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# SUPREME COURT REVIEW

## FOREWORD: TERRORISM AND UTILITARIANISM: LESSONS FROM, AND FOR, CRIMINAL LAW

PAUL BUTLER\*

### INTRODUCTION

Punishment is violent, but its violence has a purpose. Terrorism, too, is purposeful violence. My purpose in this essay is to make this strange comparison instructive. Some terrorists defend their taking of human lives by arguing that it is for the greater good. Social utility is probably the most influential justification of punishment. My thesis is that in both cases, instrumentalist justifications are usually—but not always—immoral.

I write as a citizen of a country that not only practices instrumentalist violence,<sup>1</sup> but that also has been victimized by it—in spectacular fashion. On September 11, 2001, as the whole world knows, terrorists attacked the United States of America. They hijacked four planes, and guided three of those planes into American landmarks: the World Trade Center and the Pentagon. The fourth plane crashed in Pennsylvania.<sup>2</sup> Approximately 3,000 people were

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<sup>1</sup> See Part III, *infra*.

<sup>2</sup> N.R. Kleinfield, *U.S. Attacked: Hijacked Jets Destroy Twin Towers and Hit Pentagon in Day of Terror*, N.Y. TIMES, Sept. 12, 2001, at A1.

killed, and many thousands more were injured.<sup>3</sup> Nineteen men, thought to be terrorists, were among the dead.<sup>4</sup>

In this foreword I examine what the criminal law can teach us about terrorism, and what terrorism can teach us about the criminal law. Both terrorism and the harsh punishment for crimes favored by American criminal justice are premised on a construct of cost-benefit analysis that, while (arguably) efficient, is immoral. Both terrorism and excessive punishment can be justified by instrumentalism, but neither should be.

For the record, my comparison of terrorism and American criminal justice does not mean that I think that they are equally bad. Terrorism is worse. There are, however, an extraordinary number of people in the United States who are being punished disproportionately to their just desert. They are punished for social, not individual, reasons. This is especially true of the hundreds of thousands of Americans who are imprisoned for drug offenses.<sup>5</sup> When we remember that punishment is when “the Government . . . intentionally inflicts pain,”<sup>6</sup> we understand that the state is deliberately hurting people to achieve some end. This is not as bad as

<sup>3</sup> Sara Kugler, *Official WTC Death Toll Near 2,800*, ASSOCIATED PRESS, Feb. 8, 2002. (“The city’s official count of those killed at the World Trade Center is down to around 2,800 after months of work by investigators to remove errors and duplicated names from the lists of the missing.”).

<sup>4</sup> The United States government believes that the attacks were masterminded by Osama bin Laden, although he has denied responsibility. Bin Laden is a rich Saudi expatriate who has long been engaged in a campaign to eradicate Western influence from the Islamic world. He inspires broad support “by taking advantage of real issues—like support for Israel, sanctions against Iraq and American troops in Saudi Arabia—that have generated much Arab and Muslim hostility toward the United States.” Nikki R. Keddie, *Divine Inspiration*, N.Y. TIMES, Dec. 16, 2001 at 13. *But see* Christopher Hitchens, *Against Rationalization*, THE NATION, Oct. 8, 2001 available at <http://www.thenation.com/doc.mhtml?i=20011008&s=hitchens> (attacking the liberal tendency to rationalize the events of September 11)

I know already that the people of Palestine and Iraq are victims of a depraved and callous Western statecraft . . . [b]ut there is no sense in which the events of September 11 can be held to constitute such a reprisal, either legally or morally . . . . It is worse than idle to propose the very trade-offs that may have been lodged somewhere in the closed-off minds of the mass murderers . . . . What they abominate about ‘the West,’ to put it in a phrase, is not what Western liberals don’t like and can’t defend about their own system, but what they *do* like about it and must defend: its emancipated women, its scientific inquiry, its separation of religion from the state.

<sup>5</sup> In 2000, 251,100 adults were incarcerated in state prisons for drug offenses. PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2001 12, tbl.17 (2002). In 2000, federal prisons held 73,389 drug offenders. *Id.* at 14.

<sup>6</sup> JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 11–12 (3d ed. 2001).

what terrorists do, but the difference is one of degree, not kind.

My argument proceeds in three parts. In Part I, I define terrorism and examine it from instrumentalist and moral perspectives. Along the way to making the case that terrorism is usually immoral, I discuss instances in which it is not. I argue, for example, that violence is morally justified to defeat genocide or slavery. Indeed, many contemporary definitions of "terrorism" would include slave rebellions, though many now think of those terrorists as heroes. Part II examines the concept of moral standing, to explain why and how it matters whether we practice what we preach about violence and morality. In Part III, I criticize the heavy reliance of our criminal justice system on utilitarianism. I make the same moral critique of most forms of utilitarian punishment that I make of most types of terrorism. I conclude by imagining how American criminal justice would be improved if punishment were not used as a means to an end.

## I. TERRORISM AND UTILITY

Terrorism, according to the Federal Bureau of Investigation, is "the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives."<sup>7</sup> Terrorism is the way that non-soldiers engage in war.<sup>8</sup> Among the

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<sup>7</sup> COUNTERTERRORISM THREAT ASSESSMENT AND WARNING UNIT, U.S. DEP'T OF JUSTICE, TERRORISM IN THE UNITED STATES i (1998), available at <http://www.fbi.gov/publications/terror/terror98.pdf>. Other intelligence agencies, like the CIA, use the definition of terrorism found in the U.S. Code. 22 U.S.C. § 2656f(d)(2) (1994) ("[t]errorism' means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.") The Department of Defense defines terrorism as "the calculated use of violence or the threat of violence to inculcate fear; [it is] intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological." Loren Lomasky has written that:

[a]ny purported definition of "terrorism" will itself be laden with moral and political baggage. Most individuals who employ violent means in their political activities prefer to speak of themselves as "urban guerrilla," "revolutionary," or some such. Thus the bromide "one person's terrorist is another's freedom fighter." One need not accede to the implied relativism to acknowledge the absence of firm and generally accepted criteria of application for "terrorism" and its cognates.

Loren E. Lomasky, *The Political Significance of Terrorism*, in *VIOLENCE, TERRORISM, AND JUSTICE* 86–87 (R.G. Frey & Christopher W. Morris eds., 1991).

<sup>8</sup> Serge Schmemmann, *U.S. Attacked; President Vows to Exact Punishment for "Evil,"* N.Y. TIMES, Sept. 12, 2001, at A1 ("Within an hour of the attacks, the United States was on war footing. The military was put on the highest state of alert, National Guard units were

differences between terrorism and traditional war are that traditional wars are sometimes "legal" and terrorism is illegal, and that the perpetrators and the intended victims of terrorism are often civilians,<sup>9</sup> whereas in traditional war the intended victims are soldiers.

Why do people engage in terrorism? Terrorists are not stupid.<sup>10</sup> They are purposeful.<sup>11</sup> The violence of terrorism, like the violence of punishment, is expressive. In the language of criminal law, terrorists may have retributive or instrumentalist motives for the suffering they inflict. "Retributive" terrorists believe that the victims (or their country) deserve punishment, for their own sake.<sup>12</sup> More typically,

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called out in Washington and New York and two aircraft carriers were dispatched to New York harbor."); Dan Balz, *Bush Confronts a Nightmare Scenario*, WASH. POST, Sept. 12, 2001, at A2 (Senator John McCain called the attacks of September 11 an "act of war."); Elizabeth Bumiller & David E. Sanger, *A Somber Bush Says Terrorism Cannot Prevail*, N.Y. TIMES, Sept. 12, 2001, at A1 ("'Freedom itself was attacked this morning by a faceless coward,' the president said."). Caleb Carr defines terrorism as "simply the contemporary name given to, and the modern permutation of, warfare deliberately waged against civilians with the purpose of destroying their will to support either leaders or policies that the agents of such violence find objectionable." CALEB CARR, *THE LESSONS OF TERROR: A HISTORY OF WARFARE AGAINST CIVILIANS: WHY IT HAS ALWAYS FAILED AND WHY IT WILL FAIL AGAIN* 6 (2002).

<sup>9</sup> The bombing of US Marine barracks and USS Cole are examples of cases in which the military is the target but the act is still considered, by many, to be terrorism. John F. Burns, *The Warship Explosion: The Overview, Blast Kills Sailors on U.S. Ship in Yemen*, WASH. POST, Oct. 13, 2000, at A1 (17 sailors killed in the attack on October 12, 2000). But see Caleb Carr's definition of terrorism, which excludes military targets. CARR, *supra* note 8, at 6.

<sup>10</sup> Bin Laden trained as an engineer. John Kelly, *The Man Behind the Terror*, WASH. POST, Sept. 27, 2001, at C12; see also Paul Blustein, *Unrest a Chief Product of Arab Economies*, WASH. POST, Jan. 26, 2002, at A1 ("[S]ome of the men identified as carrying out terrorist attacks on the World Trade Center and the Pentagon were educated—notably their apparent ringleader Mohamed Atta, a 33-year-old Egyptian with an engineering degree.").

<sup>11</sup> Loren E. Lomasky notes:

Individuals persistently unable to apprehend the sheer implausibility of toppling regimes by gunning down assorted tourists are unlikely candidates of successfully carrying out complex quasi-military operations. In the absence of specific evidence to the contrary, it is reasonable to impute to terrorism no lesser rationality than that which social analysts routinely ascribe to other actors and which, in any event, is requisite for the conduct of their operations. Rational agents are not systematically unable to distinguish efficacious from inefficacious activity.

Lomasky, *supra* note 7, at 90.

<sup>12</sup> During his sentencing, Ramzi Ahmed Yousef, the mastermind behind the 1993 bombing of the Twin Towers, "cited the bombing of Japan, the Vietnam War, and the trade embargoes against Cuba and Iraq as US acts that warranted punishment." John Parachini, *Religion Isn't Sole Motivation of Terror*, L.A. TIMES, Sept. 16, 2001, at M7. In 1998, two US embassies in Africa were bombed eight years to the day after the arrival of the first United States troops in Saudi Arabia after Iraq invaded Kuwait. *Id.* "Before receiving his sentence, Mr. Yousef . . . railed against the United States, Israel, and what he termed the

though, the objective of terrorism is instrumentalist. Terrorists want to coerce compliance with their will by inflicting fear.<sup>13</sup>

Terrorism is efficient when its benefits outweigh its costs.<sup>14</sup> This is a difficult calculus for some non-terrorists to understand.<sup>15</sup> The benefits of terrorism often seem indeterminate or too intangible to quantify. What, for example, were the September 11 terrorists seeking? If their intent was to make the United States less friendly

Jewish lobby in Washington, saying terrorism was the only viable response to their policies toward the Palestinians and people in other Muslim countries." Benjamin Weiser, *Mastermind Gets Life for Bombing of Trade Center*, N.Y. TIMES, Jan. 9, 1998, at A1.

<sup>13</sup> After the bombing of the World Trade Center in 1993, the conspirators

justified their attack as a way to transfer the conflict between Israelis and Palestinians to the American homeland and argued that Americans would only diminish their support for Israel when they suffered in the same way as Palestinians and other people like them in moderate Arab countries. The bombers argued that "the American people must know that their civilians who got killed are not better than those who are getting killed by the American weapons and support.

Parachini, *supra* note 12, at M7. In November, a videotape was found in a house in Jalalabad, Afghanistan in which bin Laden says, "we will not stop our raids until you free our lands." Judith Miller, *The Mastermind, A Glimpse, Guard Down*, N.Y. TIMES, Dec. 14, 2001, at A1. The intent of other instrumentalist terrorists might be provocation of a holy war. See John F. Burns, *Bin Laden Taunts U.S. and Praises Hijackers*, N.Y. TIMES, Oct. 8, 2001, at A1; Douglas Frantz & David Rohde, *How Bin Laden and Taliban Forged Jihad Ties*, N.Y. TIMES, Nov. 22, 2001, at B1.

<sup>14</sup> I am assuming that terrorists are rational, or at least subject to deterrence. See, e.g. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 243 (5th ed. 1998)

The notion of the criminal as a rational calculator will strike many readers as unrealistic, especially when applied to criminals having little education or to crimes not committed for pecuniary gain. But . . . a better test of a theory than the realism of its assumptions is its predictive power. A growing empirical literature on crime has shown that criminals respond to changes in opportunity costs, in the probability of apprehension, in the severity of punishment, and in other relevant variables as if they were indeed the rational calculators of the economic model—and this regardless of whether the crime is committed for pecuniary gain or out of passion, or by well educated or poorly educated people.

*Id.* But see Arthur Schlesinger, Jr., *When Terrorists Take Hostages; Obsession Leads to Paralysis*, N.Y. TIMES, June 27, 1985, at A23 (arguing that terrorists are "religious fanatics for whom death in a great cause is its own reward.").

<sup>15</sup> Perhaps non-terrorists make such calculations more frequently than we think. Professor Cass Sunstein has suggested that people engage in cost-benefit analysis frequently, including balancing their safety and security. See CASS R. SUNSTEIN, *RISK AND REASON: SAFETY, LAW AND THE ENVIRONMENT* (2002).

We choose how much to spend on cars, knowing that safety is expensive; we decide how much to spend on security systems in the home; we choose where to live, knowing that some areas are safer than others; we go out at night, even though we know that by doing so, we increase our risks; when the cost of risk reduction is too high, we will not incur that cost even to protect our own children. What seems forbidden is not behavior that embodies tradeoffs, but rather unduly explicit talk to the effect.

*Id.* at 127.

towards Israel, or to get American troops out of Saudi Arabia, they lost, at least in the short term. If, on the other hand, their objective was less specific—their desire was simply to hurt Americans, to frighten them, to make their institutions less stable, to reduce the sense of security conferred by citizenship in the world's most powerful country—then the September 11 terrorists were spectacularly successful.

Unlike its benefits, terrorism's costs are all too tangible. Frequently the costs are measured in body bags. The costs may include 1) the lives of the victims; 2) the terrorists' own lives;<sup>16</sup> 3) punishment; 4) war or other violence against the terrorists' "side;" and 5) public backlash against the terrorists' cause. For the suicide terrorist, death is the most certain cost. The Western (and especially the American) emphasis on individuality—the primacy of self—makes it difficult for us to understand how any cause, especially a "political" one, could be worth losing one's life. There are, however, those whose faith in their cause makes them willing to die for it.<sup>17</sup> This concept is commonplace in military discourse and terrorists are, in a sense, civilian soldiers.<sup>18</sup>

The most pitiful cost of terrorism is the loss of innocent life. For the terrorist, the pain inflicted on victims actually might be a benefit (because, in his mind, the victims are not "innocent").<sup>19</sup> A terrorist

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<sup>16</sup> But see Ehud Sprinzak, *Rational Fanatics*, FOREIGN POL'Y, Sept./Oct. 2000. He notes that experts on terrorists believe that

[s]uicide terrorism has inherent tactical advantages over "conventional" terrorism: It is a simple and low-cost operation (requiring no escape routes or complicated rescue operations); it guarantees mass casualties and extensive damage (since the suicide bomber can choose the exact time, location, and circumstances of the attack); there is no fear that interrogated terrorists will surrender important information (because their deaths are certain); and it has an immense impact on the public and the media (due to the overwhelming sense of helplessness).

*Id.*

<sup>17</sup> Bill Maher, the host of ABC's *Politically Incorrect*, was criticized for agreeing with Dinesh D'Souza's assertion on Maher's program that the September 11 terrorists were not cowardly. Maher added: "We have been the cowards, lobbying cruise missiles from 2,000 miles away. That's cowardly. Staying in the airplane when it hits the building, say what you want about it, it's not cowardly." This comment caused unrest amongst many viewers, resulting in Sears and FedEx pulling their advertising from the program. Paul Brownfield, *Troubled Timing Makes Maher Beyond "Politically Correct,"* Sept. 26, 2001, L.A. TIMES, (Calendar), at 1.

<sup>18</sup> Nathan Hale, the famous American patriot, before being executed by the British in 1776 for espionage said, "I regret that I have but one life to lose for my country." MONRO MACCLOSKEY, *THE AMERICAN INTELLIGENCE COMMUNITY* 33 (1967).

<sup>19</sup> See David Rudge, *Revised Hamas Tactics a Cause for Concern*, JERUSALEM POST, Aug. 25, 1998, at 4 (quoting Dr. Menachem Klein, professor at Bar-Ilan University and

might, on the other hand, regret his taking of life, but view it as an unavoidable cost of doing business, in the way that a “legal” soldier knows that her work may require her to kill others, or that General Motors understands that its automobiles will cause deaths.

The other costs of terrorism—punishment, war, backlash—are considerably more speculative. This lessens their effectiveness as deterrence.<sup>20</sup> For deterrence, the certainty of a consequence is a more important correlate than the severity of a consequence.

The reason that terrorism exists is because, at times, it works. Frequently cited examples of “successful” terrorism include the effort by Zionist extremists to create the state of Israel by killing Palestinians, the campaign of militant Palestinians against moderate or conservative Palestinians in the West Bank, the violence perpetrated by the Irish Republic Army against the United Kingdom, and (in constructs of terrorism that include state actors) the bombings of Dresden, Hiroshima, and Nagasaki. Depending on what one views as their goals, the September 11 terrorists are considered by some to have “won” as well.

Perhaps as tacit acknowledgment that terrorism can be efficient, the typical critique is based on a different ground: morality. Terrorists may be rational, the argument goes, but they are also evil.<sup>21</sup> The philosopher Jan Narveson has identified three components to the immorality of terrorism: first, the sense of risk that it causes the public at large; second, the powerlessness people have from being put

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Palestinian affairs expert, as saying that “[m]any Palestinians, including Hamas, view settlers as soldiers, because they are occupying Palestinian territory, and they are therefore considered legitimate targets in a war of liberation.”).

<sup>20</sup> See, e.g. SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 119 (7th ed., 2001) (“The two plausible ways to increase the direct deterrent effect of punishment are, first, to increase the risk of conviction, and second, to increase the severity of punishment. The first of these alternatives appears to be the more effective, although it is also the more difficult to implement.”).

<sup>21</sup> On September 11, 2001, President Bush declared, “today our nation saw evil, the very worst of human nature.” Elisabeth Bumiller & David E. Sanger, *A Somber Bush Says Terrorism Cannot Prevail*, N.Y. TIMES, Sept. 12, 2001, at A1.

Anyone who does not loathe the people who did these things, and the people who cheer them on, is too philosophical for decent company . . . . If what happened Tuesday does not give Americans the political will needed to exterminate men like Osama bin Laden and those who conspire with them in evil mischief, then nothing will . . . .

Lance Morrow, *The Case for Rage and Retribution*, TIME, Sept. 14, 2001, at 48. See also Leonard Pitts, Jr., *We’ll Go Forward from Here*, MIAMI HERALD, Sept. 12, 2001, at 2A. (“You monster. You beast. You unspeakable bastard. What lesson did you hope to teach us by your coward’s attack on our World Trade Center, our Pentagon, us . . . ?”).



at risk; and third, the “apparent absurdity” of attacking an innocent victim in pursuit of a political goal.<sup>22</sup>

In those cases in which it is not absurd to sacrifice an innocent life to make a political point, however, there is a (not unfamiliar) conflict between what the market bears and what morality demands.<sup>23</sup> Even when terrorism “works,” most Americans would say it is immoral because its tools are death and destruction.<sup>24</sup> Those tools seem outside the bounds of civic discourse.<sup>25</sup>

Of course they are not. Almost 40 years before September 11, 2001, H. Rap Brown, the African-American revolutionary, observed that “violence is as American as apple pie.”<sup>26</sup> In criminal law, killing or injuring people to achieve some useful purpose is a familiar concept. When the government intentionally kills or hurts someone under the guise of “punishment,” it may have retributive and/or utilitarian objectives. Retributivists punish exclusively because punishment is deserved, either because the criminal is morally blameworthy or because she has broken some contract with society. Utilitarians believe that criminals should be harmed when it is in the best interest of society, usually because punishment is believed to deter other crime, or to incapacitate a criminal, or to rehabilitate her.

Law and morality do not limit the instrumental use of violence to

<sup>22</sup> See Jan Narveson, *Terrorism and Morality*, in *VIOLENCE, TERRORISM AND JUSTICE*, *supra* note 7, at 116, 124–125 (“What is so awful about terrorism, then? It is, I take it, much the same thing as what is awful about ordinary crime: violence and the threat of violence to peaceable persons, persons attempting to go about their lives in the pursuit of harmless, nonthreatening, and morally useful purposes.”).

<sup>23</sup> For an example of “efficiencies” that are immoral or illegal, (e.g., discrimination), see Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991).

<sup>24</sup> Immanuel Kant is perhaps the best-known critic of utilitarianism. He warned that

[o]ne man ought never to be dealt with merely as a means subservient to the purpose of another . . . . Against such treatment his inborn personality has a right to protect him . . . . For if justice and righteousness perish, human life would no longer have any value in the world.

IMMANUEL KANT, *THE PHILOSOPHY OF LAW* (W. Hastie trans., 1887).

<sup>25</sup> Writing long before September 11, 2001, Professor Lomasky observed that though “terrorism has imposed severe costs within Western (and other) societies . . . [t]hese costs . . . have fallen far more heavily on individuals than on political institutions.” Nonetheless, he writes, “sober-minded persons of seasoned political judgment adopt near-apocalyptic tones when discussing the impact of terrorism.” Thus, he believes that there is a “disproportion between, on the one hand, the nugatory capacity of terrorist activity to disrupt political structures and, on the other hand, the fevered commentary it elicits.”

Lomasky, *supra* note 7, at 96–97.

<sup>26</sup> H. RAP BROWN, *DIE NIGGER DIE!* 144 (1969).

the state. Private actors are sometimes allowed to kill and destroy, if they have good reason. Defending one's life is a classic example. More broadly, the philosopher Jan Narveson has described six situations in which private violence might be moral.<sup>27</sup> He states them in order from most to least plausible justifications:

- (1) Preventing immediate injury to self – sheer self-defense
- (2) Preventing immediate injury to others – sheer other-defense
- (3) Preventing longer-range threats to life, to self or others
- (4) Preventing or rectifying loss of legitimate liberty by self or others
- (5) Providing conditions of a minimally acceptable life when no other means is possible (even when others have not clearly deprived one of such conditions)
- (6) Promoting a *better* life for oneself, some favored group, or humankind at large, beyond the “minimally acceptable” level mentioned in (5).<sup>28</sup>

Narveson proposes that, on a moral scale, (1)–(4) are “basically acceptable, that (6) is definitely not acceptable, and that (5) is the hard case, but that fundamentally it must be considered marginally acceptable if at all.”<sup>29</sup> He posits that choices (1)–(4) invoke violence as “defense” and that (5) and (6) promote violence as “need.” Professor Narveson’s calculus of morality, based on social contract theory, explains the revulsion felt by many Americans regarding the September 11, 2001 terrorists. These Americans probably would place those terrorists in Category (6), which according to Narveson is “definitely” immoral.

Terrorism is an extreme example of sacrificing lives as a means to an end, although as Part III of this article argues, it is far from the only example. Even considering the extreme, is harming innocents always immoral? To use an example from American history, was private violence directed against civilians morally acceptable to end slavery? Popular culture, at least, reveals a more balanced assessment of the people who championed violence to attack the

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<sup>27</sup> Narveson, *supra* note 22, at 130. Narveson defines morality as

[a] set of behavioral requirements and inducements that are (1) societywide: Everyone is to be subject to, to live up to the rules that are (2) (to be) universally reinforced: Everyone is also to participate in their reinforcement, by an assortment of (3) informal methods. No central, official agency defines and enforces them.

*Id.* at 127.

<sup>28</sup> *Id.* at 130.

<sup>29</sup> *Id.* at 131.

“peculiar institution.” Viewed through contemporary eyes, men like Nat Turner and John Brown may not exactly be heroes, but they are not exactly “terrorists” either. They occupy a more nuanced space in our moral universe.<sup>30</sup> As a descendent of slaves, and a witness to the scars slavery left, I am unwilling to condemn, categorically, private violence that sought to hasten its abolition.<sup>31</sup>

I am not alone in this belief. The people of Charleston, South Carolina, for example, recently erected a monument in honor of Denmark Vesey, a would-be terrorist. Vesey was executed in 1822. His crime was conspiracy. If successful, Vesey and his co-conspirators would have freed the slaves of Charleston by burning the city to the ground, killing all of the whites, stealing ships, and then fleeing to Haiti. When the tribute to Vesey was proposed, some Charleston residents protested; Vesey, after all, plotted to kill innocent people. The view that Vesey was a hero (instead of being a terrorist? in addition to being a terrorist?) carried the day.<sup>32</sup> At least in the eyes of some Americans, morality and the killing of innocent people are not always mutually inconsistent.

The uncertainty about how to evaluate the morality of some terrorists (one might also think of the original American rebels) has two possible explanations: (1) we have a double standard about terrorism and morality depending on our sympathy for the terrorists’ cause; or (2) there may be some extreme cases in which the taking of innocent lives in pursuit of an urgent objective is warranted. If we accept the former explanation, the appropriate moral solution probably is to have one standard for political violence, and that standard probably requires absolute condemnation in every case. If we endorse the second explanation, however, there may be exceptions to the general rule that terrorism is immoral. These

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<sup>30</sup> Of course slaves who led revolts had an immediate incentive: self-help. Their use of violence was directly connected to their gain, not attenuated in the way of terrorists who use violence to further a political objective. Non-slave insurrectionists, on the hand, would be “terrorists” under virtually any contemporary definition of the term. Lomasky, *supra* note 7, at 87 (noting “[w]hen TWA ticket counters or Israeli schoolchildren are sprayed with bullets, when newspaper heiresses are held hostage, Turkish diplomats murdered . . . the events are routinely and unproblematically understood by the media and their audience to be terroristic.”).

<sup>31</sup> My critique, if any, would be that private violence was not efficient. The moral case against it is less certain. Indeed, popular culture more frequently depicts anti-slavery insurrectionists as irrational than as immoral. See, e.g., WILLIAM STYRON, *THE CONFESSIONS OF NAT TURNER* (1966).

<sup>32</sup> See Jon Wiener, *Denmark Vesey: A New Verdict*, *THE NATION*, Mar. 11, 2002, at 21 (examining open historical questions about the incident).

exceptions must be carefully delineated, and then rigorously scrutinized to make sure that they are not self-serving.

Using Professor Narveson's scale, violence against the "guilty" (*i.e.*, the perpetrators) to combat genocide would be acceptable under (1)–(3), and violence to combat slavery would be justified under (4). Violence against "innocents" to combat genocide and slavery probably would fall into category (5), which Narveson describes as the "hard case." Killing innocents to end slavery is akin to the shipwrecked Dudley and Stephens killing the innocent cabin boy to save their own lives.<sup>33</sup> This is a classic hard case in criminal law. For the purposes of this essay I need not resolve the dilemma of law and morality the case presents. Rather, I simply acknowledge the dilemma. The case against harming innocents is not always as obvious as it first seems.

As I suggest in Part III, the criminal law also presents a few compelling reasons to embrace utilitarianism, especially in extreme cases. We have the same two alternatives. We might eschew utilitarianism in criminal justice in every case, on grounds of moral consistency. We might, on the other hand, consider exceptions to the moral argument against utilitarianism.

In summary, yes, the terrorists of September 11 were evil. They sacrificed human beings to pursue objectives that they should have pursued in a different way, even if the methods they used were efficient. I think that the reliance on excessive punishment in American criminal justice is evil in a like manner, and that this fact detracts from the force of our moral condemnation of terrorism. In the next sections, I explain why.

## II. MORAL STANDING

Do Americans have moral "standing" to criticize terrorists because terrorists take innocent lives as a means to an end?<sup>34</sup> Perhaps

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<sup>33</sup> See *Regina v. Dudley & Stephens*, 14 Q.B.D. 273 (1884). This analysis assumes, of course, that terrorism (*e.g.*, killing innocents to defeat slavery) is efficient, in the same way that Dudley and Stephens knew that they would live if they killed and ate the cabin boy. For a fictionalized version of the issue in *Dudley & Stephens*, see Lon F. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949). See also, PAUL BUTLER ET. AL, *THE CASE OF THE SPELUNCEAN EXPLORERS: A FIFTIETH ANNIVERSARY SYMPOSIUM*, 112 HARV. L. REV. 1834 (1999).

<sup>34</sup> Robin West, *Taking Moral Argument Seriously*, 74 CHI.-KENT L. REV. 499, 500 (citing Ronald Dworkin for the proposition that "the determinacy, integrity, coherence, and 'wholeness' of law are central to its moral standing and to our status as free and equal individuals deserving its respect.").

not. I will explain in the next section how our criminal law also uses harm as a means to an end. I first address, however, why moral standing matters.<sup>35</sup>

Standing is the legal doctrine that describes the necessary relationship between a litigant and a claim in order for the litigant to seek redress in court.<sup>36</sup> In a federal case, for example, the plaintiff must prove that "he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant."<sup>37</sup> In legal scholarship, standing has been used as a metaphor to discuss the significance of voice.<sup>38</sup> Some speakers are more credible than others, the argument goes, because of who they are, or what they have experienced. In this analysis, standing is more about legitimacy than rights. In the academy, any scholar has the "right" to discuss whatever she wishes. We might respect her views more, though, if

<sup>35</sup> Robert Wright has made a socio-biological argument in favor of moral standing. As summarized by Amy L. Wax, his argument is that

reputation—that is, what others say about us and how we appear in their eyes—acquires enormous importance. The quest for moral standing is primarily a manifestation of the "desire to be known as a reliable reciprocal altruist," and the aim of conscience, and of feelings of guilt and shame, is not primarily to make us generous and decent, but to drive us to cultivate a reputation for generosity and decency. Wright asserts that it is the desire for a virtuous reputation that "helps give consensual moral codes their tremendous power."

Amy L. Wax, *Against Nature—On Robert Wright's The Moral Animal*, 63 U. CHI. L. REV. 307, 322 (reviewing ROBERT WRIGHT, *THE MORAL ANIMAL: EVOLUTIONARY PSYCHOLOGY AND EVERYDAY LIFE* (1994)).

<sup>36</sup> "Standing," even in the legal, non-metaphorical sense, has eluded precise definition. See Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1372 (1988):

It is almost de rigueur for articles on standing to quote Professor Freund's testimony to Congress that the concept of standing is "among the most amorphous in the entire domain of public law." One of the traditional criticisms of standing law is that it is confusing and seemingly incoherent. Even the staunchest judicial advocates of the doctrine readily admit as much: "We need not mince words when we say that the concept of Art. III standing" has not been defined with complete consistency . . . .

*Id.*

<sup>37</sup> *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State Inc.*, 454 U.S. 464, 472 (1982).

<sup>38</sup> In a famous essay, Professor Richard Delgado suggested that white academics write differently about anti-discrimination laws than do scholars of color. Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984). In response, Professor Randall Kennedy accused Delgado of arguing that white scholars do not have "racial standing" to write about anti-discrimination law. Randall Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989). Other legal scholars have referred to a concept of "moral standing," although they have not defined this term.

we believe that she is a credible person.

Moral standing is, in essence, an academic rendering of the folk expression that a person should “practice what he preaches.” If one doesn’t practice what he preaches, it does not necessarily mean that the sermon is incorrect. Rather, the implied critique is that the preacher is a hypocrite.

So what if the United States is a hypocrite on the world stage with regard to certain issues, including the permissible uses of violence? In a strictly legal sense, “so what” is the correct response. Remember, though, that moral standing is about legitimacy and not about rights. Law is not the only, and sometimes not the main, source of influence, power, and authority. Particularly in the context of international law, politics and morality matter. Because the norms of international law, the means of enforcing it, and the penalties for violating it are evolving, moral authority sometimes might be as important, or determinable, as legal authority.<sup>39</sup> In the war against terrorism, the United States government has professed indignation at terrorism; it repeatedly casts the terrorists as “evil” and “uncivilized.” It has demanded, in uncompromising rhetoric, the rest of the world’s

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<sup>39</sup> Several commentators have made “moral standing” critiques of United States involvement in international affairs. Former United States Attorney General Ramsey Clark made the argument that the International Tribunal for the former Yugoslavia lacked the legitimacy to try former Yugoslav president Slobodan Milosevic. He urged Milosevic’s defense to “talk about the responsibility of the United States in the NATO bombings of Yugoslavia, for 78 days . . . for the forceful departure of hundreds of thousands of Serbs from Kosovo . . . and for the current crisis in Macedonia.” *Milosevic Advised by Former US Attorney General*, AGENCE FRANCE PRESS, July 31, 2001. Likewise, William D. Hartung, speaking of the NATO campaign in Kosovo, wrote:

[t]he bombings may or may not be “degrading” Milosevic’s forces, but they have certainly degraded the standing of the United States as a world leader . . . [a]nd until it sheds its role as a UN deadbeat, the United States will have little political or moral standing to promote a comprehensive plan for sharing the burdens of peacekeeping with key allies and regional organizations.

William D. Hartung, *A Degrading Policy*, GLOBAL BEAT SYNDICATE, Apr. 8, 1999, available at <http://www.nyu.edu/globalbeat/syndicate/Hartung0499.html>. When the United States threatened not to attend a U.N. conference against racism, Matthew Rothschild wrote, “the overriding purpose of the . . . conference—to take a stand against racism in all its guises—is so urgent and lofty that to spurn it is to diminish not the importance of the conference, but the moral standing of the United States itself.” Matthew Rothschild, *Disgrace in Durban*, THE PROGRESSIVE, Aug. 30, 2001. After the U.S. left the conference, Karen K. Narasaki, president of the National Asian Pacific American Legal Consortium said “[y]ou certainly don’t build your moral standing in the world by running away.” Rachel L. Swarns, *The Racism Walkout: The Overview; U.S. and Israelis Quit Racism Talk over Denunciation*, N.Y. TIMES, Sept. 4, 2001, at A1.

support in military actions against terrorists.<sup>40</sup> If, in fact, the United States has not practiced what it has preached about the use of violence to achieve social objectives, its leadership position in the war against terrorism might be compromised.

Unlike legal standing, however, moral standing is not an all or nothing proposition. The fact that the United States might also engage in utilitarian violence does not mean that it has no authority to criticize others who do, but it diminishes the force of the critique. My recommendation is not that citizens of the United States cease criticism of terrorists. Rather, they should recognize the critique as one of instrumentalism, and then apply it at home. The next section suggests that the criminal law is an appropriate place to begin this self-scrutiny.

### III. THE CRIMINAL LAW AND UTILITY

#### A. THOUGHT EXPERIMENT

Suicide terrorists are not deterred by what is generally thought of as the ultimate sanction: the death penalty. This does not, however, mean that they are undeterrable. It means only that the taking of their lives is not a severe enough sanction.

Imagine that the Central Intelligence Agency let it be known that its agents will assassinate five members of the immediate family of any terrorist who dies in a suicide attack. It believes that this punishment will be greater deterrence than any possible punishment of an individual terrorist. The CIA's objective is to prevent future terrorism. Thus, to send a message to potential terrorists, it plans to kill five family members of each of the nineteen September 11 suicide terrorists.<sup>41</sup> Should it? Does your answer depend upon how certain we are of the potential for future terrorism and the deterrent effect of the CIA's act? Suppose we knew that the CIA's act would deter at least one future attack, in which many more lives would be lost than the ninety-five that the CIA would take?

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<sup>40</sup> Elisabeth Bumiller, *Bush Pledges Attack on Afghanistan Unless it Surrenders Bin Laden Now; He Creates Cabinet Post for Security*, N.Y. TIMES, Sept. 21, 2001, at A1 (quoting Bush, who said "either you are with me, or you are with the terrorists.").

<sup>41</sup> The Associated Press reported that on March 4, 2002 "Israel stepped up reprisals for Palestinian [terrorist] attacks, and Palestinians said 16 people were killed by Israeli fire, including the wife and three children of an Islamic militant leader . . . ." Greg Myre, *Israeli Warplanes Fire on Arafat's Office in Bethlehem, Sixteen Palestinians Killed Amid Israeli Reprisals*, ASSOCIATED PRESS, Mar. 4, 2002.

This thought experiment is a more severe variation of the well-known “ticking time-bomb” hypothetical. This scenario, long included in criminal procedure casebooks, is no longer academic. It asks us to imagine that a person in police custody has information about the location of a bomb that is timed to explode in a short time. The person refuses to talk to the police. Should the police torture him to force him to talk?

Although United States law does not allow the government to punish innocent people, or to torture anyone,<sup>42</sup> it apparently does permit other forms of utilitarianism, even when innocent lives are sacrificed. There are examples immediately related to the events of September 11, 2001. After the hijacked commercial airplanes crashed into the twin towers of the World Trade Center and the Pentagon, the government learned of another hijacked aircraft that appeared to be heading towards Washington, D.C. The President and the Secretary of Defense each independently authorized the military to shoot down the plane, even though they knew that many innocent lives would be lost.<sup>43</sup> Military action turned out not to be necessary, apparently because of the self-sacrificing acts of some of the passengers of the aircraft.<sup>44</sup>

If you think that the government should be allowed to kill or torture for the greater good, you are a utilitarian. What you have in

<sup>42</sup> But see Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations; “Stress and Duress” Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A1 (reporting that terrorism suspects detained in secret U.S. military facilities are “sometimes kept standing or kneeling for hours, in black hoods or spray-painted goggles . . . . At times they are held in awkward, painful positions and deprived of sleep with a 24-hour bombardment of lights—subject to what are known as ‘stress and duress’ techniques.”).

<sup>43</sup> Dan Balz & Bob Woodward, *America’s Chaotic Road to War; Bush’s Global Strategy Began to Shape in First Frantic Hours after Attack*, WASH. POST, Jan. 27, 2002, at A1. Bush spoke again to Cheney, who said the combat air patrol needed rules of engagement if pilots encountered an aircraft that might be under the control of hijackers. Cheney recommended that Bush authorize the military to shoot down any such civilian airlines—as momentous a decision as the president was asked to make in those first hours. “I said ‘you bet,’” Bush recalled. “We had a little discussion but not much.”

<sup>44</sup> See Charles Lane et al., *A Sky Filled With Chaos, Uncertainty and True Heroism; Passenger on One Plane Relayed Plan; Controllers Scrambled to Track Flights*, WASH. POST, Sept. 17, 2001, at A3.

The phone call [made by a passenger from the plane] . . . offers the most detailed evidence yet of the passenger revolt aboard Flight 93 that may have caused the plane to crash short of its intended target—believed to be Washington. In other phone calls, two passengers told people on the ground they were planning to try to overpower the hijackers.

*Id.*



common with terrorists is either a disregard for morality, or a construct of it that allows the sacrifice of human lives or dignity for the greater good. If, on the other hand, you believe that the state should not kill or torture—even when the stakes are as high as they are in the thought experiment—ask yourself whether utilitarianism is warranted when its benefits are significantly lower.

Thus far, these real life examples of utilitarianism involve the law of war. War is, famously, hell, and perhaps that explains the perceived necessity of sacrificing the innocent.<sup>45</sup> Yet, as demonstrated below, criminal law also authorizes the deliberate infliction of pain on some for the good of the whole.

#### B. UTILITARIAN PUNISHMENT

A leading criminal law textbook states that “prevention theories furnish a widely accepted rationale of the practice of punishment.” According to these theories, punishment should be designed not to exact retribution on convicted offenders, but to prevent the commission of future offenses.<sup>46</sup> The major forms of utilitarian punishment are deterrence, incapacitation, and rehabilitation. The philosophical counterpoint to utilitarian punishment is retribution, which measures punishment exclusively by the criminal’s “just deserts.” Retributivists believe that punishment that exceeds individual desert is immoral.

Despite efforts to reconcile utilitarianism and retribution, the two philosophies “conflict with each other. Although adherents of both theories may agree on results in particular cases, a criminal justice system that seeks, exclusively, to prevent future crime will look very different from one that seeks, exclusively, to impose punishment based on a just-deserts philosophy.”<sup>47</sup>

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<sup>45</sup> There are also compelling examples of anti-utilitarian acts during war. The precept that if a soldier is stranded in enemy territory he will not be left behind may result in a net loss of life; *i.e.*, other soldiers may be killed in an effort to save their fallen brother or sister. During the U.S. intervention in Somalia, as dramatically depicted in the film *Black Hawk Down*, several American troops lost their lives in an effort to save the lives or recover the bodies of their fallen comrades. *BLACK HAWK DOWN* (Sony Pictures 2001).

<sup>46</sup> KADISH & SCHULHOFER, *supra* note 20, at 115–16.

<sup>47</sup> *Id.* But see Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 Nw. U. L. REV. 453, 454 (1997) (arguing that although “the underlying rationales of [retribution and utilitarian punishment] may be irreconcilable, their practical applications, properly done, suggest similar distributions of liability and punishment.”). Although Immanuel Kant argued that retribution is fundamentally inconsistent with utilitarian justifications of punishment,

The severe punishment for drug crimes favored by most American jurisdictions is a troubling example of the conflict between utilitarianism and retribution.<sup>48</sup> It is difficult to justify long sentences for drug crimes on ground of individual desert. Indeed, retribution probably is not the principle animus of these sentences.<sup>49</sup> As a former United States Sentencing Commissioner noted “[I]n the area of crimes related to drugs, crime control goals rather than just deserts . . . prevail . . . .”<sup>50</sup>

There is some evidence that these sentences have achieved their goals. Since the war on drugs resulted in more severe punishment, an extraordinary number of people have been punished for using or selling drugs.<sup>51</sup> Deterrence is notoriously difficult to measure, but to the extent that fewer people are arrested for those crimes now, the stricter sentences may have been effective.<sup>52</sup> Unless there are a

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many scholars have sought to justify a mixed theory of criminal punishment. They distinguish between, on the one hand, the general justifying aim of the criminal law, and on the other hand, the rules of criminal responsibility that determine who should be punished and how severe the punishment should be. Many have argued that the general aim of the criminal law—the reason why society has a criminal justice system—is to deter unwanted behavior. Nonetheless, some of these same utilitarians apply retributive concepts of just deserts in determining whether and how much to punish a particular person.

See DRESSLER, *supra* note 6, at 17. Norval Morris is the best-known exponent of this “hybrid” theory of punishment, also known as the “middle way.” See, e.g., NORVAL MORRIS & MICHAEL TONRY, *BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM* (1990); NORVAL MORRIS, *MADNESS AND THE CRIMINAL LAW* (1982); NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* (1974).

<sup>48</sup> On average, drug offenders serve longer federal sentences (78 months) than federal prisoners incarcerated for rape (67 months), burglary (51 months), aggravated assault (50 months) and auto theft (37 months). See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS* 476 (1996).

<sup>49</sup> Professor Sara Sun Beale has noted “[i]t seems doubtful whether drug offenses evoke the strongest retributive impulses. It seems more likely that three strikes and mandatory minimum legislation [for drug offenses] is based upon a deterrent view of the purposes of criminal sanctions.” Sara Sun Beale, *What’s Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 56 (1997).

<sup>50</sup> Ilene H. Nagel, *Foreword: Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 914 n.190 (1990).

<sup>51</sup> See *supra*, note 5.

<sup>52</sup> Adrian Walker, *Panel Finds Mandatory Sentencing Boosts Bias; Disparities are Cited in Handling of Cases*, BOSTON GLOBE, Aug. 29, 1991, at 3 (quoting Justice Department official Paul Maloney, who said, “when you’re talking about five grams of crack cocaine, you’re talking about something that has wreaked untold havoc in cities, and the question is whether Congress has made a policy choice that is effective in trying to deter drug trafficking. We believe they serve a valuable deterrent purpose.”).

virtually unlimited number of people willing to sell drugs, it seems reasonable to believe that incarcerating drug sellers for long periods of time will achieve the social benefit of reduced drug sales.

Other examples of criminal justice premised on utilitarianism are recidivist statutes, for example, "three strikes and you're out" laws, and the legal fiction of treating some children who commit serious crimes "as adults" for the purpose of punishing them more severely.<sup>53</sup>

Is the only important question to ask about these practices whether they are efficient? If getting tough on drug offenders, recidivists and child delinquents makes us safer, should that be the end of the inquiry? To answer that there are moral reasons to be concerned about punishment that exceeds individual desert is hardly to stake out a groundbreaking or radical position. Immanuel Kant warned, in 1797, that "a human being can never be manipulated merely as a means to the purposes of someone else."<sup>54</sup> The dignity of human life is offended whenever people are hurt or killed for reasons other than their individual desert. To do so is to treat a human being like a beast of burden. The history of the United States, and the world, is full of examples of the horrors to which such thinking leads. September 11, 2001 is only the most recent prominent example.

For many Americans, however, the critique of instrumentality seems to have great force when applied to terrorism and less force when applied to punishment. There are at least three possible explanations for a different assessment of the morality of ends-justified analysis when applied to terrorism than when applied to punishment. It may be that Americans prefer the state to exercise a monopoly on the power to inflict harm. Under this view, even if the state abuses its power, it still acts more legitimately than terrorists, because it is subject to democratic constraints.<sup>55</sup> The problem with this view is that it probably is not a correct assessment of the way we really think about private violence. American law, for example, allows private violence in several contexts, including in certain circumstances to defend one's self, property, or to prevent crimes. Moreover, recalling the discussion in Section I, we can think of other cases in which private violence would be illegal but still morally right

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<sup>53</sup> See Paul H. Robinson, *Commentary: Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1434–35 (2001).

<sup>54</sup> IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 100 (John Ladd trans., Bobbs-Merrill Co. 1965) (1797).

<sup>55</sup> Note, however, that in some American wars where there is no Congressional action, the democratic process is not fully observed.

in the eyes of many. Again, the examples of violence to combat genocide and slavery come to mind.

Perhaps we differ in our moral assessment of terrorism and excessive punishment because terrorists harm “innocent” people, but punishment harms criminals.<sup>56</sup> This explanation is factually correct: criminals by definition are guilty. Some people may not care about disproportionate pain inflicted on criminals, and this view probably accounts for much of the differing assessment of morality between utilitarian punishment and terrorism. Even those who endorse utilitarianism, though, probably would impose some limit on punishment. We express revulsion at perceived excessive punishment in other cultures—for example, punishing a thief by cutting off his hands. Most Americans probably would not want the government to strap Susan Smith in a car and then push the car into a lake, even though that is how she killed her own children.<sup>57</sup> Likewise, most American utilitarians probably would not endorse a sentence of life imprisonment for a shoplifter, even if that punishment would be socially useful. The fact that criminals, not innocents, are the victims of utilitarian violence probably explains some, but not all, of the distinction in our moral assessment of utilitarian terrorism versus utilitarian punishment.

The final explanation I will posit is that our view of the morality of cost-benefit analysis depends on our relationship to those costs and benefits. Assuming that the benefit of utilitarian punishment is a net increase in public safety, many do not mind that the cost is excessive punishment. Furthermore, the burden is not one that most Americans bear. The criminal is perceived as the “other.”<sup>58</sup> In the case of terrorism against the United States, on the other hand, there is nothing about it that benefits us. Moreover, we disproportionately bear the costs. We try to make terrorism inefficient by taking steps to make sure that the terrorists do not “win,” but, as described in Part I, terrorism is sometimes efficient. Our trump card, then, is that terrorism is evil. Perhaps by “evil,” though, we mean that there is

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<sup>56</sup> But see Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1 (1990).

<sup>57</sup> For an account of Susan Smith’s crime, see Rick Bragg, *Smith Jury Hears of 2 Little Bodies, and a Letter, in the Lake*, N.Y. TIMES, July 20, 1995 at A16.

<sup>58</sup> See Robert M. Bohm, *Crime, Criminals and Crime Control Policy Myths* in JUSTICE CRIME AND ETHICS 309 (Michael C. Braswell et al., eds., 1998) (noting that “many self-conceived law-abiding citizens are engaging in self-delusion” on account of evidence that “90% of Americans have committed some crime for which they could be incarcerated.”).

nothing in it for us.

### C. HARD CASE

As noted in Part I, the issue of whether private violence, directed at innocents, is morally acceptable as part of an effort to defeat slavery or genocide is a difficult case. The criminal law also presents difficult cases that might make one question an absolute condemnation of utilitarian punishment. One such case involves the preventive detention of child abusers.

In *Kansas v. Hendricks*, the Supreme Court considered the constitutionality of the Kansas Sexually Violent Predator Act.<sup>59</sup> The Act authorized the indefinite civil commitment of certain “sexually violent predators” who were scheduled for release after serving their criminal sentences. The law was passed because the legislature believed that some people are likely to engage in repeat acts of sexual violence, that they are not likely to be rehabilitated in prison, and that their treatment needs are very long term.<sup>60</sup>

Leroy Hendricks was committed, pursuant to the Act, after serving a ten-year prison sentence for “taking indecent liberties” with two children.<sup>61</sup> Hendricks “recognized that his [sexual abuse] harms children, and he hoped he would not sexually molest children again [but] he stated that the only sure way he could keep from sexually abusing children in the future was ‘to die.’”<sup>62</sup> He challenged his post sentence confinement claiming that the application of the Act to him violated the Constitution’s due process, double jeopardy, and ex post facto clauses.

The Supreme Court ruled that the Kansas statute was constitutional. It found that confinement was not “criminal punishment,” and thus the double jeopardy and ex post facto clauses were not implicated. Four justices dissented.<sup>63</sup> They believed that the Kansas statute “was not simply an effort to commit Hendricks civilly, but rather, an effort to inflict further punishment upon him.”<sup>64</sup>

I agree with the dissenters’ analysis of the Constitution, but I am sympathetic to the practical result of the majority opinion. It seems

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<sup>59</sup> *Kansas v. Hendricks*, 521 U.S. 346 (1997).

<sup>60</sup> *Id.* at 351.

<sup>61</sup> *Id.* at 355.

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

<sup>63</sup> *Id.* at 373 (Breyer, J., dissenting).

<sup>64</sup> *Id.* (Breyer, J., dissenting).

reasonable to confine a man who, if not confined, will abuse children. Since I think that this confinement is “punishment,” I find myself recommending a form of utilitarian punishment. There exist the same two possibilities as when, in Part I, I endorsed violence to help abolish genocide and slavery. The first possibility is that my moral analysis is not principled, but rather outcome determinative. The alternative is that, within a construct of morality that generally opposes utilitarianism, there might be room for limited exceptions.

In Part I, Professor Narveson’s ranking of justifiable uses of violence was helpful in explaining a way to distinguish, morally, the September 11 terrorists from anti-slavery terrorists. Let’s revisit the scale for moral guidance in the context of crime and punishment. Categories (1)–(4) permit the use of violence for defense of self or others, or to prevent longer-range threats to life and liberty. Violence in these contexts is also permitted by many American criminal codes.

Narveson’s Category (5) “hard case” is violence (against innocents) to promote a minimally acceptable life when no other means is possible. Remembering that punishment is a form of violence, it may be possible to gauge, roughly, the justice of “civil” confinement of sexual predators using this construct. Hendricks is “innocent” in the sense that civil confinement only occurs after he has served his criminal punishment. He has paid his debt to society. Subsequent incarceration is punishment in excess of his desert, but the purpose of this punishment to promote “minimally acceptable” conditions (for society) when no other means is possible. The only way to prevent Hendricks from abusing children is to hurt him, even when he has done nothing (yet) to deserve this additional injury. Utilitarian violence—punishment—here is “marginally acceptable if at all,” in Professor Narveson’s analysis.<sup>65</sup>

Excessive punishment of drug offenders, on the other hand, seems closer to Category (6): violence intended to promote a better life for oneself or others, beyond the minimally acceptable level of (5). Most people would agree that an unreformed child molester presents a more urgent danger than an unreformed drug user or seller. For example, child molesters have victims, while drug crimes are victimless. Even assuming that excessive punishment of drug offenders prevents drug crimes, there is less social benefit than prevention of child sex abuse. Category (6), recall, is “definitely not

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<sup>65</sup> Narveson, *supra* note 22, at 131.

acceptable.” A persuasive argument can be made that prevention of child sex abuse warrants utilitarian punishment even when prevention of drug crimes does not.

In any event, utilitarian punishment would be the rare case, even if the punishment is socially useful. Because utilitarian punishment is common now, American criminal justice would be quite different without it. The consequences of punishing drug offenders, recidivists, and children who commit crimes exclusively on the basis of their just deserts (desert measured either by moral blameworthiness, or harm caused) are enormous. These consequences are practical, as well as moral. The abandonment of utilitarianism as the primary justification of punishment would result in, *inter alia*, less punishment generally, and shorter sentences for drug offenders, specifically.<sup>66</sup> Since minorities are disproportionately imprisoned for drug offenses, the disparity in punishment between whites, on one hand, and African-Americans and Hispanics on the other hand, would be reduced. In other words, significant reform of criminal justice would be accomplished.

Citizens of the United States are engaged in wide-ranging discussion about the meaning and consequences of September 11, 2001. One of the lessons of that terrible day should be a more familiar understanding of the dangers of instrumentalism, and a recognition of those dangers in our criminal law.

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<sup>66</sup> See Paul Butler, *Retribution, for Liberals*, 46 UCLA L. REV. 1873 (1999) (arguing that if retribution was the justification of punishment, many of the reforms of criminal justice that liberals have sought would be accomplished).