

Human Rights After 9/11: Some Philosophical Issues
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Introduction

Since the destruction of the World Trade Center and attack on the Pentagon in September 2001, it has become common to say, and to accept, that “everything” changed on 9/11. But what does this “everything” encompass? For example, does it include our understanding of, and commitment to, human rights? Human rights by their nature are supposed to be universal, and so it seems odd to think that an historical event, even a very significant one, could alter what human rights command of us. Still, how we understand what human rights require, and how willing we are to accept that these requirements bind us inevitably vary from one person to the next. This interpretive dimension makes it not only possible but highly probable that one of the things that 9/11 changed is our understanding of human rights.

In this paper I examine three important philosophical issues that have arisen with respect to human rights in the wake of 9/11: whether it is possible for responses to terrorism to be reason-based; whether the proposal that terrorists forfeit their human rights is consonant with the Western rights tradition; and whether human rights may be used to justify the use of force. With respect to the first question I argue that to give up on the possibility of a reason-based response to terrorism is to give up on the possibility of rule-based action in international relations generally, and a position that is both very radical and difficult philosophically to sustain. Regarding the second question, I argue that it would be a weakness of the Western tradition if excluding terrorists from human rights were consonant with it, but that it is not at all clear that this is the case. With

respect to the third question, I argue that it may not be incoherent to use human rights as a justification for resort to violence, but that to do so would rob human rights concepts of their distinctive value by nullifying their transformative potential.

Can Responses to Terrorism Be Based In Reason?

Some have suggested that our political and moral situation in the wake of 9/11 is unprecedented and cannot adequately be encompassed by existing frames of reference and conceptual schemes. These two claims – that our situation is unique and that existing frames of reference do not apply – are distinct and do not depend on each other. For example, in his introduction of the now-famous “ticking bomb” thought experiment, Michael Walzer argues that in deciding whether to use torture to extract information from a conspirator in a catastrophic plot we must step outside our antecedent understandings of morality and justice not because what we confront in such a scenario is unprecedented but, rather, because in such a scenario we must grapple with questions that our ordinary understandings are not designed to resolve.¹ Such extraordinary circumstances can recur and they may be the same every time we face them. And in that case we may be able to develop a morality for the extraordinary. But this would not change the fact that such cases, because they are extraordinary, require us to step away from our usual concepts and frames of reference.

If it is true either that our situation post-9/11 is unprecedented, or that our situation post-9/11 cannot be encompassed by existing frames and concepts, then it will be difficult for us to remain consistent in our past and present uses of normative concepts.

¹ Michael Walzer, “Political Action: The Problem of Dirty Hands”, *Philosophy and Public Affairs* 2:2 (Winter 1973), 160-180.

If the post-9/11 situation is unprecedented, then the circumstances in which our concepts must be applied will be fundamentally discontinuous with those that have gone before, and so examples of what those concepts have directed us to do in previous applications will be of limited use for generating or predicting future applications. If our situation is not adequately encompassed by existing frames of reference and conceptual schemes, then not just the applications but the concepts themselves will be discontinuous. This means that the previous failure or success of arguments using such concepts may not carry over.

Yet if our responses to terrorism can be assessed neither on the basis of their consistency with past responses, nor on the basis of their coherence with our existing conceptual schemes and frames of reference, then what grounds can we use to judge them good or bad? Traditionally, skeptics about the reliability of inductive judgments (judgments based on past cases) have recommended we look either to the verdict of history or to our sentiments. For example, David Hume argued that all action is the product of emotion and the most that rational deliberation can contribute is a refinement of the process by which those emotions are engaged.² Social responses, such as legislation or the application of laws, are produced by a complex interplay of personal sentiment (including sympathy for others), common experience and group solidarity. Reason may offer an accurate awareness of how, as emotional responses to experience, such actions have been produced, but social action cannot be justified or consciously directed, only explained. Such explanations tend to set up powerful and effective feedback mechanisms that over time may produce changes in both individual and social

² David Hume, *A Treatise of Human Nature*, 2nd ed. L.A. Selby-Bigge and P.H. Nidditch eds. (Oxford University Press: 1978), 413-418, 519-524.

behavior. However in the historical moment we can respond only on the basis of what feels to us to be the correct course of action. Later, when we reconstruct how that response was produced we may judge it on the basis of how accurately it actually tracked what we felt and whether the consequences were pleasant, and so we may judge our response to have been good or bad. But even then, how we assess our behavior will be colored by how we imagine ourselves acting now in those circumstances, so that what is being reflected is really no more than the state of our sentiments right now.³

Edmund Burke similarly denied that social and political action could be based in anything other than emotion. For Burke, the problem of social action is not that reason cannot be a basis for action, but that there are such extensive limits on what we can know about our own situation, and about the interests and dispositions of others that our expectations about the outcome of adopting one course of action over another cannot serve as a principled constraint on what we do.⁴ We may attempt to convince ourselves using the tools of reason that some principles or rules will be better for us, either now or in the long run, but ultimately this is a fool's errand, for since the information and social calculations required to establish a determinate answer are in principle out of our reach, what ultimately what drives our conclusion will not, ultimately, reflect our reasoning but our emotions. However because the attempt to rely on reasoning is the first place is motivated by a suspicion of emotion, this inevitable resort to feelings will be obscured and denied. Social decision-making that is based in reason is thus likely to be less stable

³ On this see Henry David Aiken, "The Originality of Hume's Theory of Obligation", *Philosophy and Phenomenological Research* 42:3 (March 1982), 374-383, especially pp. 379-383, and Stephen Darwall, "Motive and Obligation in Hume's Ethics", *Nous* 27:4 (December 1993), 415-448, especially pp 418-419, 426-428.

⁴ Edmund Burke, *Reflections of the Revolution in France*, J.G.A. Pocock, ed. (Hackett Publishing:), pp. 29-31, 52-55, 68-71, *A Vindication of Natural Society*, Frank Pagano, ed. (Liberty Fund Publishing: 1982), pp 3-15, 89-91.

and less likely to hit on a solution that conduces to peace and well-being than decision-making that is self-consciously based in sentiment.⁵

Friederich Nietzsche argued that social responses are at best unadulterated reflections of personal will, most often the product of historically accumulated habits, and at worst an unreflective continuation of the tendency to sacrifice individuals to an illusion of order.⁶ When confronting a set of social requirements, either as an individual or as a set of individuals, we have two choices: acquiesce to demands for conformity that are by definition without principled motivation and whose consequences are likely to be personally devastating; or seize control of these requirements and either neutralize their content (so that they don't constrain anyone) or reshape their content so that they constrain others to conform to our will. The primary value in seizing control is not that this ensures a desired consequence, but that control itself is of value, in that it allows an experience and conception of self that strengthens and enlivens the will or the capacity to act and to be. Action in this view is not only valuable in itself but, ultimately, is the only value, as it is the only feature of our being that we can identify as fully and genuinely our own, and the only feature of our experience that is wholly positive and affirming. As an individual, it is possible to persist without doing this (although for Nietzsche such persistence is a symptom of decay and inherently unappealing). But for sets of individuals such mere persistence is not possible: sets of individuals act or they

⁵ Edmund Burke, *Reflections on the Revolution in France*, (*op cit.*) pp 77-79. On this feature of Burke's thought see Charles Parkin, *The Moral Basis of Burke's Thought* (Cambridge University Press: 1956), Francis Canavan, *The Political Reason of Edmund Burke*, (Carolina Academic Press:1960).

⁶ Friedrich Nietzsche, *Twilight of the Idols* Duncan Large, transl. ed. (Oxford University Press: 1998), 2.5-2.12,6.7, *Beyond Good and Evil*, R.J. Hollingdale transl. (Penguin Books: 1973), 199,201, *On the Genealogy of Morals*, Walter Kaufman, transl. ed. (Vintage Books: 1989), 1.13, 2.7-2.13.

disappear, for in the absence of action a set of individuals is without force and so, from the perspective of others, is not there.

Descendants of these positions may be seen today in lines of argument that reject the value of long-range planning as a constraint on institutions, emphasize the significance of sentiment and attachment in establishing and maintaining political stability, and deny the coherence of concepts such as “responsibility” and “agency” in analyses of social activity.⁷ These lines of argument allow that attention to history may help us to understand where our moral and legal responses come from, but they deny that it can help us determine whether those responses are right or good. To evaluate our responses, we must look to how they make us feel, or to whether they authentically reflect who, as a society, we are, or to whether we believe that our descendants will judge us to have been right. In the last five years there have been several statements by public officials in the United States that seem to reflect the influence of such skeptical lines of argument. The most striking example is then-Secretary of Defense Donald Rumsfeld’s Burkean comment in response to questions about the lack of evidence linking Iraq to al Qaeda: “Reports that say that something hasn’t happened are always interesting to me, because as we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns -- the ones we don’t know we don’t

⁷See for example Friederich Hayek, *The Constitution of Liberty* (University of Chicago Press: 1960), *The Fatal Conceit: The Errors of Socialism*, W.W. Bartley, ed. (University of Chicago Press: 1988), Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge University Press: 1982), *Democracy’s Discontent: American in Search of a Public Philosophy* (Belknap Press: 1996), Michael Ignatieff, *Blood and Belonging: Journeys into the New Nationalism* (Noonday Press: 1993), Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton University Press: 1995), Bat-Ami Bar On, “Marginality and Epistemic Privilege” in *Feminist Epistemologies*, L. Alcoff and E. Potter, eds (Routledge: 1993), pp 83-100.

know."⁸ Skepticism about the value of reason in public decision-making is also reflected in Vice President Dick Cheney's alleged Nietzschean statement in the wake of the attacks of Sept 11, 2001 that what mattered was that the United States act and be seen to do so, not that it act on the basis of a particular analysis, and in the repeated equation in White House press briefings of national strength with an absence of public debate.⁹

The problem with emotion, of course, is that it is usually specific to a particular subject, or at best to a group of subjects who have similar backgrounds. This specificity is a barrier to inter-subjective justification, especially when the subjects have different bases of experience and acculturation. Even if sentiment and sincere belief in its rightness is adequate to justify a course of action within a subject's own mind (something that is in itself controversial), these are not likely to prove adequate bases for justification to other actors in an international context. To abandon consistency with past action or coherence with conceptual frameworks in favor of sentiment as a basis for action is thus to abandon the possibility of offering *justifications*, as opposed to descriptions that others may respond to with pleasure or displeasure as their own constitutions dictate. Yet in the absence of justification, what basis can there be for genuine cooperation? Mere descriptions allow us to develop expectations of confluence between our activities and those of others. But in the end such predictions are no substitute for deliberate, coordinated adjustments and for these we need mutual understandings.

⁸ United States Department of Defense News Transcript, February 12, 2002 11:30 a.m. EST, published by Federal News Service, http://www.defenselink.mil/transcripts/2002/t02122002_t212sdv2.html

⁹Dick Cheney quoted in Ron Suskind, *The One Percent Doctrine: Deep Inside America's Pursuit of Its Enemies Since 9/11* (Simon & Schuster: New York, 2006). Representative remarks by successive White House Press Secretaries can be found in Office of the Press Secretary transcripts of press briefings by Ari Fleisher, September 26, 2001 at 12:38 p.m. EST, <http://www.whitehouse.gov/news/releases/2001/09/20010926-5.html> ; Scott McClellan on September 20, 2004 at 1:06 p.m. EST, <http://www.whitehouse.gov/news/releases/2004/09/20040920-7.html> ; Tony Snow, December 8, 2006 at 12:15 p.m. EST, <http://www.globalsecurity.org/military/library/news/2006/12/mil-061208-whitehouse01.htm>

What this points to is how radical it is to argue that we must or ought to act on the basis of emotion rather than reason. If we are not able to fully access and revise our behavior in light of our understanding of what our ends require, then we can neither offer nor accept guarantees regarding future performance as an inducement to cooperation. For such guarantees to work we must be able to think of ourselves and others as able to mould their subsequent behavior, and likely to do so based on their projections about future consequences. If we or others cannot directly determine their responses, or are unlikely to do so on the basis of future projections, promises about what they will do are either useless or redundant. A potential cooperator must be able successfully to predict how she will act for us to trust any guarantee she gives; otherwise, she will not know herself what she is going to do. However if she is able to predict how she will act but not change it, then we will not need her guarantee, we will be able to forecast her actions for ourselves. We must be able to make some kind of forecast of how she will respond to the circumstances or else we will have no independent grounds on which to estimate whether another's guarantees are trustworthy; but she must be able to change or we will have no need of partnership with her. We must be able to act on the basis of reason, in order to interact on a reasoned basis. And so if there is nothing but sentiment to drive our action, then social action too must be treated as determined by rules and laws that operate on us and through us but are largely outside the sphere of deliberate influence or control. This consequence of giving up reasoned action is in part why many have argued that to treat others as actors rather than objects we must assume that they are rational.¹⁰

¹⁰Donald Davidson, "Actions, Reasons and Causes", *Journal of Philosophy* 60:23 (1963), 685-700, "Psychology as Philosophy" in *The Philosophy of Psychology* (Macmillan: 1974), pp. 41-52, Dagfinn Føllesdal, "The Status of Rationality Assumptions in Interpretation and the Explanation of Action", *Dialectica* 36 (1982), 301-316.

Ultimately, the proposition that our circumstances preclude action on the basis of reason is difficult to sustain philosophically. For example, Mary Wollstonecraft argued that such skepticism at best fails to discredit reason-based decision-making and at worst is self-defeating.¹¹ To adopt the position of the social skeptic we must deny the possibility of comprehending even the most basic features of the political and social systems under which we live. But if it is really true that we cannot comprehend the systems under which we live, then we have no reason to think that we will do any better eschewing reason than using it. Indeed, Wollstonecraft argues, to give up reason as a basis for action is to give up the possibility of judging others to be, for example, qualified or unqualified, virtuous or vicious, and so to give up the possibility of there being any coherent basis on which to form preferences.¹² Really, then, to be skeptical about reason as a basis for social and political action is to commit ourselves to having nothing of value or interest to say about social and political systems.

In fact what is claimed by most of those who argue that our understanding of human rights must change in the wake of 9/11 is not this radical proposition. Rather than claiming that 9/11 has made it impossible to respond on the basis of reason, what is in fact argued in most instances is that the events of 9/11 have shown our previous understanding of what reason dictates to have been mistaken. This much more modest proposition is that what 9/11 has changed is not our circumstances, but the contours and implications of the body of evidence so that (reasoned) arguments that we previously believed to be good ones now look to be flawed and (reasoned) arguments that we

¹¹ Mary Wollstonecraft, *Vindication of the Rights of Men* pp. 35-36, 52-56, 58-61, 62-66, 71-77, 87-92, *Vindication of the Rights of Woman* pp. 123-124, 132, 159-160, 244-251, 277-288 in *The Vindications*, D.L. Macdonald and K. Scherf, eds (Broadview Press: 1997.)

¹² Mary Wollstonecraft, *Vindication of the Rights of Woman*, *op. cit.*, pp. 252-276 (discussion of the virtues).

previously dismissed or failed even to consider have turned out to be correct. It is more difficult to advocate this more modest proposition than the radical one set out above, because the more modest proposition requires those arguing it to engage with pre-9/11 examples and arguments whose interpretation or acceptance has now been shown to be mistaken. But if the more modest proposition can be established, its power as a tool of persuasion is much greater than that of the radical proposition set out above.

This may explain why the arguments of many public officials that the applicability of human rights concepts has changed post- 9/11 tend to slide from the radical proposition – that we cannot use prior frames of reference and concepts in our current situation – to the modest proposition – that we need not or ought not to use prior frames of reference and concepts. The negative elements of the radical proposition can be established without arguing that the accepted concepts were inadequate even before 9/11, and so can be more easily motivated than the modest proposition. However the price of this is to undermine the claims of any positive elements of the argument. The basis offered for endorsing the concepts proposed as a replacement for those outmoded by 9/11 is supposed to be the fact that these concepts more effectively engage the sentiments of the audience than those which preceded them, or a sincere belief that history will declare for the new concepts. Neither of these possibilities speaks, in itself, to those whose sentiments fail to be engaged or who do not believe history will vindicate the new concepts. Coherence and consistency in our moral and legal concepts seems, then, to be at the very least a practical necessity if we wish to convince others to accept the concepts and frameworks we prefer.¹³

¹³ This may be part of a larger role that reasoning plays in enabling complex cooperation. For example, Patrick Rysiew has argued that certain norms of reason can be explained through their contribution to

Do Even Terrorists Have Human Rights?

In recent years arguments that there are circumstances under which a person may forfeit her human rights have become widespread, particularly in debates about due process and torture.¹⁴ A central issue raised by these arguments is whether the proposal that terrorists fall outside the range of human rights protection is a betrayal of the Western rights tradition or a manifestation of that tradition's core elements. Many have argued that the creation and exclusion of an "Other" is inherent to Western conceptions of rights, and if they are correct, then the exclusion of actors whose behavior we find strange or threatening is precisely what we should expect from arguments grounded in the Western intellectual tradition.¹⁵ According to these critics, drawing the boundaries of moral protection so as to leave out precisely those whose well-being, capacity to plan and personal integrity we are most disposed to interfere with is an inevitable consequence of the way the concept of "personhood" functions in rights discourse.¹⁶

cooperative activity. If this is true, then the importance of principles such as logicity and coherence in moral reasoning derives from its intersubjectivity as much as from its normativity. See Patrick Rysiew, "Encouragement in Darwin?", *Facta Philosophica* 4:2 (Fall 2002), 271-286.

¹⁴ See for example, Jonathan Alter, "Time to Think About Torture", *Newsweek* Nov. 5, 2001, Alan Dershowitz, "Is There a Torturous Road to Justice?", *Los Angeles Times* Nov. 8, 2001, *Why Terrorism Works: Understanding the Threat, Responding to the Challenges* (Yale University Press: 2002), Bruce Hoffman, "A Nasty Business", *The Atlantic Monthly* (January 2002), Ruth Wedgwood, "Countering Catastrophic Terrorism: An American View" in *Enforcing International Law Norms Against Terrorism*, A. Bianchi, ed. (Oxford University Press: 2004), "Fighting a War Under Its Rules", *Foreign Affairs* 83:3 (May/June 2004), 126-129. William D. Casebeer, "Torture Interrogation of Terrorists: A Theory of Exceptions" in *Philosophy 9/11: Thinking About the War on Terrorism*, T. Shanahan, ed. (Open Court: 2005).

¹⁵ For example, David Luban argues with respect to torture that although justifications of torture are not inherent to the logic of classical liberalism, it is neither accidental nor unexpected that liberal arguments would serve as a ready resource for those seeking such justifications. See David Luban, "Liberalism, Torture and the Ticking Bomb", *Virginia Law Review* 91:6 (October 2005), 1425-1461.

¹⁶ See for example Carol Pateman, *The Sexual Contract* (Stanford University Press: 1988), Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (Free Press: 1991), Neil Stammers, "Human Rights and Power", *Political Studies* 41 (1993), 70-82, Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton University Press: 1995), Brian Tierney, "Natural Law and Natural Rights: Old Problems and Recent Approaches", *Review of Politics* 64: 3 (2002), 389-406.

Suppose these critics are right, and the tendency to exclude is inherent to Western conceptions of rights. For those who would exempt governments from human rights constraints in relation to terrorism, this propensity to rights exclusions is argued to be a strength rather than a weakness. Regardless of the intellectual tradition in which they originate, all theories of human rights must explain what is to be done in the face of failures to show proper respect for human rights, and why we are allowed to do it given that the transgressors, too, have human rights (at least *prima facie*.) The question of whether rights exclusions are to be regretted turns in large part on our assessment of the how rights exclusions fare as a strategy for answering this question.

In the Western tradition questions about enforcement are closely bound up with questions about the application of force.¹⁷ Exclusion arguments focus on types or patterns of deviance that disqualify an actor from the category of personhood, thus nullifying the constraints on behavior that moral rights would otherwise preclude. In the rights tradition that traces back to Hobbes, these disqualifications have normative consequences but they are not themselves supposed to reflect a judgment of moral value. For example, many 17th and 18th century natural rights theorists viewed themselves as moral scientists: as using the tools of natural philosophy – observation, dissection, and mathematics – to extend to the world of human activity a revolution in understanding similar to the one they believed to be occurring in astronomy and physics. For these theorists, natural rights were first and foremost scientific terms: descriptions of the primary levers of human behavior that could be used to apprehend and predict

¹⁷ For example, in Hobbes the primary defect of the state of nature is the general inability of individuals to compel others to follow through on promises due to their relative equality of power. In Locke one of the primary functions of government is to ensure consistent and effective enforcement of natural law. In Kant, the problem of justifying coercive applications of force to other individuals is the central problem of political philosophy.

observations of the social world. This scientific function gave a distinctive cast to the use of rights in moral evaluation and prescription, as they specified both the range of actions and claims that attach to humans in their natural state, and what list of properties a being must exhibit in order to count as a human. To fail to exhibit the relevant properties is to fail to be a human as described by the theory, and so to be a being about which it has nothing to say.

When an actor that we would otherwise think is a human turns out to fall beyond the scope of moral theory so construed, we must treat that actor as not just alien but inscrutable, and because it is inscrutable, dangerous. Insofar as such an actor does not exhibit the properties of personhood, we will not be able to predict or understand its behavior using moral theory; but insofar as it exhibits other of the properties of humanness neither will we be able to predict or understand its behavior using non-moral theory. If the actor bears enough of a resemblance to persons, it may be possible and worthwhile to subject it to discipline in the hope that it can be transformed into a person, or something close enough to it to be apprehensible within moral theory.¹⁸ But if the actor is too alien in its behavior and mentality, we must view it as we would a rabid beast: unpredictable and potentially devastating to those who come across it.¹⁹ Such an actor has no claims on us in its own right; it can at best be the occasion of claims on us by others. If the survival of a person were to depend on our preserving such an actor, this may establish an obligation to refrain from destroying it. In contrast, if the survival of a person were to depend on our destroying an actor that is not a person, this may establish an obligation to destroy. Excluding an actor from personhood thus does more than

¹⁸ John Locke, *Second Treatise of Government*, C.B. Macpherson, ed. (Hackett Publishing: 1980), II.ii8-12, iii.20

¹⁹ John Locke, *op cit.*, II.iii.17-19.

merely remove constraints from our behavior towards it; it opens the possibility of our being *required* to act towards it in ways that otherwise would be forbidden.

This possibility – that actions that would otherwise be forbidden may become not just permitted but required – makes arguments that exclude individuals from personhood a very powerful tool. Historically this tool has been used to explain why violent and indecent intrusions on the lives and persons of non-Europeans, poor people and women were necessary and appropriate.²⁰ However, some defenders of the Western rights tradition have argued the problem in these arguments is not that they exclude, but that they exclude on the basis of arbitrary properties.²¹

In contrast, a class such as “terrorists” or “outlaws” is constructed on the basis of patterns of decision-making and modes of behavior, and so does not pose the same problems as a class such as “women”. To exclude members of the class “women” from rights requires an argument establishing first, that they have properties that make them different in kind from other human beings from a moral point of view, and second, that this difference in kind is relevant to their having rights. To exclude members of the class “terrorists” requires an argument showing that their *behavior* is different in kind and that this difference in *behavior* is relevant to their moral status. Given the importance of properties such as rationality and capacity for reciprocity in many contemporary liberal theories, such an argument is not difficult to construct. For example, if we accept the arguments of John Rawls, Ronald Dworkin and T.M. Scanlon that our moral

²⁰ On this see Carol Pateman, *op cit.*, Charles Mills, *The Racial Contract* (Cornell University Press: 1997), Barbara Arneil, *John Locke and America: The Defense of English Colonialism* (Clarendon Press: 1996).

²¹ See for example, Martha Nussbaum, “The Future of Feminist Liberalism”, *Proceedings and Addresses of the American Philosophical Association* 74:2 (November 2000). Even Charles Mills, who argues that concepts of personhood have historically been used to justify colonialism, locates the problem not in the structure of rights-based philosophy, but rather in problematic epistemological and metaphysical assumptions. See Charles Mills, *op cit.*

communities are constructed from duties of reciprocity and mutual respect for the capacity to plan, then individuals who fail to constrain their behavior in accordance with principles such as proportionality of means to ends, mutual recognition of moral standing, and responsiveness to overtures of peace, will, in virtue of that failure, fall outside the range of our primary moral concern.²² We may be able to give reasons to ourselves for extending moral concern to such individuals, but those reasons cannot be based in principles that we may reasonably insist that other members of the community accept and so, whatever the limits that we may observe with respect to terrorists personally, we have no grounds for enforcing those limits on others.²³

On this defense, exclusions from personhood are not only acceptable but may actually be desirable for a theory of rights. Such exclusions give us the resources to explain in a principled way why we may coherently insist both that everyone has an obligation to respect the constraints imposed by human rights, and that egregious failures to respect those constraints should be met with punishments that would otherwise abrogate human rights. Indeed, not only are we able to explain this, but we gain the ability to do so without resorting to controversial metaphysical concepts such as “evil”. Terrorists are disqualified from rights not because they exhibit some special property, but because their behavior and pattern of decision-making makes it impossible as a matter of reason for us to apply the same rules to them that we apply in our dealings with other human beings. They are outlaws not because of what they are nor even what they fail to

²² John Rawls, *A Theory of Justice, Revised Edition* (Harvard Belknap: 1999), pp 10-15, *Justice as Fairness: A Restatement* (Harvard Belknap: 2001), pp 1-32, Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press: 1978), *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press: 2000), T.M. Scanlon, *What We Owe To Each Other* (Harvard Belknap: 1998).

²³For this distinction between what we may justify to ourselves and what we may justify politically see John Rawls, *Political Liberalism* (Columbia University Press: 1996).

be, but, rather, because their manner of engaging us has structured our options in a way that precludes according them rights.

A key issue here is whether there is really a difference between excluding an individual because of what she is and excluding her because of how she acts. For example, Locke did not disqualify non-Europeans from the protection of natural rights based on what they were; he disqualified them based on how they behaved (in particular, how they behaved toward European colonizers).²⁴ Alberico Gentili similarly justified Spanish aggression against the inhabitants of the New World based not on their failure to be human but rather on their failure to behave in ways that allowed humane engagement.²⁵ More generally, Jean Hampton argues that it is not possible to draw conclusions about rationality or irrationality in a naturalistic view like Hobbes's unless observations of a person's action are combined with a theory about his properties.²⁶ Only in light of a set of assumptions about how reason would lead a person to behave in response to his properties and his situation can we judge the behavior we observe to be rational or irrational. To declare an individual human but not a person, is either to declare her to have all properties of a human except the ability to successfully reason, or, alternately, to declare her to be reasoning, but with respect to properties nothing like our own so that we cannot use models that apply to us for them.

At the very minimum, then, to exclude terrorists from personhood is to identify them as alien in the sense of being outside of experience. This alienness is, moreover, an

²⁴ Barabara Arneil, "John Locke, Natural Law and Colonialism", *Journal of the History of Political Thought* 13 (1992), 587-603.

²⁵ Benedict Kingsbury, "Confronting Difference: The Puzzling Durability of Gentili's Combination of Pragmatic Pluralism and Normative Judgment", *American Journal of International Law* 92:4 (October 1998), 713-723.

²⁶ Jean Hampton, "Hobbes and Ethical Naturalism", *Philosophical Perspectives* 6 (1992), 333-353.

in-principle barrier to understanding; it's an evidence of inherent deficiency either in the terrorists or in our relationship to them. The claim is not that the behavior of terrorists forces us to develop a different set of rules in our dealings with them, but that their behavior defies our ability to develop a principled basis for dealing with them at all – or, at least, a principled basis for which we may be answerable to other persons or to the terrorists. To say that terrorists' behavior is incomprehensible to us is to say that *they* are incomprehensible, and that, in virtue of this incomprehensibility, they are unable to command responses from us in the way that we may command responses from one another.

Even if exclusion arguments are correct that it is acceptable and even necessary to conclude that some human beings may not command the responses due to full moral persons, there is an important questions about the extent to which we are able reliably to identify those that we may exclude. For example, Allen Buchanan argues that historically, excluding women and people of color from moral protections tends to be justified by specious empirical claims, so that the issue is not whether it is possible coherently to construct a definition of personhood that excludes women and people of color, but whether it is possible sincerely to commit the kinds of epistemic mistake that typically mask such arguments' incoherence.²⁷ In the case of rights exclusions, to be disqualified from personhood is to be placed in a very precarious situation, and so the consequences of mistakes are very serious. In addition, some may perceive it to be in their interest to be released from moral constraint with respect to those upon whom they depend or with whom they are in competition, and so they may perceive it to be in their

²⁷ Allen Buchanan, "Political Liberalism and Social Epistemology", *Philosophy and Public Affairs* 32:2 (2004), 95-130.

interest to encourage mistakes.²⁸ At the very minimum, the evidence seems to tell against there being a reliable way to identify who may legitimately be excluded from personhood, as each era's "obvious" grounds for concluding that certain individuals are not persons have turned out, on closer examination, to be unsustainable. In his contribution to this volume Larry May suggests that this is already proving to be the case with respect to at least some terrorists.²⁹

In fact, even a wholly personhood-based account like Immanuel Kant's does not obviously or easily permit exclusions of the sort that have been proposed with respect to terrorists. For while it is true that we can never tell for sure whether an individual is acting autonomously, this does not let us off the hook in any but the most extreme of cases. That's because in Kantian ethics it is the *capacity* for self-legislation, not the execution of it, that we are forbidden to disregard or subvert, and the burden of proof lies with those who would deny that the being before them is a potential agent.³⁰ This is why, for example, we are not allowed to lie even in the face of an iniquitous intent: though the iniquitous individual is failing in their attempt to exercise agency, they still have the potential capacity for it and it is this potential and not the actuality that places constraints upon us.³¹ What makes for the wrongness of violence, abuse and disregard is not the

²⁸ For example, Immanuel Kant argued that precisely this sort of cynical abuse of arguments justifying colonial administrations. See Immanuel Kant, "Perpetual Peace" in *Political Writings* H.B. Nisbet, transl., H.S. Reiss, ed (Cambridge University Press: 1991), pp. 106-107.

²⁹ Larry May, "Confronting Terrorist Aggression and Yet Defending Rights", ???

³⁰ Immanuel Kant, *Groundwork for the Metaphysics of Morals* (*op cit.*), 448, Christine Korsgaard, "Kant's Formula of Humanity", *Kant-Studien* 77 (1986), 183-202, "Self-Constitution in the Ethics of Kant and Plato", *Journal of Ethics* 3 (1999)1-29. For a discussion of the difference between Kant and natural law theorists in this regard see J. B. Schneewind, "Autonomy, Obligation and Virtue" in *The Cambridge Companion to Kant*, P. Guyer, ed. (Cambridge University Press: 1986), pp. 311-314.

³¹ Immanuel Kant, *Groundwork for the Metaphysics of Morals* (*op cit.*), 430.

actual expectations or needs of people around the world, but what those who are violated, abused and disregarded would be capable of if only they were treated appropriately.³²

Moreover, the Western rights tradition is very diverse, so that even if it is true that the arguments of some historical figures rely heavily on exclusion arguments, there are other lines of argument within the tradition that do not.³³ For example because conceptions of rights that trace back to the thinking of J.S. Mill emphasize capacity to experience harm rather than agency as the basis for moral standing, they are able to develop accounts of what qualifies individuals for rights protection that do not rely on exhibitions of morally acceptable decision-making or choices.³⁴ In these conceptions of rights it is very difficult to exclude any actual human being from the protection of moral rights without giving up the idea of rights altogether.

In his essay in this volume Larry May describes another line of the Western tradition that resists exclusions from the category of moral personhood: the natural law arguments advanced in late medieval and early modern treatments of international law, such as those of Francisco de Vitoria and Hugo Grotius.³⁵ For example, Steven Forde and Brian Tierney have argued that the interpretation of natural law by which Grotius and Vitoria licensed European powers' acts of war against the peoples of the Americas relied

³² Ruth Ginsberg has criticized this distinction between potential and actual selves on other grounds, arguing that it sets up a hierarchy of moral concern in which the needs of the affluent are given more moral weight than those of the poor. This worry does not reflect a problem in who is afforded moral standing, but rather a problem in what it is about them that is valued. See Ruth Ginsberg, "Philosophy is Not a Luxury" in *Feminist Ethics*, Claudia Card, ed. (University Press of Kansas: 1991), pp.126-145.

³³ For modern lines of argument in the Western tradition that reject justifications of colonial exceptions, see Sankar Muuthu, *Enlightenment Against Empire* (Princeton University Press: 2003).

³⁴ See for example D. N. MacCormick, "Rights in Legislation" in *Law, Morality and Society: Essays in Honour of H.L.A. Hart*, P.M.S. Hacker and J. Raz, eds. (Oxford University Press: 1977), pp. 189-209, Judith Jarvis Thomson, *The Realm of Rights* (Harvard University Press: 1990).

³⁵ Larry May, *op cit* ???

on a distinction between duties and permissions, not on exclusions from personhood.³⁶ Even Anthony Pagden, who argues that natural law justifications for rights have been consistently used by European powers to advance imperial political agendas concedes that in medieval interpretations of natural rights it is virtually impossible to exclude anyone sentient from their possession.³⁷ This is because in most late medieval and early modern interpretations natural law confers natural rights in virtue of the capacity for *action*, not the capacity for *rational action*. Which rights human beings have as a matter of natural law, and whether these rights establish duties of non-interference for others, thus depends on the view of what the law of nature commands with respect to human beings, not on what human beings can command of us.³⁸ The key is that these accounts of what is compelled by natural law, unlike Locke's or Hobbes's, start from the assumption that all humans count as such under the theory, so that exclusions are bizarre and difficult to justify. In contrast, Locke and Hobbes use their theories of natural law to identify who counts as human, so that the fact that their views exclude some of those we might otherwise judge to be human is unsurprising, and perhaps even a sign that the theory is working as it should.

So: the Western rights tradition does include lines of argument according to which we may exclude some actual human beings from rights, and so exempt ourselves from the restraints and duties towards them that respecting human rights would otherwise

³⁶ Steven Forde, "Hugo Grotius on Ethics and War", *The American Political Science Review* 92:3 (Sep 1998), 639-648, Brian Tierney, "Natural Law and Natural Rights: Old Problems and Recent Approaches", *The Review of Politics* 64:3 (Summer 2002), 389-406.

³⁷ Anthony Pagden, "Human Rights, Natural Rights and Europe's Imperial Legacy", *Political Theory* 31:2 (April 2003), 171-199, p. 175.

³⁸ Jean Porter argues that this is a reason to resist characterizing what natural law commands with respect to human beings as *rights*. However, such a worry might equally apply to the natural rights found in Hobbes and Locke. See Jean Porter, "From Natural Law to Human Rights: Or, Why Rights Talk Matters", *Journal of Law and Religion* 14:1 (1999-2000), 77-96, esp. pp 82-83.

impose. Such exclusions are especially easy to argue for within naturalistic theories such as are found in Hobbes and Locke, which treat moral prescriptions as the predictions of a moral science, many of the key terms of which are defined in terms of rationality and reciprocity. However, not all natural law views are naturalistic and at least some natural law views resist exclusion arguments. Moreover, there are some naturalistic views, like that of J.S. Mill, that are not amenable to exclusion arguments. The key difference lies in whether the theorist departs from the assumption that all actual human beings count as persons for purposes of the theory. Mill and the medieval natural law theorists do assume this; Hobbes and Locke do not.

Finally, even if it is not incoherent to use arguments from the Western tradition to motivate exclusions in principle, it is nonetheless difficult to justify any application of such exclusions in the world. Epistemologically, our judgments about where the boundaries of personhood differ from that of humanity are not sufficiently reliable to serve as a basis for action. These worries are magnified by worries about the incentives to abuse such arguments.

Human Rights and Political Violence

Since the events of September 11, 2001 scholars, journalists and foreign policy specialists have increasingly turned their attention to the relationship between human rights and political violence. Much of this attention has focused on hypotheses linking violations of human rights, especially civil and political rights, to individuals' propensity to participate in terrorist activity.³⁹ Another important focus of attention has been on the

³⁹ See for example Lloyd Dumas, "Is Development an Effective Way to Fight Terrorism?", *Philosophy and Public Policy Quarterly* 22:4 (Fall 2002), 7-12, Alan Krueger and Jitka Malečková, "Education, Poverty

extent to which structures and systematic tendencies to abuse human rights may establish rights and even duties to engage in violence.⁴⁰ In this, post-9/11 debates about human rights are continuous with previous debates about humanitarian justifications for war, now given a more poignant edge by the perception of an empirical connection between human security abroad and personal security at home.

The key issues in this latter debate are whether it is incoherent to use human rights to justify acts of violence, and what, if anything, there is to be gained by doing so. Can human rights still function as human rights if what it means to respect them is to make sure that they are only ignored for the right people at the right time? How would such an understanding of human rights situate them in relation to other normative concepts in international law? In the absence of a category of rightful violence – violence that at the very least ought not to be interfered with – human rights seem to become unenforceable and so of little value to their holders. But to say that human rights may justify resort to violence seems to undermine their universality, and to deflect the focus of attention so that we no longer ask “What was done?” but, rather, “Was what was done called for?”

On the face of it, there is something odd about using the concept of a human right to justify resorts to violence. Most theorists have taken the existence of human rights to imply, at the very minimum, a universal right to physical inviolability.⁴¹ This is why

and Terrorism: Is There a Causal Connection?”, *Journal of Economic Perspectives* 17:4 (Autumn 2003), 119-144, Anthony Oberschall, “Explaining Terrorism: The Contribution of Collective Action Theory”, *Sociological Theory* 22:1 (March 2004), 26-37, Ethan Bueno de Mesquita, “The Quality of Terror”, *American Journal of Political Science* 49:3 (July 2005), 515-530.

⁴⁰ See for example Brett Kessler, “Moral Justifications for Violent Responses to Terrorism” in *Philosophy 9/11: Thinking About the War on Terrorism*, T. Shanahan, ed. (Open Court: 2005).

⁴¹ See for example Jack Donnelly, “Human Rights as Natural Rights”, *Human Rights Quarterly* 4:3 (1982), 391-405, James Nickel, *Making Sense of Human Rights* (University of California Press: 1987), pp. 107-119, Malcolm Shaw, *International Law Fourth Edition* (Cambridge University Press: 1997), p. 204.

torture is so often invoked as an example of a human rights abuse: whatever skepticism a theorist might have about other of the rights named in the international bill of rights, everyone who accepts that there are human rights accepts that these rule out intrusions on individuals' physical integrity of the sort typified in torture.

But although theorists generally agree that human rights establish an absolute and universal prohibition on violations of physical integrity such as torture, rape, and extreme physical humiliation, many theorists have understood human rights to be compatible with practices such as capital punishment.⁴² Bruno Simma and Philip Alston have observed with respect to some of these views that there is a "remarkable correlation" between the protections that individuals are said to have under human rights law and the rights that have been incorporated into the U.S. Bill of Rights.⁴³ For Simma and Alston, this is a reason to be wary of interpretations of human rights norms in international law that appeal to custom, or to what has been generally accepted. Because interpretations of what has been generally accepted are inevitably read through the lens of local practice, the conclusions about what is permitted or forbidden that such interpretations generate tend to reflect attitudes toward the practices and priorities of a theorist's home government. To avoid this and other problems with interpretations that rely on what is generally accepted, Simma and Alston propose that human rights interpretation should rely on arguments about what human rights must include if they are to function as general principles of the international legal system.⁴⁴

⁴² See for example, James Nickel, *op. cit.*

⁴³ Bruno Simma and Philip Alston, "Sources of Human Rights Law: Custom, *Jus Cogens* and General Principles," *Australian Yearbook of International Law* 12 (1988-1989), 82-108 especially p. 94.

⁴⁴ Simma and Alston, *op cit.*, p. 106

Simma and Alston do not argue that a general principles, or *jus cogens*, approach to human rights requires us to interpret them as establishing an absolute prohibition on the use of violence. And indeed, it is not difficult to develop a general principles interpretation that makes human rights *compatible* with resorts to force. The preambles and jurisprudence of the international bill of rights motivate the compellingness of human rights norms in the “inherent dignity of the human person” and the fact that respect for this dignity is a necessary condition for the achievement of peace.⁴⁵ This grounding is compatible with a system of norms that permits the physical harm or even killing of human beings in some circumstances. For example, we might argue that what is required by human dignity is that we refrain from degrading or humiliating a person, and that we always treat her as of equal moral importance to ourselves; and that there are ways of causing suffering and death that are not degrading and humiliating and are compatible with treating the person killed as our moral equal. In such a view, there is not so much a right to perpetrate violence as the absence of a prohibition. Causing a person to suffer or die is not something that human dignity makes rightful: it is not something that a commitment to human dignity establishes that you have a right to do such that others must tolerate or even support it. Rather, causing a person to suffer or die is something that is permitted: it is something that human dignity does not, in itself, rule out.⁴⁶

So it is *prima facie* plausible to argue that resort to violence in a particular case is not prohibited by respect for human rights. This, however, is very different from saying that respect for human rights may be used to *justify* resort to violence. For this latter

⁴⁵See for example the *Universal Declaration of Human Rights*, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

⁴⁶On the concept of permissions in medieval natural law see Steven Forde, *op cit.*, pp. 643-645, Brian Tierney, *op. cit.*, pp. 400-406

claim to be plausible, it must be the case not only that respecting human rights is compatible with causing a person to suffer or die, but that, at the very least, respect for human rights requires in some instances that we tolerate the causing of suffering or death by others. Requiring toleration of violence is the minimum condition for human rights to establish the possibility of rightful violence – violence that, in virtue of our acceptance of human rights, we must be committed to accepting (in contrast to violence about which our acceptance of human rights has nothing to say.)

For example, on Kant's view of political right, respecting human agency requires us to refrain from interfering with individuals' ability to develop plans for themselves both as private individuals and as participants in civil society. This prohibition on interference establishes a duty to tolerate others' uses of the institutions and decision-making mechanisms in our civil society regardless of the purposes towards which such use is directed, so that in some circumstances we may have a duty to tolerate the use of civil institutions to perpetrate violence.⁴⁷ We are permitted to compete with others in our civil institutions and decision-making mechanisms with an eye to thwarting their execution of their plans; but we may not prevent them from participating and we must tolerate the outcomes of their participation, even if it is something that we would be prohibited from doing as a private individual, on our own. Kant's view of political right, then, opens up the possibility of using the concept of human dignity to argue that there are acts of violence that we must tolerate out of respect for human rights.

The rightfulness of the violence justified in this way is a very weak notion: it is violence that ought not to be interfered with by others. We might still be able to say of the perpetrator of such violence that she is unjustified and in the wrong on human rights

⁴⁷ Immanuel Kant, "Metaphysics of Morals" in *Political Writings* (*op. cit.*), pp 144-147.

grounds, even though her prosecution of the violence is rightful in the sense that others would be wrong not to tolerate it. This position is close to Michael Walzer's in his prohibition of all but a very narrow class of humanitarian interventions in *Just and Unjust Wars*.⁴⁸ However, this very limited sense of rightful violence seems not to be what most have in mind when they consider the possibility that human rights may justify resort to violence. For example, Véronique Zanetti argues that individuals have a human right to intervention, in the form of the application of coercive force on their behalf, when they are subject to massive violations of rights to life and security.⁴⁹ Zanetti envisages such applications of force primarily taking the form of non-military, preventive measures, but this is conceived as an expansion of the range of interventions to which individuals have a human right, from only military to non-military as well.⁵⁰ Similarly, Gillian Brock argues on Rawlsian grounds that international institutions ought to include an organization that has not just the right but the duty to respond to crises that threaten the vital interests of individuals, and that this duty includes the duty to respond militarily in some instances.⁵¹ In these arguments, human rights are argued to establish a category of violence that is rightful in the strong sense of being justified, and perhaps even compelled such that she would have been in the wrong *not* to resort to violence.

This much stronger category of rightful violence is the most controversial from the standpoint of traditional understandings of human rights. For it suggests that there is nothing strange or untoward in using the concept of a human right as a resource for

⁴⁸ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (Basic Books: 1977).

⁴⁹ Véronique Zanetti, "Global Justice: Is Interventionism Desirable?" in *Global Justice*, Thomas Pogge, ed. (Blackwell Publishing: 2001), 204-218.

⁵⁰ Zanetti, *op. cit.*, pp. 214, 217.

⁵¹ Gillian Brock, "Humanitarian Intervention: Closing the Gap Between Theory and Practice", *Journal of Applied Philosophy* 23:3 (2006), 277-291.

condemning violence against persons in some contexts and praising or even commanding it in others. Such a view is controversial not so much because of the conceptual puzzles it creates as for the practical one. Using the concept of a human right to justify violence seems to require commitments and paths of actions that cannot be practically reconciled, even if there is no logical contradiction.⁵² For example, Candace Vogler argues in the context of a critical analysis of Mill's moral psychology that the practical sustainability of a person's ends depends on their being supported by reasoning that combines intellectual and affective considerations.⁵³ On this view of practical reasoning, using human rights to justify violence might be thought unsustainable not because there is anything intellectually incoherent in such a use of the concept, but because the emotional or affective dispositions we would have to cultivate in order to put such a concept to use cannot be systematically maintained.

A concept of human right that can justify resort to violence requires us to develop affective dispositions to abhor violence when directed only against some, not all persons, and to make the distinction based on an abstract property, the applicability of which depends on a complex moral argument. As a matter of human psychology, it seems unlikely that we could cultivate that sort of disposition. We might be able to develop a disposition to abhor violence directed against all persons, to be indifferent to violence directed against persons, or to distinguish between persons based on a tangible or easily assignable property such as "not fully grown" or "one of us". In contrast, there seems to be a real danger that cultivating an affective disposition such as indifference to violence

⁵² For detailed discussions of consistency: among commitments see J.L. Mothershead, "The Role of Contradiction in Ethics", *Philosophy and Phenomenological Research* 22:4(1962), 490-500, Elijah Milgram, *Practical Induction* (Harvard University Press: 2000); among actions see Christine Korsgaard, *Creating the Kingdom of Ends* (Cambridge University Press: 1996.)

⁵³ Candace Vogler, *John Stuart Mill's Deliberative Landscape* (Garland Publishing: 2001).

in connection with a property such as “guilty” or “dire threat to vital interests” can only succeed in virtue of relying on more tangible properties like “one of us”, so that the ultimate outcome would be to destabilize our dispositions to abhor violence with respect to everyone else.

Even if it is possible to reconcile the use of human rights to justify resort to violence with the aspiration of universally protecting and promoting human dignity we must ask what, in the end, there is to be gained by doing so. Would such a reconciliation make for greater clarity and power in our thinking about the implications of human rights? I suspect the answer is “No.” After all, there is no shortage of coherent arguments legitimating resort to violence in the face of gross injustice, and delegitimizing objections to being subject to such violence in at least some circumstances. There is not a theoretical gap in the kinds of justifications available to us that we can remedy by developing human rights theories into accounts of legitimate resort to violence.

If anything, including resort to violence as a human right seems to shrink the potential uses to which the theory may be put. For example, using human rights to justify violence seems to undermine the potential for human rights to serve as a practical basis from which to build reciprocal relations of non-violence between groups, as has been proposed in arguments for the importance of mechanisms to document human rights violations in successful transitions to democracy, and in empirical research on the role of human rights field monitoring in political stabilization and conflict resolution.⁵⁴ Insofar as human rights are able to lay the ground for stable, non-violent relations it is because they are perceived as a way of describing or characterizing behavior that is neutral

⁵⁴ See for example Christine Bell, *Peace Agreements and Human Rights* (Oxford University Press: 2000), Todd Howland, “UN Human Rights Field Presence as a Proactive Instrument of Peace and Social Change: Lessons from Angola” *Human Rights Quarterly* 26 (2004), 1-28.

between conflicting parties. To allow the same behavior to be characterized as rights-violating when perpetrated by one side but not when perpetrated by the other undermines the potential for such perceptions of independence.

Surely what we need, and what human rights are uniquely positioned to offer, is not yet another argument that resorting to violence is okay, but rather an argument that what is right is refusing to resort to violence, and an explanation of how such refusal can be feasible even for those who have been victimized. For human rights to play these roles, they must be first and foremost a tool for condemning violence against persons wherever it is found, regardless of who it is employed by and what its purported trigger or aim might be. The point here is not that human rights may not be used as a justification for violence without ceasing to be human rights. The point, rather, is that insofar as human rights are to continue to be a concept that has something useful to add to international law and relations, they must not turn into yet another means by which violence may be legitimated.

Conclusion

In this paper I've identified three important sets of philosophical issues that human rights theorists and activists face in the wake of 9/11: whether our responses to terrorism can be reason-based; whether terrorists have the same human rights as everyone else; and whether human rights can be used to justify resorts to violence. One of the striking features to emerge from the foregoing discussion is how familiar the issues raised by these questions have turned out to be in almost every instance. For example, the issues raised by concerns about the novelty of our circumstances and the limitations this

seems to place on our ability to resort to precedent or existing theory that initially seem to call for a new approach to international law and conflict are revealed on closer examination to reflect a long-running debate about political justification and the limits of our capacity to acquire knowledge of the social. The issues raised by terrorists' apparent refusal to abide by the rules of the international social contract are also very familiar: they are the issues of whether rationality and reciprocity are necessary elements of moral standing, and if so whether it is possible to generate and justify our judgments about who is excluded from moral standing in a principled way. The issues raised by the possibility of using human rights to justify resort to violence are also continuous with pre-9/11 debates, in this case debates about the role of human rights in justifying humanitarian war.

One lesson that we might take from this is that the events of September 11, 2001 seem philosophically important not so much for the way they changed the circumstances within which our reasoning is deployed, but for the way they have changed us, the reasoners. Many of us are now willing to countenance possibilities, both moral and political, that previously would have appeared to us as non-starters, and to take seriously lines of argument whose structure or departing assumptions once seemed irredeemably flawed. Insofar as 9/11 has changed the circumstances within which we reason, it is by generating additional empirical claims and new data against which such claims may be tested, and infusing debates about the limits of our knowledge, the grounds of moral standing, and the proper uses of human rights concepts with a new urgency.