Security, ethics and the ticking-bomb argument

How we can think the unthinkable
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Abstract

The recent terrorist attacks on Charlie Hebdo in Paris have lead to a resurfacing of the legitimacy question concerning the use of exceptional measures against terrorism. In this essay I turn to security studies to address issues regarding the moral permissibility of measures aimed at defeating a proclaimed terroristic threat, often forcing us to choose between deontological and consequentialist conceptions of morality. Which counter-measures align with our democratic values? Can we conceive of just interventions outside this value system? Arguments of self-defense and just war could always rely on a known enemy and threat from which the state had to defend itself. With the broadening of the security agenda and a paradigm shift from threats to risks, both sources of insecurity and consequences of security policies have become increasingly unpredictable. Analyzing the interplay between the Foucauldian concept of risk dispositive (Foucault, 1980), the concept of dirty hands (Walzer, 2004), Taleb's black swan theory (2007) and Agamben's (2005) permanent state of exception, this essay aspires to analyze the conditionality of morality and how the way we perceive security influences our moral reasoning by taking a closer look at the discourse, practice and justification of torture in Western democracy. In order to do so, it is important to scrutinize the dominant moral views in political decision-making and to conceptualize the role of risk management in modern society. The interplay between the conditionality of morality and modern security discourse is brought to light by analyzing the implications of the ticking-bomb argument.

Introduction

On its release in June 2010, Gregor Jordan's movie 'Unthinkable' generated quite some controversy. Viewers were confronted with a terrorist who threatens to detonate three bombs in different American cities. With the lives of thousands of innocent people at stake, the FBI decides to use unconventional methods and brings in an anonymous interrogator to torture the suspect. Seeing the mysterious character 'H' torture the suspected terrorist, the viewer is faced with an age-old moral dilemma: how far can you go for the right reasons? 'Unthinkable' thus provides us with an explicit screening of what is commonly called 'the ticking-bomb argument', which states that under extreme conditions, limited time and for the sake of saving many lives, torture is justified (Bufacchi and Arrigo 2006). By confronting us with the ticking-bomb argument, 'Unthinkable' ironically asks us to think about what we supposedly cannot, about extreme scenarios in which the unthinkable might become thinkable. It forces us to accept the conditionality of what many of us today consider to be universal moral principles.

Security studies and, more broadly, international relations has struggled with these questions, which emphasize a tension between deontological and consequensialist views on morality. Arguments of self-defense and just war could always rely on a known enemy and threat from which the state had to defend itself. With the broadening of the security agenda and a paradigm shift from threats to risks, both sources of insecurity and consequences of security policies have become increasingly unpredictable. Analyzing the interplay between the Foucaultian concept of risk dispositive (Foucault, 1980), the concept of dirty hands (Walzer, 2004) and Agamben's (2005) permanent state of exception, this essay strives to analyze the conditionality of morality and how the way we perceive security is influencing this conditionality by taking a closer look at the discourse, practice and justification of torture in Western society. In order to do so, it is important to scrutinize the dominant moral views in political decision making, to conceptualize the role of risk management in modern society and ultimately to see how the contemporary practice of torture in Western society can be seen as a result of the interplay between ethics and politics.

The normative nature of political theory restricts our analytical toolset to a comparative theoretical approach. Being aware of its limitations, this article strives not to prove any ontological moral truth, but to open up the debate on our perception of morality in modern democracies. I will draw on several examples from popular culture to show how

moral judgments and ambiguities are interwoven in our everyday lives. First I will elaborate on two questions concerning *what* we think morality is and *who* is to be held accountable.

Two questions on morality

'Morality is about choice, and meaningful choice varies with the conditions of survival. (Nye 2009: 25).

Imagine you are driving a trolley, when all of a sudden you see five workmen on the rails in front of you. The breaks are not working and you are left with the choice of staying on the current track, which will inevitably lead to the death of five men, or to change the track, taking the life of one worker instead. Is it morally acceptable to make a decision which will surely kill an innocent bystander? When faced with this moral dilemma, most people are inclined to act, preferring one death over that of five (Thomson, 1985: 1395). The consequence supposedly legitimizes the driver to act. This reasoning follows the utilitarian tradition in Western political culture on judging morals, in which the consequence justifies the means (Freeman, 1994: 314).

Now imagine standing on a bridge over a single track on which a trolley is approaching five similarly unaware workmen. On the edge of the bridge stands a heavy man, who will beyond any doubt stop the train in time if he would fall from the bridge. Would you push the man from the bridge? From the utilitarian perspective, not that much has changed compared to the previous situation. In order to save five, you will have to sacrifice one; "When the act accuses, the result excuses" (Walzer 1973: 175). Most people however chose to refrain from acting (Thomson, 1985: 1409). The prevailing argument in this second thought experiment stemmed from a deontological, Kantian interpretation of moral judgment, which states: 'Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as means, but always at the same time as an end' (Hill, 1980: 84). In other words, you should only act if the act itself is deemed morally right. In the first situation we are tempted to think utilitarian, in the second we are inclined to choose the deontological perspective. Machiavelli (1532), notwithstanding his otherwise clear position regarding the desired moral reasoning of those in power, explicitly addresses our problem in 'the Prince': "Wisdom consists of knowing how to distinguish the nature of trouble, and in choosing the lesser evil." Taking our two previous examples into account, the inconsistent concept of 'lesser evil' seems to need some further clarification.

The morally ambiguous behavior in the example above shows how a difference between personal and impersonal harm can change our moral judgment, radically altering our normative judgment of a given situation (Greene, in press). In the ticking-bomb situation described earlier, thousands of lives can be saved by an immoral act against one. The fact that we have to inflict harm to a person in our direct proximity makes it more personal than the harm that might befall thousands of innocent, but at the same time unknown citizens. It is by avoiding the moral dilemma from becoming personal that we can make decisions which we otherwise might not have made. In the movie 'Unthinkable' we can see these processes unfold. The moral dilemma is kept impersonal by bringing in an anonymous outsider to inflict the torture to the suspected terrorist instead of inflicting physical violence herself. But the more the FBI agent starts to see the terrorist as a human being, the harder it becomes to condone the immoral behavior of the interrogator.

Up to now we have solely regarded one's moral judgment over the act he or she committed. Whether we regard an act as just or unjust also depends on who is making the decision. We pass different moral judgments onto those who are expected to protect us than onto our neighbors. Michael Walzer (1973) illustrates this difference by the concept of *dirty hands*. Combining a deontological and utilitarian moral perspective, he argues that politicians might find themselves in a situation where an immoral act can be the right thing to do, without making the act in itself any less immoral (Walzer 1973: 162). The paradox here is that the guilt inflicted by the Kantian belief is necessary for the good politician to refrain from becoming evil altogether. The right act therefore should feel morally wrong. This is the particular usefulness of guilt. By feeling a strong sense of guilt, the rules are only overridden when deemed unavoidable, only by means of exception (Idem). This is where Walzer's theory differs from the utilitarian perspective, in which the righteous goal always implies moral justification of the means. Further in this article we will see the importance of the exceptionality of immoral acts by taking a closer look at the risk dispositive of 'the war on terror' and Agamben's permanent state of exception (1998).

The videogame Grand Theft Auto V gives us the opportunity to apply the concept of dirty hands in practice. The controversial videogame got a lot of public criticism for a scene in which the player had to torture a man in order to get information out of him (Hern, 2013). Why did this scene, which according to the developers actually is meant to criticize the general acceptance of torture in American society, get so much negative attention? Precisely because playing a game is not regarded as an act that avoids an imminent and almost certain disastrous consequence, the obligation to torture was perceived as a wrong without a right.

The game was accused of precisely that moral shortcoming which it tried to criticize. It contained the morally wrong, but lacked the direct and irreversible consequence that made the act permissive as unavoidable.

A second explanation for the controversy can be found in the earlier mentioned differentiation between personal and impersonal harm. What was seen as shocking was not merely the act of torture, but the fact that the players themselves had to inflict the pain on a character in front of them, thereby making it an act of personal harm. Would there have been as much controversy when the player did not inflict nor see the torture himself, but merely ordered it from afar with the push of a button? The consequence for the fictional victim would have been the same, but the moral confrontation for the player would not. For politicians, the situation can often force them to make a decision none of us at home would be able nor justified to make. We will now turn to security studies and the concept of risk dispositive in order to see how impersonal harm, the concept of dirty hands and different conceptions of moral justification are influenced by the conceptual shift to a risk paradigm in Western society.

A concept of risk

'It's impossible that the improbable will never happen.' (Emil Gumbel, 1958: 201)

During the Cold War, states' security agenda was relatively straightforward. The referent object was the state and existential threats were of a military nature. This strong focus on military force was enforced by the arms race between the US and the Soviet-Union (Buzan, 1997:8). With the untangling of the Soviet Union a broadening in the security agenda slowly changed the focus from threat to risk, from certainty to uncertainty (Williams, 2005:58). Since the shift away from the traditional, neo-liberal security paradigm, several new paradigms have competed to provide a fitting and comprehensive conceptualization of security. Especially influential was the emergence of the Copenhagen School, which moved away from realist notions of threats, instead analyzing security as a dynamic, inter-subjective and communicative process (Graaf and Zwierlein, 2013). This new security paradigm abandons conceptions of objective dangers and the rational directed state responses and shows how politics is involved in a process of securitization (Buzan, 1997). Through the use of speech and acts, threats are made known, accentuated or in some cases ignored. The subjective nature of such a conception of security lends itself well for political manipulation and - as we will

see later on – the legitimization of exceptional measures. A second important contemporary event in security studies is the increased attention to a shift from political action based on perceived threats to a focus on risk-management (Graaf and Zwierlein, 2013). For now it suffices to underline the difference between these two paradigms as one of level of certainty. Where threats can be uncovered and eliminated, risk can merely be minimized. In the words of Ulrich Beck (2002: 41): 'As soon as we speak in terms of 'risk', we are talking about calculating the incalculable, colonizing the future'.

In this article I will focus on a Foucauldian concept of risk and how it influences moral conceptions in modern society. Foucault's notion of risk enables the use of a dispositive, consisting of 'discourses, institutions, architectural forms, regulatory decisions, laws, administrative measures, scientific statements, philosophical, moral and philanthropic propositions' to manage insecurity (Foucault, 1980: 194). Uncertainty leads to a situation in which the state can lay down a multitude of possible futures dependent on an array of risks that might not happen but are always possible (Ardenau and Munster, 2007: 95). It is again important to emphasize that the symbolical meaning and belief system underlying such a risk dispositive does not merely describe an ontological truth, but rather combines concrete threats with a system of prioritizing and politicizing of future dangers. Examples of such undetermined risks can be found in the discourse on cyber security and terrorism, which spreads insecurity and fear precisely because the dispositive of 'the war on terror' has made rational what was previously unknown and contingent (Wochum, 2013: 167). An unknowable future thus has to become at least imaginable in order for the risk dispositive to successfully enable politics to act according to a precautionary principle.

In 2002 former Secretary of Defense Donald Rumpsfeld was asked about the lack of evidence connecting the Iraq government with the provision of weapons to terrorist groups (Donald Rumpsfeld, 2002). His now infamous reply denies the lack of evidence to be sufficient reason not to act against the Iraq government:

"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 know. And if one looks throughout the history of our country and other free countries, it is the latter category that tend to be the difficult ones" (Idem)

We can illustrate this point by elaborating on the political tension stemming from what Nassim Nicholas Taleb (2007) called 'black swan theory'. In his book he explains how extremely low probability events can have major impacts on our society. The problem of induction underlying his argument is illustrated by the concept of a swan as a white animal that might hold true for thousands of observations, but only the sighting of one black swan is needed to completely change our previous self-proclaimed truth. By allegedly deriving our knowledge of the unknown from assumed properties of the known we exclude possibilities that have yet to be induced (better: deduced??). He argues that so-called 'unknown unknowns' are the largest drivers of social change due to their extreme and unpredictable outcomes. Examples can be found in the Wall Street crash, the earthquake leading to the breakdown of the Fukushima power plant and the 9/11 attacks on the World Trade Center. The problem is that such extreme small probability events can only be rationalized in hindsight. So how can we evade the paradox stemming from the impossibility to act on something we do not, and in many situations cannot know? How do we guard ourselves against these unknown unknowns? The political difficulty with such outliers stems from their inherent improbability, which means that the politician always either acts too late, after induction of the improbable, previously unknown risk, or too early, thereby unknowingly preventing the event that legitimizes the intervening policy to begin with. To clarify this point I will use the Charlie Hebdo attack as an example of an event that can be regarded as an unpredictable event with extreme consequences for our perception of risk.

Let us imagine two possible scenarios: in the first scenario the current socialist French government placed twenty extra police officers at the entrance of every media office that was associated with ideological critique or satire in one way or another. This expensive new policy would surely have led to mass criticism, as there was no indication or previous occasion that would had proven the current level of security as insufficient. Policy would have been made to defend people against a black swan that previously had only been speculative. With the new security measures in place, the terrorist would probably not have attempted to attack the Charlie Hebdo office. With no attack taking place the previous criticism regarding the necessity of the measure remains valid.

In the second scenario the French government accepts that there are countless unforeseeable outliers and only limited state funds, thus deciding to only act on the basis of acute and explicit security threats. After the Charlie Hebdo shooting on 15 January 2015 - thus after the previously unknown outlier became reality - the government deployed additional armed forces to guard public transport stations, places of worship and touristic

highlights (Pleasance, 2015[1]). The exceptional measures are legitimized by the experience of disaster in their absence. Once more the politician is perceived to be at fault, this time because the door to the stable only got locked after the horse bolted. We seem to find ourselves in an impasse.

The initial vagueness surrounding the means and ends in the conceptual shift from threat to risk poses both a problem and an opportunity for policy makers when it comes to legitimizing morally questionable measures. Applying the concept of risk dispositive to our previous moral dilemma, we find ourselves in the following scenario: you are a politician standing on a bridge, thinking about trolley security when you get a feeling that there *might be* a single operated trolley coming your way that *might* kill the 5 workers on the track below. At the moment you can see the trolley it will be too late, you have to choose if you have the trolley bombed before you have the certainty of the existence of the threat. In order to comply with the concept of dirty hands, the general will have to persuade both himself and society that the consequence of doing nothing might be so disastrous and irreversible that even the minimum chance of occurrence legitimizes him to take an exceptional measure. In order to legitimize the act the governance of risk has to adopt an imperative of zero-risk, in which guilt is assumed a-priori (Ardenau and Munster, 2007: 105).

The difficulty arises because of the nature of pre-emptive measures and the problem of political accountability. As the risk still has to turn in to an imminent threat when the exceptional measure is taken, we will never know if this transformation actually would have taken place and have to trust on the discourse provided by the politician. Only the management of insecurity itself justifies the use of the precautionary principle, which can best be described by a combination of the notion 'better safe than sorry' and a passage of the ILGRA report that states: '"absence of evidence of risk" should never be confused with, or taken as, "evidence of absence of risk"' (ILGRA report 2002: 6).

The increasing uncertainty and need for a clear explanation of that what is fundamentally unclear have made the concept of security into what Peterson calls: 'an ongoing matter involving political and moral choices' (Petersen, 2012: 705). He argues that this wide conception of risk and security opens up the possibility for everything to be constructed as a security issue. Combining the Copenhagen School's analytic toolkit with the Foucauldian

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[1] Pleasance, C. (2015, March 22). Soldiers on the streets: Military is brought in to protect Eiffel Tower, media offices, places of worship and public transport links as France responds to terror attacks (n.d.). Retrieved from http://www.dailymail.co.uk

concept of risk dispositive, it is additionally not only the security issue that becomes of a subjective nature, the referent object itself is also no longer limited to the nation state, but can vary depending on the dominant risk dispositive. The attack on Charlie Hebdo was for example not proclaimed by the media as an attack on either France or regional satire magazines, but as a threat to freedom of speech in the entire Western world.

Contrary to Beck's theory of risk society (Beck, 1999), in which the lack of knowledge of risks ultimately leads to a more democratic and slow process of risk management, the Foucauldian approach predicts swift governmental action, legitimized by its own discourse. Subjected to the unknown 'the sanctioning intervention precedes the anticipated action' (Wochum, 2013: 168). We now turn to one of the most controversial contemporary debates to show the underlying mechanisms of moral justification of exceptional measures in a society dominated by risk.

Torture and the permanent state of exception

When the exception becomes the rule, the machine can no longer function.
(Agamben 2005: 58)

By looking at the practice of torture in Western society, in particularly the United States, it becomes clear how the effects of the conceptual shift from the traditional security paradigm to a risk paradigm enables political elites to justify exceptional measures that seem to clash with earlier mentioned assumed democratic and ethical norms. First, a brief history of the legal prohibition of torture by the US will be given, after which Agamben's theory of the permanent state of exception will be set out to explain a transformation in the conception of moral limits.

The United States has made punishments that include torture illegal under the 8th amendment, signed the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1988 and participated in the drafting of the Universal Declaration of Human Rights, which prohibits the use of any kind of torture (Goodlife and Hawkins, 2006: 359-360). It is outside of the scope of this essay to outline the extensive debate on which conduct should or should not be seen as torture. As this essay focuses on the practice of torture of the US, the legal definition as expressed in 18 U.S.C. § 2340 will be

used[2]. Even though the compliance with international law and domestic prohibition of any act of torture seems to indicate that the days in which torture was condoned by the US authorities are far behind us, the debate fired up again after the terrorist attacks of 9/11. As part of the self-declared 'War on Terror', the Bush administration changed the status of Al Qaeda and Taliban prisoners to 'unlawful enemy combatants', to whom the regulations of the Geneva Convention concerning torture and interrogation methods do not apply (Mckeon, 2009:13). The definition of torture was altered so that certain interrogation methods which were previously forbidden, like water boarding, were now allowed (Idem). But it was not only the political elite that saw terrorism as sufficient reason for a change in the moral justification of torture, the American people themselves were also increasingly supporting the torture of terrorists when confronted with a hypothetical ticking time bomb dilemma (Luban, 2005 1426). Affected by this discourse, the 'universal' part of human rights turned out to be rather conditional in the aftermath of the 9/11 attacks.

Let us take a closer look at the underlying mechanisms of this change in moral beliefs. Walzer has applied the concept of dirty hands to the fight against terrorism, condoning extreme measures as rightful immoral acts in order to prevent the disastrous effects of more successful terrorist attacks on civil liberties (Walzer, 2004:139). The good politician should do the immoral thing to achieve the right outcome in these extreme conditions of insecurity and consequently suffer the guilt of the act. The necessity of the immoral act being regarded as such is disappearing through the dual process of the exception becoming the norm and a shift from personal to impersonal harm. In other words, in the reflexive post-9/11 American society the dirt is decreasingly perceived as dirty.

How did this transformation come about? Changing the focus from conventional threats to risks has increasingly transformed the presence of danger from the exception to the norm. Instead of striving for eliminating insecurity altogether, it is the management of insecurity and risk that is seen as the main task of security policy in the risk paradigm (Weaver, 2002). Giorgio Agamben (2005) analyzes political legitimization of exceptional measures by theorizing the emergence of such a 'state of exception'. Following up on Carl Schmitt's definition of the sovereign as 'he who decides on the exception' (1985:5), he

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[2] "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control; for a more detailed definition see: http://www.law.cornell.edu/uscode/text/18/2340

explains the justification of political immorality through a proclaimed necessity to act in a state of emergency. The state of emergency is declared by government in times of crisis to justify measures opposing conventional law in order for the sovereign to find a way to get out of the crisis situation (Agamben: 2005). With the risk dispositive of 'the war on terror', the Bush administration created a perceived security crisis that cannot be suspended, establishing a permanent state of exception which enables the state to paradoxically take juridical measures that cannot be understood in legal terms (Idem: 1). As put by Agamben: 'Indeed, as specific instances of American imperialism have expressed, and as Nazi Germany made manifest, the state of exception has ceased to function as "exceptional" in any sense, and is rather now considered as the normal form of juridical rule' (1998: 168).

The working of this permanent state of exception is exemplified by the redefinition of the juridical status of suspected terrorists and by defining moral permissibility through fictional situations. Changing the status of Al Qaeda and Taliban prisoners outside of the Geneva Convention, taking away their rights, making what was previous seen as immoral into a juridical normality, creating an entity that resembles what Agamben (1995) calls a homo sacer: a person which is reduced to bare life and can therefore be harmed without punishment. Redefining the status of these prisoners outside of the regular categories strengthens a conception of 'the other'; thereby changing the perception of torture to an act of impersonal harm. Alison Howell emphasizes a similar trend in the practice of pathologization of the inmates in Guantanamo Bay (Howell, 2007: 36). By effectively labeling the prisoners as madmen, both the unorthodox interrogation methods and the secrecy surrounding camp are legitimized. Next to alienation of the referent subject, a second legitimizing mechanism to validate and necessitate exceptional measures was the framing of the war on terror as a constant race against the clock. The ticking-bomb argument displayed in the movie 'Unthinkable', which in reality has never taken place, dominated the discourse on ethics in the war on terror in popular. By the spreading of this hypothetical scenario through means of popular culture, a previously unknown and uncertain risk became a concrete and rational source of fear. The use of the ticking bomb argument to legitimate extreme human rights violations is however not limited to popular culture and has been adopted by both scholars and policy advisors to explain the exceptional permissibility of torture in extreme cases (Bufacchi and Arrigo, 2006).

Walzer's concept of dirty hands is first applied to legitimize a perceived wrong means to prevent an even worse end, but the normalization of the exception makes the most important element of Walzer's theory disappear: necessary guilt. As the exception becomes

the rule, the necessary moral condemnation of the means falls away, as can be seen in the example of the Bush administration. The way we perceive the concept of security strongly influences what we came to believe were constant ethical norms. Whereas in a society dominated by risk, the exception has become the norm, in ethics, the norm seems to have become increasingly exceptional.

Conclusion

"Sovereignty is exercised within the borders of a territory, discipline is exercised on the bodies of individuals, and security is exercised over a whole population".

- Foucault (2007: 11-12)

Zizek explains with an analogy to the television series '24': 'The problem for those in power is how to get people do dirty work without turning them into monsters' (Zizek, 2006: 1). When the credits roll, the viewers of 'Unthinkable' are left without a definite answer to who the monster in this story is. It is one of the scarce moments where Hollywood and academia seem to agree with one another. The contestations between deontological and utilitarian conceptions of right and wrong form a grey area, which is heavily influenced by the dominant security paradigm in society. Walzer's theory of dirty hands in first instance seems to successfully bring the two moral schools together, but in the end falls short due to a lack of applicability outside an ideal type simplification of ethical dilemmas. Political discourse and technological progress make it possible to objectify both actors and exceptional measures, thereby blurring our perception of the severity of the means. A man in military facility operating a drone, bombing a town multiple thousands of kilometers away cannot simply be compared with a soldier that is stationed in that same town. The shift in security paradigm has contributed to an omnipresence of inter-subjective and communicative concept risks. Previous blindness for low probability events has made place for a security discourse that constantly emphasizes the possibility and severe impact such events would make. As the nature of risk excludes its complete elimination, current risk dispositives such as 'the war on terror', 'global warming' and 'cyber security' have instigated a permanent state of exception, in which dirty hands can become every day practice. This notion does not imply that the supposed risks posed to the referent objects of these risk dispositives should not be taken seriously, but rather that we have to be conscious of the external effects of the politics of securitization. In this

article, I have shown how moral beliefs are influenced by our conception of security. This notion is unsettling, as it contradicts a widespread belief in Western society that ethics can be expressed in a universal language. At the same time this might have an emancipating effect, as it gives us the possibility to change our conceptions of security, to choose if we position ourselves on the trolley or on the bridge. When the unthinkable becomes thinkable, we can also choose to think the better of it.

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