

The War on Terror and the Ethics of Exceptionalism

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ABSTRACT *The war on terror is commonly characterized as a fundamentally different kind of war from more traditional armed conflict. Furthermore, it has been argued that, in this new kind of war, different rules, both moral and legal, must apply. In the first part of this paper, three practices endemic to the war on terror – torture, assassination, and enemy combatancy status – are identified as exceptions to traditional norms. The second part of the paper uses these examples to motivate a generalized account of exceptionalism; a taxonomy of different exceptionalisms is derived, including temporal, spatial, and group-based exceptionalisms. The third part of the paper considers the ethical status of exceptionalism, paying particular attention to the group-based exceptionalisms that are argued to be prevalent in the war on terror. It is concluded that there is nothing inherently wrong with group-based exceptionalism and, furthermore, that the proper locus of ethical evaluation lies not with the norms that are being excepted, but rather with the groups that are being excepted from them.*

KEY WORDS: War on terror, exceptionalism, torture, assassination, POW status

The War on Terror

Since 9/11, we have been told that the nature of war has changed and that our approaches to it must be updated lest we be unable to defend ourselves (Crawford 2003). Traditional wars, including ones as recent as the United States' first incursion in Iraq, have tended to be fought on battlefields. The distinction between combatants and non-combatants has been clear, not least of all because combatants wore uniforms whereas non-combatants did not. Civilians have been largely exonerated from risk during these conflicts: while collateral damage has always been a part of warfare, the risk to civilians was unintended but foreseen. The non-involvement of civilians was effected not just by clear identification thereof, but also by the abovementioned separation between them and the conflict. Wars were fought between state actors with transparent chains of command, a high degree of centralization, and obvious diplomatic and political outlets. To be sure, there are numerous exceptions to these features of conflicts, though it is uncontroversial that they have, historically, been largely instantiated in those conflicts. Not only have we been able to characterize conflicts in these ways, we have adopted norms that

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explicitly require many of them; these have been codified both legally and in the just war tradition (Walzer [1977] 2006; Orend 2005).¹

The contemporary advent of terrorism, however, compromises all of these features (Shanahan 2005).² Wars are not fought on conventional battlefields, but rather in urban centers. The combatant/non-combatant distinction has become blurred, at least insofar as combatants are no longer readily identified; certainly, they commonly lack military uniforms. But the distinction has been blurred further insofar as civilians often provide material support for combatants through positioning, sustenance, communication, and so on. Are such civilians combatants? Can they be justly targeted? Not only do civilians, whether willing or unwilling, become complicit in some of these cases, but civilians on the other side become targets. In fact, this is one of the hallmarks of terrorism: the targeting of civilians.³ So, again, the effects that terrorism has on the combatant/non-combatant separation is two-fold: terrorists incorporate non-combatants on their side into the conflict while, at the same time, threaten non-combatants on the other side (Meisels 2007). Finally, terrorists are often not state actors. It is therefore unclear what their command structures are, which are usually decentralized. And traditional tools, such as diplomacy and other political interventions, are less effective insofar as we often would not even know who to approach in the first place and, regardless, the ideological commitments of terrorist groups could render such measures futile.

Given that terrorists change the landscape of warfare, we can then ask whether those who attempt to combat these terrorists are justified in changing their tactics as well. Does the fact that terrorists are no longer playing by the traditional rules license the terrorists' opponents in playing by different rules as well? If so, what should the new rules be? How do we justify them?

Before moving forward, let us identify some archetypical practices that have catalyzed new discussion vis-à-vis their role in opposing the war on terror: torture (especially interrogational variants), assassination, and enemy combatancy/prisoner of war (POW) status.⁴ None of these is a historically novel issue, but each had a reasonably clear status in pre-9/11 norms (both in the US and abroad). Since 9/11, however, these norms have come under pressure and/or been subject to violation.

Torture, for example, has been widely decried as a violation of basic human rights as well as of international law. The opposition to torture has been codified in various declarations and conventions, including: Article 5 of the Universal Declaration of Human Rights (1948); The Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987); and the Declaration of Tokyo (1975). However, since 9/11, the torture debate has resurfaced. While few have overtly called for the legitimization of torture, the semantic maneuvers by the Bush Administration require pause.⁵ For example, §17 of the Third Geneva Convention says that '[n]o physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever' (Third Geneva Convention 1949). By denying suspected terrorists prisoner of war status (more on this below), §17 would seemingly not attach. The Bush administration has

also endorsed coercive techniques that, in its estimation, nevertheless fall short of torture (Wolfendale 2009). Furthermore, the Bush administration employed counsel, John Yoo, whose infamous ‘torture memos’ sought to give legal grounding to torture or torture-like techniques (Yoo 2003; Bybee 2002).⁶

The point of this paper is not to evaluate the merits of these claims, but rather to observe that, post-9/11, proscriptions on torture have come under debate, both legally and morally. And, lest we lay this wholly at the feet of the unpopular Bush administration, it is worth noticing that, as recently as 2005, the majority of Americans thought that the torture of terrorists was justifiable in some situations (Associated Press 2005).⁷ Even the academy has turned significant energies to exploring the morality of torture, though most of the sentiment has been decidedly negative. The simple phenomenon of this amassing literature on torture suggests that new questions are being raised.⁸

Regardless, the central point is that a practice that had previously been highly proscribed has now been met with more sympathy, at least in some circles. And why? The reason is the contention that torture is an essential tool to fighting terrorism; that, without torture, we will be unable to protect our citizenry and unable to fully effect our countermeasures to terrorism. What I want to explore in this paper is, again, not whether this is true, but rather the sort of conceptual and moral apparatus terrorism affords us relative to existing legal or moral norms.

Let me raise two other practices that are similar to torture in the sense that proscriptions against them are being revisited in light of the war on terror. First, consider assassinations.⁹ Historically, these have played an important role in warfare¹⁰ and in thinking about warfare; Sun Tzu mentions assassinations in his *Art of War* ([6th C. BCE] 1910: esp. Ch. XIII), Machiavelli discusses the importance of protecting against them in *The Prince* ([1515] 1908: esp. Ch. XIX) and Thomas More ([1516] 1949: 65) wrote about the potential moral advantages of assassination in terms of effecting a quicker end to hostilities. Pre-9/11 though, assassination was clearly not allowed in the United States, nor by its agents operating abroad. In 1976, President Ford issued Executive Order 11905 which stated (in §5g, ‘Restrictions on Intelligence Activities’) that ‘[n]o employee of the United States Government shall engage in, or conspire to engage in, political assassination’ (Ford 1976). This apparent ban on assassination was reaffirmed in subsequent executive orders by President Carter in 1978 (Carter 1978) and President Regan in 1981 (Regan 1981). However, just weeks after 9/11, President Bush signed an intelligence ‘finding’, which authorized ‘lethal covert action’ against Osama Bin Laden (Woodward 2001). While the word ‘assassination’ is not explicitly used here, it is nearly impossible to interpret this action from Bush as not relaxing the strictures earlier enplaced by Ford.

As in the torture case, the argument for assassination derives from a post-9/11 climate: terrorists, especially high-impact ones, can effect a tremendous amount of damage and take many civilian lives. Assassination can neutralize the targeted terrorists and, perhaps, save many lives. And, in this climate, the legitimacy of assassination has again become a prominent issue (Thomas 2005; Gross unpublished). Why not use regular law enforcement to apprehend

and prosecute those terrorists? This is an important question being discussed in the literature, and I do not plan to address it here.¹¹ Suffice it to say that at least part of the answer has to do with expediency: assassinations might be carried out faster than law enforcement and the judicial process can operate. Furthermore, we also may not always have the diplomatic or jurisdictional avenues that would otherwise empower law enforcement, thus rendering that option moot. It is also worth noticing that the executive orders between 1976 and 1981 were during the Cold War, particularly when the USSR thought that we might have been plotting assassinations of Fidel Castro; the presidents' actions were at least as much to allay Cold War hostilities as with any other concern. Therefore, at least part of the historic impetus against assassination lies in antiquated concerns.

Finally, consider the treatment of POWs. The Third Geneva Convention (1949) clearly delimits how POWs can and cannot be treated; we have already seen above that any sort of coercive interrogation is clearly proscribed, though other issues are addressed as well. The detention facilities at Abu Ghraib and Guantánamo have almost certainly failed to live up to these requirements. This has not been, however, for some sort of mere complacency on the behalf of the Bush administration, but rather through an explicit position that the Convention does not apply. As has now become controversial, the administration applied 'enemy combatancy' – as opposed to POW – status on the detainees, thus abrogating substantial restrictions on their treatment. However, despite widespread opinion, the Bush administration did not create this status, which was originally proffered in a 1942 Supreme Court case, *Ex parte Quirin*. The ruling held that:

... the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals. (*Ex parte Quirin* 1942)¹²

Enemy combatants, then, are neither lawful nor unlawful combatants; the former are afforded POW status (and protection under the Geneva Convention) whereas the latter are civilians who may be prosecuted under domestic law. This legal category allows detainees to be held indefinitely, both without Geneva Convention protections *and* without access to the legal system.¹³ As a justification for this approach, we are told by White House Counsel Alberto Gonzales that the war on terror constitutes a 'new paradigm' and 'renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions' (Gonzales 2002; Marks 2006: 118).

Similar sentiments have been expressed by Major General Geoffrey Miller, the former commanding officer at Guantánamo, who said: '[Joint Task Force] Guantánamo's mission is to detain enemy combatants and then to gain intelligence from them to be able to win the global war on terrorism. And so we are detaining these enemy combatants in a humane manner . . . and in accordance, as much as we can, with the Geneva Convention' (Gandini & Saleh 2005: 22:58–23:21). This emphasis on intelligence and the defeasible commitment to the Geneva Convention is endemic of the post-9/11 era. (Following his service at Guantánamo, General Miller was sent to Abu Ghraib, where it is widely believed that he transformed the interrogation program to include some of the more aggressive techniques practiced at Guantánamo.¹⁴)

Myriad moral and legal issues are raised by this approach (Brough 2005), though its contribution to our discussion is to provide a third example of a way in which terrorism, or at least our response to it, challenges existing norms. Having now sketched how these three issues – torture, assassination, and enemy combatancy status – have been affected post-9/11, let us now move on to a more general and theoretical discussion of exceptionalism (next section) and its ethical upshots (last section).

Exceptionalism

In this section, incorporating the above-mentioned and other examples, I will develop a general and theoretical account of exceptionalism. By this I mean that the war on terror, through its novel face and extreme stakes, suggests to some that we need to make exceptions to traditional norms.¹⁵ In the next section, I will consider some of the ethical issues that attach to this discussion, but the present section is largely conceptual. Surprisingly, the literature bears little work on the doctrine of exceptionalism, a deficiency that the present project aims to ameliorate.¹⁶ In particular, there are four elements that an account of exceptionalism should provide. First, it should tell us what the exception is *to*. Second, it should tell us *what* is being excepted. Third, it should properly delimit the *scope* of the exceptions. Fourth, it should tell us *why* the exception is being made.

Let us briefly expand on each of these questions before moving forward. The semantics of 'exceptionalism' mandate that something is being excepted vis-à-vis some category. Consider, for example, some school rule which holds that all students must be in the classroom except those with a hall pass. The exception, then, is to the otherwise inflexible stricture that all students must be in the classroom (element 1). So when we talk about what exceptions are to, we are looking for some sort of stricture that would apply in absence of the exception. The strictures that we are primarily interested in are moral and legal ones, so I will most commonly just refer to 'norms', which we can take to be usefully ambiguous between either of these two classes; nothing in the following analysis hangs on the various distinctions between them.¹⁷ Second, we have to be precise about what is being excepted (element 2); in the above example, it is obviously whatever students hold hall passes. Importantly, the

exceptions have to be granted to a proper subset of whatever the norm binds (including the empty set).¹⁸ So, for example, teachers are not excepted from the norm that all students must be in the classroom since they are, *ex hypothesi*, not students. Regarding teachers, the norm simply does not apply, and that is relevantly different from it having an exception. Therefore, what gets excepted must be something to which the norm otherwise would have applied, absent the exception.

The third element pertains to scope, and I think scope can be understood in various sorts of ways. Let me herein mention three; these will be discussed in greater detail in subsequent sub-sections.¹⁹ First, imagine that we can park on the street except on Tuesdays (when street cleaning takes place). In this case, the scope of the exception is *temporal*: the norm applies at all *times* except Tuesdays. Second, consider that Americans can have wine directly shipped from wineries in California except those who live in Montana (among some other states).²⁰ In this case, the scope of the exception is *spatial*: people who occupy certain spaces have one set of privileges, while those that occupy some other spaces lack those privileges. Third, consider that all children in Prince George's County, Maryland, were required to be vaccinated against Hepatitis B, except those whose families could demonstrate certain religious beliefs (Abruzzese 2007; Chaddock 2007). In this case, the scope is *group-based* since some groups (*viz.*, those lacking certain religious beliefs) are bound by the stricture, whereas others (*viz.*, those having certain religious beliefs) are excepted.

Let me make several other points regarding scope. First, there need not be *single* classes of exceptions, but exceptionalism is rather fully consistent with the following: 'All *Xs* can/cannot/must ϕ , except for *Ys* and *Zs*.' In the wine shipping case, Montana residents are restricted, but at time of writing, so are residents of just over a dozen other states. Each of these states is then an exception to the norm, and it is irrelevant to their status *vis-à-vis* that norm what other state's statuses are. In the vaccination case, those with certain religious beliefs were excepted, but so were those with certain medical conditions. And, second, these scopes need not be mutually exclusive: some norm could bind pursuant to two of the above requirements being met and otherwise be excepted. For example, I once lived on a street in Pittsburgh where you could park only on one side of the street (spatial) on Tuesdays (temporal). If it was not Tuesday or if there was a spot on the permitted side of the street, then the stricture was excepted. The interplay among these different scopes can give rise to more complex norms and exceptions but, conceptually, such interplay is straightforward.

In addition to the above comments regarding scope, I take there to be another feature, which is more pragmatic than conceptual. To wit, it should be the case that there are fewer exceptions to the norms than cases in which the norms apply, this is not conceptually required, but failing this desideratum would otherwise give rise to poorly-specified norms. For example, I could have a 'norm' which says that everyone must serve on university service committees, except those that do not work at universities. And, undoubtedly, this is true. But it is not useful, and the problem lies in

scope. The proper norm is not this one, but rather that all university employees must serve on university service committees: the people that are 'excepted' from the first norm never should have been included in its scope in the first place.

Finally, there must be reasons for the exceptions (and for the norms), lest they be arbitrary or capricious. This issue of justification will be deferred until the next section when we consider the ethics of exceptionalism, though I certainly take it to be part of the conceptual requirements that we are discussing here. And, in every one of the cases above, we can easily supply reasons for both the norms and the exceptions, while withholding judgment on their relative merits.

I now want to take the above framework and return to a discussion of exceptionalism as pertains to the war on terror in particular. In a recent essay, Jonathan Marks writes about the history that 'compartmentalization' has had on various military conflicts; his compartmentalization bears on my group-based exceptionalism insofar as both effect varying treatments for some groups. Marks (2006: 119) argues that:

The wars between the city-states of ancient Greece, as well as war waged by Alexander the Great against the Persians, were marked by respect for the life and personal dignity of war victims. Temples, embassies, and priests of the opposing side were spared and prisoners of war were exchanged. Yet both the Greeks and Romans failed to demonstrate similar respect for those regarded as barbarians . . . More recently, Nazi doctors perceived Jews as *Untermenschen* (or sub-humans) who where, by reason of this categorization, not protected by the 1931 *Reichsgesundheitsrat* regulations prohibiting human experimentation that was fatal, disabling, or conducted without the voluntary consent of the subject.²¹

These are some pre-9/11 examples of group-based exceptionalism: whether the 'barbarians' are excepted from certain forms of respect or the Jews were excepted from legal protections, the examples are ones in which group membership changed the norms that were afforded to some population. As I will argue below, I think that most of the significant exceptionalisms that are endemic of the post-9/11 era are group-based exceptionalisms, as opposed to the other two variants that I have identified.

Temporal Exceptionalism

Before turning to that argument, though, let us consider some post-9/11 exceptionalisms that are not group-based, as these are worth considering. So, for example, consider the USA PATRIOT Act,²² which I take as an example of temporal exceptionalism, as does Marks. The original legislation contained various provisions – so-called 'sunset provisions' – that were to expire on December 31, 2005, unless they were reauthorized by Congress.²³ In fact, most of these provisions were made permanent by Congress; only §206 and §215 were left as sunset provisions, now set to expire at the end of 2009. Some other provisions were slightly modified.²⁴

As originally legislated, the gist of the USA PATRIOT Act was that Americans were to have such and such liberties at all times, *except* for the

dates between its being signed into law (26 October, 2001) and its then-prospective expiration (31 December, 2005). Since dates are delimiting when the exceptions are in play, this is an example of temporal exceptionalism. However, I do not think that temporal exceptionalism is all that significant in the war on terror. For one, there are very few cases that are overt ones of temporal exceptionalism; probably the USA PATRIOT Act is the only substantial one. And, of course, the bulk of the USA PATRIOT Act was made permanent, so it is hardly delimiting temporal exceptions any more. §206 and §215 are the only sections that are still temporally delimited, and they may yet be made permanent. If they are, then none of the sunset provisions will have actually expired (permanently).

But I think it is also unlikely that temporal exceptions are ever what legislators will really be after. In the wake of 9/11, the Bush administration presented controversial legislation that, even in that political climate, would have been hard to make permanent. To my mind, the sunset provisions are more of a test run or political compromise than an end in themselves, as the now-permanence of most of the USA PATRIOT Act indicates. This is probably not always the case for sunset provisions, though the exceptions are strange cases.²⁵ For example, John Adams and the Federalist Party passed the Alien and Sedition Acts (US Congress 1798), which were meant to limit political opposition to an undeclared naval war on France. However, this act expired at the end of Adams's presidency such that the Democratic-Republicans (the then-political rivals of the Federalists) could not similarly limit opposition against their own agendas. More typical would be something like the Federal Assault Weapons Ban, which was a subtitle of the Violent Crime Control and Law Enforcement Act of 1994, signed into law by President Clinton. This provision was set to expire in 2004, if President Bush did not renew it. He did not, and the provision expired. But certainly the advocates of the ban wanted it to be renewed or made permanent and, as with the USA PATRIOT Act, the sunset provision on the ban was a political compromise in order to gain temporary legislation as permanent legislation would have been less politically viable.

Of course, there are differences between having sunset provisions and simply repealing laws. Consider, for example, Prohibition in the United States (Massey 2008). The Eighteenth Amendment, which prevented the sale, manufacture, and transportation of alcohol for consumption, went into effect in 1920. The Twenty-First Amendment then repealed the Eighteenth Amendment in 1933, thus restoring the previously precluded practices. However, this is not properly understood as a case of exceptionalism in the sense that the USA PATRIOT Act was originally conceived. The latter had explicit provisions for the cessation of its provisions, whereas the Eighteenth Amendment did not. It is true that Americans have had various liberties with respect to alcohol *except* during 1920–33, though this exceptionalism only makes sense *ex post* (i.e., once the liberties are restored). This is importantly different from the USA PATRIOT Act, which said, *ex ante*, that Americans would (not) have certain liberties from part of 2001 until the end of 2005. Or, to put it another way, a repeal just means that some legislature has changed

its mind (or that some new legislature disagrees with its predecessor and legislates accordingly). Temporal exceptionalism, on the other hand, means that the same legislature is effecting different legislation at different times and not that that legislature (or any other) has changed its mind on appropriate legislation. This, then, is another reason that temporal exceptionalism is not likely to be extremely prevalent as many of the instances that we might appeal to are, properly understood, ones of repeal rather than of (*ex ante*) exceptionalism.

I therefore take it that we have amassed several reasons to think that temporal exceptionalism will not be common, whether generally or as pertains to the war on terror. First, it will rarely be the intent (or at least the hope) that the exceptions are not made permanent. The assault weapons ban is perhaps even more clear in this regard than the USA PATRIOT Act: it is certainly not the case that those legislators thought that assault weapons would be any better in 2004 than they were in 1994, though a different administration intervened against their aspirations. Second, and similarly, exceptions *are* made permanent, at least some of the time (cf., most sections of the USA PATRIOT Act). In these cases, there are no temporally-delimited exceptions; rather, there is ongoing legislation, though legislation whose status has changed (i.e., from provisional to permanent). Note, though, that it hardly matters to whomever would have been affected as there is no practical difference between a temporary status being made permanent and a permanent status being assigned from the outset. (This is not to say that there are not psychological or political differences in these legislative schemes, just no significant practical differences aside from reauthorization.) Third, many cases that might otherwise look like temporal exceptionalism are better understood as ones of legislative *change* rather than exceptionalism, strictly speaking.

Spatial Exceptionalism

As mentioned previously, exceptionalism could also occur along some spatial axis: remember our friends from Montana who cannot receive wine directly from California wineries. Here we have a norm which applies to everyone *except* those who occupy some particularly delimited space. And this suggests the generalized conception of spatial exceptionalism: 'All *Xs* can/cannot/must ϕ , except those who are in *S* (where *S* is some location).' Unlike temporal exceptionalism, there is undoubtedly a lot of spatial exceptionalism: every time local norms deviate from some more widely-held norms, spatial exceptionalism exists. Something would have to be said about how to individuate locations, particularly nested ones, but I shall not pursue that here. For this project, though, the question is whether the war on terrorism gives rise to spatial exceptionalism. And I do not think that it does, at least not in the relevant sense. Before seeing the argument for that, let us consider Marks, who argues for the contrary.

Marks points to enemy combatancy status, which I already discussed; we can therefore skip the details of that status. Let me say from the outset that I suspect this is the most plausible example of spatial exceptionalism in the war

on terror and that, if it does not withstand scrutiny, then it is unlikely that spatial exceptionalism is significant in this regard. Marks writes of ‘*spatial* or *geographic* exceptionalism, in which physical locality is relied upon to justify the non-application of protective norms and procedures. A good example of this is Guantánamo Bay, selected by the administration in an effort to keep detainees beyond the *habeas corpus* jurisdiction of federal courts’ (Marks 2006: 120, emphasis added).^{26,27} Marks thinks that this is an example of spatial exceptionalism on the grounds that certain norms (do not) apply, based on location. The norm, then, could be something like ‘All those held in US custody have the right to *habeas corpus*, except those held at Guantánamo (and, perhaps, some other places).’

I do not disagree that this statement is true, nor do I disagree that the administration specifically chose Cuba precisely because they could assign such status to the detainees held there. But this does not seem to me as, properly understood, an example of spatial exceptionalism. Let us contrast this case with that of the Montanan who cannot directly order Californian wine. In that case, there is nothing about the Montanan *himself* that does any of the motivating work for the legislation. If the Montanan moves south to Wyoming, he can order wine, and this would be of vanishingly little interest to the Montana legislature. Their law is precisely designed to govern a *space*, irrespective of whoever occupies that space. If all of the residents of Montana and Wyoming traded states, the legislation would continue unaffected. This is therefore a perfect example of spatial exceptionalism.

Contrast that case with Guantánamo. The practices at Guantánamo are not motivated by the space over which they are operative, but rather by the people who occupy that space (*viz.*, the detainees). If the detainees were to swap spots with 500 or so residents from Florida, the US government, unlike the Montana legislature, would not have any reason to maintain its practices in Cuba. Furthermore, it might have a reason to try to change some of the norms that thereafter applied to those detainees who were now in Florida.

So the appropriate test to distinguish between true spatial exceptionalism and would-be cases is to ask whether it is the *space* that matters or else the *group* that is in the space. Imagine that the Bush administration could deny *habeas corpus* to suspected terrorists (or allies who might have critical intelligence) *regardless* of where they were. In such a scenario, there would be no reason to create Guantánamo; there is no independent reason to exercise control over that space. Of course, *habeas corpus* probably cannot be denied in, say, Florida, so the administration has a reason to keep the detainees away from there. Again, though, the interest is in affecting the status of the *group*, not the space. So, unlike the example with Montana, which I take to be a true instance of spatial exceptionalism, I take the treatment of the enemy combatants at Guantánamo to be effectively group-based exceptionalism, masquerading as spatial exceptionalism. This is not, though, to prejudge the morality of the practices, only to identify the proper avenue for that inquiry. Let us now take up group-based exceptionalism directly.

Group-Based Exceptionalism

So far, I have denied that temporal exceptionalism was an important facet of the war on terror and I have argued that the war on terror's most compelling example of spatial exceptionalism was more properly understood as a group-based exceptionalism. In this sub-section, I will argue that the most significant exceptionalisms in the war on terror are, in fact, group-based; in the next section, we will discuss the ethical implications of this result. Let us now return to the three cases identified as archetypical in the war on terror: torture, assassination, and enemy combatancy status. The identification of enemy combatancy status as group-based exceptionalism was already made above, but more should be said about torture and assassination in this regard.

Starting with torture, I think that this is clearly an example of group-based exceptionalism. But what is the group that is receiving different treatment? And what is the norm to which the exception is being made? Roughly, I think that it looks something like this: 'Do not torture, except when it is necessary to prevent greater harm.' Putting aside both the associative moral and empirical issues, I think this is a reasonable approximation of the idealized torture exception as some endorse to fight the war on terror. Again, this is not to prejudge the morality or efficacy of the exception, merely to try to get clear on its proposed structure; let us therefore consider a couple of remarks on this proposal.

First, nobody thinks that torture is justified unless it prevents some greater harm. Torturing of prisoners and political dissidents, for example, is patently impermissible and there is little to no philosophical merit to having a discussion about these sorts of practices. (There might be practical merits in terms of abrogating such practices where they continue.) Second, this norm seems to be of the right sort insofar as its starting point is *not* to torture, and then to allow the exceptions to come in. Alternatively, it could say something like 'Torture should be practiced, except when ...', but this formulation would violate the pragmatic constraint on exceptionalism that I postulated above: the exceptions should be rarer than the non-exceptions, and even proponents of torture agree that it would be the exception rather than the rule.

Now the question is what the relevant axis of exception is in the above-mentioned norm. It is not spatial: there is no *space* outside of which one norm applies and inside of which a different one applies. Or, if there is, this space delimitation is derivative (cf., the above arguments on enemy combatancy status). Similarly, there is no time at which torture is licensed as against other times or, if there were, it would again be derivative. For example, we might say that torture is licensed only at *times* during which it would be expedient, but the only reason that those times are relevant is because there are *people*, at those times, who are unwilling to surrender lifesaving intelligence. This proposal, then, is that the exception for torture could be predicated only on there being people from whom we might extract important information. These people, actual or hypothetical, therefore form the *group* that is relevant to the exceptions to our norm against torture: the people with lifesaving

intelligence which cannot be expediently obtained in any way other than torture.

The point of this paper is not to assess whether such groups exist, or whether, even if they did, torture would be permissible. Certainly critics object to the exception on either of these two grounds: some say that the relevant preconditions will never be met, whereas others say that, even if they were, torture is categorically impermissible.²⁸ Regardless, the present objective is to figure out the structure of the exceptions, though more general comments will be made in the following section regarding some of the moral issues that follow. I take it, though, that torture could only be a sort of group-based exceptionalism, as with enemy combatancy status as discussed above.

Furthermore, I think that assassination occupies a similar sphere. Again, starting negatively, the norms against assassination are not tied to specific places: it is not the case that assassination is normalized in place A and not normalized in place B (from the point of view of US agency/involvement, let us say). If we were attempting to assassinate someone, we would not care much where s/he happened to be, at least not for reasons other than prudence and efficacy. We might care, for example, whether the target was in a crowded place, at an embassy, in some place where the assassin might noticed, and so on, but all of these features are again derivative on the class of persons that we want to assassinate. Temporal-based exceptionalism is also not appropriate: the would-be target is not off the hook when the clock strikes midnight, or at any other time. The circumstances might change such that we no longer pursue assassination at some time but, in that case, the driving feature is the circumstances themselves, not the temporal features of the case.

Rather, the norm against assassination looks something like: 'Do not assassinate, except when it is necessary to prevent greater harm.' The exceptions to this norm are going to be *people* who are effecting great evils and who cannot be accessed diplomatically or politically. There are probably two classes of people to which assassination could be the most appropriate – which is not to say that it is necessarily appropriate at all – and those are terrorists and despotic, genocidal leaders. If, for whatever reason, these groups cannot be directly engaged by military action, then there are at least *prima facie* compelling reasons to target them. Again, this discussion is not to render any commentary on the morality of assassination,²⁹ but rather to locate it under the category of a group-based exceptionalism: the putative exceptions to the norms against assassination would be the groups of people that comprise the terrorists and leaders that the world would be better off without.

Having already discussed enemy combatancy status, I will not say more about it, other to reiterate that it was, like torture and assassination, appropriately understood as group-based exceptionalism. Therefore, *all* of the examples that I have characterized as archetypical in the war on terror are of this sort. Furthermore, as argued in previous sections, I do not think that there are other examples in the war on terror where different kinds of exceptionalism are likely to play a significant role. Having now located the sort of exceptionalisms practiced in the war on terror, let us discuss the ethics of exceptionalism.

The Ethics of Exceptionalism

In this final section, we will consider some of the ethical features that are germane to the exceptionalisms presented above. While the most interesting discussion will pertain to group-based exceptionalism, let us first consider the ethics of temporal and spatial exceptionalism. From the outset, let me say that I consider these the most benign and group-based exceptionalism more perilous.

Starting with temporal-based exceptionalism, the idea here was that some norms applied at some times and not at others. Again, I do not think that this sort of exceptionalism is particularly relevant to the war on terror (though see earlier for a discussion of the USA PATRIOT Act). But, even if it were, I think it could be carried out in a morally sensible sort of way. Generally, imagine that there is some national emergency.³⁰ This could be war, some infectious disease, a national disaster, or whatever. In these cases, the public good is quite often going to be pitted against the rights of some individuals. We can see this in the public health case, for example, by considering quarantine and forced immunization (Wynia 2007; Selgelid 2005). In other cases, we might see it in rationing.³¹ In all of these cases, though, it at least seems reasonable that we might restrict some liberties, so long as such restrictions were necessary, served the greater good, and were lifted as soon as necessary. Certainly some people might deny this position, though I will not defend it here.³²

What are debatable, of course, are the sorts of empirical claims that motivate the restrictions on offer. For example, imagine the claim that we need electronic surveillance to conduct the war on terror, thus violating the privacy rights of at least some. Objections to this line of thought are more often made on the grounds that the results of such surveillance will not likely to be of any use to the war on terror; such restrictions therefore execute costs without providing countervailing benefits (Henderson 2002). Civil libertarians certainly like to invoke rights to privacy, but if they actually believed that, absent such restrictions, our society were in serious risk of destruction, then it would be unreasonable of them to persist in their objections. Rather, I assert that the empirical basis for restricting liberties is sometimes unsound, not that, in theory, there is any serious moral objection to the sorts of reasonable restrictions that well-founded empirical prognoses would suggest.

Moving on to spatial exceptionalism, I again do not find this to be that worrisome. Or at least I think this insofar as we are considering instances, properly understood, of spatial exceptionalism and not the sorts that are masking group-based exceptionalism (cf., Guantánamo). Again, return to the example of the Montana legislature excepting its citizenry from norms governing other locales. It seems perfectly acceptable as a premise of self-governance that local legislatures be able to set the parameters by which they govern, and some of these parameters may give rise to spatial-based exceptionalisms. To be sure, there are Constitutional considerations that come into play, such as the Fourteenth Amendment and the Commerce Clause, that are relevant; the Commerce Clause, for example, is being

interpreted in ways inconsistent with legislation banning direct wine shipments, which means that the Montana law might soon fall. But there is nothing *in principle* wrong with norms applied to certain geographic zones, so long as those norms do not run afoul of broader considerations (e.g., constitutionality). We certainly do not want it to be the case that local norms are arbitrary or capricious but, if they were, the problem would be the caprice or arbitrariness and not, intrinsically, the spatial-based exceptionalism that they characterized.

But what about group-based exceptionalism? Again, I understand this to be the most substantial form of exceptionalism suggested by the war on terror. And, unfortunately, I take it to be the most perilous of all the forms derived in this paper. Why? There are obvious cases of group-based exceptionalism which are completely immoral and rank among the greatest injustices humanity has perpetuated. We hardly need to catalogue these but consider, for example, slavery or genocide. In both of these cases, certain norms applied, except to some group. These norms could range from freedom to vote to even the liberty not to be killed. In the Holocaust, Jews were deprived of practically everything (often including their lives) merely because of their identification with some group; the same is true of American slaves and countless other tyrannized groups. The mere fact that some of these horrors are straightforward instantiations of group-based exceptionalism should give us pause when considering the whole category.

Or should it? Just as there are horrible cases of group-based exceptionalism, there are also completely innocuous ones. For example, consider collegiate admissions, which except one group from some outcome (e.g., acceptance or rejection) based on features that it has (e.g., grade point average, SAT scores, etc.). All American citizens can vote, except convicted felons – or at least those not residing in Maine or Vermont – and those under the age of 18. This former exception strikes many of us as problematic, but little seems wrong with the latter. We except the group of people that have been in car accidents or otherwise have poor driving records from the car insurance rates to which the rest of us have access. So there certainly seem to be unproblematic group-based exceptionalisms. What, then, is the difference between the acceptable and unacceptable forms? And, for present purposes, where do our archetypes from the war on terror fall?

The first thing to say here is that the relevant differentia is *not* what norm the exception is from, which might seem an intuitive way to go. Take some norm such as: 'None should be enslaved, except those of African descent'. The reason that this exception is morally problematic does not, strictly speaking, have to do with allowing exceptions to a particular norm. It might be the case that there are exceptions to the norm (e.g., those that consent to being sold into slavery) or it might not. But it is the *exceptions* that matter, not just the norms, in determining the moral status of the exceptionalism.

To see why this is the case, consider the norm of allowing citizens to vote. As mentioned above, there are and have been exceptions to this norm. For example, children cannot vote in the US, and women did not, nationally, gain

the right to vote in the US until the ratification of the Nineteenth Amendment in 1920. Consider some time before 1920, when neither women nor children had the right to vote. Granting that one of these exceptions is morally permissible and the other one morally impermissible, it therefore follows that it cannot be the *norm* that drives the permissibility, but rather the *group* that is excepted from the norm. I do not deny that it depends on the group *in relation to the norm*, such that some group might be reasonably excepted from some norm (e.g., women's access to men's restrooms) while that same group might not be reasonably excepted from another (e.g., women's right to vote). However, the norms, independently of the groups to which the exceptions would bear, are not the proper objects of moral evaluation.³³

If this is right, we must look at the groups that would be excepted from the norms. Using the suffrage case again, there is no moral reason to exclude women from a political process to which men have access: whatever the morally relevant features are that ground men's claim to voting are similarly held by women. As this illustrates, we have to think not only about the group that is to be excepted, and this gives rise to a second key ethical feature: we also have to think about the relationship that group shares *to the other groups that are not excepted*. We need to treat like cases alike, though we have to specify the dimensions of similarity that matter in each case. Unlike the gender difference in voting, though, we can locate a relevant difference between children and adults, thus grounding the exception made against children's right to vote. Namely, we want our electorate to have a certain level of rationality, capacity for acquisition and processing of information, etc., and there is no doubt that young children lack this. (I take no position on whether the age of 18 is the appropriate cutoff.)

Now let us return to the cases presented in the context of the war on terror, looking specifically at the groups that stand to be excepted and the relationship that those groups bear to the groups that will not be excepted. Furthermore, let us consider whether there are morally relevant differences between these groups that might serve to effect differential moral status across them. Both of the groups that are affected by exceptions made for torture and enemy combatancy status are, ideally, those that have critical intelligence.³⁴ And those that are targeted for assassination are similar insofar as they are assessed to pose threats, whether now or in the future. There might be a difference in these cases insofar as the former groups' crimes could be of omission (i.e., by not revealing the information), while the latter group's crimes would be of commission (i.e., by effecting the harms directly). I am not sure this is right though and, regardless, this distinction is orthogonal to our discussion. What matters, for our purposes, is that all of those groups excepted are responsible, actively or passively, for some threat and, through their agency, can abrogate the threat.

An obvious objection to this claim is that it is simply false: many of those subject to detention or torture, in fact, have no critical intelligence, and some are not even terrorists at all (Baldor 2006; Rejali 2007: 510). It might even be the case that those targeted for assassination are not bad people, though I find this less likely since it is more likely that we disagree about what 'bad'

means and/or whether there are other options available. Regardless, at least this first claim is certainly true. What are its implications for our analysis? To my mind, it *does not have important implications* for the morality of group-based exceptionalism. The reason is that it just shows we are applying the exceptions to the *wrong group*: a group that includes, not just the people that we should be excepting, but rather to a group that (maybe) includes those people, as well as others to whom the exceptions should not apply. That we have our groups delimited improperly says nothing about the status of exceptionalism, *as applied to the proper groups*.

The waiting objection now is that, pragmatically, it is somewhere between hard and impossible to make sure that we have the right groups. First, I do not think that this is completely true: our military intelligence just has to do a good job in classifying people into the right groups. There is no doubt that this is a challenge, and probably no doubt that it could have been done better than has been since 9/11. But I certainly think that we can get it mostly right and, given the complexities of warfare and some of the latitudes that must be therein conferred, this is close enough (cf., collateral damage).³⁵ Second, this really is meant to be a theoretical project, and, I think, we need to work out our theoretical commitments before turning to practice.

Where we now stand is that we have an (idealized) account of exceptionalism wherein we are excepting groups who pose harms from various protections. What is the moral status of such an account? As indicated above, one of the criteria is to compare the moral status of the excepted groups to the non-excepted groups. In these cases, there is at least one morally relevant difference between those groups, which is complicity or agency in imminent or otherwise future harms. For simplicity, let us just call this something like (partial) responsibility. The notion of responsibility certainly has not gotten a free ride in the philosophical literature, though I will not have anything substantive to say about it here.³⁶ Rather, I will just observe that we obviously treat responsible parties different from non-responsible parties, as evidenced by our systems of praise and blame, and as codified in our moral and legal systems (Wallace 1994; Sher 2005).³⁷ And there are certainly good reasons for this.

So I do think that there are relevant differences between these would-be excepted groups and their contraries. Are they sufficient to warrant exceptions to the norms? People will disagree strongly about this, and I cannot hope to settle the debate, so much as to offer the framework in which it should be considered. I think that what ultimately matters is whether the practices are effective. It either is or is not the case that we gain critical intelligence by denying POW status detainees and/or by torturing them (or others). Critics are surely skeptical in both cases, though I am more sanguine of intelligence being derived in the torture case than in the enemy combatancy case insofar as the latter is (almost) necessarily going to consist in casting a wider net than is necessary; escalating the status of some of that group to another one subject to torture would, both hopefully and ideally, be done only with good reason. This is not to suggest that torture always (or even most of the time) reveals critical intelligence, only to suggest that, when

torture is considered, we are more likely to have someone withholding such intelligence than we would in cases where we were merely collecting people for detention. In the latter case, we would understandably have a lower threshold. Assassinations either avert worse harms in the future or they do not, and it is these proclivities by which their merits should be judged.

Note that I have intentionally used vague language, such as ‘effective’, ‘better’, and ‘worse’. The reason that I do this is not to waffle, but rather to appreciate that different people understand these terms differently and that the above account is compatible with variable conceptions in this regard. We could make these evaluations in terms of overall consequences, human rights, dignity, or whatever. The upshot of this paper, however, is meant to be that there is nothing inherently wrong with group-based exceptionalism. Nor is there anything wrong with exceptionalism merely in virtue of the norms that are being excepted. Both of these conclusions, I think, would have been counterintuitive. Rather, we gauge the ethics of exceptionalism by focusing on the *groups* that are excepted and by looking for differentia between those groups and other groups that are not excepted. Ideally, I think that the exceptions that we have considered can be justified. As those exceptions have actually been practiced in the war on terror, I am less certain. Regardless, I see no in-principle objection to these sorts of group-based exceptionalisms or others that would employ similar strategies.

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Notes

¹ Also, see the classic treatment of just war theory by Aquinas (1948: Question 40, esp. Article 1).

² For skepticism on the moral distinctiveness of terrorism, see McPherson (2007).

³ While not uncontroversial, this feature of terrorism has been identified at least since Walzer (1977: 197, 203). For other analyses of ‘terrorism’, see Waldron (2004) and Coady (2004). Also useful are Baur (2005) and Harte (2005).

⁴ Michael Gross (unpublished) has also discussed blackmail as such a practice, though I will not consider it here. The development of chemical and biological weapons might also be visited in this context (Cooper 2006). Melinda Cooper is especially interested in germ warfare and the US military’s growing interest in biodefense research.

⁵ Consider, for example, the claim that torture requires pain ‘equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, the permanent impairment of a significant bodily function, or even death’ (Bybee 2002).

⁶ Henceforth, I shall just use ‘torture’, though I mean it to include most sorts of coercive interrogations. This locution is not meant to morally load those practices, but rather is undertaken for facility and concordance with common usage.

- ⁷ I suspect that public sentiment against torture has been rising in the past couple of years, though that is just a hypothesis; I could not find more recent data. Regardless, polls are fickle, so we should not take them too seriously.
- ⁸ Some important articles include Allhoff (2003, 2006a, unpublished), Arrigo (2004), Bufacchi & Arrigo (2006), Davis (2005), Luban (2005), Shue (1978, 2006), Wolfendale (2006), and Wynia (2005). For books, see Allhoff (forthcoming), Brecher (2007), Levinson (2004), and Rejali (2007).
- ⁹ In the literature we see the term ‘assassination’ alongside the closely-related ‘targeted killing’, though these distinctions are never made clear. According to Gross, assassination is linked to ‘perfidious killing in war’, while ‘targeted killing’ lacks this connotation; it is therefore less morally loaded. However, some interpret ‘targeted killing’ as being a sort of extra-judicial execution, and therefore more appropriate to law enforcement rather than to armed conflict. I shall use ‘assassination’ for my discussion, though I take it that discussion would apply equally to targeted killing (Gross, personal communication, 5 May, 2008).
Regarding ‘assassination’ itself, Franklin Ford (1985: 2) defines it as ‘the intentional killing of a specified victim or group of victims perpetrated for reasons related to his (her, their) public prominence and undertaken with a political purpose in view’. For some other conceptual work on assassination see Zellner (1974), especially Rachels’ (1974) essay.
- ¹⁰ A good historical account of assassinations is Ford (1985).
- ¹¹ For discussion, see the following: Altman & Wellman (2008), David (2003), Gross (2006), Kasher & Yadlin (2005), Kershner (2005), Meisels (2004), and Statman (2004).
- ¹² The case upheld the jurisdiction of a United States military tribunal over a group of German saboteurs that has been apprehended in the United States, two of whom were American citizens.
- ¹³ See, for example, Murphy (2004). For critical discussion, see Gill & van Sliedregt (2005).
- ¹⁴ For more discussion of these techniques, see Wolfendale (2009).
- ¹⁵ For a contrary position, see Fiala (2006). Fiala is worried that exceptions can ultimately normalize immoral behavior. This seems a misplaced worry to me insofar as the exceptions that are of interest to us are the ones that are morally justifiable; there is no reason to consider morally unjustifiable exceptions. Therefore, what we are normalizing is not immoral behavior, but rather behavior that, in other contexts, was not necessary. If the worry is that the normalized behavior would persist if and when the present context reverted to the earlier one, then that is interesting only as a social concern, not a philosophical one. Philosophically, there would be no longer be any justification for the exception, so the unexpected norm should be restored. Exceptions in war are also considered in Rodin (2006).
- ¹⁶ There is a growing literature on moral particularism, though much of it is orthogonal to the present project. In its more extreme forms, moral particularism denies that there are moral principles. More conservatively, it admits of moral principles, but denies the preeminence of these principles. See, for example, Hooker & Little (2000) and Dancy (2004, 2005). Some of this literature mentions exceptions. See, for example, Dancy (1999) and Goldman (2001).
- ¹⁷ Note, though, that exceptionalism can be construed even more generally than moral and legal norms. Consider, for example, Mendel’s Second Law (the Law of Independent Assortment), which holds that the inheritance pattern of one trait will not affect the inheritance pattern of another trait. However, this is not quite right: this ‘law’ is true except when genes are linked to each other (as might happen with genes proximally situated on the same chromosome such that they might segregate together during meiosis), in which case it is not. Again, the exception is to some stricture (viz., that independent assortment is required), and what is being excepted is some phenomena (viz., transmission of linked genes). My analysis can similarly accommodate these examples as well, though the emphasis will be on exceptions to moral and legal norms.
- ¹⁸ For example, consider: ‘All *X*s must ϕ , except *Y*s.’ This norm does not imply that there are *Y*s; rather, it implies only that, if there were any *Y*s, they would not have to ϕ . This is still a well-formed excepted norm, even if there might not be any *Y*s at present.
- ¹⁹ These examples will motivate distinctions similar to those suggested in Marks (2006: esp. 119–120). We both derive spatial and temporal exceptionalisms, and his collective exceptionalism is similar to my group-based exceptionalism. Further discussion of his account will appear below.
Marks’s taxonomy also includes ‘*interpretive exceptionalism*, in which norms are reinterpreted in order to narrow the scope of the protection conferred or of the conduct that is prohibited’ (Marks 2006: 121, emphasis added). His example of this includes (re-)interpretation of torture as that which requires pain

'equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, the permanent impairment of a significant bodily function, or even death' (Bybee 2002).

Another example he uses is the view once expressed by Department of Defense officials that medically-trained personnel assigned to develop interrogation strategies at Guantánamo and Abu Ghraib were not acting as physicians and, therefore, not subject to the strictures of medical ethics. See Bloche & Marks (2005). See also Allhoff (2006b).

There are a few different reasons that I do not bring Marks's interpretive exceptionalism into my account. First, interpretive exceptionalism seems necessarily *post hoc*, and therefore not very philosophically interesting: of course people should not change their conceptions of something merely because it is convenient or expedient. What is interesting, in both the torture and physician cases, is to *acknowledge* that we have torture or physicians, and then to talk about whether these things are acceptable or not; mere semantic recourse to move the bar somewhere else just seems disingenuous rather than philosophically suggestive. Second, I think that the interesting facets of the interpretive approach – if there are any – can be subsumed under another form of exceptionalism, most likely group-based exceptionalism. In the torture case, for example, there would be a certain group of people, namely the interrogatees, who are excepted from protections against some practices. In the physicians case, there would be a certain group of people, namely medically-trained interrogators, who are excepted from medical duties. His interpretive exceptionalism can therefore be subsumed under my group-based exceptionalism (see below).

²⁰ Wine shipping laws are available online from the Wine Institute (Wine Institute no date). For discussion, see Massey (2008).

²¹ See also Fleck (2000: 13) and Baker (1998: 201, 211). Both cited in Marks (2006: 119).

²² Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (2001).

²³ For list of these provisions, see Doyle (2004). They include: §201 (wiretapping in terrorism cases); §202 (wiretapping in computer fraud and abuse felony cases); §203(b) (sharing wiretap information); §203(d) (sharing foreign intelligence information); §204 (Foreign Intelligence Surveillance Act (FISA) pen register/trap and trace exceptions); §206 (roving FISA wiretaps); §207 (duration of FISA surveillance of non-US persons who are agents of a foreign power); §209 (seizure of voice-mail messages pursuant to warrants); §212 (emergency disclosure of electronic surveillance); §214 (FISA pen register/trap and trace authority); §215 (FISA access to tangible items); §217 (interception of computer trespasser communications); §218 (purpose for FISA orders); §220 (nationwide service of search warrants for electronic evidence); §223 (civil liability and discipline for privacy violations); and §225 (provider immunity for FISA wiretap assistance). Cited in Marks (2006: 121).

²⁴ The USA PATRIOT Act was renewed and amended through two subsequent pieces of legislation. The first was the USA PATRIOT Improvement and Reauthorization Act of 2005 (2005). The second was the USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006 (2006). For analysis, see Doyle (no date).

²⁵ For a more comprehensive discussion of sunset provisions than I can offer here, see Davis (1981). For a recent proposal to apply a sunset provision model to judicial decisions, see Katya (2003).

²⁶ Marks also mentions CIA interrogation centers in Eastern Europe that 'were established in order to circumvent the ban on cruel, inhuman, and degrading treatment, pursuant to the administration's view that the ban did not apply to aliens held outside the United States' (Marks 2006: 120). I will not discuss this example in particular, though my forthcoming discussion applies, *mutatis mutandis*, to it.

²⁷ Note that, while the Bush administration is routinely criticized for denying *habeas corpus* to detainees, Bush's is certainly not the first presidency to restrict or undermine this protection. (It further bears notice that, according to the US Constitution, the protection is hardly unalienable. According to Article I, Section 9, Clause 2: 'The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.' This clause, of course, does not grant the *president* the right to suspend it, of which more shortly.)

During the Civil War, President Lincoln suspended *habeas corpus* several times. The first took place after the attack on Fort Sumpter in April 1861 and applied to the military line between Philadelphia and Washington, DC. This action was challenged and overturned in *Ex parte Merryman*, in which Supreme Court Chief Justice Roger Taney held that only Congress, not the president could suspend the writ. Lincoln went on to ignore Taney's order to restore it. For more details, see *Ex parte*

Merryman (1861). The suspension ended in February 1862, though was reissued – this time over the entire North – in September. Congress then passed the *Habeas Corpus Act* of 1863, which was meant to indemnify the president against judicial challenges as had arisen in *Merryman*. President Johnson restored the writ state-by-state between December 1865 and August 1866. In the early 1870s, President Grant suspended it in nine South Carolina counties as part of action against the Ku Klux Klan. See Johnson (1899).

In 1987, President Reagan refused to ratify Protocol I, an amendment to the Geneva Conventions that the US had signed in 1977. At stake, primarily, was Article 44, Paragraphs 3–5; Regan interpreted these paragraphs as extending protections to terrorists. By not ratifying the Protocol, the US would not owe those fighters the judicial provisions made in Article 3(1)(d) of the Third Geneva Convention thus, effectively, denying them *habeas corpus*. Despite having been ratified by over 160 countries, the US has still not ratified it, whether under Reagan or any subsequent administration. (Iran, Iraq, and Israel are other notable exceptions.) See Reagan (1987).

President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996, in which §101 set a statute of limitations for the request of *habeas corpus* and further limits the power of federal judges to grant relief. See Antiterrorism and Effective Death Penalty Act of 1996.

There have also been various Supreme Court cases that have upheld the limitation of *habeas corpus*. *Ex parte Quirin* (1942), mentioned above and in note 12, held that the enemy combatants could be denied *habeas corpus*. *Johnson v. Eisentrager* denied *habeas corpus* to nonresident aliens captured and imprisoned abroad. See *Johnson v. Eisentrager* (1950). However, some important decisions have asserted *habeas corpus* protection: *Hamdi v. Rumsfeld*, for example, upheld it for detainees who are US citizens (*Hamdi v. Rumsfeld* 2004). See also *Boumediene v. Bush* (2008).

²⁸ For example, Davis (2005) does not think there are any conditions that would justify torture whereas Bufacci & Arrigo (2006) think that, even if torture were permissible in theory, it would never be so in practice. (This is an extension of dialectical charity as, I suspect, they otherwise agree with Davis.) For a response, see Allhoff (forthcoming: esp. Ch. 6). See also the references in note 13 above for further discussion.

²⁹ Again, for discussion and debate, see the references in note 11 above.

³⁰ It is worth noting that constitutional provisions have already been explored in this regard as pertains especially to terrorist attacks. See Ackerman (2004b). For a less technical discussion, see Ackerman (2004a).

³¹ Rationing can take place in different contexts, but consider food rationing in the US during World War II (Bentley 1998; Zweiniger-Bargielowska 2000). There is also a literature about rationing in medicine; a classic is Rescher (1969: 173–186).

³² For discussion of such rights in the time before World War II, see Swisher (1940). For a recent opinion against the suspension of such rights for the greater good, see Cassel (2004). For a general overview on such issues, see Duncan & Machan (2005).

³³ As a counterexample to this claim, we might postulate some norm which could bear no exceptions, such as ‘None may be subjected to genocide, except . . .’. I still think that, logically, it matters what the group is that is being excepted and, even if no exceptions are justified, that the analysis must include the groups. For example, imagine the case that the world will be destroyed unless some group is subjected to genocide. I think that it is an open question whether genocide is justified in this particular case, and we would want to think about the group to be excepted. Maybe it turns out to be the case that no exception is justified, but we would have to consider the groups who were candidate exceptions. The other alternative, then, is that there *are* exceptions to every norm, whether actually or possibly, and this is the view that I would be more inclined to endorse. If this is true, then, *ex hypothesi*, the groups matter.

³⁴ Note that the group subject to torture is probably a subset of those classified as enemy combatants; I think it is probably unreasonable to think that most enemy combatants are tortured, though this presumably depends on the definitions that we employ.

³⁵ This discussion typically starts with the doctrine of double effect; see Foot (1967). For discussion pertaining to the war and terrorism context in particular, see Brown (2003), Haydar (2005), and Kamm (2005).

³⁶ A conspicuous beginning to this discussion was in Thomson (1971). More recently, see Pettit (2007: esp. section 1). For discussion in the context of war, see Ingierd & Syse (2005).

³⁷ For a discussion relating responsibility to politics and law, see Matravers (2007).

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