norm against pre-emptive self-defense.⁹⁵ I do not deny that attempts at public legitimization certainly constitute a more robust challenge than secretive ones. Yet by suggesting that a norm can *only* be challenged by official public statements directly stating non-compliance to what is presented as an outdated or inappropriate norm, Hurd limits our ability to conceive of the very types of challenges more likely to occur surrounding some highly salient norms: secretive ones. Indeed, it would have been politically untenable for the Bush administration to simply announce to the nation that they had decided to start torturing, but this does not mean that their inflammatory rhetoric, along with significant changes in policy, and accompanied later by public defense of this policy, constitutes a very serious challenge to the norm. As well, any claims of exception or exemption such as that found within the OLC memos would regardless still constitute a revision of the torture norm, for it is a norm that accepts *no* deviations, no matter who the deviator or what the circumstances. The torture case suggests that challenges to highly salient norms will often involve secrecy and doublespeak; revisionists will at first hide the full extent of the challenge from public view even while it is implemented in policy and the public is desensitized through inflammatory discourse and euphemisms such as “coercive interrogation.” A more direct challenge to the norm may follow depending on the reception that the limited challenge receives.

To sum up this section, revisionists in the Bush administration challenged the absolute prohibition of torture by discourse that cast their enemies as unworthy of any civilized restraint, and by orders to the CIA to get results by any means necessary.

⁹⁵ Ian Hurd “Breaking and Making Norms: American Revisionism and Crises of Legitimacy” in “Resolving International Crises of Legitimacy,” special issue, *International Politics* 44, no. 2-3 (March/May 2007): 200.

Revisionist lawyers provided legal cover and actively sought to re-shape policy to legalize certain forms of torture against certain enemies. The challenge to the norm, then, was present in private administration meetings, but most obviously in official policy, and both of these certainly made possible the widespread and systemic torture practices that rounded out the American challenge to the torture norm. If the eventual exposure of these practices and policies had brought the expected overwhelming public backlash, the challenge could have been quickly defeated, and the torture norm would have maintained a high level of salience in America. However, for many Americans, exposure of the torture at Abu Ghraib and the torture memos surprisingly brought a grudging acceptance of the necessity of utilizing extreme and illiberal measures *in defense of* liberal democracy. I will now turn to this process by which the revisionist challenge to the torture norm “cascaded” throughout American society.

Death Series Stage 2: Reverse Cascade

Challenge Resonance

Why did the gloves come off so quickly after 9/11? Why did the American people tacitly license extra-legal measures in the war on terrorism? As unsatisfying a scholarly answer as it is, much can be explained by raw emotion, for “Anger...especially in information-uncertain situations...leads people to favor more severe punishments.”⁹⁶ Witnessing the gruesome images of 9/11 in real time, and faced with the ever-present threat of another attack, the American people grew increasingly fearful of terrorism, and hateful of terrorists.⁹⁷ They felt a “deep sense of victimization,”⁹⁸ and 49% of those polled felt considerably more threatened in the year following 9/11 than before,⁹⁹ resulting in an increasing level of distrust of all (and especially Arab and Muslim) foreigners.¹⁰⁰ Surprisingly, these strong fears of international threats did not significantly motivate Americans to become more politically informed, and news audiences grew only slightly, while newspaper readership continued to decline.¹⁰¹ Along with this political disengagement came an increasing level of trust of government in general, and George Bush in particular, whose approval ratings catapulted to unprecedented heights after

⁹⁶ Peter Liberman, “An Eye for an Eye: Public Support for War against Evildoers,” *International Organization* 60, no. 3 (Summer 2006): 691.

⁹⁷ Huysmans, “Normativity, Inwardness and the Exception,” 18.

⁹⁸ Norris, “‘Us’ and ‘Them,’” 250.

⁹⁹ Michael Tragott et al, “How Americans Responded: A Study of Public Reactions to 9/11/01,” *PS: Political Science and Politics* 35, no. 3 (Sept 2002): 512.

¹⁰⁰ Tragott et al., 513, 515.

¹⁰¹ Scott L. Althaus, “American News Consumption During Times of National Crisis,” *PS: Political Science and Politics* 35, no. 3 (Sept 2002): 517-521.

9/11,¹⁰² and this public trust that their president would “do the right thing” proved especially strong for foreign policy issues.¹⁰³

While before 9/11 torture would have seemed beyond the pale of civilized conduct for most Americans, many now accepted the possibility that certain taboos would have to be broken in defence of their country, suggesting that exogenous shocks may be crucial to norm regress. Of course, such a level of public support for torture will not be forthcoming unless torture is considered an effective and necessary means to provide accurate and timely intelligence to prevent another attack. I will now examine the framing of counterterrorist torture as useful and necessary, beginning with a counterfactual scenario long popular in ethics 101 classes: the tale of the ticking-time bomb.¹⁰⁴

Ticking Bombs Threaten the Torture Norm

The scenario is now well-known: a small-scale nuclear device has been hidden in somewhere in New York city, timed to go off within the hour; you have captured the terrorist who planted it but cannot get him to talk; you are therefore faced with an excruciating moral choice: do you sacrifice the city to save his, and your, dignity, or do you torture him and save the city? This hypothetical, employed consistently by accomplices to the regression of the torture norm,¹⁰⁵ essentially brings absolute moralists down into the muck of moral trade-offs; “to the extent that this scenario frames official

¹⁰² Ibid.

¹⁰³ Brian J. Gaines, “Where’s the Rally? Approval and Trust of the President, Cabinet, Congress, and Government Since September 11,” *PS: Political Science and Politics* 35, no. 3 (Sept 2002): 531, 534.

¹⁰⁴ Hannah, “Torture and the Ticking Bomb” 622.

¹⁰⁵ The pejorative tone to the word “accomplice” is not meant to pass moral judgment on all those who thoughtfully and begrudgingly came to condone torture in certain circumstances through the use of this hypothetical, only to suggest that these rationalizations did play a large role in the decreasing salience of the norm.

and public understandings of the threat of terrorism, it tends to make torture appear more reasonable as a response.”¹⁰⁶ Indeed, in *this scenario*, “torture is the *only possible response to terrorism.*”¹⁰⁷

Long ago, however, Henry Shue wisely recognized that the danger of basing one’s ethics on the “hard case” is that a yawning gap exists between artificial cases and reality:

“[t]he proposed victim of our torture is not someone we suspect of planting the device: he *is* the perpetrator. He is not some pitiful psychotic making one last play for attention: he *did* plant the device. The wiring is not backwards, the mechanism is not jammed: the device *will* destroy the city if not deactivated.”¹⁰⁸

Sikkink similarly points out the danger that arises when the scenario is treated as a consequentialist causal story of the real world.¹⁰⁹ Despite the fact that there has been no confirmed case of torture actually providing timely information to diffuse a ticking-bomb,¹¹⁰ and the oft-cited example for the efficacy of torture to avert impending terrorist threats has been all but discredited,¹¹¹ this counterfactual served as the dominant frame regarding torture, and “the ethics 101 question...survived as a policy debate.”¹¹² The administration and its supporters seem to have started with the threat of the ticking-time bomb, assumed the efficacy of torture, and moved on to torture as the desired response.¹¹³ The secretive nature of national security matters then allowed them to hide behind classified status, ensuring that no one can challenge the actual efficacy of their

¹⁰⁶ Hannah, “Torture and the Ticking Bomb,” 624.

¹⁰⁷ Holmes, “Is Defiance of Law a Proof of Success?” 122.

¹⁰⁸ Henry Shue, “Torture,” *Philosophy and Public Affairs* 7, no. 2 (Winter 1978): 141.

¹⁰⁹ “Consequences, Comparison, and Counterfactuals,” 430.

¹¹⁰ Levinson, “War Against Virtual States,” 83.

¹¹¹ McCoy, *A Question of Torture*, 112.

¹¹² Ibid., 624.

¹¹³ See Alasdair Palmer, “Professor Torture Stands by his famous memo,” *The Montreal Gazette*, Saturday, March 17, 2007.

interrogation methods,¹¹⁴ With such uncertainty, the credibility of this scenario all seems to turn on perceptions of the level of threat, which ironically, the very use of the scenario increases!¹¹⁵

Interestingly, in this re-framing of torture, the revisionists and their accomplices invoke a long-standing torture debate in Israel in which torture was also excessively rationalized using similar arguments,¹¹⁶ showing that norm revisionists and their accomplices, as well as norm entrepreneurs, can piggy-back on past examples to gain legitimacy for their cause. And like the Israeli torture debate, this frame proved surprisingly effective on those most reluctant to endorse torture of any kind, for it allowed otherwise kind and decent, rights-respecting people to visualize those being tortured not as victims, but as threats, and the torturers as quiet heroes, making a great moral sacrifice so that others may live.¹¹⁷

Torturing the American Way

The rationale of ticking bombs allows the reconciliation of torture with America's liberal ethic by portraying torture as a necessary, and relatively humane, means employed reluctantly in the protection of the liberal state.¹¹⁸ While most liberals reject outright crude physical torture like pulling out finger nails or electrocution, there has been widespread support for what has been called "torture lite,"¹¹⁹ that should not cause grievous harm, deprive the victim of his dignity, or be disproportionate, and should be

¹¹⁴ Sikkink notes that evidence for the efficacy of torture can problematically only be produced by the torturer, "Consequences, Comparison, and Counterfactuals," 438.

¹¹⁵ Hannah, "Torture and the Ticking Bomb," 630.

¹¹⁶ Neil McMaster, "Torture: from Algiers to Abu Ghraib," *Race & Class* 46, no. 10 (2004): 9.

¹¹⁷ Holmes, "Is Defiance of Law a Proof of Success?" 128.

¹¹⁸ Ibid., 42.

¹¹⁹ See for example, Sikkink, "Consequences, Comparison, and Counterfactuals," 435.

limited and controlled.¹²⁰ Americans can almost be convinced that “torture lite is not torture at all, or at least that it isn’t cruel enough to make liberals wince — not when the stakes are high enough.”¹²¹ Michael Walzer justified the use of extreme measures in fighting the War on Terror precisely on these grounds: “it isn’t a betrayal of liberal or American values to do that; it is in fact the right thing to do, because the first obligation of the state is to protect the lives of its citizens....think about what will happen to our civil liberties if there are more successful terrorist attacks.”¹²² Other scholars echoed Walzer’s logic, suggesting a “lesser evil” approach¹²³ — a compromise of sorts that holds certain coercive tactics as justifiable to prevent the greater evil of another 9/11, as long as they do not cross over an *unclear* line into full-out torture.¹²⁴ This argument, put forth by Michael Ignatieff, Richard Posner and others, holds that the responsible politician must get his hands dirty in defense of what s/he values, and that “no one who doubts that should be in a position of responsibility.”¹²⁵ In this view, liberty and security are not diametrically opposed, but rather the former presupposes the latter. Harsh interrogation measures become an unfortunate necessity in defending the liberal democratic state from illiberal, threatening forces, and are legitimated both “through a discourse of ‘balance’ between security and liberty and in terms of the ‘protection’ of liberty.”¹²⁶

¹²⁰ Bellamy, “No pain, no gain?” 123.

¹²¹ Luban, “Liberalism, Torture, and the Ticking Bomb,” 43.

¹²² Michael Walzer, *Arguing About War* (New Haven: Yale University Press, 2004), 139.

¹²³ See Michael Ignatieff, *The Lesser Evil* (Toronto: Penguin Canada, 2004), esp. 25-53,133-144

¹²⁴ Richard A. Posner notes that this involves the difficult task of “picking out the point along a continuum at which the observer’s queasiness turns to revulsion.” See, “Torture, Terrorism, and Interrogation,” in *Torture: A Debate*, ed. Sanford Levinson (Oxford: Oxford University Press, 2004), 291. The problems with this are obvious, as one person’s queasiness will surely be another’s revulsion.

¹²⁵ Ibid., 295; See also Michael Walzer, “Political Action: The Problem of Dirty Hands,” in *Torture: A Debate*, ed. Sanford Levinson (Oxford: Oxford University Press, 2004).

¹²⁶ Vivienne Jabri, “War, Security and the Liberal State,” *Security Dialogue* 37, no. 2 (March 2006): 51.

Alan Dershowitz went one step further, suggesting the need for “torture warrants” to ensure that the third value we all cherish — democratic openness and accountability — does not get lost in the mix.¹²⁷ This idea of judicial torture, although widely repudiated, is merely the most extreme of a widespread liberal movement to reconcile their civilized self-image with a perceived necessity for torture.¹²⁸ Of course, the Bush administration has also attempted to keep Americans in the dark of what was going on in CIA prisons around the world, and as Andrew Linklater reminds us, even the most civilized of people can tolerate torture if it is kept from view.¹²⁹ Yet the fact that America’s torture program survived its disclosure after Abu Ghraib, and indeed most of America remained at best apathetic,¹³⁰ shows liberal acquiescence to be based upon more than ignorance.

Whither the Defenders of the Norm?

I will now briefly discuss the noteworthy role of certain defenders of the norm in resisting the revisionist challenge. While the press did prove instrumental in bringing American torture abuses to light, they also played right into the revisionists’ hands by further encouraging “the public perception of the ubiquity of danger...[through] media coverage.”¹³¹ Despite ample evidence, the press continually failed in its few meek attempts to frame American torture as systemic, losing out to Bush’s characterization of torture being the product of a few “bad apples” on the night shift; as a result, “abuse”

¹²⁷ See Alan Dershowitz, ”Tortured Reasoning,” in *Torture: A Debate*, 257-280.

¹²⁸ See McCoy, *A Question of Torture*, 178 and Linklater, “Torture and Civilization,” 115.

¹²⁹ Linklater, “Torture and Civilization,” 112.

¹³⁰ See Greenberg, “The Rule of Law Finds its Golem.”

¹³¹ Hannah, “Torture and the Ticking Bomb,” 630.

rather than “torture” long-remained the dominant media frame regarding Abu Ghraib.¹³² Also, simply by following press protocol and providing both sides of the *debate*, the press legitimated those who would support torture as policy;¹³³ thus Dershowitz could appear on CBS’ *60 Minutes* and make his case to the public that ticking time-bombs justify the use of torture warrants and torture lite.¹³⁴ The Democratic opposition proved even more weak-kneed than the press, and in the run-up to the 2004 elections, with national security as a hot-button issue, John Kerry completely refused to challenge the President on the torture issue.¹³⁵

Yet the norm did have its stalwart defenders. Lawyers within the State Department, Navy, Army, Air Force and from the Joint Chiefs of Staff all rejected Yoo’s interpretations of the Geneva Conventions and America’s obligations under the UN Convention against torture,¹³⁶ and Colin Powell himself challenged Rumsfeld on the issue.¹³⁷ The Supreme Court struck down the suspension of *habeus corpus* in Guantanamo and re-instated the rights of the unlawful combatants, with Chief Justice Sandra Day O’Connor warning that “an unchecked system of detention carries the potential to become a means for oppression and abuse of others.”¹³⁸ Within the Senate, the norm had its most vocal champion in Republican John McCain who, along with other leading members of the Senate Armed Service Committee, pushed for legislation which would limit executive authority over detainee interrogation, establish the US Army Field

¹³² Lance W. Bennet, Regina G. Lawerence, and Stephen Livingston, “None Dare Call it Torture: Indexing and the Limits of Press Independence in the Abu Ghraib Scandal,” *Journal of Communication* 56, no. 3 (Sept 2006): 467.

¹³³ Thanks to Richard Price for this point.

¹³⁴ *60 Minutes* (co-host, Mike Wallace; executive producer, Don Hewitt), January 22, 2002.

¹³⁵ McCoy, *A Question of Torture*, 161.

¹³⁶ Bowker, “Unwise Counsel,” 190.

¹³⁷ McCoy, *A Question of Torture*, 115.

¹³⁸ *Ibid.*, 148.

Manual as the standard for interrogation for all U.S agencies, including the CIA, and ultimately ensure an end to torture and cruel and unusual punishment in U.S. custody.

Unmoved by Cheney's request for an exemption for the CIA, and in the face of a threatened Presidential veto, the Senate voted 90-9 in support of McCain, in a "stunning repudiation of Bush's interrogation policy."¹³⁹

The revisionists did not back down in the face of this spirited defense, however, and Bush soon after issued what the *New York Times* called a "constitutionally ludicrous 'signing statement,'"¹⁴⁰ maintaining that as commander-in-chief he could take whatever steps he deemed necessary in the defense of America. Cheney successfully convinced McCain to include in the amendment a possible legal defense for accused CIA interrogators, allowing them to avoid prosecution simply by stating that "they did not know that the practices [they used] were unlawful,"¹⁴¹ and Gonzales continued to suggest that water-boarding might not be sufficiently "severe" enough to warrant prohibition.¹⁴² While the Pentagon did distance itself from torture through the release of its new Army Field Manual which banned such interrogation techniques as nudity, hooding and water-boarding, the Military Commissions Act of 2006 — passed by both houses of Congress — contains loopholes that empower the President to "order both endless detention without trial and inhumane CIA interrogation."¹⁴³ In sum, then, while the defenders were instrumental in checking the administration, the sheer intransigence of the revisionists prevented them from successfully rolling back the full extent of this norm regress.

¹³⁹ Ibid., 187.

¹⁴⁰ *New York Times*, January 14, 2006.

¹⁴¹ McCoy, *A Question of Torture*, 217.

¹⁴² Ibid., 218.

¹⁴³ Ibid., 223.

Victory of the Revisionists

A Nation of Torturers?

The torture norm within America is experiencing a crisis of legitimacy, measured most easily by public opinion. In a 2004 poll conducted by the Washington Post and ABC News, 35% of Americans accepted that torture is acceptable in some circumstances.¹⁴⁴ A December 2005 poll conducted by the Associated Press echoed this result, although this time, the total of Americans who believe that torture is justified “at least in rare instances” amounted to over 60%!¹⁴⁵ This sentiment is not confined to the general public, and a recent U.S. military survey found that more than one-third of army and marine personnel would torture to save a comrade.¹⁴⁶

Similar polls from the years preceding 9/11 are lacking,¹⁴⁷ but one can reasonably infer from their absence that before the twin towers fell the norm enjoyed a ‘taken-for-granted’ quality among the populace.¹⁴⁸ As well, revelations in the mid-90s that the CIA had trained some of Latin America’s most feared torturers through the School of the Americas were met with yearly protests of thousands rather than widespread rationalizations that torture was somehow necessary in the fight against communism.¹⁴⁹ This suggests that the net result of the revisionist challenge has been the successful re-

¹⁴⁴ ABC News/Washington Post Poll, “Torture Methods Opposed,” May 27, 2004, http://abcnews.go.com/sections/us/Polls/torture_poll_040527.html

¹⁴⁵ MSNBC, “Poll finds broad approval of terrorist torture: Most in U.S., Britain, France and South Korea say torture justified in rare instances,” Dec 9, 2005, <http://www.msnbc.msn.com/id/10345320/>

¹⁴⁶ Jim Mannon, “One in 10 U.S. combat troops admit to abusing civilians: poll; More than a third support use of torture to save fellow soldiers,” *The Vancouver Sun*, May 5, 2007.

¹⁴⁷ In one otherwise comprehensive examination of attitudinal trends, for example, there are no pre-9/11 torture polls to juxtapose with recent ones, as they are with other issues such as views of the military and levels of patriotism. See The Pew Research Center for the People and the Press, “Trends in Political Values and Core Attitudes: 1987-2007; Political Landscape More Favorable to Democrats” (March 22, 2007), 25, <http://people-press.org/reports/display.php?ReportID=312>.

¹⁴⁸ Thanks again to Richard Price for suggesting this line of reasoning.

¹⁴⁹ For a comprehensive account of the School’s complicity in torture, see, Jennifer K. Harbury, *Truth, Torture, and the American Way: The History and Consequences of U.S. Involvement in Torture* (Boston, Mass: Beacon Press, 2005).

framing of torture in a dark reversal of the successful efforts by transnational civil society to re-frame landmines as a humanitarian rather than a military issue.¹⁵⁰ Whereas transnational civil society injected a moral calculus into the landmines issue, shifting the burden of proof onto militaries to prove that landmines have over-riding military utility that justifies their continued use despite the tremendous civilian cost, the revisionists and their accomplices have essentially taken the moral calculus *out* of torture, shifting the burden of proof onto the defenders to prove that torture has no military utility.¹⁵¹ At the very least, the revisionists have created a situation where the costs of *not* torturing — measured in threats to national security — seem higher to many Americans than the shame of doing so.

Constructivists studying the domestic impact of international norms have suggested that, along with the salience of the norm, this impact is mostly contingent on domestic structure (level of centralization and closeness of state-society relations).¹⁵² In liberal states, because societal groups are afforded a central role in decision-making and tend to strongly support human rights, governments comply with international norms through a rational means-ends calculation that takes into account societal pressure.¹⁵³ In a strange way, the American example seems to bear this out, and suggests that in times of emergency, the elites of even liberal countries abandon the long-standing moral beliefs of many citizens, and the long-cherished identity of their country, not in spite of the objections of much of society, but *because* the society begins to object less and less —

¹⁵⁰ See Price, “Reversing the Gun Sights.”

¹⁵¹ Much recent scholarship has consequently focused on refuting torture on the grounds of inefficacy rather than Kantian moralism. See Sikkink, “Consequences, Comparison, and Counterfactuals.”

¹⁵² Checkel, “International Norms and Domestic Politics.”

¹⁵³ See also Oona Hathaway, “The Promise and Limits of the International Law of Torture,” in *Torture: A Collection*, ed. Sanford Levinson (Oxford: Oxford University Press, 2004).

albeit, partially in response to powerful government re-framing efforts. In other words, the compliance of liberal democratic states with international norms often reflects more a logic of consequences than appropriateness among state leaders, yet also depends on the level of appropriateness which the norm commands among the citizenry. Because leaders see norms more as constraints than constitutive, they will violate them to the extent to which they think society will accept violation.

Normalization of Torture and the Limits of Hypocrisy

While the Bush administration condemns torture publicly, they “are willing to resort to it anyway,”¹⁵⁴ and exposure of the breaking of the torture norm without the expected change in behaviour and rhetoric calls into question constructivist claims of the effectiveness of hypocrisy in forcing state compliance. It seems that naming and shaming only works to the extent that the norm retains an unquestioned and over-riding moral stigma within society, a level of salience that the norm against torture no longer has in the United States.¹⁵⁵ As Karen Greenberg perceptively notes, one result of the administration’s actions has been to take “perhaps the ultimate taboo and [make] it part of the landscape, both theoretically and in practice,”¹⁵⁶ and this seems to give credence to Marc Lynch’s claim that continued hypocrisy may prove dangerous to the legitimacy of moral norms.¹⁵⁷ The muted public response to Khalid Shaik Mohammed’s recent dramatic confessions (almost certainly given under torture) confirms this, and suggests

¹⁵⁴ Hannah, “Torture and the Ticking Bomb,” 626.

¹⁵⁵ For example, despite a widely-held perception that the torture memos played some role in Abu Ghraib and that more detainees were being improperly held in secret, there was little political backlash against Bush in the 2004 election. See PIPA, “Americans on Detention, Torture, and the War on Terrorism,” 11.

¹⁵⁶ “The Rule of Law Finds its Golem,” 2.

¹⁵⁷ See “Lie to Me: Sanctions on Iraq, Moral Argument, and the International Politics of Hypocrisy,” in *Moral Limit and Possibility*.

that the norm revisionist have won the day: American “torture [has been] normalized — presented as something acceptable.”¹⁵⁸ In this regard, I place the torture norm at the far end of the domestic reverse cascade on the death series, and suggest that a norm in this stage of norm regress is experiencing a domestic crisis of legitimacy: the torture norm within America must either be legitimated by its defenders or lose its remaining salience.

The Future of the Torture Norm and the Reversibility of Moral Progress

What does this mean for the future of the international torture norm? As Ethan Nadelmann reminds us, moral prohibitions usually reflect the “needs and impositions of the most powerful states,”¹⁵⁹ and because America is so important for the system of international law,¹⁶⁰ I suggest that a crisis of legitimacy within the United States certainly affects the strength of the norm internationally. However, recent scholarship has effectively argued that a crisis of legitimacy within the United States does not necessarily constitute a crisis in the norm itself,¹⁶¹ and the torture norm seems to bear this out. Taking “world society” as a referent, there remains a widespread agreement that the normative precepts of the prohibition of torture are “rightful,”¹⁶² and American revisionism may have more to do with the character of the present administration — which is experiencing its own crisis of legitimacy — than the characteristics of the norm itself.

¹⁵⁸ Zizek, “Knight of the Living Dead.” See also, Rosa Brooks, “America tortures (yawn): In just a few years we’ve grown disturbingly comfortable with the fact that the U.S. practices torture,” *Los Angeles Times*, February 23, 2007.

¹⁵⁹ Ethan A. Nadelmann, “Global Prohibition Regimes: the Evolution of Norms in International Society,” *International Organization* 44, no. 4 (Autumn 1990): 484

¹⁶⁰ Paul F. Diehl, Charlotte Ku and Daniel Zamora, “The Dynamics of International Law: The Interaction of Normative and Operating Systems,” *International Organization* 57, no. 1 (Winter 2003): 55.

¹⁶¹ Richard Price, “Nuclear Weapons Don’t Kill People Rogues Do,” in “Resolving International Crises of Legitimacy,” special issue, *International Politics* 44, no. 2-3 (March/May 2007).

¹⁶² Dunne, “The Rules of the Game are Changing,” 282.

It seems, then, that the international norm against torture retains a higher level of salience in the liberal world outside of the United States; however, Amnesty International has disturbingly reported an increase in cases of torture worldwide, reflecting the troubling possibility that “human wrongs — such as torture in the name of anti-terrorism — can ‘cascade’ throughout global politics just as quickly as human rights enhancing norms can be diffused.”¹⁶³ In their discussion on norm cascades, Sikkink and Finnemore note that “it is not possible to predict exactly how many states must accept a norm to ‘tip’ the process, because states are not equal when it comes to normative weight.”¹⁶⁴ So it must be with the reverse cascade. Yet it seems reasonable to assume that, to the extent that other *liberal* states begin to emulate American torture practices — pushing the regression of the norm to the international stage of the reverse cascade and disturbingly close to the expiration point of the death series — we may yet see an international crisis of legitimacy in the norm itself.

The troubling example of norm regress which I have outlined provides a stark warning of the reversibility of even our most cherished moral commitments. Just as new norms can emerge and gain salience through the work of norm entrepreneurs, norms once thought internalized can lose salience, and if the crisis of legitimacy is not resolved, perhaps even expire. Awareness of the contingency and reversibility of moral progress should only urge us to take future discursive battles over our most cherished moral values much more seriously, for as Zizek reminds us, “those in power are literally trying to break a part of our ethical backbone, to dampen and undo what is arguably our

¹⁶³ Ibid., 284. Kathryn Sikkink also notes a precipitous decline in the strength of the torture norm worldwide since 9/11, “Consequences, Comparison, and Counterfactuals,” 434.

¹⁶⁴ ‘International Norm Dynamics and Political Change,’ 901.

civilization's greatest achievement, the growth of our spontaneous moral sensitivity.”¹⁶⁵

To the extent that this hard-fought moral sensitivity has value, theorizing the processes by which it erodes should galvanize corrective action, and alert norm entrepreneurs concerned with human rights that their efforts are needed still.

¹⁶⁵ Zizek, “Knight of the Living Dead.”

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