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## Articles

# Intention, Torture, and the Concept of State Crime

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*Notwithstanding the universal prohibition against torture, and almost universal agreement that in order to qualify as torture, the act in question must be committed intentionally with an illicit purpose, the intentional element of torture remains ambiguous. I make the following claims about how we should interpret the intent requirement as applied to states. First, state intent should be understood objectively with reference to the apparent reasons for state action. The subjective motivation of particular state actors is not directly relevant. While we focus on subjective intent in the context of individual crime because of its relation to culpability and blameworthiness, in the context of state crime we should be concerned with preserving the legitimacy of political authority, and the conditions for legitimacy turn on the apparent reasons rather than subjective motivations behind state action. Second, the primacy of questions of legitimacy also makes irrelevant the distinction*

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*between specific and general intent. Instead, state-directed torture that is committed secretly and in a manner that removes it from public scrutiny should be regarded as quasi-criminal. Finally, the official interpretation of the Convention against Torture (CAT) adopted by the United States is flawed because it imposes a specific intent requirement that is not objective, and accords ambiguous weight to publicity. In doing so we make a double error: We treat state crimes as essentially the same as individual crime, and we fail to distinguish between the quasi-criminal and humanitarian functions of the CAT. To identify a state act as torture, courts should ask whether alleged acts (which otherwise meet the actus reus of torture) appear to have been motivated by radical indifference to the suffering of the torture victim and the aim of stripping her and/or other members of the political community of their humanity. Only to the extent they seek to further establish the acts as “quasi-criminal,” courts should ask whether the alleged acts were committed secretly or in a manner calculated to avoid accountability.*

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Torture is wrong; it is also criminal. We might expect the contours of torture as a moral wrong to be vague. Torture is wrong for many reasons, and those reasons will operate with varying force against distinct practices. The absence of clarity in the law of torture is more surprising. Recent events in Iraq and in the “war on terror” have demonstrated that this vagueness is dangerous, inasmuch as it renders the legal concept vulnerable to manipulation and evasion.

Most common methods of torture are recognizable as such by the international legal community. But this international consensus is not accompanied by similar certainty with respect to the legal standard. Among the open questions on legal torture are: which physical acts amount to torture, whose acts count as torture, how much pain must an act produce before it is torture, and in what sense must the act and the pain be intentional. In this paper, I focus on this last ambiguity. I do not expect to answer all outstanding questions. My aim is to resist a move that many commentators and courts make, namely, the recourse to domestic criminal law as a means by which to understand the obligation of states not to engage in torture.<sup>1</sup> Because the intent of a state that has a policy of torture is of fundamentally different import than the intent of an individual who commits a crime like torture, we should understand the doctrine of torture as applied to states to require a distinct mental state.

The Convention Against Torture (“CAT”) was enacted in December 1984, and went into effect in June 1987.<sup>2</sup> To date, over 150 nations have signed the treaty, which requires states to prosecute and prevent torture.<sup>3</sup> The CAT defines torture as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>4</sup>

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1. See, e.g., *In re J-E*, 23 I&N Dec. 291 (BIA 2002), discussed *infra* in Part I.B.2.

2. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46 (June 26, 1987) [hereinafter “CAT”].

3. See *id.* at art. 2, 4-7. For an updated list of those states which have ratified, together with their reservations, see United Nations Treaty Collection, Part IV (Human Rights), Section 9 (Convention Against Torture) at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en).

4. *Id.* at art. 1.

The statute defines torture without specifying the nature of the torturer; that is, it does not limit the legal attribution of torture to natural persons. Clearly, individuals may commit torture on behalf of states, but states too might engage in torture by adopting torture as a state policy or by systematically employing it as a means of governance.

There have been few efforts to articulate with greater specificity the mental state required in order for a state to commit torture. The rule is incomplete both in international law and in domestic law implementing the Convention. In the international context, the standard adopted by the CAT has never been fleshed out because those who have drafted jurisdictional statutes for international courts have shied away from state crime altogether.<sup>5</sup> The absence of either a robust practice of state criminal responsibility or institutions capable of effectively imposing criminal liability on states has thwarted the extension of the international criminal law framework to state actors. The language of criminality also may not lend itself to state action inasmuch as it implies by analogy with domestic law that a state that commits an international crime must assume “outlaw status” and submit to a general forfeiture of rights, such as those associated with sovereignty.<sup>6</sup> It remains unclear what specific legal consequences might flow from state crime that would not ultimately burden the state’s population, who themselves may have been the primary victims of the crime in question. Thus, it is uncertain whether there is or should be a legal concept of state crime.

My argument rejects the analogy with domestic criminal law and, therefore, the view that we must identify and delineate the elements of what would be state crime by analogy to the function and form of domestic criminal law. However, I assume the prevailing view that a state is subject to constraints beyond those which it has assumed by treaty and that those constraints should be recognized in law, namely in *jus cogens*, which does not require consent by a state to bind it.<sup>7</sup>

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5. See *infra* at Part I.

6. See Ted Stein, *Observations on ‘Crimes of States,’* in INTERNATIONAL CRIMES OF STATES: A CRITICAL ANALYSIS OF THE ILC’S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY 196 (J.H.H. Weiler, M. Spinedi, and A. Cassesse eds., 1989). However, the term is not misleading to the extent it implies only forfeiture of some rights associated with sovereignty; after all, criminal conviction does not result in the forfeiture of all rights in domestic law either. For example, it is not implausible that a developed regime of international law would authorize nonconsensual intervention by third party states within a “criminal” state.

7. At least two landmark cases have recognized the prohibition against torture as a general rule of international law applicable to all states, or its *jus cogens* nature. See *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), and *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No 3) UKHL [1999] 1 A.C. 147 (U.K.). But see *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia*, [2006]

Whether any violations of those fundamental obligations amount to “state crime” will remain hotly disputed, and it is not my aim to defend the concept as such.<sup>8</sup> But, at the very least, states may commit “wrongful acts” which do not depend on the violation of a treaty and in which states not directly affected—indeed, the international community as a whole—may have a cognizable interest. Some of those wrongful acts are categorically and unconditionally wrong in a way that less fundamental wrongs are not. Moreover, it is worth recognizing these acts in law as state actions and not just individual acts. Otherwise, our legal characterization of such events will inadequately reflect their multiple and overlapping moral meanings. Thus, I will generally refer to violations of fundamental, non-negotiable obligations to which all states are subject and in which all states are interested as “state crimes” and “quasi-criminal,” though I reject the view that these special reaches of state obligation are analogous to criminal acts within a domestic political community. Without stepping into the ongoing debate in international law as to whether acts commonly regarded as “state crimes” are technically “crimes,” I observe that, in part because the question is unresolved, the mental element of those would-be crimes has yet to be properly conceptualized.

The mental state requirement is inadequately conceived in domestic law as well. In domestic courts, torture claims against states have been litigated primarily in two contexts: (1) tort claims against foreign sovereigns under the Alien Tort Claims Act<sup>9</sup> and Torture Victim Protection Act,<sup>10</sup> and (2) withholding of removal claims under the CAT.<sup>11</sup> Political constraints and the availability of conveniently narrow doctrinal analysis have thwarted development of a coherent intention requirement in these contexts. The executive branch’s singular attempt

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UKHL 26 (appeal taken from Eng.) (U.K.) (unanimously rejecting universal jurisdiction for torture).

8. It is likely that, even if the notion of state crime is helpful, not all breaches of state responsibility cognizable under *jus cogens* should be characterized as criminal or quasi-criminal. See NINA JORGENSEN, *THE RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES* 91 (2000) (“It may be that the degree of overlap has been exaggerated because the scope of neither concept has been fully delimited.”).

One might also use the conception of obligations *erga omnes* to clarify the status and character of international crime. But again, state crimes will not encompass the full range of the obligations. See Giorgio Gaja, *Obligations Erga Omnes, International Crimes and Jus Cogens: A Tentative Analysis of Three Related Concepts*, in Weiler et al., *supra* note 6, at 157-59.

9. 28 U.S.C. § 1350 (2006).

10. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (2006)).

11. Immigration Regulations, 8 C.F.R. § 208.16(c)(4) (2008).

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to define torture with specificity has not shed light but instead cast a shadow on domestic discourse.<sup>12</sup>

In this article, I begin to remedy this gap. *Mens rea* is traditionally an essential prerequisite to criminal liability. In the context of state crime, we must reconceptualize this intentionality requirement, which is well-developed in domestic criminal law but oriented primarily toward individuals. State crimes are fundamentally unlike individual crimes, and the related intent requirements should be construed differently. In the context of individual crime, we seek to justify punishment with reference to the blameworthiness of those who have committed the crimes we punish; by contrast, in the context of state crime, we are concerned primarily not with justifying punishment but with preserving the legitimacy of political authority. Accordingly, while domestic criminal law looks to the subjective intent of a defendant in order to assess culpability, the law of state crime should look to objective intent to assess whether the apparent reasons for state action are consistent with legitimate political authority. Secret torture that rejects discursive scrutiny most flagrantly violates international norms and poses the greatest danger to domestic and international legal order.

I make the following claims about how we should interpret the universal but still ambiguous requirement that torture be committed with the intention to accomplish the act. First, intention by states should be understood objectively. The subjective motivation of particular state actors is not directly relevant. Second, the distinction between specific and general intent is irrelevant to understanding torture by states. Instead, torture that is committed secretly and in a manner that removes it from public scrutiny should be regarded as quasi-criminal. Finally, the official interpretation of the CAT adopted by the United States is flawed because it imposes a specific intent requirement that is not objective, and accords ambiguous weight to publicity.<sup>13</sup> In doing so we make a double error: we treat state crimes as essentially the same as individual crime, *and* we fail to distinguish between the quasi-criminal and humanitarian functions of the CAT. To identify a state act as torture, courts should ask whether alleged acts, which otherwise meet the *actus reus* of torture, appear to have been predicated on radical indifference to the suffering of the torture victim and whether those acts strip her and/or other members of the political community of their humanity. Only to the extent that

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12. See, e.g., John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice, Memorandum for William J. Haynes II, General Counsel, Department of Defense, Jan. 9, 2002; Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Department of Justice, Memorandum for Alberto R. Gonzales, Counsel to the President, Aug. 1, 2002.

13. 8 C.F.R. § 208.18(a)(5) (1999), discussed *infra* in Part V.

they further seek to establish the acts as “quasi-criminal” should courts ask whether the alleged acts were committed secretly or in a manner calculated to avoid accountability.

My argument proceeds as follows. In Part I, I provide background as to how torture has been conceived in the international community and in domestic law. I then identify the philosophical gap I am trying to fill. In Part II, the heart of my argument, I support my first claim that only objective intent by states is morally relevant. In Part III, I elaborate the intuitive: state intent to torture is objectionable because ruthlessness and cruelty, both incompatible with legitimate political authority, are imminent in the practice. In Part IV, I argue that this ultimately makes the specific versus general intent distinction uninteresting with respect to states and we should instead focus on the degree of transparency surrounding a state policy of torture in assessing its “criminality.” In Part V, I show that our present focus in the immigration context on an individuated intent to torture is misguided. Instead, immigration judges and their reviewing courts should focus on public information about a state’s policies and assess how they reflect on the motivation behind that policy. And to the extent these immigration courts serve a humanitarian function, they should de-emphasize transparency, which is relevant only to the quasi-criminal character of the state policy.

## I. DEFINING THE PROBLEM

The crime of torture is ultimately perpetrated by individuals. The CAT obligates states to criminalize torture and to prosecute individuals guilty of torture.<sup>14</sup> But the CAT is primarily concerned with torture that is the consequence of a state policy. After all, cruelty by private individuals unrelated to state activity does not qualify as torture. Under Article 1 of CAT, to qualify as torture an act must be inflicted “[b]y or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”<sup>15</sup> This is consistent with customary international law.<sup>16</sup>

Which actors qualify as “public officials” raises interesting and important questions of its own. My aim here, however, is to understand what kind of involvement will make torture more than an individual crime by the particular official who inflicts it. The nature of involvement will turn on what actual steps were or were not taken by the government

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14. See CAT, *supra* note 2, arts. 4-7.

15. See CAT, *supra* note 2, at art.1.

16. For example, a policeman torturing in violation of a national constitution and on his own authority, would not be violating international customary law. Louis Henkin, *Remarks on Draft Restatement of the Foreign Relations Law of the United States (Revised)*, 76 *SOC’Y INT’L L. PROC.* 184, 190 (1982).

or officials other than the one who directly inflicted torture. But because torture is an intentional act, torture by a state also requires that we understand what degree of intentionality we must attribute to the state before holding it responsible for, and then culpable of, torture as a state policy. The state's mental state comprises both its choice of action or inaction and the reasons behind those choices. State torture might encompass all acts of torture by state actors that are traceable to active or passive choices made by the state, or it might further require that those choices be made with particular motivations. The content of the intent requirement for states has not been adequately elaborated because there has been no opportunity for either the drafters of relevant statutes, or courts interpreting those statutes, to construct a coherent and morally compelling account that is more than a political compromise.<sup>17</sup>

A. *International Law of State-Directed Torture*

Recent progress made in establishing international criminal law on firmer footing has taken place almost entirely in the realm of individual criminality.<sup>18</sup> Through international tribunals and now the International Criminal Court, individuals who formerly would have escaped legal consequence for torture by virtue of sovereign immunity or political compromise now face a greater threat of prosecution by the international community. Individualizing responsibility for state crimes through criminal law produces a handful of the guilty but many false innocents.<sup>19</sup> Perhaps more problematically, it fails to recognize, let alone redress, the special wrong embodied in state complicity in or even state organization of an atrocity, including the administration of torture for state ends.

Nigel Rodley identifies three pillars to a legal understanding of torture in the international community: intensity of pain; purposiveness; and the public status of the perpetrator.<sup>20</sup> The 1998 Rome Statute of the International Criminal Court departs from this understanding in Article 7(2)(e), in that no specific purpose is needed to prove the crime of torture

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17. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 818 (D.C. Cir. 1984) (Bork, J., concurring) ("Nations rely chiefly on diplomacy and other political tools in their dealings with each other, and these means are frequently incompatible with declarations of legal rights . . . [o]ne consequence is that international law has not been extensively developed through judicial decisions.").

18. This trend began after World War II with the Nuremberg Trials and subsequent codification of the Nuremberg principles by the newly constituted International Law Commission. See JORGENSEN, *supra* note 8, at 27.

19. Ruth Jamieson & Kieran McEvoy, *State Crime by Proxy and Judicial Othering*, 45 BRIT. J. CRIMINOLOGY 504, 521 (2005).

20. Nigel Rodley, *The Definition(s) of Torture in International Law*, in CURRENT LEGAL PROBLEMS 467, 468 (M.D.A. Freeman ed., 2002).

and there is no mention of the public status of the perpetrator.<sup>21</sup> But Rodley points out that every other instrument defining torture incorporates a purposive element<sup>22</sup>: Article 1 of the UN Declaration and Convention Against Torture,<sup>23</sup> Article 2 of the Inter-American Torture Convention,<sup>24</sup> and the Elements of Crimes concerning the war crime of torture under the ICC Statute in respect of international armed conflict (Article 8(2)(a)(ii).1) and of non-international armed conflict (Article 8(2)(c)(i).4).<sup>25</sup> He suggests that the absence of these basic elements in the Rome Statute may reflect the fact that the Rome Statute is restricted to individual penal responsibility, while the other instruments attempt to codify international human rights law, which in principle involves the establishment of state responsibility.<sup>26</sup>

The International Law Commission drafted a code on state responsibility in 1973, which has been the subject of extended review, criticism, and revision.<sup>27</sup> The initial draft by Special Rapporteur Roberto Ago included a category labeled “state crime,” but after much debate that section was omitted in the final version. The revision, which replaced the notion of “crime” with that of “serious breach,” was prompted in large part by the objections raised by those who feared that, by distinguishing in draft Article 19 between “crimes” and “delicts,” the proposed code would have led to a “criminalization of responsibility.”<sup>28</sup> It was argued that criminalization was, if not misguided, at least premature given limited state precedent and the failure to construct a legal system specifically tailored to international state crimes.<sup>29</sup> For example, the requirement under draft Article 19 that “it must be recognized as a crime by [the international] community as a whole” was especially contentious because it was argued that this requirement rendered the whole notion of a state crime uncertain and subjective.<sup>30</sup>

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21. Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 90.

22. Rodley, *supra* note 20, at 481.

23. See CAT, *supra* note 2.

24. Inter-American Convention to Prevent and Punish Torture art. 2, Dec. 9, 1985, O.A.S. T.S. No. 67, 25 I.L.M. 519.

25. See Rome Statute, *supra* note 21, art. 8.

26. *Id.* at 469-70; see also Rodley, *supra* note 20, at 487.

27. See International Law Commission, *Code on State Responsibility*, (1973), [http://untreaty.un.org/ilc/summaries/9\\_6.htm](http://untreaty.un.org/ilc/summaries/9_6.htm).

28. Eric Wyler, *From ‘State Crime’ to Responsibility for ‘Serious Breaches of Obligations under Peremptory Norms of General International Law’*, 13 EUROPEAN J. INT’L L. 1147, 1148 (2002).

29. *Id.* at 1148.

30. Alain Pellet, *Can a State Commit a Crime? Definitely, Yes!*, 10 EUROPEAN J. INT’L L. 425, 427 (1999).

Moreover, perhaps because no institutions exist capable of administering sanctions of a penal nature against a state, or even of enforcing an order of cessation, the primary consequence of state crime has always been envisioned as money damages. Critics of the ILC draft emphasized this civil aspect of the law of state responsibility.<sup>31</sup> However, as Eric Wyler observes, the absence of a centralized authority capable of imposing effective sanctions is inconsistent with domestic civil legal orders as well.<sup>32</sup>

Others concede that state crime is not analogous to domestic crime but nevertheless support the creation of international treaties, codes, and institutions capable of adequately handling would-be state crime.<sup>33</sup> Pellet observes that state crime does have distinctive aspects that warrant treatment separate from that of ordinary international delicts. He observes:

[W]hen a state breaches an international obligation essential for the interests of the international community as a whole, it never acts by chance or unintentionally; therefore, the elements of intent and of fault, which are not necessarily present in other internationally wrongful acts, are part of the crimes, exactly as they are part of penal infractions in domestic laws. Moreover, even without a judge, the reactions of the international community to a crime clearly include punitive aspects.<sup>34</sup>

Therefore, it is not necessary to conflate state and individual crime in order to distinguish state crime from other wrongful conduct by states.

But given this preliminary debate regarding the existence of state crime and its status as a legal concept, it is not surprising that no substantial attention has been devoted to understanding what would-be state crime would entail were it ever to be recognized as a distinct legal category.<sup>35</sup> This article attempts to redress this important gap, with focused attention on the intent requirement as applied to states.

One might question the utility of fleshing out the concept of state crime in the absence of institutions authorized to enforce state criminal or quasi-criminal responsibility. But there are a number of benefits to thinking through the meaning of state torture at this stage. First, the

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31. Wyler, *supra* note 28, at 1148-49. The ILC in fact had long ago rejected the possibility of state criminal responsibility on these grounds. *See* 2 ILC YEARBOOK 128 (1964).

32. Wyler, *supra* note 28, at 1149.

33. Pellet, *supra* note 30, at 434.

34. *Id.*

35. Notably, developed Western states, including the United States, have been more skeptical about the concept of state criminality than developing and East European states. *See* JORGENSEN, *supra* note 8, at 255-56.

development of institutions capable of exacting consequences for state crimes like torture may depend on further development of the concept. International legal norms are recognized as such only after they have either been codified by treaty or otherwise have plausibly attained the status of “almost-universally accepted” norms. Discussion over the merits of a category of state crime, or the contours of any like category, would profit from more sustained discussion about what state crime entails.

Second, although states presently face nothing like criminal responsibility for their most terrible conduct, even today there are various contexts for the assessment of state conduct. Besides the tort and immigration contexts discussed below, truth and justice commissions are faced with many of the normative questions raised by a regime of quasi-criminal responsibility. It also behooves all those engaged in critical scrutiny of state conduct, from domestic and foreign press to NGOs and foreign states, to develop the conceptual tools needed to name state crime. Finally, a better understanding of state torture and its particular wrongs may positively influence the development of domestic norms intended to guide the conduct of state actors. That is, if we know what state torture is, it may be less likely to happen.

### *B. Domestic Law of Torture*

The legal concept of torture has been given shape in domestic law through litigation in two contexts: tort claims against foreign states and claims by aliens that they are entitled to withholding of removal under the CAT. In the former context, the concepts and legal norms surrounding statehood have limited the development of a coherent jurisprudence of torture on two fronts. The discussion below demonstrates, first, that consistent with prevailing international law of torture, only acts traceable to state authority are actionable as torture. Second, also consistent with international respect for sovereignty, states themselves have been in almost all cases immune from tort liability. As a result, there has been little opportunity for courts to define the boundaries of the intent requirement for state torture while adjudicating tort claims.

The second context, i.e. withholding of removal, has progressed further substantively, but in a manner that has misled rather than enlightened observers as to the legal significance of torture as a state act. Aliens otherwise eligible for removal from the United States frequently seek to avoid removal by seeking protection under the CAT. In this context, immigration judges and federal courts of appeal have had occasion to grapple with the contours of the intent requirement in torture.

However, as discussed below, the question of intent has been misframed, and the resulting case law, misguided.

Recently, there has been a third legal front for the law of torture. The Office of Legal Counsel in the Bush Administration repeatedly visited the question of defining torture, so as to ensure that all legally available means are employed by U.S. agents in the War on Terror, among other wars.<sup>36</sup> Its initial efforts to preserve the widest possible sphere of action produced a shockingly hollow understanding of the limits on torture by U.S. agents.<sup>37</sup> Those standards were revised, and have motivated a public discussion of the appropriate boundaries on state behavior, but the narrow conception of torture initially espoused continues to have lingering effects on judicial understanding of torture.<sup>38</sup>

### 1. Tort Claims Against Foreign States

Victims of torture and other state crimes have repeatedly attempted to bring foreign state actors to justice in U.S. courts. After all, U.S. law recognizes state responsibility for torture. The Restatement (Third) of Foreign Relations provides that torture by a state is a violation of international law, and sets forth conditions under which states may be subject to scrutiny by other states.<sup>39</sup> However, generally only individuals associated with foreign states, rather than the states themselves, have been held accountable. Although statutes have been enacted with the specific intent to aid these plaintiffs, thus far, there has been limited occasion to test the scope of liability allowed, and there is reason to believe that new statutes intended to confirm liability will be of limited utility.

The Alien Torts Claims Act appeared to make it possible for some plaintiffs to pursue tort claims against their home governments in U.S. courts. However, in *Argentine Republic v. Amerada Hess Shipping Corp.*,<sup>40</sup> the Supreme Court held that the Foreign Sovereign Immunities Act precludes construction of the Alien Torts Claims Act to grant U.S. courts jurisdiction over foreign states.<sup>41</sup> The Torture Victim Protection Act of 1991 provides for civil actions against individuals acting under

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36. See generally THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005) (compiling Bush administration memoranda justifying the use of torture).

37. See Yoo, *supra* note 12; Bybee, *supra* note 12.

38. See Memorandum from Daniel Levin, Acting Assistant Att’y Gen., to James B. Comey, Deputy Att’y Gen. (Dec. 30, 2004); Detainee Treatment Act of 2005, 42 U.S.C. § 2000dd (Supp. V 2005). See *infra* Section 3 regarding residual effect of initial standards.

39. RESTATEMENT (THIRD) OF FOREIGN RELATIONS, §§ 701, 702 (1986).

40. 488 U.S. 428 (1988).

41. *Id.* at 434, 436-38.

actual or apparent state authority.<sup>42</sup> Its definition of torture parallels that of the CAT.<sup>43</sup> Since amended in 1996 by the U.S. Antiterrorism and Effective Death Penalty Act, the Foreign Sovereign Immunities Act has made an exception for state immunity in cases involving terrorism, including torture.<sup>44</sup> Under the revised act, as further amended by National Defense Authorization Act for the Fiscal Year 2008, states may be liable for money damages resulting from personal injury or death caused by an act of torture.<sup>45</sup> However, defendants must be officially designated as “state sponsors of terrorism,” and either the victim or the claimant must be a U.S. national. The non-judicial role in designating states as “rogue” means that the final determination of state liability for torture will remain outside the hands of the judiciary.<sup>46</sup> Moreover, since proportionally few victims of torture by foreign states are U.S. nationals, and since victims have no expectation of recovering damages on an unenforceable verdict, there is limited incentive on either side of these suits to develop a jurisprudence of state torture.

To be sure, the prospect of holding states responsible for torture they have directed is less distant than it once was. Over one hundred years ago, in *Underhill v. Hernandez*,<sup>47</sup> the Supreme Court first set out the Act of State doctrine, which might have shut the door to state responsibility altogether.<sup>48</sup> The *Underhill* Court held that:

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.<sup>49</sup>

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42. See TORTURE VICTIM PROTECTION ACT OF 1991 § 2, 28 U.S.C. § 1350 (2000).

43. See TORTURE VICTIM PROTECTION ACT OF 1991 § 3(b), 28 U.S.C. § 1350 (2000). See also *Doe v. Liu Qi*, 349 F. Supp. 2d 1258, 1315 (N.D. Cal. 2004) (stating that the TVPA definition mirrors that in CAT).

44. See 28 U.S.C. § 1605(a)(7) (2000). See also *Sutherland v. Islamic Republic of Iran*, 151 F. Supp. 2d 27, 45 (D.D.C. 2001) (observing that the Foreign Sovereign Immunities Act suspends immunity for acts of torture); *Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27, 29, 32 n.6 (D.D.C. 2001) (same); *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19, 25 (D.D.C. 2001) (same).

45. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338-44 (2008).

46. See 28 U.S.C. § 1605(a)(7)(A). See also Jason Binimow & Amy Bunk, *Annotation, Validity, Construction, and Operation of “Foreign Terrorist Organization” Provision of Anti-Terrorism and Effective Death Penalty Act (AEDPA)*, 8 U.S.C.A. § 1189, 178 A.L.R. FED. 535 (2002).

47. 168 U.S. 250 (1897).

48. *Id.* at 254.

49. *Id.* at 252.

However, this doctrine, intended at least in part to defer to the executive branch's authority in matters of foreign relations, was narrowed considerably by the so-called Tate Letter. This letter from Jack B. Tate, Acting Legal Adviser in the Department of State, to Acting Attorney General Philip Perlman on May 19, 1952, shifted U.S. foreign immunity doctrine such that only public acts of foreign governments would be covered.<sup>50</sup> Courts subsequently adopted this restriction on the Act of State doctrine, following the rule that in order for the Act of State doctrine to apply, an action must be governmental or public.<sup>51</sup> Thus, secret, possibly illegal acts by officers of the state may be official but not protected acts of state.<sup>52</sup> The next step seemed finally to establish state responsibility, for torture at least. Congress provided that, because torture is never done as a matter of public policy, Act of State doctrine does not apply.<sup>53</sup>

Importantly, while torture will never qualify as an "act of state," it may nevertheless be conducted under color of governmental authority such that it can meet the legal definition of torture.<sup>54</sup> Notwithstanding the fact that U.S. courts are now available as forums for civil claims by torture victims against foreign states under certain circumstances, there have been no cases in which a foreign state has actually been forced to pay a torture victim any sum as a result of a U.S. civil action. This does not mean that no progress has been made.<sup>55</sup> But it means that we are a long way from a developed domestic jurisprudence regarding the contours of the crime of torture as perpetrated by states.

## 2. Withholding of Removal

Article 3 of the CAT prohibits refoulement or deportation to a state where there are substantial grounds for believing that a person may be subjected to torture.<sup>56</sup> This paper does not directly raise the question of

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50. See Letter from Jack B. Tate to Philip Perlman, *reprinted in* 26 DEP'T OF STATE BULL. 984-85 (1952).

51. This development took place on the heels of an international trend away from absolute state immunity to a rule of restrictive state immunity. See ROSANE VAN ALEBEEK, *THE IMMUNITY OF STATES AND THEIR OFFICIALS IN INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW* 14, 17 (2008). However, in practice immunity decisions remained political. *Id.* at 32.

52. *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1546 (N.D. Cal. 1987).

53. S. Rep. No. 249, 102nd Cong., 1st Sess. at 8 (1991).

54. See *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

55. See Jules Lobel, *The Limits of Constitutional Power: Conflicts between Foreign Policy and International Law*, 71 VA. L. REV. 1071 (1985) (arguing that there is value to legal statement of the unlawfulness of torture even where a court lacks authority to enforce it).

56. See CAT, *supra* note 2, art. 3.

whether a participating state has already committed torture, though that is the best evidence of the prospect of torture in the future. Notwithstanding this unusual, forward-oriented dimension to the Article 3 inquiry, it has dominated matters arising under the CAT before the Committee Against Torture, an international committee set up to administer the treaty.<sup>57</sup> It is also the context in which torture has been most frequently litigated in domestic courts.

Article 1 defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person” for certain prohibited purposes.<sup>58</sup> The Drafting Committee of the CAT provided that the requirement that torture be intentionally inflicted should be understood to require only general intent.<sup>59</sup> However, in its ratification of the treaty, the U.S. Senate imposed its own understanding of the treaty to require specific intent.<sup>60</sup> Implementing regulation Section 208.18(a)(5) reflects the Senate’s understanding.

In the Senate’s resolution, the Senate further expressed its understanding that, while acquiescence of a public official in torture committed by third parties might qualify as torture under Article 1, warranting protection under Article 3, for an act to be taken with the “acquiescence” of a public official, the official must “prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.”<sup>61</sup> The Senate Report clarifies that “[a]wareness” includes “both actual knowledge and ‘willful blindness.’”<sup>62</sup>

The Senate did not elaborate the meaning of the term “specific intent,” or the other legal terms used in its statements of its understanding. The Board of Immigration Appeals has looked to domestic criminal law to inform its interpretation. In *In re J-E*,<sup>63</sup> the BIA cited Black’s Law Dictionary to define specific intent as the “intent to accomplish the precise criminal act that one is later charged with” while “general intent” commonly “takes the form of recklessness or

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57. Sarah Joseph, *Committee Against Torture: Recent Jurisprudence*, 6 HUM. RTS. L. REV. 571, 574 (2006).

58. CAT, *supra* note 2, art. 1.

59. HERMAN BURGERS & HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE—A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 41 (Martinus Nijhoff 1988).

60. It also substantially narrowed the circumstances under which mental suffering would qualify. U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 CONG. REC. S17486 (1990).

61. *Id.* at 17491-92 (1990).

62. S. EXEC. REP. No. 101-30 at 9 (1990).

63. 23 I&N Dec. 291 (BIA 2002).

negligence.”<sup>64</sup> It went on to hold that Haitian prison officials who maintained horrendous conditions did not commit torture because the prison conditions were not the result of a specific intent to inflict pain or suffering, but just the result of budgetary and management problems.<sup>65</sup> Only isolated instances of police mistreatment in the prisons might rise to the level of torture.<sup>66</sup> Courts of Appeals, applying a highly deferential degree of scrutiny, have in several instances endorsed this interpretation of the CAT. For example, in *Auguste v. Ridge*, the Third Circuit declined to “say that the BIA erred in its interpretation of the ‘specific intent’ requirement in *In re J-E* by defining that term as it is ordinarily used in American criminal law.”<sup>67</sup>

A number of observers have challenged the specific intent requirement, and others have questioned its application in cases like *In re J-E* and *Auguste*. My purpose is to elaborate precisely why specific intent, as least as it has been construed in American criminal law, is not the appropriate standard, in light of the purposes of the prohibition on state torture. While it is likely that the substitution of general intent for specific intent will result in a more lenient standard for withholding removal, there are independent moral reasons to prefer a standard that does not appeal to this domestic distinction at all.

### 3. Office of Legal Counsel

While it may be tempting to dismiss the attempts to define torture by the Bush Administration’s Office of the General Counsel as politically motivated, their legal effect may endure even though the Administration has since renounced the more narrow standards it initially promoted. The actions and policies of the Administration have been widely reviewed and criticized and it is not my aim here to review that literature.<sup>68</sup> But relevant specifically to the question of defining intent in torture is the 2002 opinion issued by the Office of Legal Counsel of the Department of Justice in which it defined specific intent under the CAT narrowly along the lines of domestic criminal law. Mere knowledge by an interrogator that pain was a likely result of her actions would not be

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64. *Id.* at 301.

65. *Id.*

66. *Id.* at 302.

67. *Auguste v. Ridge*, 395 F.3d 123, 145 (3d Cir. 2005).

68. See, e.g., Owen Fiss, *The Example of America*, 119 YALE L.J. POCKET PART 1 (2009); JORDAN J. PAUST, *BEYOND THE LAW: THE BUSH ADMINISTRATION’S UNLAWFUL RESPONSES IN THE “WAR” ON TERROR* (2007); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005); Seth Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278 (2003).

sufficient. More generally, the treaty was construed narrowly and established strikingly permissive guidelines with respect to torture.<sup>69</sup>

The Board of Immigration Appeals was influenced by the opinion of the Office of Legal Counsel in its *In re J-E* decision. Although the narrow 2002 opinion definition was renounced in a December 30, 2004 Opinion by the Attorney General, the BIA continues to apply the narrow standard.<sup>70</sup> While we can expect to the BIA standard to eventually take a more palatable form even on its existing course, one may suspect that judicial inertia is reinforced by the absence of a developed conception of state intent relevant to the torture inquiry. Again, this paper aims to begin to remedy this gap.

## II. THE MORAL RELEVANCE OF STATE INTENT

The first problem with the resort to domestic criminal law in defining state crime lies in the subjective approach to intention prevalent in domestic law.<sup>71</sup> The weight of subjective intent has been controversial, and contemporary criminal theory has cast doubt upon it. Nevertheless, even today, subjective intent, that is, the actual intent of the defendant, is generally thought to be important in criminal law because of its relation to blameworthiness.<sup>72</sup> Blameworthiness in turn is taken to justify the imposition of punishment. Punishment in the domestic criminal law context usually takes the form of substantially depriving the defendant of her liberty, to a far greater extent than would normally be permissible in the absence of a criminal conviction.

Other considerations may also be important to blameworthiness, such as the harm resulting from a defendant's actions and even the reasonableness of defendant's subjective view. But as the authority to punish is often viewed as dependent on an individual defendant's capacity to choose between right and wrong, it is not surprising that the nature of the choice actually made would be seen as critical to assessing

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69. See Internal Memorandum from the Office of the General Counsel, Compliance with Article 3 of the Convention Against Torture in the Cases of Removable Aliens, at 4 (May 14, 1997).

70. See Renee Redman, *Defining "Torture": The Collateral Effect on Immigration Law of the Attorney General's Narrow Interpretation of 'Specifically Intended' When Applied to United States Interrogators*, 62 N.Y.U. ANN. SURV. AM. L. 465 (2007).

71. See John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875, 1878 (1992) ("Most commentators acknowledge that the following attributes tend to distinguish the criminal law from the civil law: (1) the greater role of intent in the criminal law, with its emphasis on subjective awareness rather than objective reasonableness. . . .").

72. *Liparota v. United States*, 471 U.S. 419, 425-26 (1985) (refusing to construe ambiguous statute as criminalizing conduct in the absence of criminal intent, because the mens rea requirement reflects "belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.").

the criminal act. If we may only be held responsible for acts over which we have control, we must be culpable for the manner in which we have exercised that control before we can be blamed for the harm we cause.<sup>73</sup> While evil intent alone is never enough to justify punishment, some degree of *mal* intent has long been regarded as essential to the conditions of legitimate punishment.<sup>74</sup>

It is not my purpose here to defend this understanding of mens rea in criminal law; my observation is only that it appears to explain at least in part the resilient status of subjective intent in domestic criminal law. But whatever the merits of the reasoning above, it does not apply to states. State responsibility, even quasi-criminal liability, for torture does not result in a deprivation of state liberty; indeed, there is rarely a question of depriving a state of even its sovereignty on the grounds of some past offense. The rights associated with sovereignty are of far more dubious pedigree than those associated with individual liberty, in any case.<sup>75</sup> While the normative force of liberty stems from a conception of the person as one capable of and entitled to shape her own conception of the good life, the normative force of sovereignty turns on contingent claims about the role of state institutions in delivering peace and prosperity to individuals and groups within its jurisdiction. Even Thomas Hobbes, an especially stalwart defender of the prerogatives of the sovereign, defended sovereignty and its powers on the grounds that it was most conducive to the welfare of the sovereign's subjects.<sup>76</sup> In practice, states respect the sovereignty of other states for self-interested reasons and under the imperative of avoiding the moral catastrophe of

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73. See MODEL PENAL CODE § 2.02, which sets forth the “minimum requirements of culpability.” Subsection (1) provides that, with limited exception, “a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.”

74. See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 114 (1968) (“All civilized penal systems make liability to punishment for at any rate serious crime dependent not merely on the fact that the person to be punished has done the outward act of a crime, but on his having done it in a certain state of frame of mind or will.”); MICHAEL S. MOORE, PLACING BLAME 191 (1998) (“Any plausible theory of punishment gives some prominent role to the desert of offenders.”). Moore contrasts the orthodox view, in which both culpability and wrongdoing matter to just deserts, with the subjective view, in which culpability alone determines extent of responsibility. *Id.*

75. See STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999); Judith Resnik and Julie Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921 (2003); see also Ken Booth, *Three Tyrannies*, in HUMAN RIGHTS IN GLOBAL POLITICS 64-65 (Tim Dunne & Nicholas Wheeler eds., 1999).

76. THOMAS HOBBS, LEVIATHAN 23 (Oskar Piest ed., 1958) (“For by art is created that great LEVIATHAN called a COMMONWEALTH, or STATE-in Latin CIVITAS-which is but an artificial man, though of greater stature and strength than the natural, *for whose protection and defense it was intended*; and in which, the sovereignty is an artificial soul, as giving life and motion to the whole body.”) (emphasis added).

war. Thus, sovereignty is upheld even where states fail to serve the instrumental role that might best justify their institutional existence in the abstract.

This brings us to a more fundamental disanalogy with domestic criminal law. States are moral agents in a more literal sense than are persons. Like persons, states can make moral claims on others, and others may make moral claims on them. But while moral constraints on individuals usually arise from others' interests, individuals are not morally obligated to always pursue other individuals' interests, or at least, they are usually permitted to give priority to their own interests and those of others in their circle. Individuals acting in pursuit of their own interest do not need to justify their actions except inasmuch as they impinge on the rights of others or to the extent they do so in a manner connected with a collective failure to fulfill their obligations toward others.<sup>77</sup> Individuals are taken to have their own life projects and conceptions of the good, which have morally salient value not only for themselves but, to a more limited extent, for others just by virtue of the fact that they have been adopted by a moral agent. Our moral capacity to create value is at the root of the self-justifying character of human endeavor, and it is that capacity in others that imposes constraints on how we may pursue our respective projects and goods, and creates certain kinds of obligations to them.

States, on the other hand, are—or should be—entirely servile creatures. In prevailing liberal democratic theory, states are not just constrained by individuals' values but their existence is motivated by the projects and values of the individuals they govern.<sup>78</sup> To the extent a state fails to serve the purpose of facilitating individuals' pursuit of their separately or commonly held conceptions of the good life, it ceases to fulfill its function. Even illiberal states purport to facilitate the pursuit of

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77. See THOMAS NAGEL, EQUALITY AND PARTIALITY 14 (1991) ("From his own point of view within the world each person, with his particular concerns and attachments, is extremely important to himself, and is situated at the center of a set of concentric circles of rapidly diminishing identification with others. But from the impersonal standpoint which he can also occupy, so is everyone else: *Everyone's* life matters as much as his does, and his matters no more than anyone else's."). Nagel describes two moral standpoints, and it is one of the central tasks of political theory to integrate them, or rather, it is one of the central tasks of political institutions to make it possible for individuals to integrate them. *Id.* at 14, 86.

78. This is implicit in the idea of the social contract. In the liberal contractarian tradition, the boundaries and obligations of the state are those to which individuals subject to its powers would assent. Individuals consent, albeit hypothetically, to the state's monopoly of power at least in part because doing so ultimately enables them to pursue their separately conceived plans. See JOHN RAWLS, A THEORY OF JUSTICE 11 (1971) (describing the theory of social contract found in Locke, Rousseau and Kant, and the one in which his own theory is rooted).

the good life among some group. That group may be ethnically or religiously defined, and/or the state may be premised on a particular theory of that good—rather than leaving it, to the extent possible, to individuals to define for themselves—but the state nevertheless justifies itself and its powers with reference to the good of its constituents. Indeed, even undemocratic states claim to act on behalf of the governed, and most defend their undemocratic practices on the theory that their authoritarian structure better serves the real interests of the people.

Given their inevitable claim to serve the interests of those over whom they exercise power, states are subject to more robust moral constraints; they are bound not just to respect, by not interfering with, but to affirmatively promote, the good of those they govern. Accordingly, the more significant moral question with respect to the moral character of a state is not whether they have violated a moral code of conduct but whether they fulfill the affirmative moral function of a state. The former question, whether one has violated a moral rule, speaks to blameworthiness. We commonly think of the latter question, whether a state may be viewed as fulfilling the function that justifies its powers, as one of legitimacy—the legitimacy of political authority.<sup>79</sup>

A. *Legitimate Authority, Legitimate State Action and Objective Intent*

Is the state legitimate? That question is sometimes asked with respect to the general concept of statehood, but it rarely arises with respect to a particular state. When it does, it is not really a legal question. But in the context of state crime, we appropriately ask: Does the challenged state action undermine the legitimacy of the state? That

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79. See, e.g., G.E.M. Anscombe, *On the Source of the Authority of the State*, 20 *RATIO* 1, 27-28 (1978) (“authority in the command of violence (which . . . distinguish[es] government from a Mafia in control of a place) is based on its performance of a task which is a general human need,” in particular, the administration of justice); Jeremy Waldron, *Kant’s Legal Positivism*, 109 *HARV. L. REV.* 1535 (1996) (explaining Kant’s view that law and political authority are necessary to enable peaceful co-existence under conditions of profound moral disagreement); PENNY GREEN & TONY WARD, *STATE CRIME: GOVERNMENTS, VIOLENCE AND CORRUPTION* 3 (2004) (noting that sociologists and political scientists often refer to legitimacy as that which “distinguishes state coercion from the naked violence of ‘robber bands’”); FREDERICK DUNN, *THE PROTECTION OF NATIONALS: A STUDY IN THE APPLICATION OF INTERNATIONAL LAW* 134 (1932) (“[T]he primary purpose of political organization . . . is to maintain conditions under which social life is possible.”); Michael Phillips, *The Justification of Punishment and the Justification of Political Authority*, 5 *LAW AND PHIL.* 393, 397 (1986) (“[T]ate authority is justified to begin with at least partly by the need of a society effectively to prevent or deter certain types of acts.”); Jerome Hall, *Authority and the Law in AUTHORITY* 64 (Carl Friedrich ed., 1958) (“[A]lthough authority is not an expression of reason, it presupposes, at least in a democracy, that reason and science have been put to the maximum use to solve the problem in hand.”).

question must be answered with reference to the conditions of legitimacy for political authority, though it does not require an exhaustive or complete set of criteria for legitimacy. I make the limited claim that the legitimacy-factor in state action turns substantially on the objective intent behind the action, i.e., the affirmative as well as the background reasons which apparently motivated the action in question.

Under such an objective approach, the otherwise important distinction between advertence and motivation all but collapses. Almost all state action, and certainly acts that might constitute torture, are traceable to some reason, and importantly, will be traced to a reason by the public. Even unplanned action is, and will be perceived as, the product of choices regarding structures of accountability, as well as choices regarding the vigor (and funding) with which certain state purposes are to be pursued, such as security or the protection of human rights. In the context of state crime, we are interested in whether certain prohibited reasons are present in the apparent calculus behind the allocation of state resources and methods of governance. The presence of reasons which would detract from the legitimacy of the political authority renders the action in question illegitimate.

A legitimate political authority is one which we are bound morally to obey, or at least, one which we may normally choose to obey without compromising our individual autonomy.<sup>80</sup> In order to be able to

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80. See Immanuel Kant, *On the Common Saying: 'This May Be True in Theory, But It Does Not Apply in Practice'*, in KANT: POLITICAL WRITINGS 73-79 (Hans Reiss ed., H.B. Nisbet trans., 1991) (arguing that state coercion may be justified in order to create and maintain conditions of rational freedom, i.e., a civil society governed by laws which could be willed by those governed); Immanuel Kant, *Perpetual Peace: A Philosophical Sketch*, in KANT: POLITICAL WRITINGS 112-13 (Hans Reiss ed., H.B. Nisbet trans., 1991); JEFFRIE G. MURPHY, KANT: THE PHILOSOPHY OF RIGHT 91-95 (1994) (explaining Kant's views); Jeffrie Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFFAIRS 217 (1973). See also RONALD DWORKIN, LAW'S EMPIRE 191 (1986) ("A state is legitimate if its constitutional structure and practice are such that its citizens have a general obligation to obey political decisions that purport to impose duties on them."); EQUALITY AND PARTIALITY, *supra* note 77, at 8 ("The pure ideal of political legitimacy is that the use of state power should be capable of being authorized by each citizen—not in direct detail but through acceptance of the principles, institutions, and procedures which determine how that power will be used."). See also Helen Stacy, *Relational Sovereignty*, 55 STAN. L. REV. 2029, 2035 (2003) ("[A] strong claim of sovereignty by a state that is committing human rights abuses will not be respected by the international community."); Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 50 (1992) ("Legitimacy, in turn, is the quality of a rule, or a system of rules, or a process for making or interpreting rules that pulls both the rule makers and those addressed by the rules toward voluntary compliance."); BETRAND DE JOUVENEL, SOVEREIGNTY: AN INQUIRY INTO THE POLITICAL GOOD 33 (J.F. Huntington trans., 1957) ("Authority ends where voluntary assent ends. There is in every state a margin of obedience that is won only by the use of force or by the threat of force: it is this margin which breaches liberty and demonstrates the failure of authority.").

rationally obey the state for reasons compatible with our autonomy, and not just out of fear of coercion, we must be able to view the state as a moral agent acting on our behalf. One might take the position that we are morally bound to obey political authority, without further inquiry into its legitimacy. (This Hobbesian position might appear at first blush rather authoritarian, but one could argue that the moral obligation is often overcome by other obligations.) However, even philosophers with a radical commitment to political authority as such are likely to agree that the reasons for our duty to obey are bound up with some expectation of the function that political authority serves.<sup>81</sup> Even if the state's failure to adequately fulfill this function does not eviscerate a duty to obey, it at least undercuts the rationale behind a duty to obey and thereby weakens it. Likewise, one might reject a duty to obey even a legitimate political authority. But most will nevertheless concede that the fact that something is required, prohibited, or permitted by law may create reasons for action or inaction.<sup>82</sup> One might then regard the problem of legitimacy as having to do with securing the proper weight for those reasons, which will turn on whether the state performs the function which would justify giving its directives weight.

My argument with respect to state intent does not require agreement on the nature of our relationship with authority. We need only see political authority as serving some function and the legitimacy of authority as turning on the conditions for rational belief that it serves such a function. We need not agree on what that function is. The state's function, or our reasons for following its directives, may be relatively banal, having only to do with the state's coordinative function, such as building roads or setting and enforcing traffic laws. Or that function may be moral. The state may be the means by which we achieve peaceful co-existence, or the means by which we fulfill political moral duties, such as those of distributive justice, arising from our interdependence. Its directives may be our best bet at acting on the totality of reasons which apply to us in the usual case, given its superior information on a range of issues. The state may be the means by which we achieve the kind of free and just society in which our and others' desired lives are possible. These possible statements of the moral function of the state overlap considerably. Whatever reason we may have for deferring to, or at least respecting political authority, we can evaluate individual state actions by

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81. See HOBBS, *supra* note 76.

82. See, e.g., JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 245 (Oxford Univ. Press 1979) ("One has moral reasons to act in conformity with the laws of a good system more often than those of a bad system even if there is no special moral obligation to obey the laws of a just legal system.").

reference to that function by asking whether the action undermines or reinforces our deferential or respectful attitude.

I have framed the question of legitimacy in terms of individuals' reasons to obey the law. This is consistent with the emphasis in contemporary jurisprudence on law's claim to be a legitimate authority<sup>83</sup> and the fundamental problem of accounting for the normative power of legal directives. It is also consistent with a longstanding practice in political science and sociology of explaining and assessing legitimacy in terms of the beliefs and perceptions of the governed toward authority.<sup>84</sup> Most notably, in his influential account of authority, Max Weber identified authority by reference to sustained compliance with directives.<sup>85</sup> He also observed that most effective authorities claim legitimacy and are indeed regarded as legitimate,<sup>86</sup> and he identified different modal-types of legitimacy based on the distinct grounds upon which those subject to authority are called upon to view, and in fact view, that authority as authoritative.<sup>87</sup>

A number of critics reject Weber's approach on the ground that it appears to de-normalize the concept of legitimacy in two respects. First, inasmuch as popular support or consent is measured on behavioral criteria alone, i.e., apparently voluntary compliance with state directives, legitimacy that depends just on such support characterizes any stable government and would thus appear to render all effective political authority legitimate—including brutal dictatorial regimes that are widely perceived as ruthless and cruel.<sup>88</sup> Such a notion of legitimacy would seem to lack a means by which to distinguish legitimate from illegitimate authority.<sup>89</sup> Any stable state not racked by violent rebellion is

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83. See, e.g., *id.* at 30 (“[I]t is an essential feature of law that it claims legitimate authority. . .”).

84. See John Schaar, *Legitimacy in the Modern State*, in *POWER AND COMMUNITY IN POLITICAL SCIENCE* 283-84 (Philip Green & Sanford Levinson eds., Random House 1970) (stating three prevailing accounts of legitimate authority in political science and noting that they all turn on belief, citing SEYMOUR LIPSET, *POLITICAL MAN: THE SOCIAL BASES OF POLITICS* 77 (Doubleday 1960); Robert Bierstedt, *Legitimacy*, in *DICTIONARY OF THE SOCIAL SCIENCES* 386 (Free Press 1964); Richard Merelman, *Learning and Legitimacy*, 60 *AM. POL. SCI. REV.* 548 (1966)).

85. MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 212, 946, 948 (Guenther Roth & Claus Wittich eds., Univ. of Calif. Press 1978).

86. *Id.* at 213, 953-54.

87. *Id.* at 36.

88. See HANNA PITKIN, *WITTGENSTEIN AND JUSTICE* 283 (Univ. of Calif. Press 1972) (Weber's subjects are “taken to consider a government or a law as legitimate if they act as if they do”); see also Robert Grafstein, *The Failure of Weber's Conception of Legitimacy: Its Causes and Implications*, 43 *J. OF POL.* 456 (1981).

89. See Regina Titunik, *Democracy, Domination and Legitimacy in Max Weber's Political Thought*, in *MAX WEBER'S ECONOMY AND SOCIETY: A CRITICAL COMPANION* 144-45 (Camic et al eds., Stanford Univ. Press 2005) (“Weber's use of the term

characterized by what formally qualifies as voluntary compliance, and if such compliance is the only evidence of consent available to us as observers, we are unable to critique any effective authority as illegitimate.

Second, inasmuch as popular support or consent is seen as the basis for legitimacy without any reference to the institutions or policies which are supported, bad governments supported by morally corrupt societies would be deemed “legitimate.”<sup>90</sup> We could not condemn as illegitimate brutal popular governments, such as Nazi Germany, which are ruthless and cruel but not necessarily perceived as such within the society governed. Critics along these lines insist that legitimacy must be a property of state institutions and cannot be controlled or determined by the governed, who may or may not identify or concern themselves with the relevant properties of the state.<sup>91</sup> Legitimacy is an entirely objective conception directly assessable from an outsider’s vantage point, without reference to the perspective of those called upon to obey political authority. On this view, the existence of a duty to obey law might still identify or characterize all legitimate political authority, but the existence of such a duty—and certainly the bare perception of such a duty—would not constitute a legitimate regime.

These are powerful critiques of the Weberian concept of legitimacy.<sup>92</sup> However, they do not apply to my limited conception of legitimacy, which turns not on actual belief in legitimacy per se but on the conditions for rational belief in a duty to obey or the accordance of substantial weight to legal directives. This approach is motivated expressly by the normative significance of belief, in light of the moral

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legitimate . . . does not indicate [objective or normative validity]. It was not Weber’s intention to establish criteria of legitimacy and illegitimacy. Indeed he developed no category of illegitimate rule in the sense of rule without right.”); Wolfgang Mommsen, *Discussion on Max Weber and Power-Politics*, in MAX WEBER AND SOCIOLOGY TODAY 114 (Otto Stammer ed., Kathleen Morris trans., Blackwell 1971) (“[T]here is no concept of non-legitimate rule in Weber’s sociology of government”).

90. *Id.* at 284, 286 (such a conception of legitimacy “dissolves legitimacy into acceptance or acquiescence” makes it “entirely a matter of sentiment”).

91. See PITKIN, *supra* note 88, at 281-82 (“‘legitimate’ means something like ‘lawful, exemplary, binding’—not ‘what is commonly considered lawful, exemplary, binding’ nor ‘what ought to be considered lawful, exemplary, binding’”). Pitkin argues that Weber’s definition imputes “total irrationality and subjectivity” to his subjects by failing to inquire into the criteria for their judgments of legitimacy. *Id.* at 283.

92. At least, they are powerful critiques of the over-extension of Weber’s operational concepts outside of their intended domain. Weber was himself fully aware that his assumptions might be false and did not intend the concepts of either authority or legitimacy as normative ones. He was attempting to create conceptual categories that would facilitate empirical observation, which would in turn enhance our understanding of the various ways in which power is exercised (not the way it should be). See WEBER, *supra* note 85, at 214.

significance of compliance with law, and does not look to compliant behavior as dispositive evidence of belief. It does preserve the fundamental notion, promoted by Weber but followed by numerous sociologists and political scientists, that legitimacy is not a direct property of institutions; rather, legitimacy is a condition that arises when certain attitudinal conditions are in place for citizens governed by those institutions.<sup>93</sup> Despite its democratic emphasis, my working, partial conception of legitimacy avoids the two most disputed aspects of Weber's approach: a reference to beliefs themselves, as opposed to the conditions for rational belief, and the imputation of a belief in legitimacy based solely on observed behavior, namely, obedience. These differences follow naturally from the normative character of my argument and the decidedly non-normative stance adopted by Weber.

Thus, a fairly thin but still fruitful notion of legitimate authority warrants focus, in evaluating state action, on whether citizens may view that action as motivated by appropriate reasons, i.e., reasons compatible with the state's function. Our view of the state's reasons for its action turns on its objective, or apparent, intent: the reasons which a reasonable observer would attribute to the state.<sup>94</sup> It is not a matter of individuals weighing at each moment whether the cumulative actions of the prevailing regime warrant deference. Rather, the apparent motivations for state actions create a public culture that mediates individual relations with the state.<sup>95</sup> The plausibility of the state fulfilling its function turns

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93. The emphasis on the conditions for rational respect for authority is a common theme in discourses on authority influenced by Kant. See *supra* note 84. See also JÜRGEN HABERMAS, LEGITIMATION CRISIS 101, 105 (Thomas McCarthy trans., Beacon Press 1975) (arguing that the validity claims of norms issued by an authority depends on at least "the conviction that consensus on a recommended norm could be brought about with reasons," i.e., that it could be "discursively redeemed"); CARL FRIEDRICH, MAN AND HIS GOVERNMENT 218, 225 (McGraw Hill 1963) ("authority rests upon the ability to issue communications which are capable of reasoned elaboration" but what is important is "not the psychological concomitant of a belief in the capacity of the authority for such reasoned elaboration" but "the actual presence of this capacity"). While "authority as the capacity for reasoned elaboration is capable of creating legitimacy whenever it provides good 'reasons' for the title to rule," "legitimacy can be achieved only when there exists a prevalent belief as to what provides a rightful title to rule." *Id.* at 237.

94. See my related argument in *Deliberative Autonomy and Legitimate State Purpose under the First Amendment*, 68 ALB. L. REV. 815, 834 (2005).

95. Cf. David Easton, *The Perception of Authority and Political Change*, in Friedrich ed., *supra* note 79, at 188 ("The readiness of the members of a political system to maintain or shift their support for political authorities is a function not only of who they think the authorities are, but also of their perceptions of the way in which the authorities act. Different images of the characteristics of political authority would result in different types of responses to the demands imposed upon the members of a system by these authorities, if only because we interpret the meaning of the acts of others in the light of what we think of them."); STANLEY COHEN, STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING 76 (Polity 2001) (observing that disavowals of atrocities are

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on a public construction of state institutions and their avowed purposes. In most regimes, because the moral function of the state is essential—justice (of many types) is impossible without it—individuals can accept an obligation to obey the law, and to respect political and legal authority more generally, without forfeiting a sense of themselves as moral agents in their own right.

It is clearly not the case that any time a state acts for apparent reasons which its constituents could not endorse, the state, or even the particular government in question, becomes illegitimate. An individual who commits an immoral act probably does not thereby become generally “immoral.” A single profitable transaction will not make a corporation profitable. An organization that effectively accomplishes some project does not thereby become “effective.” Nevertheless, inasmuch as we aspire to be moral or profitable or effective, it makes sense to assess individual acts in light of our larger aims, especially when those aims are fundamental or our *raison d’être*.

Legitimacy serves as a reference point for evaluating state actions, and in particular, the rationales behind them. The conclusion of an inquiry into a particular state action will either be that the action was legitimate or not; the question of the legitimacy of the regime is usually set aside or handled separately. The fundamental criteria by which we assess a state nevertheless inform the standard by which we can assess particular exercises of state power.

The question of state crime is fundamentally about identifying those acts which are never appropriate for a legitimate state. Again, the question is not whether a state that commits a state crime is immediately rendered an illegitimate regime. The point is rather that, in designating a kind of state action as quasi-criminal, we indicate that those actions are never legitimate, and that they pose at least the risk of undermining the legitimacy of the state in the long-term. Thus, we can understand the question of state crime as one about the legitimacy of state action, rather than the legitimacy of states directly. Of course, the fact that a given action is illegitimate does not thereby make it a state crime, any more than the fact that an act is blameworthy renders it criminal from the standpoint of domestic criminal law. Before we designate acts as criminal in domestic law, we appeal to additional criteria that identify them as especially blameworthy; we further restrict criminality to acts which are blameworthy for particular reasons. Similarly, abuses of power such as curtailing freedom of the press may be illegitimate, and may undermine the legitimacy of the regime that adopts them, but most

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not “private states of mind. They are embedded in popular culture, banal language codes and state-encouraged legitimations.”).

of us would not go so far as to designate those state actions as quasi-criminal.<sup>96</sup> If every human rights violation were deemed quasi-criminal, the concept of state criminality would have no utility.<sup>97</sup> We need not

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96. At the moment, the outer boundaries of state crime are, like the concept of state crime itself, deeply contested. As a matter of positive law one would rely primarily on which crimes have been universally recognized, and in particular, those accepted as subject to either the jurisdiction of the International Criminal court or universal jurisdiction. ILC's Draft Article 19 (ultimately rejected) attempted a more substantive account, providing that a state crime could be "a serious breach of an international obligation of essential importance for the maintenance of international peace and security," "the self-determination of peoples" or "the safeguarding and preservation of the human environment," or "a serious breach *on a widespread scale* of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid." DRAFT ARTICLES ON STATE RESPONSIBILITY, art. 19, para. 3, [1976] 2 Y.B. INT'L L. COMM'N (PT. 2), at 95, U.N. DOC. E/CN.4/Ser.A/1976/Add.1 (Part 2) (1977) (emphasis added); *see also*, Quincy Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT'L L. 38, 56 (1947) (a crime under international law is "an act committed with intent to violate a fundamental interest protected by international law or with knowledge that the act will probably violate such an interest, and which may not be adequately punished by the exercise of the normal criminal jurisdiction of any state"). These definitions suggest that the interests protected go beyond those of direct concern to other states' interests, but they are ambiguous as to which interests of the human being will be "safeguarded"—the example of apartheid suggests it is not limited to physical integrity. So, for example, such language does not resolve the question of whether widespread censorship of press and speech, or outlawing of certain religions, would constitute state crime.

Sometimes the over-expansive language of human rights is invoked to give substantive content to state crime, possibly for lack of a consensus on which subset of human rights are protected under international criminal law. *See, e.g.*, Leon Hurwitz, *International State-Sponsored Organizations to Control State Crime: The European Convention on Human Rights*, in CONTROLLING STATE CRIME 284 (Jeffrey Ian Ross ed., Transactions Pub. 2000) (taking the view that "violations of human rights are most assuredly 'crimes' and . . . physical violence is not a requirement to be classified as such"); David Kauzlarich, Ronald Kramer, & Brian Smith, *Toward the Study of Governmental Crime: Nuclear Weapons, Foreign Intervention, and International Law*, 16 HUMANITY & SOC. 543, 557 (1992) (moving freely between violations of human rights and state crime).

Prosper Weil argues that uncertainty about which international norms should be accorded the status of state crimes severely undermines the international law regime. *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 424-28 (1983).

97. *See* Ira Sharkansky, *A State Action May Be Nasty But It Is Not Likely to Be a Crime*, in CONTROLLING STATE CRIME, *supra* note 96 at 36 ("[A]cademic practitioners in the field of state crime have gone to such extremes in their usage as to deprive the term of any significance."); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2591 (1991) ("A variety of post-Nuremberg efforts to enlarge the scope of crimes against humanity have brought more confusion than clarity to the term's meaning."). Penny Green and Tony Ward make a related point in preferring a "torture paradigm" of state crime over a "health paradigm." *State Crime, Human Rights and the Limits of Criminology*, 27 SOC. JUSTICE 101, 103-04 (2000). They observe "sociological continuity" between crimes like torture and violations of positive human rights such as deprivation of basic human necessities,

resolve at this stage, however, the additional specifying criteria in the context of state crime in order to understand that the legitimacy question is fundamental to assessing state action. (I will shortly propose one additional criterion *infra* in Part B.) Because legitimacy is at issue, and that legitimacy turns on apparent reasons accessible to the public, objective, not subjective, intent is morally relevant to any inquiry into state action, including the question of state crime.

*B. What is Objective State Intent?*

It should be evident that the present argument for the use of objective intent is not simply a pragmatic response to the evidentiary burdens a prosecutor or claimant under the CAT would face if required to show subjective intent on the part of a collective agent such as a state. Nor does my argument that objective intent, rather than subjective intent, should constitute the mental state requirement for a state crime depend on the proposition that there is no such thing as subjective intent as applied to a collective agent.<sup>98</sup> In construing subjective intent for an individual criminal defendant, courts make presumptions about the existence of a unitary and continuous moral agent capable of forming stable and coherent intentions.<sup>99</sup> Derek Parfit has described the problems with most common conceptions of personal identity, and has argued that our identity consists in a collection of physical and psychological facts, and in fact, is not always determinate.<sup>100</sup> We persist in putting aside this problem of identity for most normative purposes, however, and we assign blame and punish persons for past deeds, including deeds undertaken by conflicted persons who might have acted otherwise moments later.<sup>101</sup> We do so not just because we are conceptually comfortable with the idea of the unitary person, but because a conception of the person which did not allow for assumptions of continuity would render us unfamiliar to ourselves and drain our lives of meaning and

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but conclude that it is not helpful to “stretch the term ‘crime’ to cover all social harms.” *Id.*

98. Cf. William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1507 (1987) (describing realists’ rejection of the “anthropomorphism of legislative ‘intent’”).

99. See MOORE, *supra* note 74, at 616 (describing the criminal law’s presumption of “unified character structure,” i.e., an intelligible pattern to individual mental states and actions, both at any time and over time, as well as a “unified consciousness.”).

100. DEREK PARFIT, *REASONS AND PERSONS* 201-17 (Oxford Univ. Press 1984).

101. It is an interesting question, but one beyond the scope of this article, whether we are more lenient with a defendant who has evinced inconsistent and unstable criminal purpose prior to his criminal act because we deem the act less culpable, or instead because we are reluctant to reduce him to the person who in a given moment committed the criminal act.

purpose. Similarly normatively motivated presumptions make it possible to construct a notion of subjective state intent. For example, one might take state intent to consist of the intentions stated in legislation, statements made by the executive in internal documents assessing a course of action, statements contained in committee reports, statements made publicly in support of a course of action, etc.<sup>102</sup> Each of these constructions of state intent are viable and plausibly motivated under various circumstances. My argument for the use of objective state intent in the context of assessing responsibility for state conduct is normative, not metaphysical.<sup>103</sup>

Inasmuch as objective intent turns on apparent reasons, the objective intent of a state turns on the social meaning citizens of that state will assign to the state's action.<sup>104</sup> Obviously, social meaning is illusive, or at least, indeterminate. There are a number of conceptual tests we could use, the appeal of which should be judged in terms of how well they capture the effect of state action on political authority. For example, one might ask what reasons a reasonable observer would attribute to the state; alternatively, one might ask which of the most generous rationales for state action the groups directly disadvantaged would find plausible. These possible tests are objective, but context-specific. That is, while they do not amount to a poll, actual attitudes toward state action are strong evidence of its legitimacy or lack thereof. This might appear to be a drawback of this conception of state crime since, historically, many oppressive and quasi-criminal regimes have enjoyed substantial support among their populations.<sup>105</sup> However, general support for a government does not necessarily imply that the populations affirmatively supported the quasi-criminal activities of those states. Those state activities which are widely acknowledged and

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102. See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1523-24 (2000) (discussing how one might construct legislative intent in order to identify the expressive impact of legislative action).

103. See Hans Kelsen, *Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals*, 31 CAL. L. REV. 530, 533 (1942-43) (“[I]f it is possible to impute physical acts performed by individuals to the State although the State has no body, it must be possible to impute psychic acts to the State although the State has no soul. Imputation to the State is a juristic construction, not a description of natural reality.”).

104. I have argued this elsewhere. See *Deliberative Autonomy and Legitimate State Purpose Under the First Amendment*, 68 ALB. L. REV. 815, 834 (2005).

105. Cf. GREEN & WARD, *supra* note 79, at 109 (“[T]he fact that citizens believe in the legitimacy of their government is not equal to the fact that a given power relationship is legitimate . . . illegitimacy is an objective property of the relevant act in the sense that it does not depend upon how the act is perceived by its social audience.”).

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supported are indeed more difficult to characterize as quasi-criminal on my view.

The significance of a regime's support among its governed population raises two fundamental questions with respect to the degree of contextuality for which objective state intent should allow. First, is the reasonable observer by whose perspective we might decipher objective intent situated within the relevant country? Second, is the observer assessing the state's actions at the time that they occur, or with the benefit of hindsight? The reasonable observer should be situated within the relevant country, but should enjoy the benefit of hindsight.

### 1. Contextualized Reasonableness

Objective state intent should hinge on social context. That is, the reasons reasonably attributed to the state will depend on the social, political, and economic history of the country, as well as existing circumstances, salient controversies, and known government priorities and objectives. Like language informs the meaning of text, social context will inform the objective intent of the state. As our use of the concept of objective state intent is normatively motivated, the underlying issue is whether it is the perspective of the governed or some other, outside perspective that speaks to legitimacy. I have argued that legitimacy turns not directly on whether a state fulfills certain functions but rather on whether individuals may rationally defer or respect law promulgated by the state on the grounds that it fulfills some critical function. Whether that attitude is possible is best assessed from the perspective of those whose attitudes toward the state and its laws are at issue.<sup>106</sup>

Conceiving of state intent in this contextualized manner may in some instances result in a more lenient standard than one which would employ the perspective of an outsider. But at other times, this approach will result in a more robust standard of state responsibility. Actions that might appear benign, innocuous or even accidental from the outside may be plausibly interpreted as planned, insidious, or malicious from within

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106. See FRIEDRICH, *supra* note 93, at 226 ("Since opinions, values and beliefs, as well as interests and needs, are continually changing in response to changes in the environment and to creative innovation, whether of a political, aesthetic, technical or religious nature, it is quite possible, indeed it is a recurrent experience, that a person may lose his power based on authority not because the commands he gives or the opinions he utters are less 'authoritative' in the sense that they may not be elaborated by reasoning, but because such reasoning is related to opinions, values and beliefs that have lost their validity in that community. It is therefore necessary to sharpen further the definition of authority as the capacity for reasoned elaboration by adding: in terms of the opinions, values and beliefs, interests and needs of the community within which the authority operates.").

the society governed. Within the admittedly nebulous bound of reasonableness, the latter perspective should be honored. Just as a speaker may be presumed fluent in the language she speaks, so will a government be presumed well-versed in the social context in which it operates. While that presumption may not hold, a failure on the part of a state to understand the implications of its own actions can never operate as an excuse. A state may be mistaken about the legitimacy of its actions, but as we are interested in legitimacy itself and not, for example, state sincerity, it is the conditions of legitimacy that appropriately inform the intent inquiry in the context of state crime. Again, legitimacy turns on the perspective of the governed. A state whose actions are likely to be interpreted especially ungenerously by its citizens is likely to be at least in part responsible for the prevailing distrust, and thus it should not be surprising that this background distrust will adversely impact an assessment of the legitimacy of its actions.

One might worry that interpreting a state's intention in light of the social meaning of a state's action, especially in the highly contextualized manner advocated here, collapses the distinction between state and society. While the special character—and in particular, the unique moral function—of a state is the grounds for looking to objective rather than subjective intent, whenever we look in the law to objective intent, it must be interpreted within the social context in which the agent acts. For example, we will understand the objective intent of the parties to a contract with reference to the common structure of similar contracts, the norms of the industry in which the contract is located, and more general social facts that inform the meaning of the language used in the contract.<sup>107</sup> Similarly, we will understand the objective intentions of a director on a corporate board only by appreciating typical corporate behavior. Thus, the argument for the use of objective intent in the context of state crimes is not an argument for a type of intent wholly unfamiliar to the law, and it should raise no special concerns about the conflation of the legal actor with the society in which she acts. Contextualized objective intent is the dominant notion of intent in the law.<sup>108</sup> It is the narrow, special case of individual criminal law where subjective intent does and should play an important role.

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107. See RESTATEMENT (SECOND) OF CONTRACTS §§ 221-222 (1979).

108. See, e.g., *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (whether a police officer has qualified immunity depends on the “objective” question of whether a reasonable officer would believe there was probable cause—officer’s subjective beliefs are “irrelevant”); *Yount v. Acuff Rose-Opryland*, 103 F.3d 830, 836 (9th Cir. 1996) (“Contract interpretation is governed by the objective intent of the parties as embodied in the words of the contract.”); *Flax v. Smith*, 479 N.E.2d 183, 185 (Mass. App. Ct. 1985) (holding that whether an implied easement has arisen turns not on the grantor’s subjective intent but on the presumed objective intent of grantor and grantee under the

## 2. Reasonableness with Hindsight

The second dimension of objective state intent requires a choice of temporal context: society at the time of the alleged crime, or society at the time of adjudication. In many cases, support for a regime, and perhaps even its quasi-criminal activities, ultimately gives way to loathing and distrust. Indeed, because only a major change in social conditions or political balance makes inquiry into state crime conceivable or feasible, inquiries into state crime are especially likely to take place after substantial time has passed.<sup>109</sup> The question of timing, i.e., the moment in time from which a reasonable observer should evaluate state action, is therefore critical. Here is another point at which the legal concept of state crime should diverge from that of domestic individual crime. Because the concern is with legitimacy, the inquiry may impose the perspective of hindsight and consider information that may not have been in the public domain at the time the actions were taken. After all, the question is whether the actions were legitimate, and that question of act-specific legitimacy is conceptualized with reference to the legitimacy of political authority. The question is not whether the actions in fact undermined political legitimacy, let alone whether it was perceived to have that effect at the time.

The hypothetical nature of the inquiry implies that whether a state action was quasi-criminal will depend on how a reasonable observer would assess that action today. While punishment of an individual based on shifting standards would violate basic precepts of criminal law and theory, state crime does not raise the same issues.<sup>110</sup> The blameworthiness and desert of an individual defendant turn on what was known to the defendant at the time. In particular, the character of the subjective intent that is at issue in individual criminal law will turn on

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circumstances); *Alton M. Johnson Co. v. M.A.I. Co.*, 463 N.W.2d 277, 279 (Minn. 1990) (whether a settlement is reasonable in an insurance coverage dispute depends on objective facts facing plaintiff); *Noll v. Harrisburg YMCA*, 643 A.2d 81, 87-88 (Pa. 1994) (holding that whether a product is an improvement to real property turns on the objective intent of the parties); RESTATEMENT (SECOND) OF TORTS § 283 (1965) (setting forth an objective conception of negligence under the “reasonable man” standard).

109. See Stanley Cohen, *State Crime of Previous Regimes: Knowledge, Accountability, and the Policing of the Past*, 20 LAW & SOC. INQUIRY 7, 45-46 (1995) (describing the problems associated with the “profound discontinuity” between the society in which state crimes are reviewed, and the one in which they took place. “The torturer from last year’s military junta does not always seem to quite belong to today’s time.”).

110. Jeremy Waldron makes a closely related point, arguing that because the prohibition on torture applies in the first instance to states and state policy, there is no compelling liberty interest in defining the contours of the crime precisely in advance. See Waldron, *supra* note 68, at 1699.

the world as it is known to the defendant, which is of course limited to the world as it in fact exists at that time. But we are interested in objective intent on the part of the state because it is the appearance of the state's reasons for actions that affect legitimacy. We are, moreover, interested in the legitimacy of the state as an ongoing enterprise.<sup>111</sup> The aim is rarely punishment per se, given not just the absence of institutions capable of effecting punishment but the practical difficulty in punishing a state without punishing the society and people it governs, among whom are the victims of many kinds of state crime, like torture. Thus, the remedy of state crime usually takes the form of some kind of rejection. Whether that rejection is an overhaul of political institutions, a purging of elites and state agents at various levels in varying capacities, remedial compensation to victims, wholesale legal reform that undoes to the extent possible ongoing effects of the earlier regime, or mere acknowledgment of the gross wrongdoings we here refer to as state crime, naming and rejecting is a forward-oriented project intended to shore up the legitimacy of the state going forward. As an objective test, it is adaptable to the history in which it is applied, but it need not pervert itself by assuming the very mindset that gave rise to crime, or the factual ignorance that sustained it.

There may be no single, intuitively appealing way to implement an objective standard for state intent. But as we know, subjective mens rea has given rise to its own share of moral dilemmas and dissatisfactions. No doubt, the approach proposed here also leaves unresolved a number of further questions that one would need to resolve in order to fully operationalize any conception of state intent. One might choose clarity at the cost of flexibility and, perhaps, moral precision, and indeed, should a juridical body ever regularly apply the concept it might eventually do just that. But at this early stage in the jurisprudence of state crime, it may be better to set forth a legal principle that embodies the underlying normative and conceptual difficulties associated with state crime.

Even if one is comfortable with the conception of objective state intent presented here, one might question whether objective intent is properly referred to as intent at all. While the term is admittedly oxymoronic, it is useful to speak of objective intent as a variant of intent. Both the concepts of subjective and objective intent reinforce the principle of agency in the law. Intent requirements are essential to the

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111. See Cohen, *supra* note 109, at 15 (“[T]here are no historical cases of total regime change—a complete displacement of every agent of power and influence.”). Even where new individuals are running the state, there are usually numerous legal and institutional remnants of the prior regime. The more severe the state crimes committed, the more drastic the wiping out of such residue—until the rejection of the prior regime approaches something of a death penalty.

manner in which the law regards the persons and entities it purports to govern.

Where the law requires subjective intent for legal liability, as in criminal law, the law honors free will by acknowledging its outer boundaries. In order to respect free will, the law must distinguish between free and unfree acts.<sup>112</sup> By denying culpability, or at least, criminal responsibility, for acts that do not represent the exercise of free choice, the law makes clear our moral and legal responsibility for other actions.<sup>113</sup> Like the requirement of subjective intent, legal inquiries that focus on objective intent are also important in establishing the presumption of agency in the law. But where the law inquires only about objective intent, the law claims for agency the still wider territory of action intelligible by reference to objective intent.

The capacity for intent distinguishes an actor from an object or other causal intermediary.<sup>114</sup> Even when intention is spoken of broadly, as in general intent, to encompass facts which should have been known because they were foreseeable but of which the actor was not in fact cognizant or on which she did not reflect, the characterization of the actor's intent emphasizes the expectation, indeed, the assumption, that the actor acts on reasons. Intent affirms the actor's agency by rejecting at once both the propositions that her actions are determined and that her actions are random. While the requirement of subjective intent in criminal law and certain other limited areas incorporates the presumption that individuals subject to law act, the apparently weaker requirement of objective intent in much of the law presumes further that actors act on reasons and that those reasons are intelligible to others. Even where it appears a defendant's conduct was not rationally motivated, by inquiring only after objective intent, the law presumes that she acted on reasons

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112. See Herbert Morris, *Persons and Punishment*, 52 THE MONIST 475, 494 (1968) (arguing for a right to punishment "linked to a feature of human beings, which—were that feature absent—the capacity to reason and to choose on the basis of reasons—profound conceptual changes would be involved in the thought about human beings. It is right, then, connected with a feature of men that sets them apart from other natural phenomena.").

113. Cf. MOORE, *supra* note 74, at 610-13. Moore identifies a number of assumptions regarding the person as the object of criminal law, including rationality and autonomy. The latter is understood to include the capacity to initiate action, to cause further events to occur in world beyond movements of body, *to act motivated by reasons*, and to choose and to cause the realization of one's choice, or the "power to mould one's character by one's own design." *Id.*

114. See *id.* at 490 ("When we talk of not treating a human being as a person or 'showing no respect for one as a person' what we imply by our words is a contrast between the manner in which one acceptably responds to human beings and the manner in which one acceptably responds to animals and inanimate objects. . . . [W]hen we 'look upon' a person as less than a person or not a person, we consider the person as incapable of rational choice.").

and that those reasons are communicable to, or at least cognizable by, other people.<sup>115</sup> The presumption is appropriate irrespective of the degree of reflection actually exercised by a given actor because it is always normatively, not just, if at all, metaphysically, motivated. In criminal law we presume that individuals act, rather than simply move, because action is essential to a finding of moral culpability. We may sometimes further presume that the reasons on which actors act are communicable and cognizable because the presumption underpins a deeply intuitive regime of outcome responsibility,<sup>116</sup> because it promotes welfare by incentivizing optimal behavior with regard to others, or, as in the case of state liability, because it is essential to the legitimacy of the defendant's authority.

Thus, to understand state intent to mean something different from both the use of the concept of intention in domestic criminal law and perhaps ordinary usage of the notion of intent, does not drain the concept of moral force. Instead, understanding state intention as an objective construction ensures that adjudicators of state responsibility attend to the kinds of reasons that are of moral import in the context of political authority. Because intention requirements in the law are varied, but always motivated by a conception of the legal actors whose actions are being regulated, the content of the requirement in each context appropriately turns on our conception of the legal actor. It is not a surprise, then, that the relevant intention requirement for an individual is different from that for a corporation, or a state. In the case of a state, we are interested not in free will but political legitimacy. The conditions for legitimacy are determined, at least in part, by the apparent, objective reasons, behind state action.

### III. WHAT REASONS MAKE TORTURE A STATE CRIME? OR, THE PROBLEM WITH TORTURE

In the liberal view of state responsibility sketched above, two kinds of background "but-for" reasons elevate torture traceable to a state policy to the level of state crime: ruthlessness and cruelty. Ruthlessness refers to a demonstrated refusal to acknowledge limits on state power. Cruelty refers to a rejection of torture victims' humanity and inviolability by treating the victim as a body rather than a moral agent. Many torture victims represent a social or political group in the eyes of the state and

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115. Cf. KENT GREENAWALT, *OBJECTIVITY IN THE LAW* 94 (1992) ("Confidence that human beings are capable of discovering the mental states of others depends substantially on confidence about the intersubjectivity of language.")

116. See Tony Honore, *Responsibility and Luck*, 104 L.Q.R. 530 (1988); THOMAS NAGEL, *MORTAL QUESTIONS* 24-38 (1991).

society, such that the offense is not just to the individual torture victim.<sup>117</sup> Torture has the intended effect of denying the humanity of the entire group.

In its willingness to engage in torture, a state simultaneously rejects two constraints: legal constraint and moral constraint. Its ruthlessness denies any legal boundary on its power, and its cruelty denies the humanity of its victims, which would otherwise give rise to moral restraint. As Harold Koh has explained, “The reality of torture is the banality of torture—captors torture and act cruelly toward other human beings because they can: because they have the power to do so, and the freedom to do so.”<sup>118</sup> David Sussman has further explained, “The torturer confronts no moral or legal impediments stemming from his victim’s will, but is limited only by his own desires and interests, or the desires and interests of those he serves as an agent. . . . Torture, even the ‘lite’ variety, strives to immerse its victim in a world of absolute arbitrariness and unpredictability.”<sup>119</sup> Both ruthlessness and cruelty raise special concerns for liberalism, which is committed to a bounded state, and more specifically, to boundaries which reflect the humanity of those governed.

#### A. *Ruthlessness*

A government that allows its agents to commit torture fails to recognize boundaries on its power.<sup>120</sup> Numerous authors have observed the connection between torture and tyranny. David Luban has described torture as “a microcosm, raised to the highest level of intensity, of the tyrannical political relationship that liberalism hates most.”<sup>121</sup> Already Michel Foucault associated torture with the public spectacle of royal dominance and revenge.<sup>122</sup> Similarly, Jeremy Waldron argues that a rule against torture is emblematic of a deeper legal principle:

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117. See Jaime Malamud-Goti, *Trying Violators of Human Rights: The Dilemma of Transitional Democratic Governments*, in STATE CRIMES: PUNISHMENT OR PARDON 71, 83 (1988).

118. Harold Koh, *Can the President be Torturer in Chief?*, 81 IND. L. J. 1145, 1165 (2006).

119. David Sussman, *Defining Torture*, 37 CASE W. RES. J. INT’L L. 225, 228 (2006).

120. This discussion emphasizes torture that is permitted, albeit rarely, as a matter of policy. The Appeals Chamber of the ICTY has ruled that no plan or policy is required as an element of the definition of crimes against humanity. *Prosecutor v. Kunarac, et al.*, Case No. IT-96-23 & IT-96-23/1-A, Judgement, at para 98 (June 12, 2002). But this is aberrant.

121. David Luban, *Liberalism, Torture and the Ticking Bomb*, 91 VA. L. REV. 1425, 1430 (2005).

122. MICHEL FOUCAULT, DISCIPLINE AND PUNISH 48-49 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

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Law is not brutal in its operation. Law is not savage. Law does not rule through abject fear and terror, or by breaking the will of those whom it confronts. If law is forceful or coercive, it gets its way by nonbrutal methods which respect rather than mutilate the dignity and agency of those who are its subjects.<sup>123</sup>

Thus, he too concludes that “[t]orture is characteristic of tyranny, not free government.”<sup>124</sup>

Winston Nagan and Lucie Atkins have explored more specifically the mechanisms by which torture entrenches tyranny. Torture, they explain, “[a]ttacks the authority and legitimacy of the state, provokes or intensifies social conflict, undermines the idea of peace, and, in its tacit claim to unlimited social control, challenges the idea of the rule of law itself.”<sup>125</sup> In language suggestive of the conversion of the state from a moral agent on behalf of its citizens into an exogenous and illegitimate third party force, they argue that:

[w]hen torture becomes routine practice in governance, the state does not represent the moral order of the community, but instead is the repository of authorized violence and impermissible coercion. . . . [W]hen power is maintained by practices of torture and ill treatment, the claim to state legitimacy is illusory, or weakened.<sup>126</sup>

Nagan and Atkins point out that while torture may consist in the “infliction of extreme pain and suffering by a victimizer who dominates and controls,” only when it includes state sanction and/or participation, such that it “sends a social message of intimidation and a message about the scope, character, and strategies of official social control” does it qualify as a crime against humanity.<sup>127</sup> Torture as tyranny is not just a peculiar and marginal dimension of torture but the essence of its quasi-criminal character when committed by states.

The tyrannical character of torture is present whatever the immediate purpose for which it is employed. Daniel Rothberg has explained how the public display of brutalized bodies communicates a political message regarding the authoritarian powers of the state. In his case study, the difference between brutalization of dead bodies and torture of live bodies is unimportant in that both are intended to, and do, deny any boundaries beyond which the state cannot or will not go. Both

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123. Waldron, *supra* note 68, at 1726.

124. *Id.* at 1720.

125. Winston Nagan & Lucie Atkins, *The International Law of Torture: From Universal Proscription to Effective Application and Enforcement*, 14 HARV. HUM. RTS. J. 87, 90 (2001).

126. *Id.* at 91.

127. *Id.* at 93.

also express contempt for the individuals and groups who are brutalized.<sup>128</sup> Through horrific displays of its brutality, the Guatemalan state “established a culture of fear and intimidation characterized by enormous mistrust and heightened by the near-complete impunity that shielded perpetrators at all levels from any possible accountability.”<sup>129</sup> Unraveling the meaning behind their methods, he concludes that torture is a symbol of, and a step toward, the illegitimacy of state power.<sup>130</sup>

Torture is also tyrannical when it is available as a means of law enforcement, as in interrogational torture. When it is among the repertoire of the police, even if officially reserved for emergencies, it reserves pockets of lawlessness within the law itself. While it is surely better to torture with the aim of avoiding the loss of human life than to torture for any other purpose, if the law *ex ante* allows for torture, it fails to recognize absolute, or at least ever present, limitations on state power.<sup>131</sup> The availability of torture as a method of governance means that the state may, at its own choosing, expand its power to overwhelm the constraints under which it is otherwise placed. In the face of such explosive power, individual lives are no longer sacred, just small.

Lawrence Weschler makes a related point in connection with the solidarity movement in Poland. He observes that his Polish informants reported that their movement was an expression of their subjectivity, in opposition to their experience under a tyrannical government as mere objects of history.<sup>132</sup> A liberal state is a medium for the political agency of its constituents, and its mandate respects and supports their aspirations. At the opposite end of the spectrum, a repressive regime uses individuals and their bodies freely for the state’s independent purposes. In a perversion of agency, those state purposes are self-justifying and are not tempered or constrained by procedures and laws intended to tie them back to the interests and rights of those governed. Only in ruthless pursuit of unbridled state purpose does a state employ torture.

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128. Daniel Rothberg, *What We Have Seen Has Been Terrible: Public Presentation Torture and the Communicative Logic of State Terror*, 67 ALB. L. REV. 465, 476 (2003).

129. *Id.* at 483.

130. *Id.* at 488-89.

131. See Seth Kreimer, *Rejecting “Uncontrolled Authority Over the Body”: The Decencies of Civilized Conduct, the Past and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 423, 446 (2007) (“Ordered liberty requires . . . that government officials be denied unchecked discretion to impose extrajudicial violence, physical brutality, and degradation.”); see also Kreimer, *Too Close to the Rack*, *supra* note 68, at 291 (arguing that interrogational as well as punitive torture is unconstitutional in the United States because both “shock the conscience”).

132. Lawrence Weschler, *Afterword*, in STATE CRIMES, *supra* note 117; see also, GREEN & WARD, *supra* note 79, at 131 (torture spreads “fear and political paralysis”).

### B. Cruelty

Torture rejects not only legal constraint, but moral constraint. Specifically, the torturer rejects her victim's humanity and inviolability, the very foundations of liberal boundaries on state power.<sup>133</sup> Rejecting the autonomy of the victim, torture instead exploits her physicality. It violates her bodily integrity in order to negate the personality that depends on it. Such "government occupation of the self" is at odds with the vision of humanity that lies at the core of liberal democracy.<sup>134</sup> It is for this and related reasons, that Judith Shklar identified cruelty as the first and worst vice in the liberal view.<sup>135</sup> If liberalism begins, a la John Rawls, with the individual's two moral powers, or if liberalism begins, a la Kant, with the individual's capacity for reason and resulting moral agency, the torturing state begins and ends with the individual as a body. This is consistent with the tendency of states which systematically degrade some subset of their citizens to emphasize the physicality of targeted groups, and to deny those aspects of the group associated with their humanity, such as their art, music, literature and other dimensions of culture. Sociologist Elizabeth Stanley observes that "victims of state crime do not tend to be seen as 'victims,'" instead "they are either depicted in danger-linked ways (e.g. as subversives) or as being outside the human experience altogether (e.g. as vermin). Through such devaluations, 'victims are put out of sight or below the threshold of moral vision;' their perceived dangerousness and difference make them appear 'deserving' of state force."<sup>136</sup>

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133. See Thomas Nagel, *Personal Rights and Public Space*, 24 PHIL. & PUB. AFF. 83, 89-90 (1995) (inviolability means that one "may not be violated in certain ways—such treatment is inadmissible, and if it occurs, the person has been wronged"). Nagel illustrates the non-instrumental character of the rights that comprise inviolability in his discussion of torture: "To be tortured would be terrible; but to be tortured and also to be someone it was not wrong to torture would be even worse." *Id.* at 93; see also Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT'L L. J. 1, 16 (2002) (arguing that international law now recognizes a principle of civilian inviolability, which is "a corollary of individual dignity").

134. Kreimer, *Too Close to the Rack*, *supra* note 68, at 299.

135. JUDITH N. SHKLAR, *ORDINARY VICES* 7-8 (1984).

136. Elizabeth Stanley, *Truth Commissions and the Recognition of State Crime*, 45 BRIT. J. CRIMINOLOGY 582, 585 (2005). See also GREEN & WARD, *supra* note 79, at 129, 138 (identifying circumstances where "[t]here has been a historical devaluation of a section of the population" as among the structural conditions under which torture is more likely and noting that victims "tend to come from the marginalised, criminalised and impoverished sections of society"); Eric Stover & Elena O. Nightingale, M.D., *Introduction: The Breaking of Bodies and Minds*, in *THE BREAKING OF BODIES AND MINDS: TORTURE, PSYCHIATRIC ABUSE AND THE HEALTH PROFESSIONS* 1, 5 (Eric Stover and Elena O. Nightingale eds., 1985) ("[T]he purpose of torture is to break the will of the victim and ultimately to destroy his or her humanity.").

Amoral treatment of the person is especially inimical to the liberal state, which is motivated by a particular moral vision of the person. But every illiberal state embraces some moral conception of the person; indeed, it is the eagerness with which some illiberal states pursue the perfection of that ideal that renders them illiberal. Contrary to liberal principles, many states explicitly or implicitly fail to recognize the equal moral worth of all persons. But only a few outlier regimes in history have categorically denied the worth of some group of citizens. The discursive conditions for disparate treatment and mistreatment of all kinds are more modest; they invoke social hierarchies but do not usually deny a group some place, however undesirable, in the community. Torture goes further than most states, liberal or illiberal, are prepared to go in their ordinary stance toward even the most downtrodden in a given political community. Conversely, in those rare instances where a state does officially deny the humanity of some group, torture and other outrages become commonplace.

Elaine Scarry has explained how torture destroys its victims in multiple ways. It reduces them to their body, and in the process eliminates all those aspects of themselves which previously made up their identity. It reduces all the familiar objects of civilization around them to weapons of pain, and thereby alienates the individual from the world as she knew it. It uses the victim's own body against her, and strips her of voice.<sup>137</sup> Torture expresses the torturer's view of the victim to the victim, and at the same time reconstructs the victim's view of herself. Its very aim is to dehumanize.<sup>138</sup> Its object is not just the individual torture victim but all those in the group who might have been tortured instead. By destroying the body, it destroys the attached subject, others in the group to which that subject belongs, and ultimately, the political community in which it is now possible to substitute body for subject.<sup>139</sup>

Louis Seidman argues that "[i]n the most direct and literal sense, torture teaches us as individuals that we are slaves to our bodies and that our beliefs, our values, and our moral obligations—in short, all that makes us human—count for nothing when our bodies are at stake."<sup>140</sup> While Seidman views this as a truth, it is not the conception of the

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137. ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* 40-41, 47-50 (1985).

138. See Patrick Lee, *Interrogational Torture*, 51 *AM. J. JURIS.* 131, 136 (2006) (aim of torture is to disintegrate, where integration of various aspects of self is a basic human good).

139. See generally Franz Kaltenbeck, *On Torture and State Crime*, 24 *CARDOZO L. REV.* 2381, 2391 (2003) ("Torture destroys not only the body but also the subject. Not only the subject of the victim!").

140. Louis Michael Seidman, *Torture's Truth*, 72 *U. CHI. L. REV.* 881, 886 (2005).

person that motivates and constrains the state. The liberal conception of the person emphasizes our capacity to reason for the sake of our own projects and in order to respect others; like other political philosophies, it must take into account the body but cannot be reduced to it. To reduce the citizen to her body destroys much of what motivates the moral edifice that guards it. John Parry elaborates the parallel effect of torture on the legal world it inhabits:

[T]orture mocks the law, using punishment to gather evidence to justify the punishment already inflicted, rather than using evidence already gathered to justify punishment. When torture is legal in the sense of being an official policy, the victims' suffering and pain become irrelevant to the law and they become further isolated at the moment they are most in need of the law's protections.<sup>141</sup>

The torturing state need not be indifferent to suffering in general. Nor is it always sadistic, imposing suffering for its own sake; torture is most likely to occur in the quest for information in the context of security. But the cruelty in torture is a departure from the premise of humanity that should undergird all state policy and practice. Torture is only possible where the state has suspended that commitment to the humanity of its victim. As a practice it embodies indifference, which is just the absence of that commitment, and as a policy it communicates that indifference, which only emboldens further cruelty.

Thus, torture is the product of illegitimacy, is itself illegitimate, and breeds illegitimacy. It is the symptom of a state that cannot govern effectively and fulfill its moral function within the bounds of law. It is possible only where some group is dehumanized and excluded from the political community. It is illegitimate in its absolute and radical exercise of power and indifference to suffering and brutality. It breeds illegitimacy because it creates new and morally defective reasons to obey the state, and further alienates and segregates the group from which torture victims are drawn. Drawing on my earlier conclusions regarding the nature of criminal state intent, when we ask whether a state has committed the particular crime of torture, we should ask the following regarding the state's intent: Would a reasonable observer view the challenged policy or practice as ruthless in its indifference to legal constraint, and cruel in its disregard for the humanity of its victims?

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141. John T. Parry, *What is Torture, Are We Doing it, and What if We Are?*, 64 U. PITT. L. REV. 237, 247-48 (2003).

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IV. BEYOND THE SPECIFIC/GENERAL INTENT DISTINCTION:  
TRANSPARENCY

I have argued above that the fundamental moral question for a state, as distinct from a private individual, is the legitimacy of the political authority it claims. I further argued that the legitimacy of its authority turns on the apparent reasons behind its actions and policies. Finally, I have argued that with respect to the crime of torture, it is the ruthlessness and cruelty communicated by torture which undermine the legitimacy of any state that engages in the practice of torture. In the previous Part, my aim was to show that the inquiry into state intent should be an objective one, and more specifically, that an adjudicator of state responsibility for torture should assess whether the policy or practice in question communicates the ruthlessness and cruelty endemic to torture, and which makes it repugnant to a liberal state.

These arguments also have implications for what should not be a part of the inquiry. Because the morally relevant conception of intent in the context of state crime is an objective one, it is not of fundamental importance whether the central actors in the scheme of torture intended to accomplish the act of torture. It is not important, in other words, whether we would characterize their intentions as “specific” in the meaning of domestic criminal law.

But it would not be accurate, either, to say that the inquiry should be into general intent. It may very well be the case that the public will reasonably attribute to the government the intention to accomplish all predictable consequences of state action. But this is not necessarily the case. Robust public discourse regarding public affairs will allow for a fairly nuanced understanding of the complex motives behind state policy. It is not always the case that the specificity of the state’s purpose will relate systematically to its illegitimacy.

More important than specificity in this context, is transparency. The importance of transparency was already implicitly acknowledged by the Tate Letter, which shifted U.S. foreign immunity doctrine such that only public acts of foreign governments would be protected.<sup>142</sup> More generally, it is evident that secrecy rather than specificity of intent poses the greater threat. Intent to hide or mislead the public regarding a practice of torture communicates with particular intensity the contempt for law and moral constraint which makes torture problematic in the first place. Secrecy makes it impossible for law to govern the torturing state,

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142. Letter from Jack B. Tate, Acting Legal Adviser, Dept. of State, to Acting Att. General Philip Perlman (May 19, 1952), reprinted in 26 DEP’T OF STATE BULL. 969, 984-85 (1952).

and thereby makes the ruthless practice still more ruthless.<sup>143</sup> Secrecy also denies the obligation to justify the exercise of power on individuals, it denies the legitimate interest of the political community in what happens to the torture victim, and in this cruelty it alienates and dehumanizes her.

Torture that betrays ruthlessness and cruelty on the part of the state may stoke illegitimacy well enough on its own to qualify as quasi-criminal. But inasmuch as we face the challenge of delimiting ‘state crime’ to as narrow a sphere of state activity as possible, it may behoove us to add additional limiting principles, in the same way that we rely on more than blameworthiness to identify domestic individual crimes. If it seems too “lenient” to demarcate only secret torture as criminal, it is not. First, it is indeed the case that the states which we would characterize as most illegitimate are the ones most likely to practice torture secretly and with the least scrutiny possible.<sup>144</sup> That said, it may be the case that we have recently seen a tidal change in that it is now politically possible to be “pro-torture” inasmuch as that is taken to communicate a commitment to national security.<sup>145</sup>

Second, it is rarely the case that a state tortures on an ad hoc, public basis such that it would not be subject to quasi-criminal responsibility for its torture. Most torture is committed illicitly, but regularly. No state commits torture as a matter of public policy.<sup>146</sup> Yet torture is committed via policies, guidelines and directives—not ad hoc emergency measures.<sup>147</sup> Thus, a state that engages in torture is likely to have formed an intent both to do so and to do so under cover from public and international scrutiny.

One might object and argue that, between secret and open torture, secret torture is the lesser evil. Secret torture communicates nothing, and

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143. Mary Margaret Penrose, *Impunity—Inertia, Inaction, and Invalidity: A Literature Review*, 17 B.U. INT’L L.J. 269, 270 (1999) (“It is essential to the structure of torture that it take place in secret, in the dark, beyond considerations of shame and account.”).

144. See Ruth Wedgwood, *International Criminal Law and Augusto Pinochet*, 40 VA. J. INT’L L. 829, 836 (2000) (“Authoritarian regimes usually hide or deny their violent practices, rather than protest proffered standards.”); William Chambliss, *State-Organized Crime*, 27 CRIMINOLOGY 183, 204 (1989) (“[S]tate agencies whose activities can be hidden from scrutiny are more likely to engage in criminal acts than those whose record is public. This principle may also apply to whole nation-states: the more open the society, the less likely it is that state-organized crime will become institutionalized”).

145. See Jamieson et al, *supra* note 19, at 520 (“What is arguably novel in the contemporary War on Terror is not that a liberal democracy would engage in the illegal othering practices discussed above, but rather that it does so with a brash lack of concern about admitting it.”).

146. S. Rep. No. 249, 102d Cong., 1st Sess., at 8 (1991).

147. Luban, *supra* note 121, at 1445.

therefore cannot corrupt political culture, let alone individual attitudes toward the state. Alternatively, one might argue that, if we are confident that secret torture is worse, it reveals a flaw in a legal conception of torture that concerns itself with political attitudes. Both arguments confuse a legal standard that turns on the rational conditions for belief in the legitimacy of political authority, with one that centers on actual belief. As explained above in Part II.B., this distinction has a number of consequences, one of which is to evaluate state action retrospectively and with full information. Thus, the nature of the actions that might constitute torture should be assessed with knowledge that the public may not have had at the time those acts were committed. The fact that the state's actions were cloaked and withheld from public scrutiny is a separate fact, and one that should be accorded great weight in characterizing the action as not just de-legitimizing, but also quasi-criminal.

#### V. IMPLICATIONS FOR WITHHOLDING CLAIMS

In this Part, I assess the implications of this view for withholding claims under CAT, the primary context within which American courts are called upon to assess whether other states are engaging in torture. The official interpretation of the CAT adopted by the United States is flawed because it imposes a specific intent requirement that is neither objective nor concerned with publicity. In doing so we make a double error: we treat state crimes as essentially the same as individual crime, and we fail to distinguish between the quasi-criminal and humanitarian functions of the CAT. The best interpretation of CAT will ask whether the state's challenged practices communicate the ruthlessness and cruelty which make torture anathema. Because withholding proceedings under CAT are more humanitarian than quasi-criminal, it is not necessary to inquire further whether the challenged practices are committed openly or in hiding.

As discussed in Part I, the Board of Immigration Appeals and several US Courts of Appeal have imported a "specific intent" requirement as conceived in domestic law into immigration law. In order to show eligibility for withholding of removal under CAT, an alien must show that the torture to which she may be subject would be specifically intended by governmental actors, i.e., state agents with the actual purpose of accomplishing the criminal act of torture.

8 CFR Section 208.18(a) sets out the definition of torture which an alien must meet to qualify for withholding. Section 208.18(a)(5) provides that in order to constitute torture an act must be specifically intended to inflict severe physical or mental pain or suffering. In

*Auguste v. Ridge*, the Third Circuit concluded under this standard that “[a]n act that results in unanticipated or unintended severity of pain and suffering is not torture.”<sup>148</sup> *Auguste* further elaborates:

[F]or an act to constitute torture, there must be a showing that the actor had the intent to commit the act as well as the intent to achieve the consequences of the act, namely the infliction of the severe pain and suffering. In contrast, if the actor intended the act but did not intend the consequences of the act, i.e., the infliction of the severe pain and suffering, although such pain and suffering may have been a foreseeable consequence, the specific intent standard would not be satisfied.<sup>149</sup>

The *Auguste* court rejected the alien’s contention that torture exists where the actor had knowledge that the action or inaction might cause severe pain and suffering as “inconsistent with the meaning of specific intent.”<sup>150</sup>

A number of commentators have observed a few perverse consequences of a specific intent rule in this context. For example, governments can effectively immunize themselves from CAT by passing laws prohibiting certain unlawful practices, which will make it difficult for an immigration court to conclude that the state intends to accomplish those prohibited acts.<sup>151</sup> Moreover, the specific intent standard creates an incentive for governments “to purposefully shield themselves from knowledge of torture in their jurisdictions, and so duck their obligations under the treaty.”<sup>152</sup> Under US implementing regulations, “acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.”<sup>153</sup> But awareness, in the legal sense, of particular instances of torture is not necessary to communicate indifference to law or moral constraint.

Indeed, the specific intent standard fails to track any apparent morally relevant criteria. It leads to peculiar results. *Auguste*’s claim

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148. 395 F.3d 123, 133 (3d Cir. 2005).

149. *Id.* at 145-46.

150. *Id.* at 146.

151. See Lori A. Nessel, *Willful Blindness to Gender-Based Violence Abroad: United States’ Implementation of Article Three of the United Nations Convention Against Torture*, 89 MINN. L. REV. 71, 123-24 (2004); see also *id.* at 128 (noting that specific intent is not required in the domestic civil rights statutes that are more analogous to the remedial nature of Article 3).

152. Patricia J. Freshwater, Note, *The Obligation of Non-Refoulement under the Convention Against Torture: When has a Foreign Government Acquiesced in the Torture of its Citizens?*, 19 GEO. IMMIGR. L. J. 585, 598 (2005).

153. 8 CFR Sec. 208.18(a)(7) (2008).

was rejected because the court found there was no evidence that prison officials intended to torture him, even if they maintained conditions that would lead to pain and suffering of an intensity that might qualify the causal acts as torture in some other context.<sup>154</sup> But in *Lavira v. Att’y Gen.*, the same court (albeit a different panel) was more sympathetic.<sup>155</sup> The *Lavira* court relied on a “caveat” in the *Auguste* holding:

[W]e are not adopting a per se rule that brutal and deplorable prison conditions can never constitute torture. To the contrary, if there is evidence that authorities are placing an individual in such conditions with the intent to inflict severe pain and suffering on that individual, such an act may rise to the level of torture.<sup>156</sup>

Because *Lavira* was disabled, the court concluded that “[s]evere pain is not ‘a’ possible consequence that ‘may result’ from placing *Lavira* in the facility, it is the only plausible consequence given what Haitian officials know about *Lavira* and about their own facility.”<sup>157</sup> The result was not surprising in itself, but it was surprising in light of the earlier result in *Auguste*. It was especially surprising that *Lavira*’s claim was not distinguished on the possible grounds that a disabled person was likely to suffer still more than an able-bodied person in the deplorable conditions that prevail in Haitian prisons. Rather, the court decided that prison officials intended to inflict pain and suffering on the disabled person by placing disabled persons in the same horrific conditions that all others were placed in.

It does not seem plausible that the horrific conditions in Haitian prisons constituted torture on the facts in *Lavira* but not *Auguste*. The current standard simply fails to map onto the morally relevant questions about torture by states. Instead, having set off on the unhelpful path outlined by domestic criminal law, it must grope awkwardly to articulate what is apparent: that practices and policies which are pursued with indifference to law and the dignity of their victims constitute torture.

While claims under CAT should not turn on the distinction between general and specific intent, they probably should not turn on secrecy either. That is because while the distinction between secrecy and transparency is helpful in separating quasi-criminal from truly unanticipated, scrutinized, and therefore rare instances of torture, the latter distinction itself is of limited relevance in the withholding context. That is because Article 3 of CAT is primarily a statement of humanitarian obligation. This means that those criteria which speak to

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154. *Auguste*, 395 F.3d at 153-54.

155. 478 F.3d 158 (3d Cir. 2007).

156. *Id.* at 169 (quoting *Auguste*, 395 F.3d at 154).

157. *Id.* at 170.

the quasi-criminal character of a state policy of torture should not be part of the Article 3 inquiry.

This would represent a change from current practice as well. In *In re J-E*, the BIA seemed to believe that specific intent was absent in part because third parties were permitted to witness the alleged torture.<sup>158</sup> Similarly, the *Auguste* court was moved by the fact that the Haitian government “freely permitted the ICRC, the Haitian Red Cross, MICAG, and other human rights groups to enter prisons and police stations, monitor conditions, and assist prisoners with medical care, food, and legal aid.”<sup>159</sup> The *Auguste* court abruptly rejected “Auguste’s contention that the introduction of criminal law concepts into the standard for relief under the Convention was in error because the Convention is not about criminal prosecution, but rather about protecting the victims of torture” as “besides the point.” It insisted that “[t]he specific intent standard is a term of art that is well-known in American jurisprudence. . . .”<sup>160</sup>

Article 3 should be understood as primarily humanitarian for a number of reasons. First, the first consequence of a finding of eligibility for removal is that the plaintiff alien is permitted to remain in the United States. There is simply no defendant in these cases, and it is peculiar to view the alien’s attempt to avoid misery as but a means by which to adjudicate state guilt. In fact, the CAT as a whole, with its primary apparent purpose of aiding victims of torture, rather than punishing its perpetrators, more closely resembles a tort statute than a criminal statute.

Denying that criminal standards should be imported into Article 3 hearings does not eliminate the possibility of “naming” states responsible for torture. Limited international fora for the adjudication of state crime exist, as does the remote possibility of a civil remedy in certain jurisdictions, as in the United States. But until international institutions exist that are capable of neutrally adjudicating and enforcing state responsibility, the international community must rely on states to name and punish themselves. Articles 12 and 13 of the CAT already recognize this reality in that they call on states to investigate torture.<sup>161</sup> In this they will stand as judge and accused—unless they fragment power between branches in precisely the manner that makes torture less likely in the first place.

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158. *In re J-E*, 23 I & N Dec. 291, 301 (2002).

159. 395 F.3d at 153 (quoting *In re J-E*, 23 I & N Dec. at 301).

160. *Id.* at 145.

161. See CAT, *supra* note 2.

## VI. CONCLUSION

The continuing practice of torture is astonishing and raises many interesting and difficult questions. Many of those questions have little to do with the mental state of the sponsoring state. But constructing a morally sound conception of state intention is essential to the legal enterprise of understanding torture. Many scholars and advocates have grappled with the human costs and implications of torture; too few have attempted to identify and defend the specific elements of the legal act.

I have attempted to set forth a well-conceived account of what torture entails on the part of a state, that is, what a state must intend to do. Specifically, I have argued that a state should be deemed to have intended torture where a reasonable observer, situated within the society governed by that state but with the advantage of hindsight, would see implicit in the state's actions a rejection of both legal boundaries on its powers and moral constraints on its treatment of the most marginalized persons in its power. Where those actions are further undertaken in secrecy, or in a manner calculated to avoid discursive scrutiny, they may assume a quasi-criminal character.

The project is modest in at least two respects: I do not attempt to characterize torture in all its dimensions. Nor do I attempt to promote a conception of state intention that is appropriate in all contexts, even within the law. Just as torture has many dimensions which may be addressed separately, the fundamental concept of intention should be adapted to institutional context. That said, there is set of practices that varying elaborations of torture must illuminate. The concept of intention too does common conceptual and moral work in a variety of contexts. In particular, it makes operative the idea that agents are motivated by reasons. Because moral agents, at least individual and state agents, differ fundamentally in their constitution, and because the criteria for evaluating those reasons correspondingly differs, the operative notion of intent must be adapted as well.

The conceptual flexibility promoted in this paper is pragmatic. The absence of a compelling moral account of legal torture in the existing literature is an obstacle to legal expression of its criminality, even with respect to states. To be sure, grave political and institutional barriers exist to a legal order, domestically or internationally, in which states are legally accountable for torture. But if the law has thus far failed to give adequate legal expression to state responsibility for torture, we can begin by articulating outside of law what is now lacking in it.