Surfacing a Submerged Right: Thoughts on the Structural Origins of the Terrorism of the Weak

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“That which comes before is for the sake of that which comes after”.
Aristotle

I.
This paper is a dialogue with themes and questions raised by the relationship between terrorism and civil liberties that remain unresolved, primarily questions about the origins of terrorism, and the effect of a causal analysis on what might be considered just responses to terrorist acts. As a student in an interdisciplinary social science department that depends heavily on epidemiological analysis there is a chunk of epidemiological or demographic information that I explore as characteristic of the causal milieu of terrorism.

I set up or justify the epidemiological piece in about 2/3rds of the paper. The paper then has material that can be categorized as 1) background of the background, 2) background, and 3) explications of a causal model for terrorism. As a broad frame I consider this an investigation into revolution, as a norm, as a right, as a duty, as a cause and effect of [in]justice.

The use of epidemiology and the causal analysis raised the issue of commensurability for me. I have spent considerable time looking at the boundaries between disciplines, sciences, domains of knowledge because my primary analytical subject is medicine/health, and there are serious incommensurabilities between the “hard sciences” themselves (physics, chemistry, biology), and, more importantly, between biology as biochemistry and the social sciences. I was initially concerned with clarifying some points on the latter incommensurability, but have determined that would be beyond the scope of this paper.

Having decided to look at causality, I was also concerned with describing and explaining the causal models I use. I begin with Aristotle because his causal models (material, efficient, formal, final) are, with some minor exceptions, the basis for all discussions of causality. But there is only one causal model (of Aristotle’s four) anyone will admit to using in contemporary thought, that of efficient causation. This trend began roughly with Bacon, was solidified in the 19th century with the rise of the natural sciences, and vanquished the remaining uses of formal and final causation in theory of biology in the 1930s.

As a student of the law, the idea and centrality of “intention” is self-evident. There would be no systems of justice without being able to ascribe responsibility to actors.1 This fundamental way of parsing relationships is based on common morality and fairness, the way people have lived and understood relations since time immemorial. We impute criminal responsibility to terrorists

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and by so doing we imply they are responsible agents, and in this responsibility we find *mens rea*, the criminal intent.

Intention and efficient causality are two different causal models. Efficient causality can operate within intention, but not the other way around. To me this is a major cognitive dissonance not only in many theories, but in society itself to the extent it glorifies and accepts without question the epistemology of "science." I want to simply note that this problem must be examined for a philosophically sound description and explanation of terrorism. In this regard, the data that arise from statistical analyses of populations has profound implications for our theories and understanding of society and causality, but I will not address them. I therefore will be discussing causal pathways and events that contain philosophical complexities and contradictions, but without further comment.

II.

When we analyze terrorism what norms are we implying are being violated? We agree that there are positive norms against various behaviors, including murder and "terrorism," but we are compelled to have classes such as we did because the norms against or regarding terrorism seem inapposite, incomplete in some way. When we engage in consideration of terrorism as a philosophical endeavor I submit we are looking for a definition so we can formulate norms we feel are just. This implies there is some injustice in the existing norms.

One does not have to engage in the debate of whether this is philosophical essentialism, because the end of the discourse is focused on law, and inquiries into law are always grounded in the pragmatic of the constitution, the legislature or the court. A successful class such as ours should end with clearer thinking about terrorism, which in turn leads to more appropriate legal responses. One could think we are seeking to regulate behavior, not to determine how terrorism is dealt with in "natural law," whatever that is. I am not being pejorative about natural law because I consider myself a natural law person, but I recognize that seeking norms in natural law is not straightforward. On the other hand, what are we doing when we seek to understand the justice in something like terrorism, since we begin by assuming the positive laws in effect are in some ways inadequate? Is this indeed an inquiry into natural law?

Professor Waldron might have it that we are investigating the nature and scope of an "archetype," a kind of super-structure in the world of Dworkian principles. An archetype of what though? I submit we are looking at the archetype, if there are such things, of revolution, rebellion, insurgence, mutiny, etc. Intense philosophical reflections on revolution are more common in times of war and civil strife, and this round, the most intense since the Vietnam war in the US, was brought on by 9/11.

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2 There is a suggestion that the psychological analysis of intention is not commensurate with, or is not of the same order as, that of causality. I think it is more artificial to see them as incommensurate than otherwise. See Hart, id.; see also, Hans Kelsen, *The Pure Theory of Law*, 2d ed., 91-99 (tr. Max Knight, 1967).


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Professor Waldron introduces use of the word “archetype” in an effort to get at, describe, the sense of why we, certain kinds of human beings who respond with horror and indignation at the inhumanity of man to man, abhor torture. He distinguishes his use of the term from the common Jungian meaning, I think to avoid an invocation of natural law, but I am not sure there is need to so sharply distinguish these uses of the word. Much analytic parsing is linguistic in nature. To say there is a system of principles that are not written down but that deeply inform positive law, well in substance that looks like morality and natural law, and it is hard to tell why that is not an Aristotelian form of some kind. But perhaps there is no need to go there. I want to examine what revolution is. Is it an archetype of the same kind as the abhorrence to torture? Is it a Waldronian legal archetype?

I approach it in two ways and conclude it is, if there are such archetypes.

The discussion we had was primarily framed as an inquiry into understanding the responses to 9/11, and then generally to “terrorism.” I think most the speakers we heard begged the question of the context, the origins, of 9/11, and by so doing made terrorism into a neat, well-defined descriptive package that begins with some disaffected individuals or groups willing to kill themselves and others in pursuit of some vague aims that include manipulating the state in which the civilians were killed. It starts with the mens rea of the actual suicidal or terrorist act(s), it involves the people who plan that act, and it ends with the legal and extra-legal responses of individuals and the state to such act(s). Although the reductionism is explainable by the obscurity of the structural reasons for Al Qaeda’s terrorism and the unidimensionality of legislation, it should not keep us from analyzing the roots of terrorism to the same extent we examine the responses. I am not being radical by suggesting knowledge of a thing’s causes is necessary to eradicate or limit the thing.

We did not give any priority or space to the stories of the “terrorists,” we did not examine the reasons they feel compelled to kill, nor compare it with the motivations of states to kill in the same way. We referred to the carpet and fire bombings of WW2 and Vietnam, but they did not really inform the discussion. We discussed terrorism in colonial Algiers, and although the terrorist acts of France were referred to as causal events, they were not examined as a source of the terrorist acts of the FLN. In other words, although the undercurrent of the class was a search for justice, we did not seek justice in, arguably, one of the important places we could find it.

Some would argue we discussed the only justice that matters, how society should respond to these vicious acts. This not only begs the question of what the acts are, as noted above, it begs the question of what justice is. Justice is a complicated matter, but in its formulation as the “right” response to the individuals who perpetrated random lethal violence against civilians for political aims, it is limited. I would argue a broader idea of justice is needed. Justice as law is simply one way to think of justice, but I prefer Aristotle’s more general formula, that justice is a matter of excess or deficiency. This opens the way to different, more historically oriented

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55 See Martha Crenshaw, Thoughts on “The Effectiveness of Terrorism in the Algerian War” in Terrorism in Context (unpublished, 2006); see also, Walzer, JUST AND UNJUST WARS, ___, at 204-6.
56 For a description of many ways justice has been described, see WHAT IS JUSTICE (ed. Robert C. Solomon & Mark C. Murphy, 2000).
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readings of terrorism, which in turn lead to the consideration of terrorism as a tactic. That is, as the field in which terrorism is identified becomes more comprehensive, the defining characteristic, or identity, of terrorism loses its local political character and it is seen to simply be a tactic.

Tactics can be used by anyone, and terrorism as a tactic has been used since time immemorial. Aristotle says:

… for a tyranny is not destroyed until some men come to trust each other, owing to which tyrants also make war on the respectable (epieikēs), as detrimental to their rule not only because of their refusal to submit to despotic rule, but also because they are faithful to one another and to the other citizens, and do not inform against one another nor against the others ....

Michael Walzer continues the point:

The systematic terrorizing of whole populations is a strategy of both conventional and guerrilla war, and of established governments as well as radical movements. ... Tyrants taught the method to soldiers, and soldiers to modern revolutionaries. That is a crude history ... terrorism in the strict sense, the random murder of innocent people, emerged as a strategy of revolutionary struggle only in the period after World War II, that is, only after it became a feature of conventional war.

Here we reach the first description of the archetype of revolution (of which terrorism is a species). Wanton violence against civilians is a tactic to oppress, to destroy solidarity and trust, and it has been in use since antiquity. It is a response to tyranny and oppression, or, to state it somewhat differently, it is caused by tyranny and oppression.

Aristotle gives us interesting guidance as to who the revolutionaries are, and the moral or ethical source of their motivation:

What creates the problem is that the equitable (epieikēs) is just, but not the legally just but a correction of legal justice. The reason is that all law is universal but about some things it is not possible to make a universal statement which shall be correct. ... When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by oversimplicity, to correct the omission—to say what the legislator himself would have said had he been present, and would have put into his law if he had known. Hence the equitable is just, and ... this is the nature of the equitable, a correction of law where it is defective owing to its universality. ... It is evident also from this who the equitable man is; the man who chooses and does such acts ....

Revolution then, is the act of the just in response to the manifest injustice of the tyrannical state. It is the archetype of the search for a peaceful and harmonious life with the group, in society. It is a principle of political harmonization. It happens when positive law is not synchronized

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7 Aristotle, POLITICS 1314a (tr. Rackham, 1944).
8 Walzer, id., at 197-8.
9 See e.g., R. M. Hare, Rules of War and Moral Reasoning, in WAR AND MORAL RESPONSIBILITY, id., note ___, at 46 (describing Priam’s disgust, but not moral sense of wrongness, for the pending killing of the defeated that waits him at Troy).
10 A Foucaultian power dynamic permeates the context of terrorism as I frame it in this paper, but I do not bring it to the surface.
11 Aristotle, NICOMACHEAN ETHICS 1137a-b (tr. W.D. Ross, 1908).

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sufficiently with the day to day life and needs of the citizens, and there is a kind of kickback from the people.

There is another Waldronian sense it is an archetype. Revolution has been framed in legal and political theory as both a right and a duty. In the drafting of the Universal Declaration of Human Rights the drafting committee considered the right of revolution, but decided to “submerge” it in the preamble rather than set it out as an explicit right because they were afraid it would be abused.\textsuperscript{12}

\begin{quote}
\emph{Whereas} disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

\emph{Whereas} it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law …\textsuperscript{13}
\end{quote}

The Declaration of Independence of the Thirteen States describes it both as inalienable right and as duty:

\textquote{… That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government …[and] when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce [the People] under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security. …}

It is clearly a legal principle of some kind, although it did not make it as a positive right, other than as described above, into the International Bill of Human Rights.\textsuperscript{14} I return to this thread below.

I examine terrorism as a species of revolution, and at different times discuss it as a tactic of war. I am in strong agreement with Professor Manin though, that as a legal matter it should, in the absence of a legal war, be considered a crime under applicable municipal law.\textsuperscript{15} However, terrorism as received in 2006, \textit{i.e.}, in discourse responsive to 9/11, is in the United States treated as a matter of war. I think the complexities in determining just responses to “terrorism” are partially determined by its bad fit with both municipal and international legal regimes. With regard to municipal law it is the claim that the revolutionary group is not under the aegis of the


\textsuperscript{14} The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), The International Covenant on Economic, Social and Cultural Rights (ICESCR), the Optional Protocol to the ICCPR, the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty, and the United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR, all of which can be found at the \texttt{[online] UNIVERSITY OF MINNESOTA HUMAN RIGHTS LIBRARY}, at \texttt{http://www1.umn.edu/humanrts}, accessed 5/4/06.


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state, or that the state and/or its laws are illegitimate, that at least morally takes the group outside of the domestic legal order, giving it thus an international flavor. Yet the group has to comply with international norms to be recognized as an entity that can communicate with other international entities, and these requirements can rarely be met by the revolutionary group. They fall between the cracks of social order. In this section I consider revolutionaries, terrorists, from the international perspective.

The *ius ad bellum* (just war theory) embodied in the United Nations Charter,\(^{16}\) to which virtually all states have agreed to, says only defensive wars are allowed, only in response to actual imminent attack, except as allowed by the Security Council, representing in theory the will or determination of the international community. Under these standards, combined with the standard of non-interference,\(^{17}\) revolution and most revolutionary acts, even cross-boundary acts, do not rise to the level where they consist of a “threat … against the territorial integrity or political independence” of a state.\(^{18}\) Therefore, more often than not terrorism or revolutionary acts should be handled by municipal criminal law.

There has been an interesting development in UN *ius ad bellum*, however. On October 24, 2005, the General Assembly adopted the outcome document of the 2005 World Summit.\(^{19}\) In that document the General Assembly recognized a “responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”\(^{20}\) That set the stage for the development of the idea, and on April 28, 2006, the Security Council (SC) confirmed the principles established by the World Summit.\(^{21}\) SC Resolution 1674 “reaffirms the provisions of paragraphs 138 and 139 of the World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”\(^{22}\)

This is interesting because it establishes a duty to protect and therefore heightens the importance of a failure to abide by the duty. In the case of Palestine now, or Algeria in colonial times, would the failure by the international community to fulfill their duties be the “legitimate” justification for revolution? Does the failure of the international community to respond to its duty in essence waive the applicability of International Humanitarian Law (IHL)? IHL is thought to consist of universal norms (either customary international law (CIL) through the Geneva Conventions (GC), or CIL because of them), or to be positive law. The Bush administration interprets IHL (the GC) as positive law, which limits their applicability to those situations that comply with

\(^{17}\) Charter, id., Art. 2(7).
\(^{18}\) Charter, id., Art. 2(4).
\(^{20}\) Id., at Paragraphs 138 & 139 (139. … In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII … should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.)
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certain procedural regularities. It is clear from the history of the Geneva Conventions (treaties) that they acquired their status by agreement, but not universal agreement.23

In any event, positivists have a strong argument that they are treaty rights. Where does this leave the revolutionary? They do not have status that would allow them to enter into treaties. Does that mean they should be bound by the terms of treaties? Or to customary international law? I submit that the application of IHL to the Palestinians, for example, results in an injustice. The SC in Resolution 1674 reiterates numerous times that violence against civilians is off-limits, but at the same time it is only now recognizing a duty to help those oppressed by tyranny. Often the kinds of violence we are considering is not threatening to the existence of the state, and the bona fides of the oppressor state is assumed.24 In the case of tyranny, where the tyrant is operating with impunity in the realm of international and human rights law, where the tyrant’s military power dwarfs that of the revolutionaries, where the revolutionaries cannot be a party to the GCs, where the revolutionaries learned terrorism from the state, where they feel duty bound to free the oppressed and suffering, and they are Aristotle’s “respectable,” how can a civilized mind deny them any means to help themselves? To put it in philosophical or moral terms, is not the denial of their right to fight with whatever weapons they have, after having exhausted “proper” appeals to the international community, a denial of justice?

There is one final set of points to make regarding the applicability of ius in bello, IHL or other norms to revolutionaries. Earlier I pointed out that revolution is considered a right and a duty. The origin and nature of rights is obscure and not much agreed on, and rarely is the discussion of duty as extensively analyzed as right because many thinkers are of the opinion rights give rise to duties, i.e., that rights are logically precedent to duties. Furthermore, in the UN Human Rights System, rights are seen to arise from dignity.25

I find the reliance of the concept of “dignity” unconvincing. I think the primordial state of the human being, the natural healthy state of man (and other animals) is one of compassion. This suggests that duties arise before rights. Be that as it may, in addition to compassion the individual is seen as autonomous, as having a range of liberties and freedoms in which he can undertake his duties and flourish as a human being. In social contract theory this autonomous being, this source of duties and rights, has a formal relationship with his fellow humans that results in, or is, the state. This is the theoretical structure that gives meaning to the Declaration of Independence. On this reading, the right to revolution precedes the state, and therefore it precedes agreements between states. It is a primary characteristic or attribute of autonomy.

24 For interesting examples of how differently this issue is seen by educated commentators, see Brian Urquhart, The Outlaw World, The New York Review of Books (May 11, 2006) (who misses the point altogether that “terrorism” may actually have a just cause when he says: “… [society is taking ]…steps toward establishing an international institutional and legal order [including now the International Criminal Court, and the beginning of a system of legal obligation for states related to the prevention and suppression of terrorism.”) and Tony Judt, The Country that Wouldn’t Grow Up, Haaretz.com, at http://www.haaretz.com/hasen/spages/711997.html, accessed 5/4/06 (taking an extraordinarily dry-eyed look at the corner the Israelis are painting themselves into by denial of their terrorism, responding in part to the controversy over the Mearsheim/Wald piece on the Israeli lobby).
25 References to their origin in God or in Nature were stripped from the UDHR. See Morsink, id., note ___, at ___.
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This line of thought about autonomous individuals can be traced from Hobbes, through Kant into Rawls. In this lineage knowledge of the other is derivative, not direct. It is based on a kind of solipsism. There is another line of thought, found in Aristotle and mirrored in Hegel, in which the individual includes the state as an aspect of their identity. The state and others can be known directly. On this theory the right to revolution is a right to mold and control an aspect or characteristic of oneself, not simply a right or claim against another. This references moral principles that are very deeply engrained in our society. "If thine eye offends thee, pluck it out." MATTHEW 18:9. We have a warrant to do things with ourselves we do not with the truly other. And if the state is the constituted population of citizens, and they are all identified with the state, killing citizens is no different than killing or attacking the state. I can only point to the complexity the presupposition of knowledge-of-the-other, or identity-with-the-other, introduces into the inquiry.

I believe we can find in the foregoing the Waldronian archetype I referred to above, a principle or structure that informs human behavior, but, unlike the norm against torture, it is the right that dare not speak its name, it is submerged, stigmatized by righteous statists, and shunned by the democratically complacent.

I think there is not as much distance between Jung and Waldron as he would like. Archetypes in the more Jungian sense are primordial images, not abstract principles like Justice. An archetype of Justice might by an image with a sword (the sword of discrimination), an image that tells the story of the abstraction in symbolic terms. The purpose or function of the image is to create a complex moral and intellectual response that is informed by the abstract principle. So torture is an horrific image consisting minimally of the state torturer inflicting unimaginable torments on the citizen for some purpose. The response is what Waldron identifies as the principle, but it is clear that not everyone responds the same way. That is the power of the image, and the weakness. There are those, such as Cheney and Bush, who (it appears) find some kind of perverse solace in this image, as though it represents for them security and justice. In fact, there is a good argument torture continues to be used universally, but kept far from the public eye because of its repugnance. Hare even admits a utilitarian “level of thought at which [absolute principles] can be criticized, justified, or even on occasion rejected in their particular applications when conflicts arise or when a case is sufficiently out of the ordinary…”

Similarly with revolution. We all have some image of it, perhaps Alberto Korda’s famous image of Che Guevara, perhaps a raised red fist, or Buddhist monk in flames and meditation, etc. The idea that it is a right, some kind of universal principle, implies that for most people the response to the image of revolution is one of justice being sought, of righteousness, of the right and duty of the respectable person(s) to fight for what they believe against the monolithic forces of evil that have somehow, wrongly, gained control of the institutions of life. But at the same time it represents the forces of anarchy, and there is a tension. If I live in a peaceful democracy and I see

27 Hare, id., note ___, at 60 (responding to what he sees as a weak argument from Thomas Nagel for absolute moral standards for judging wartime atrocities).
these images they can invoke anxiety if I reflect them into my own political environment. The more abstract a principle becomes the more images it can be reflected into, and the more widely it can be used.

In the archetypal images of torture and revolution, where is the enemy? who is the enemy? It is the nameless and faceless state, and this reveals the inherent problem with our principles. Identifying the victim and the victimizer depends on character and circumstance. “Terrorists” are bad by definition, their goals unworthy. But this moral judgment has nothing to do with the actual people, their character and context of their actions. We have become fixated on the violent and emotionally charged image, and cannot see the other side of the story.

To sum up Section II, I have identified terrorism as a species of revolution and begun the process of deconstructing the analysis that conflates moral and legal responsibility for acts that use the tactic of terrorism. It is respectable persons that respond with revolution to oppression because tyranny is unjust. It is not clear why revolutionaries, since they are rejecting a bad social contract, are required by any moral or legal norms not to use the tactics they think will best serve their ends, assuming they have, in a manner of speaking, given the tyranny and its supporters due process protections of asking for redress non-violently, as have the Palestinians, the Algerians. Once society turns its back in response to numerous “legitimate” entreaties, what are the obligations of the oppressed? If we look underneath the hood of the law, we find principles, or archetypes, but they admit of ambiguity.

III.

We call something terrorism, and define it in statutes and weighty articles, but are unable to agree on what it is. There are many relevant questions that can be asked. Do we know it when we see it, or do we know it when we are told it is there? Who tells us, when, and why? When does an act of terrorism begin, and when does it end? What exactly is the terrorism? Is it the violence, is it the planning, or is it the reasons plans are made? Is it one act, or all acts? Who is the actor and what is the act? There is a causal pathway and the act(s) is at the end of a causal funnel that opens into the past, and one that opens into the future. What is in these causal pathways?

I do not intend to answer all of these questions, rather I focus on questioning the identity of the actor and of the act. I recognize the many analyses that focus on the people who actually do the act, the act itself, and the immediate consequences of the act. But here I attempt to expand the inquiry into more distal structures.

Here are the terms of the inquiry.

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28 Perhaps the response could be made that Dworkian principles do not involve images in this way, but are more abstract forms that order judicial thought. But what is the source of these principles if not the complex images of individual cases layered one on another informing and being informed by rational thought, in Anglo-American jurisprudence?

29 See e.g., Cass Sunstein, RISK AND REASON (2002) in which Sunstein argues for expert control over regulation because citizens are incapable of appreciating both risk and benefit, but get emotionally fixated on the risk, the danger.


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I refer to an act. This is commonly known as the “act of terrorism,” and it refers to the bombing, or other act of aggression, and it may refer to the planning for the act. I do not call it “terrorism” because I am uncertain at this point what terrorism is, and I am convinced by the many existing analyses and definitions that there is no agreed on definition. I do not conclude that terrorism therefore does not exist, but I do conclude its nature is unclear.

What is the identity of the thing that is called “terrorism”? If we know this we can then identify people or entities who undertake it as “terrorists,” and we can discuss the it in terms of morality and justice with more clarity.

There are significant problems with the undertaking of identifying something in this fashion though. What domain of knowledge, what language, do we use? I accept a more or less Aristotelian universe. I do not question physical existence, or that there are such things as facts, such as that a bomb exploded at such and such a time in such and such a place, subject to forensic rules of evidence, whether applied or not, etc. I assign full ontological value to the account of a thing. Even though accounts are abstract things, they are continuities that can be discussed, and they are what we know as a thing’s identity.

In similar fashion full ontological value is assigned to moral entities, to justice, and to concepts such as the state. These accounts are not of physical things (what account is?) but of relations between people, property and things, or principles that order people, property and things.

These entities are an intrinsic part of the way things in everyday life are understand and talked about, especially things like terrorism. However, there is a body of thought that patently rejects them, and it should be carefully distinguished. Science, in the positivistic sense it is understood and used by life-scientists, rejects teleological thinking, non-physicalist entities, etc. The metaphysics of early 20th century Science has been imported into legal thinking, especially through the efforts of Hans Kelsen and his followers. Inasmuch as this discussion and my conclusions include moral and legal content, I reject the Kelsenian project of scientizing law, its separation of the legal and moral orders, and its rejection of an overall teleological structure.

On the standard analytical method I would ask what aspects, characteristics or qualities of the act and the people do we trace backward? What do we use as evidence to support our decisions? It is easy to focus on the people and the act, and the given explanations, but when we go backward in time we have to be careful to avoid biases of various kinds. Bias would lead us to structure the past to explain the present (the act/actors) in terms that support our prejudices or a priori assumptions.

In this way this is a construction project. How do we reduce, or deconstruct the present, what reduced or deconstructed elements are important, how do we trace them into the past, and with

31 Kelsen considered himself a scientist, but his legal ontology is clearly a dualism, not the physical monism of science.
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what authority do we construct the causal structure that gives rise to the present? That is, how do we identify the act/actors before the act/actors appear on the scene as the act/actors?\textsuperscript{32}

We must begin with the end. Since one thing I query is upstream causal events, my conclusions to a certain degree are “fact” driven, they include references to historical events and temporal order. I use the language of politics, international relations, law, economics, psychology and sociology to describe or refer to historical events, I use a philosophical language of causation to connect them, and I use the language of morality and justice to analyze them.

Is this type of analytical structure valid? “Facts” are used similarly by the domain specific languages referred to, even if they are framed differently within the domains. Morality and justice are practical philosophical categories used to assign human values to events and relationships and as such are meta-factual undertakings also. The application of causal theory to provide an account of events, and the application of moral theory to give them value and through which to understand them, constitute a rational approach to the subject.

This is a moral analysis and so it is about assigning responsibility. For any act it is generally true that the actors are responsible, but if my analysis is successful I will also be able to assign responsibility to the upstream causal actors or events that contain significant unities or continuities with the acts/actors or that significantly constrains the acts or events.

Responsibility for criminal acts can be attenuated on the axes of intentionality and competence.\textsuperscript{33} In that sense the further down the causal pathway the distal act/actors are traced the greater the likelihood the objection will be made that I might be letting the original act/actors off the hook, or somehow diminishing their legal responsibility for the act. I want to be clear from the beginning (or end) that criminal acts should be prosecuted and criminal actors held liable for their criminal acts. I regard the acts under discussion as criminal acts, although they can also be constructed as acts of war. I will discuss the issues of war below, but here want my moral position to be clear. Regardless of responsibility I am able to assign further up the causal pathway, if an individual breaks the law, subject to due process and other human rights considerations, they should be bear the consequences. This begs the question of whose law, where and when, etc., but I will assume that all such acts occur in jurisdictions in which there is a local criminal code and the local judicial and prosecutorial apparatus to undertake a criminal investigation and prosecution.

Once the bodies of the actors have been left behind in the causal analysis the methodological problems arise. Do we proceed inductively or deductively? The inductive approach would have us identify those characteristics in the actors that seem to be influential in their acts, and trace those characteristics into historical events and mental states that were somehow connected to the actor and thus were possibly causative. The deductive approach would involve developing a hypothesis in some analytic domain and testing it.

\textsuperscript{32} The relationship between identity, determination and free will is a big problem. I use it to destabilize the “easy,” or say legalistic, answer that reifies terrorism and terrorists in images such as 9/11 and Osama bin Laden.

\textsuperscript{33} When I wrote this Section III of the paper I had not yet read Hart’s discussion of responsibility, but my analysis is similar to his. See Hart, id., at note ___.

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Since we are looking at events that unfold and have their public meaning in the domains I identified above, history, economics, sociology, law, politics, psychology and foreign affairs, the hypothesis would involve historical events that can be described in relevant terms that could potentially have influenced the actor. The hypotheses need not consider private historical events because they are difficult to uncover, and whatever can be said about the acts, they are intended to be public. Undoubtedly there is a connection between the private and public histories, but assuming there are historical public factors that somehow influence these acts, they affect many people and not all of those people end up as these kinds of actors. We thus have to assume key private causal entities that we cannot know, speculation about which is beyond the scope of this paper.

Although I explicitly reject the ontology of science in these kinds of projects, the philosophers of science have had valuable [epistemological] things to say about the methodological use of deduction and induction to develop and describe causal pathways. Popper argued, expanding on Hume, that induction is theoretically impossible. Lakatos, responding to the problem that it clearly appears at times we induce, argued that what really happens is a kind of program in which induction and deduction are both used. Lakatos’ approach makes more intuitive sense and seems more consistent with how we think we should analyze causal relationships, how we should be logical and persuasive in describing our analytical methods and developing our argument.

However, the only kind of causality that can be described in those terms is efficient causality, which does not serve the project. Efficient causality makes sense as long as we stay close to the bodies and the historical events of the act/actors, but as we seek identities, unities, continuities, between the act/actors and the past we find efficient causality to be inadequate to the task, especially since we seek identities in order to assign moral responsibility, to get a broader sense of justice. What do we seek, really? By framing it in these terms we seek to expand the identity of the act/actor beyond the bodies and historical event of the bombing or act involved.

In many ways determining the historical form of the account is familiar. We do it when we understand historical things and give them moral content, i.e. use them in moral analysis. For example, we might start with the Bush administration’s decision to attack Saddam Hussein and Iraq in response to 9/11. As we look into the circumstances surrounding the decision we find two cold warriors committed to the ideology of war (Rumsfeld and Cheney), we find policy recommendations suggesting that Saddam Hussein should be removed from office using force, we find the first Gulf War and the decision not to remove Hussein, and so on. For some of us, contemplating these things leads us to conclude that the administration was using the events of 9/11 to justify a decision that was made some time before. We feel there is injustice in the failure of the administration to be honest, and to use subterfuge to incur extraordinary financial and other costs on the US, and the suffering of the Iraqi people for a plan not only ill-conceived, but ill-managed. What gives moral import to the decision is its placement in a flow of events. We intuit the beginning of this catastrophe lay in the late 70s, in the brainstorming of neo-conservative wonks, or we place it with the training and frustrations of Cheney and Rumsfeld as the fallout from Watergate led to restricted presidential powers.
This kind of analysis is commonplace, but we rarely conclude that the events of the 1970s cause “insurgency” in Iraq even though they were intended then and there is a direct intentional link from those writings to the invasion. If we associate the two events we do so loosely, and if pressed would abandon our sense of reality of the moral unity between the two events, and let ourselves be convinced by talk of bodies and minds limited temporally by the US occupation itself. The Aristotelian concept of identity and causality allows us to not so easily dismiss the links and the unity between the temporally and spatially attenuated events. Using this method we overcome the inherent difficulties of physicalist notions of efficient causality when dealing with clearly mental entities. We do not have to deal with problems such as the location, existence and identity of history, sociology, or other linguistic and formal structures we use to describe and explain ourselves and the state. These become elements of causal streams we perceive as flowing from the past into the future that we can use to assign moral responsibility.

I am not suggesting that all events that come before are for the sake of all events that come after. If this were the development of a comprehensive philosophical statement that kind of vision, a Hegelian World Spirit perhaps, would have to be addressed, but here I seek merely to expand the reasonable scope of moral responsibility beyond the bodies of the actors, if it is warranted. Who, or what, else should be included in the causal analysis? How should we identify the parties? I am not suggesting that all events that come before are for the sake of all events that come after. If this were the development of a comprehensive philosophical statement that kind of vision, a Hegelian World Spirit perhaps, would have to be addressed, but here I seek merely to expand the reasonable scope of moral responsibility beyond the bodies of the actors, if it is warranted. Who, or what, else should be included in the causal analysis? How should we identify the parties?  

Scientific [legal] positivism trains us not to stray far from the act/actors in determining causality, and does not give us the freedom to seek deeper, broader and longer lasting identities or accounts of the kinds of act/actors we are examining.

The effect of using intention in analysis is the ability to collapse distal causal events into one act. The separate events do not lose their characterization as efficient causes, but the intention orders them in a unique way, resulting in their unity into one event, a single identity. Instead of the act/actor we began with, there is a larger event with more complex causal pathways as one thing, and to this one thing we can assign moral value. This unified context also provides a framework within which to measure the justice of one component or another. It may be that the act/actors we began with cannot be said to be unjust when the unity of the event, the larger identity, is understood, even if the act itself, e.g., a bombing, is not only immoral it is illegal.

How are the kinds of linkages I am looking for characterized? Later I discuss the Palestinian/Israeli conflict as an example and that will concretize the idea. In general, I seek to provide a conceptual framework to more strongly link things we intuitively understand as being parts of the same causal pathway, or of the same event.

If we apply this idea of identity there is no difference in the development of the identity between description and explanation, and we may find the gravitas of the act/actors in unexpected places. Perhaps the places will not be unexpected, but the conclusion as to moral responsibility may be unexpected. This, of course, has potentially important legal implications because law arises from moral observations and feelings. For example, in the end I conclude that certain applications of

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34 I originally included a section applying the idea of final causation here, but have redacted most of it and substituted the idea of intention.
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the Geneva Conventions result in manifest injustice, and that new legal norms should be developed for those situations.

I begin, below, testing the hypothesis the act/actors under consideration do not appear *causa sui*, but are determined effects of public historical events. If I find some linkage between the events then I use the causal linkage as a sign, along with the moral connection of the events, to consider the entire process as one identity. It may be that my linkages can be framed as opinion or conjecture to a greater or lesser extent, but I argue if my analytical tools are rational, then the linkages are as sound as the tools.

**The tools**

I am not going to describe the metaphysical tools anymore than they have been identified above (with the exception of determinism). The moral tools have been alluded to and will be used throughout, also without further description or explanation. However, the factual tools bear introduction.

What is a factual tool? For analytical purposes I accept the existence of reductionist physical entities. The entities themselves can be constructions of any descriptive language but for our purposes the languages identified above are used, economics, sociology, law, foreign affairs, politics, psychology, etc. The relationships between these disciplines can be argued, but for my purposes there are two attributes they share that I find relevant, apart from their fact-naming function. First, these languages exist independent of biochemistry, chemistry and physics. They are, generally speaking, about living things, whereas biochemistry, chemistry and physics are languages that describe inanimate entities.

Second, the facts (or objects) they identify can be counted. States, people, income, wars, disease, mortality, morbidity, investment, and resources can be counted, and sums compared. Counting and performing mathematical techniques on the things counted (statistics) is intrinsic to the sciences, using the term broadly, of demographics and epidemiology.

The intention of this analysis is to follow the causal chain away from the individual bodies and the individual acts that are known as “terrorism.” One line of causal inquiry is into other bodies. But what is it about other bodies, and other things, such as newspapers, history, war, politics, etc. that influences the actors that perform the act? If we say that a competent person is responsible for their actions, and the criminal law is based on this, then how can we make an argument that other factors may play important causal roles?

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One kind of argument, the kind I intend to assert, is made using statistics. Epidemiology is the field that uses statistics to understand the determinants of disease. Social epidemiology uses statistics to investigate social determinants of disease, as opposed to “individual risk factors,” such as eating too much, or not exercising enough, etc. I will not be making an epidemiological argument per se, but will be arguing from “facts,” methods and conclusions developed by epidemiology.

Epidemiology is concerned with populations. Its tool, statistics, grows in accuracy the larger the group being considered. Social epidemiologists have developed their own language to describe their inquiries into the prevalence, incidence and causes of disease in populations. Characteristics of populations do not map, and cannot be mapped, onto individual members of the population. If it is a statistical regularity that 1% of a population will attempt suicide in a given period, it is not possible to know which 1%.

They have discovered in populations a “social gradient.” People can be arranged hierarchically according to income, education, occupation, class, etc. (SES). Those higher on the ladder, regardless of the dimension(s) measured, historical period, or geographical location, have better health (lower mortality and morbidity) than those beneath them. Thus the durable “social gradient.” It has (neo)material and psychosocial causes. Evidence for it can be found historically, epidemiologically and socially. This finding is interpreted to mean that disease as a population characteristic is determined, to simplify, by SES. That is, one’s SES is the cause of one’s state of health.

The discussion of the causes in this approach is couched in terms of “root causes” or “fundamental causes.” Fundamental cause theory arose in response to the risk-factor approach (dominant in the last half of 20th century) and holds that social conditions are fundamental causes of health inequalities (as reflected in morbidity and mortality statistics), not merely correlates or clues. Social conditions include socioeconomic status (SES), social capital, social stigma, biological mechanisms, and racism. The theory has four essential components:

a) a fundamental cause influences multiple disease outcomes;

b) it operates through multiple risk factors, including those listed above;

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36 I argue statistical regularities demonstrate, and justify giving, full ontological status to the population, group, constituted state, etc. See e.g., Ian Hacking, EMERGENCE, id.; Ian Hacking, THE TAMING OF CHANCE (1990); THE PROBABILISTIC REVOLUTION VOL. 1 & 2 (ed. Lorenz Kruger, Gerd Gigerenzer, Mary Morgan, 1987); Harry Marks, THE PROGRESS OF EXPERIMENT: SCIENCE AND THERAPEUTIC REFORM IN THE UNITED STATES 1900-1990 (1997); Theodore Porter, TRUST IN NUMBERS: THE PURSUIT OF OBJECTIVITY IN SCIENCE AND PUBLIC LIFE (1995).


39 Link & Phelan, id.
c) “new intervening mechanisms reproduce the association between fundamental causes and mortality over time;” and

d) “they involve access to resources that can be used to avoid risks or to minimize the consequence of disease once it occurs.”

Stress has been identified and elucidated as an important link between levels in the social gradient, i.e., as a neurophysiological agent responsible for transforming “loss of autonomy over one’s life-course, or over one’s working or neighborhood environment,” into “states of anxiety and physiological arousal, which result in the enhanced chronic secretion of harmful levels of doses [sic] of cortisol, adrenaline, and nor-adrenalin with the body’s neuron-endocrine system.”

Prolonged stress can cause changes to brain morphology.

The social epidemiologists have elucidated a deterministic model of social causation. The model is sometimes described as “structural violence,” especially when speaking of the 20% of the world’s population that exists in abject degraded poverty as a side-effect (“garbage humans”) of neo-liberal economic policies. I argue below that the presence of a pronounced social gradient is a necessary element of the act/actors under consideration.

The social construction of disease is a complex topic that requires a limitation relating to the idea the state is a living thing that can be diseased. That understanding of the state can lead to the justification of extra-judicial killings and torture to remove diseases such as Marxism from the body politic. These acts and justifications are rejected as immoral and illegal. However, the idea that “terrorism” is a social disease is intuitively close to the mark, and the fundamental

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40 Id., at 74.
44 The story of a torture victim from Uruguay illustrates. Ana Valdes and John Wilmerding, If Torture Works … (2006) at http://www.uslaboragainstwar.org/article.php?id=10411, accessed 5/4/06, (I was 19 years old when I was tortured, in Uruguay, at that time one of South America’s most ‘exemplary’ countries, with a long tradition of democracy and legality. … We were tortured by people we knew. … I was beaten and tortured by friends of my uncles and my cousins. … Some years ago, I went to church in Spain and confessed … I didn’t know the priest was a member of Opus Dei, the Catholic right-wing sect who supported Franco and Pinochet … He asked me why I have not been in confession for so many years, so I told him briefly about my four years in jail, and my exile in Sweden. … He asked me how I felt about the men who interrogated me. I was a bit struck by his question … up until that time, I had not given them much thought. … Yet he insisted, and so I said “Today, I am not sure how I feel. I can accept that many of them believed they were right, and that torture or pressure were only methods to gather information, but …” … He interrupted me and said: “But you should love the people who tortured you. They did it to save your immortal soul. If you died under torture, you should go directly to heaven. They were good Catholics, and only wanted to save you from the devil, and from Marxism.”); see also, Michel Foucault, DISCIPLINE AND PUNISHMENT: THE BIRTH OF THE PRISON 1 – 72 (tr. Alan Sheridan, 1977) (relating that the torture victim was known as the “patient”).

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causes theory supports this idea. I do not develop this metaphor to frame policy debate, but this type of argument is used routinely by public health experts advocating for social reform.

What is the relationship between Aristotle’s final cause theory, his theory of identity, and fundamental cause theory? The evidence of the link between stress and brain morphology suggest efficient causality, but the jury is still out on the exact linkage, and why it persists at the higher levels of the social gradient as well. I think it looks like formal causality, a kind of causality that is related to final causality, and which fits into the identity theory. It seems clear that the social gradient is a fundamental characteristic, expressed as a statistical regularity of societies or populations. This suggests further that in the living organism of society a certain amount of disease and death is normal, or structural. This, of course, is obvious, but its implications are not. What we see in the exemplar case I present below is a very steep social gradient, and dismaying mortality and morbidity figures. If the cause of the steep and cruel social gradient is clear, we can assign moral responsibility to its causes for the difference, at least, in mortality and morbidity between it and mortality and morbidity of social structures in which the social gradient can be said to be “healthy,” such as that found in advanced democracies.

There is an unresolved tension in my argument between the idea of individual autonomy, and its legal and moral consequences, and the idea that an individual is completed or made whole by his or her relation with the state, i.e., that the state is an intrinsic component of individual identity, that there is a unity between individual and state. The fundamental causes model seems to be empirical evidence for the strong link between the state (or population) and the individual, and suggests that causal agents act through that link to profoundly affect conditions for the individual’s phenomenology. This places the discussion squarely in the ancient arguments about determinism and free will and the problem of the one and the many.

IV.
In order for terrorism to arise there must be

1) an oppressor state;
2) an oppressed population (group, peoples);
3) the state of the oppressed population injured, i.e., the oppressed population is unable to self-determine with regard to their government, their identity is injured (Aristotle/Hegel – self is also state, and self can know other);
4) the oppression must continue for a long time and no other avenues of action or communication are open or working, there are no alternatives;
5) the oppressor state maintains its oppression by terrorist acts, either covert or overt;
6) the international community allows the terrorism by the oppressor to be done with impunity, i.e., the oppressed population is abandoned;
7) by virtue of the oppression the social gradient between oppressed and oppressor must be steep and deeply embedded or structural (see Table 1), i.e., the sense of helplessness and fear is stimulated by every impression, and the sense of hopelessness pervasive.

<table>
<thead>
<tr>
<th>Measure</th>
<th>Israel</th>
<th>West Bank</th>
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On this reading terrorism is determined by the oppressor. Table 1 is evidence of the social structures constructed and maintained by the oppressive state to constrain and make vulnerable the oppressed population. In an environment of no relief suicidal violence is to be expected. Yet, when it happens the oppressive state exhibits its credentials as a victim and decries the criminal and unjust behavior of the suicide bombers. An example of this is being played out as I write this paper.

On March 2, 2006, after Hamas won the election in Palestine, the Israeli “ruler-in-waiting,” Foreign Minister Tzipi Livni, traveled to the UK with the campaign to destabilize the incoming Hamas Palestinian government by starving it of cash. Israel's policy was described by a spokesman as putting "the Palestinians on a diet, but not to make them die of hunger." On April 11, 2006, a report from the United Nations Office for the Coordination of Humanitarian Affairs foretold very serious consequences as a result of Israeli freezing of Palestinian revenues. It said, in part:

Without PA salaries, poverty rates are predicted to increase sharply, conservatively, to 74%. Since 2000, poverty rates increased from 22% to 56%. Palestinian Gross Domestic Product (GDP) growth is anticipated to drop to negative 25% in 2006 compared to 5% positive growth in 2005.

<p>| | | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
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<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Population</td>
<td>6.2 m</td>
<td>2.3 m</td>
<td></td>
</tr>
<tr>
<td>Irrigated land</td>
<td>1990 km sq</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>Population in poverty</td>
<td>18%</td>
<td>59%</td>
<td></td>
</tr>
<tr>
<td>GDP</td>
<td>129 b</td>
<td>&lt; 2 b</td>
<td></td>
</tr>
<tr>
<td>GDP per capita</td>
<td>$20,800</td>
<td>$800 (after aid, $400 before)</td>
<td></td>
</tr>
<tr>
<td>Area</td>
<td>22770 km sq</td>
<td>5860 km sq</td>
<td></td>
</tr>
<tr>
<td>Water</td>
<td>440 km sq</td>
<td>220 km sq</td>
<td></td>
</tr>
<tr>
<td>Coastline</td>
<td>273 km</td>
<td>0 km</td>
<td></td>
</tr>
<tr>
<td>Infant mortality rate (IMR)</td>
<td>7 deaths/1000 births</td>
<td>20 deaths/1000 births (infant mortality per 1,000 live births)</td>
<td></td>
</tr>
<tr>
<td>Labor force %</td>
<td>43%</td>
<td>15% (labor force as percentage of population)</td>
<td></td>
</tr>
<tr>
<td>Daily aid from USA</td>
<td>$15.14 million</td>
<td>$200 k</td>
<td></td>
</tr>
<tr>
<td># of prisoners</td>
<td>9,100 Palestinians</td>
<td>0 Israelis</td>
<td></td>
</tr>
<tr>
<td># killed since 9/00</td>
<td>1,084</td>
<td>3,837</td>
<td></td>
</tr>
<tr>
<td># children killed since 9/00</td>
<td>124</td>
<td>715</td>
<td></td>
</tr>
<tr>
<td># injured since 9/00</td>
<td>7,633</td>
<td>29,639</td>
<td></td>
</tr>
<tr>
<td>Home demolished since 9/00</td>
<td>0</td>
<td>4,170</td>
<td></td>
</tr>
<tr>
<td>Settlements on confiscated land 3/’01 – 7/’02</td>
<td>60+</td>
<td>0</td>
<td></td>
</tr>
</tbody>
</table>

45 Cf., Walzer, JUST AND UNJUST WARS, id., note ___, at ___ (“radically determined”).
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On May 7, 2006, the World Bank warned donors that the humanitarian crisis of the Palestinians since the financial embargo by Israel was deeper than they anticipated, and that it could render Gaza and the West Bank ungovernable. Reuters reported that:

> In March, the World Bank projected that by the end of 2006 Palestinian poverty and unemployment levels would rise to 67 and 40 percent, and personal incomes would drop by 30 percent.

> "We now consider these figures underestimates," it said in the memo. …

Western powers led by the United States and the European Union have frozen direct aid to the Palestinian Authority to put pressure on Hamas to renounce violence, recognize Israel and abide by interim peace deals.

Local, regional and international banks, fearful of being hit with U.S. anti-terrorism sanctions and lawsuits, have refused to deal with the Authority. …

> "A continuation of this crisis threatens to undermine Palestinian institutions and cause severe damage to structures that donors have been building since 1993," the World Bank said.

> "The institutional decay will likely also have a negative impact on security, which in turn would make it difficult for government, the private sector and providers of humanitarian assistance to operate properly.

> "The ensuing institutional damage may be irreversible and could lead to a situation in which West Bank and Gaza in effect becomes ungovernable," the World Bank said.48

The United States slavishly follows Israel,49 but Israel is fast using up its goodwill (what remains of it in the US) and is facing its own crises brought on by its steadfast insistence it is a victim, all the whole grossly violating international law and common decency in its treatment of the Palestinians.50 It will soon lose the last flag of victim-hood it retains, the Holocaust, from its egregious misuse of it.51

Table 1 demonstrates the depth of the constraints on Palestinian society Israel has constructed. It takes many years and sophisticated legal maneuvering and expert lobbying to attain this level of oppression. It is not the result of ad hoc responses to Palestinian violence, but of a conscious strategy to eradicate the Palestinians, or at least take everything from them.52 This is the context in which Ariel Sharon started the last intifada by going to the Dome of the Rock and claiming it for the Jews.

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51 Id.
52 Id.
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Israel’s clear intent to cause the Palestinians to suffer as a result of their democratic election is evidenced in the events since the election, the words of Israel’s foreign minister, and the subsequent reports that indeed Israel put the Palestinian’s on a diet, and such a diet that it is causing massive health problems,53 in addition to the economic and social suffering and internal violence.54

It is clear the Palestinians have no options. Even if they acceded to Israel’s demands, all of them, the damage that has been done cannot be reversed in any short period of time, if ever. The Israelis have created a true humanitarian disaster with complete impunity, and with the tacit support of the United States.

In the background are the social and cultural constraints seen in Table 1. In the medium ground is the second intifada, and in the foreground is the crisis brought on by the democratic election. Each of these layers, on the analytical framework given above, is a moral cause of all Palestinian acts.55 Each of these layers of subjugation and impunity act to narrow the sphere of autonomy of all Palestinians, each degrades and humiliates the Palestinians. Not even the Arab states respond to their cries for help, and those that might respond are bullied off by the United States.

There is no international law to which the Palestinians can appeal because it is ignored with impunity by Israel. There is no domestic law with which they can claim justice. How, in these circumstances, can anyone claim the Palestinians have a moral, or legal, obligation to follow international law, or recognize such conventions as IHL. They have endured for decades without the benefit of those agreements between civilized nations.

In this scenario, who is a terrorist and what does that mean?

53 Sonia Nettinin, Palestinian Health Care Conditions Under Israeli Occupation, Counterpunch (April 11, 2006), at http://www.counterpunch.org/nettinin04112006.html, accessed 5/8/06 (According to the Palestinian Ministry of Health, 36 health care workers have been killed, 447 health providers have been wounded and 129 patients have died at Israeli checkpoints. How? There have been 375 attacks on health care centers, 383 attacks on ambulances, with 38 ambulances destroyed altogether. … Palestinian women in labor have not been left out of the equation of military occupation. Since September 28, 2000, at least 67 women have given birth at Israeli checkpoints. As a result, 39 newborns died or they were delivered stillborn. … According to a map from the Applied Research Institute Jerusalem there are over 100 established checkpoints throughout the West Bank, an area totaling 5,970 sq. km, and this figure does not include flying checkpoints and barriers, such as roadblocks, razed roads, dirt mounds, etc. When Israel completes construction of the wall, approximately 33 per cent of villages within the West Bank will be denied "free and open access to their health care system," per the IHC. Moreover, 81 per cent "of people living in isolated zones and enclaves cannot access primary health clinics, medical centers, and hospitals as needed." … There are instances where Palestinians need access to urgent medical care, but Israeli forces will not allow Palestinian ambulances to cross the checkpoint.)


55 See Hart, Postscript, id., note ___, at 226 (In the moral case … the hypothesis that we might hold individuals morally blameworthy for doing things which they could not have avoided doing, of for things done by others over whom they had no control, conflicts with too many of the central features of the idea of morality to be treated merely as speculation about a rare or inferior type of moral system.).

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Terrorism is a tactic used very successfully by Israel and not so successfully by the Palestinians. Neither is held to international standards, but the Palestinians are being severely oppressed. Given these conditions it is rational to anticipate further Palestinian self-destructive violence.

Terrorism as shorthand for something morally reprehensible committed against innocent citizens of the oppressor state is deeply flawed because it ignores structural factors determined by that state.

V.
This course was about terrorism and civil liberties. The civil liberties part put the focus on state responses to terrorism. The inquiry is based on an intuition, or observation, that the response in fact taken has gotten it wrong in some way, is needlessly creating a further injustice. I argue it is difficult to analyze the events or responses without having some clarity about causation because causation and responsibility are so closely linked, and the search for justice, proportion, for the response that gets it right, will depend in significant part on how we assign legal and moral responsibility.

There is theoretical agreement terrorism is a tactic. It is used by the powerful and the powerless alike, but its use by the powerful is much more destructive. We do not consider here terrorism used by the powerful because it is done with impunity. There are international standards against its use, but apart from the rare head of state or high commanding officer that is indicted for war-crimes, it goes unpunished, and, in fact, often unremarked and unnoticed by most people. On the other hand, terrorism by the weak is criminalized in most states. Murder has always been criminalized, but “terrorism” as the tactic linked to the weak became the subject of public interest and thus became deserving of its own statutes.

On the legal status of terrorism by the weak, I agree with Manin that it is a crime, not an act of war. War is something between states, regardless of how weak one or the other is. Yet because terrorism by the weak has traditionally been against states, and because the US responded to 9/11 with its war apparatus, we must use the language of war if we intend to disentangle the legal meanings and ascribe legal responsibility.

I have concerned myself more with the imputation of moral responsibility though. Laws are for the powerful so we cannot expect legal responses to closely match underlying moral responsibility, but by parsing the moral landscape perhaps we can attain greater certainty in our own views and perhaps influence the laws by changing the moral discourse.

I make two points about the weak who use terrorism. First, they are revolutionaries, but revolutionaries with little hope, beaten over many years, people living in despair and desperation who are continuously terrorized. Nonetheless, they still have dignity and compassion that drives them to fight against tyranny.

Revolution is something archetypal, both in the Jungian and in the Waldronian senses. It is recognized as a right and as a duty, and as an effect and a cause. It is an attribute of autonomy, a power to say no to the bad social contract. It is a shadow right, recognized but submerged. In this sense it justifies terrorism by the weak. I argued, in conjunction with this statement, that it is...
unjust to hold the weak to any moral or legal standards for fighting when their oppressor acts with impunity and in gross violation of international norms, and the international community repeatedly ignores all entreaties.

They have moral standing as beaten revolutionaries, and their actions cannot simply be written off as immoral in addition to being illegal. We have a duty to consider their suffering, the kind of long-term suffering that causes suicide bombing. That is not the act of a healthy, flourishing person.

The second point is structural. Table 1 demonstrates a decades old policy of repression, subjugation and theft. In personal terms it represents long-term despair and humiliation. It represents constraints that determine the acts of the revolutionary, of the oppressed citizen that feels they must do something against the injustice. The constraints are so powerful what autonomy does it leave? How does the respectable character, the inner determining factor, interact with the oppression, the outer determining factor? What options does the brave soldier have, if he cannot fight militarily because of the oppression? They have been stripped not only of the dignity of day to day life, but the dignity to be able to fight soldier to soldier.

There are formidable philosophical problems with the two observations. One sees the revolutionary as autonomous, one as conditioned by oppression. That the oppressor is morally responsible for the terrorism of the weak is arguably not entirely self-evident, but it is intuitively clear, and it is supported by epidemiological evidence. The epidemiological evidence is evidence of lack of moral capacity for the revolutionary, a complex conclusion that strips them of dignity and at the same time restores them to dignity. It removes the moral burden of their acts and places it properly with the oppressor, thereby reducing autonomy but recognizing that the autonomy that remains is at the service of a respectable character.

I am not on this analysis condoning suicide, something I think there is another archetype against. Nor am I arguing that the individual should be able to escape legal liability for murder. But in some ways, when I balance the immense societal level injustice served on the Palestinians or others in their position against their weak and ineffectual terrorist response, the moral gravity of the oppression overwhelms Pharisaic emphasis on deontic standards.

What is just in this moral environment? How is international justice to be determined? Is moral justice the same as legal justice, or ought it be the same? I think the point of revolution is that

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56 But is suicide the moral issue, or sacrifice? See Hans Jonas, *Philosophical Reflections on Experimenting with Human Subjects*, DÆDALUS 219 (Spring, 1969). That [human] sacrifice is an active societal norm (archetype) is seen in the fact 20 – 30 million people (the exact number will never be known because it is a trade secret) citizens of the United States alone volunteer for human experimentation with no *rational* expectation of benefit. I estimate of these 300,000 to 800,000 put themselves at serious risk of harm. When [some] people have no hope they do not mind being sacrificed for the common good, but the interplay between structure/context and autonomy are at work here exactly as they are in the discussion above. There is wide understanding in the research ethics community that the putative protection for human subjects, the informed consent “process,” is worthless. I argue that is because the context completely contradicts it. By the time a subject is at the point they are given the informed consent, they are already in the research enterprise. They have no effective capacity or autonomy with regard to participating. I argue this is the same for the people who blow themselves up, and the people who talk the people into blowing themselves up, but to a lesser degree. And [bracketing murder], if one kind of sacrifice is morally acceptable, why not the other?

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moral and legal justice should be aligned, but that does not get to a sense of what justice is, how it is to be determined, or what it means to say there is legal, moral, distributional, social, retributive or any other kind of justice. Is not justice one thing? Of the accounts of justice I have read, the one that makes most sense is Aristotle’s idea that injustice is excess or deficiency, that justice is in the mean. “Mean” refers to conditions in which life flourishes. Table 1 reveals an obscene excess and deficiency, a terrible injustice, and I argue that similar injustices underlie all terrorism by the weak.

Laws can be passed criminalizing terrorism by the weak, good laws that do not infringe the just sphere of autonomy as determined by national norms. But what good is that law against the injustice, the structural gradient, that causes the crime? Does it meet any of the criteria used to justify criminal laws as regards the cause? Punishment, retribution, rehabilitation, deterrence? Criminalizing terrorism of the weak, sending armies after it, torturing it, setting loose secret killers against it – none of these things will be of any effect, as the perpetrator sits with impunity in the international community, protected by sovereignty and powerful friends, supported by trade agreements and other property interests. There is an international structural problem, there is injustice in international relations behind terrorism of the weak.

I do not assert the particulars of this model fit all terrorism by the weak, but I would argue the structural causes, the social gradient and the terrorism of the strong, are powerful and will be found in most cases of terrorism against states.