EXCHANGE

Utilitarianism and the Morality of Indefinite Detention

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Don Scheid is rightly concerned with finding a way to address the sort of attacks that occurred in the U.S. on September 11, 2001. He thinks that “the most important feature that distinguishes al-Qaeda-style terrorism is its great lethality of mass murder.” What he calls mega-terrorists are people “intent on committing one or more acts of catastrophic terrorism,” including “those who have engaged in acts of catastrophic terrorism in the past and are prepared to do so again, and also individuals who attempt or plan to undertake such attacks. Conceptually, the mega-terrorist is a terrorist who poses a significant threat to undertake an act of catastrophic terrorism.” As Scheid explains, his “argument from dangerousness is essentially a utilitarian or consequentialist one,” “a kind of cost–benefit argument, balancing individual liberty against the collective security of society.”

At first blush, it might seem consistent with utilitarianism to allow for the indefinite detention of individuals because of their dangerousness. According to John Stuart Mill’s liberty principle, “the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.” Scheid argues, by way of Oliver Wendell Holmes, Jr., thus: “No society has ever admitted that it could not sacrifice individual welfare to its own existence. [If conscripts are necessary for its army, it seizes them, and marches them, with bayonets in their rear, to death.]” He concludes that, “[w]hen the stakes are high enough,” society will sacrifice individual welfare to its own existence. He believes “this consequentialist approach is essentially correct…. The idea is to detain indefinitely only very dangerous persons, that is, mega-terrorists.”

Insofar as Justice Holmes himself is concerned, when “Fort Sumter was fired on and President Lincoln called for 75,000 volunteers,” a young

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Holmes, “20 years old and shortly to be graduated from Harvard with the class of ’61, walked down Beacon Hill with an open Hobbes’s ‘Leviathan’ in his hand and learned that he was commissioned in the Twentieth Massachusetts Volunteers.” Hence, we would expect the thrice-wounded Civil War combat veteran to endorse military conscription when it is necessary to the survival of the state. More importantly, Holmes’s view is consistent with utilitarianism. Military conscription’s underlying idea is that “everyone who receives the protection of society owes a return for the benefit, and the fact of living in society renders it indispensable that each should be bound to observe a certain line of conduct towards the rest.” That conduct includes “each person’s bearing his share ... of the labours and sacrifices incurred for defending the society or its members from injury and molestation. These conditions society is justified in enforcing, at all costs to those who endeavour to withhold fulfilment.”

Hence, there is a duty to serve society that explains and justifies society’s right to impose military conscription. There is, however, no duty underlying indefinite detention.

Scheid gives two examples in support of the idea that, “as dangers become greater, more extreme measures to protect against those dangers are justified.” In the first example, “it may be justified to use a heavily armed SWAT team, tear gas and stun (concussion) grenades” in response to “a hostage situation arising from an armed bank robbery.” In the second example, “bombing a building from which rocket propelled grenades are coming is perfectly justified in the context of a war.”

Scheid then concludes: “As a general rule, individual rights and limitations on the use of force may be reduced as threatened dangers increase.” The difficulty with this argument is that it misses the point. What we ought to conclude from the examples is that as danger increases individual liberty and limitations on the use of force may be curtailed, not that individual liberty and limitations on the use of force may be curtailed as the mere threat of danger increases. In the words of Justice Holmes, there is a “clear and present danger” in Scheid’s examples.

Although he recognizes that it is “notoriously difficult to predict who will commit a violent crime,” Scheid nevertheless rejects this problem, holding that it “cannot be a conclusive objection to the preventive detention of mega-terrorists.” However, it does seem to be a requirement of a utilitarian approach that the danger be clear and present; if it is not, there are no clear and present consequences, the negative impact of which would justify the severe curtailment of individual liberty that is the essence of indefinite detention. Mill allows that “particular cases may occur in which some other social duty is so important as to overrule any one of the general maxims of justice.” However, the sorts of cases Mill has in mind that would justify kidnapping people are those where the danger is imminent, and where the loss of life is almost certain. According to this view, “to save a life, it may not only be allowable, but a duty, to steal or take by force the necessary food or medicine, or to kidnap and compel to officiate the only qualified medical practitioner.” In his essay, Scheid warns of “possible worldwide anarchy”
and it being “only a matter of time” before a portable nuclear device destroys a major city. He tells us that “the kind of terrorism we are facing is that of sustained campaigns of highly lethal terrorist groups, like al-Qaeda, who operate globally.”

But where are the sustained campaigns of highly lethal terror? No terrorist attacks anywhere on the planet approaching the scale of 9/11 have occurred in the nine years since 9/11. Indeed, 9/11 is both the standard of mega-terrorism and the sole instance of it. Scheid tells us that, “[o]nce the terrorist suspect is in custody, the emergency created by the threat the suspect represents is contained.” But if we adopt this view, we end up believing that the existence of a single individual intent on committing an act of catastrophic terrorism is sufficient to constitute a national emergency.

While Scheid tends to think of dealing with international terrorism as a sort of “quasi-war,” his view of detention is indefinite because when (if) the suspect will cease to be dangerous is indefinite. The indefiniteness of detention in war does not arise because of a particular level of dangerousness on the part of the combatants being held; rather, it arises because the length of the conflict in which they are engaged is very often undeterminable. Looking to legal doctrine for support, Scheid observes that preventive detention of dangerous individuals is found in American law. He points to the civil commitment of dangerous mentally ill persons and to laws regarding sexual predators. “The argument for sexual-predator laws is simply, that certain convicted sexual predators are too dangerous to release even after they have served their criminal sentence.” He concludes: “By analogy, a mega-terrorist who has taken it into his head to blow up buildings and kill hundreds of people also ought to be liable to preventive detention. Some terrorist suspects are simply far too dangerous to release once captured.”

This line of reasoning is a concern because it seems to be at odds with Scheid’s claim that his “perspective is broadly moral, not legal.” Why should we think that legal doctrine will supply us with good moral doctrine? If we are to take a consequentialist approach, then the moral legitimacy of indefinite detention must rest on the positive consequences that result from its implementation, not on the law. Even if the moral legitimacy of indefinite detention did rest on the law, preventive detention in American law is defined as “[c]onfinement imposed usu[ally] on a criminal defendant who has threatened to escape or has otherwise violated the law while awaiting trial, or on a mentally ill person who may cause harm.” Since Scheid’s mega-terrorists are not criminal defendants who have threatened to escape or have otherwise violated the law while awaiting trial, and since there is no claim that they are mentally ill, his conception of them is inconsistent with the conception of individuals liable to preventive detention found in American law. Moreover, the Supreme Court has denied the constitutionality of dangerousness as a sufficient condition for detention. In Foucha v. Louisiana (1992), the Court held that “the substantive component of the Due Process Clause bars certain arbitrary, wrongful government actions.” In this case the “Louisiana statute violates the Due Process Clause because it allows an insanity
acquittee to be committed to a mental institution until he is able to demonstrate that he is not dangerous to himself and others, even though he does not suffer from any mental illness.” A person “may be held as long as he is both mentally ill and dangerous.”

Indefinite detention is also a violation of Article 9 of the International Covenant on Civil and Political Rights (ICCPR), which “guarantees the right to be free of arbitrary arrest and detention.” This violation is not only a matter of international law, it is also a matter of justice. Since the ICCPR is a covenant that the U.S. voluntarily entered into, the U.S. promised to abide by it and hence has a moral obligation to do so. As Mill reminds us, “it is confessedly unjust to break faith with anyone: to violate an engagement, either express or implied, or disappoint expectations raised by our own conduct, at least if we have raised those expectations knowingly and voluntarily.”

Included in this promise is the understanding that “Article 2 of the ICCPR obliges each State Party ‘to respect and to ensure’ the rights recognized in [the] Covenant and to adopt such laws as may be necessary ‘to give effect’ to these rights.” Indeed, “the obligation is of such a high order that it ‘constitutes a treaty obligation inherent in the Covenant as a whole,’ and hence the obligation is non-delegable even in states of emergency.” This being the case, the U.S. has a legal obligation not to practice indefinite detention as well. Article VI, Section 2 of the U.S. Constitution clearly states that, in addition to the Constitution itself and U.S. laws made pursuant to the Constitution, “all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land.” Since the ICCPR constitutes a treaty obligation, whenever we violate it by practicing indefinite detention we violate the supreme law of the United States.

Finally, “there is no evidence that preventive detention works. Comparative studies of terrorism stretching back more than 20 years have concluded that draconian measures—such as prolonged detention without trial—are not proven to reduce violence, and can actually be counterproductive.” Since it may contribute to the “underlying factors [that] are fueling the spread of the jihadist movement,” namely, “injustice and fear of Western domination, leading to anger, humiliation, and a sense of powerlessness,” there is a sense in which indefinite detention can be self-defeating—it may increase the likelihood of future attacks.

Notes

2 Ibid., 4.
3 Ibid.
4 Ibid., 7.


sentence is included from Scheid’s fuller quotation of Holmes in his n. 30.


9 Holmes was seriously wounded at Ball’s Bluff, Virginia when he took a bullet “through his breast,” then critically wounded when “a bullet pierced his neck” at Antietam, and then wounded again when a “bullet cut through tendons and lodged in his heel.” Ibid.

10 Mill, On Liberty, 70.


12 Ibid., 5–6.

13 Ibid., 6.

14 Ibid.


17 Ibid., 10.


19 Scheid, “Indefinite Detention of Mega-terrorists,” 4. This echoes the sentiment expressed by President Bush in the indefinite detention rationale he gave two months after 9/11. It includes the premise that: “the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the [U.S.] and the probability that such acts will occur“ constitute “an extraordinary emergency” for national defense and this emergency is “an urgent and compelling government interest.”


21 Ibid., 5.

22 Ibid., 6.

23 Ibid., 2.


26 Ibid., 71, emphasis added.


28 Mill, Utilitarianism, 45.

29 Ibid., 17.

