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## A DIFFERENT CASE FOR RESTRAINT

Michael W. Lewis\*

Mark Osiel, *The End of Reciprocity: Terror, Torture, and the Law of War* (Cambridge U. Press 2009). Pp. 676. \$45.99.\*\*

### INTRODUCTION

The United States' response to the terrorist attacks of September 11 has included the use of coercive interrogations, indefinite detention, and the targeted killing of Al Qaeda operatives in Afghanistan, Pakistan, and Yemen. These responses have been roundly criticized on legal, moral, and policy-making grounds by a wide range of scholars, politicians, and activists. Vast numbers of books, articles, and editorials have concluded that the Bush administration's legal, moral, and policy arguments were incorrect, internally inconsistent, and unsustainable. But few have taken the next step to consider the broader implications that this rejection of the Bush administration's policies has for how law, morality, and politics are shaped by terrorism. What coherence does law have if it countenances a series of heinous breaches (terrorism), but upholds its own prohibitions against any practical response (increased intelligence collection through coercion and increased incapacitation through detention and targeted killings)?<sup>1</sup> What fundamental moral principle(s) does international humanitarian law ("IHL")<sup>2</sup> rest upon if it creates a system that, from a consequentialist perspective, can be used to privilege its most egregious violators? If law and morality fail to require a specific course of action, what policy choices should a purely self-interested United States' government make about detainee treatment and targeted killings in the face of Al Qaeda's continuing threat to its civilians?

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\*\* This is the price and pagination for the paperback edition.

1. For those that take issue with this formulation, replace the word "terrorism" with the word "torture" in the first parenthetical and change the second parenthetical to "denying its victims civil or criminal remedies on national security grounds" and the question about coherence may seem more appropriate. In both cases, however, the law is allowing fundamental wrongs to continue by prohibiting responses to these wrongs on rights-based (either individual or collective) grounds.

2. The laws of war are generally referred to as international humanitarian law ("IHL") and only apply during armed conflicts. IHL contrasts with international human rights law which is the exclusive source of international law in peacetime. The interplay between IHL and human rights law during armed conflicts will receive considerable attention later in the review. Intl. Comm. of the Red Cross, *What is the Difference between Humanitarian Law and Human Rights Law?*, <http://www.icrc.org/Web/eng/siteeng0.nsf/html/5KZMUY> (posted Jan. 1, 2004).

In his book *The End of Reciprocity: Terror, Torture, and the Law of War*, Mark Osiel<sup>3</sup> examines the challenges that terrorism poses to IHL and to the American policy makers that must continue, modify, or reverse the policy responses to terrorism adopted by the Bush administration. Wary of the ease with which writing on such topics can become polemical, he sets out to dispassionately<sup>4</sup> evaluate the implications of rejecting the Bush era responses using the tools of law, philosophy, and sociology. His analysis, as the title implies, focuses on the role that reciprocity plays in law, morality, and international relations.

While the Bush administration did not explicitly justify its use of coercion, detention, and targeted killings on reciprocal grounds, Osiel finds that legal and moral arguments based upon the availability of reciprocity to restore the symmetry of risk between the U.S. and Al Qaeda more compelling than those actually offered by defenders of these policies. As a result, he frames the rejection of coercion, detention, and targeted killings as a rejection of reciprocity and then considers whether this diminution or elimination of reciprocity can be squared with existing understandings of law and morality. In both cases he concludes, rather controversially many will say, that neither law<sup>5</sup> nor morality<sup>6</sup> clearly prohibit the resort to coercion, indefinite detention, and targeted killings in response to Al Qaeda. But these conclusions should not be seen as Osiel's endorsement of such policies. Osiel writes, "[t]hat law and morality permit response in kind is not to say that they require it."<sup>7</sup>

Although law and morality may support (or at least fail to definitively condemn) resort to reciprocity in response to terrorism, they do not exist in a vacuum. Osiel's examination of the social science of war demonstrates the dangers inherent in resorting to reciprocity and the limitations of (predominantly) bilateral game theory to truly account for the costs and benefits of a multilateral world. If American self-interest lies in retaining its place in the world,<sup>8</sup> Osiel concludes that it must acknowledge the importance of soft power and seek to enhance that power whenever the concrete costs are not intolerably high. This can be done by adopting a different conception of reciprocity, a more diffuse, systemic, and multilateral reciprocity that is more commensurate with American self-identity and global leadership. "The logic of law and morality permits the United States to play by the same rules as its adversary. But the logic of interest and identity requires it to play by different and more demanding ones."<sup>9</sup>

### CONCEPTIONS OF RECIPROCITY

Osiel describes several different conceptions of reciprocity. The first and most

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3. Aliber Family Chair in Law, University of Iowa College of Law and Director of International Criminal and Humanitarian Law of the T.M.C. Asser Institute, University of Amsterdam.

4. This book succeeds in coming across as one of the least agenda-driven works on the subject. Osiel is equally critical of the legally contradictory, and at times incoherent, Bush era justifications for its responses to terrorism and of the politicized, impractical, and at times intellectually sloppy work of its many critics.

5. Mark Osiel, *Terror, Torture, and the Law of War* 147-148 (Cambridge U. Press 2009).

6. *Id.* at 218.

7. *Id.*

8. Osiel discusses that place in terms of the magnanimity of the hegemon. *Id.* at 312-325.

9. *Id.* at 396.

frequently discussed is “tit-for-tat” reciprocity, also described as “retaliatory” reciprocity.<sup>10</sup> This version of reciprocity, having its roots in international relations theory, finds a “duty to repay good deeds and at least a right to reciprocate bad ones.”<sup>11</sup> It is potentially useful in ordering anarchic systems through the consistently proportionate sanctioning of rules violations that leads to the possibility of cooperation. If country A expels five of B’s diplomats for alleged wrongdoings, then B will expel five of A’s.<sup>12</sup> If B recognizes its wrongdoing, it might only expel four diplomats as a conciliatory gesture, or it might expel six if it feels that A’s actions were unjustified.<sup>13</sup> Additional steps may be taken if one side or the other continues to feel slighted, but if consistently proportionate tit-for-tat exchanges continue, it should reestablish equilibrium between A and B where there exists no outside force capable of doing so.<sup>14</sup>

The second meaning of reciprocity which might be described as “consensual” reciprocity “involves rules applied equally to all parties in a conflict because these rules reflect an acceptable balance of benefit and burden” that both sides find agreeable.<sup>15</sup> A ready example of such reciprocity is the principle of equality among sovereign states. This conception of reciprocity is linked to tit-for-tat because any acceptable balance would have to allow parties to interact using tit-for-tat absent some other form of rule enforcement.

It is the existence of just such an outside form of rule enforcement that defines the third “social contract” meaning of reciprocity. Tit-for-tat is no longer necessary to maintain equilibrium because the parties directly involved will look to the rule enforcement mechanism to settle their disagreement and establish a new equilibrium for them.<sup>16</sup> Because no such effective enforcement mechanism exists at the international level, particularly within the context of armed conflict, it is with tit-for-tat reciprocity that Osiel is chiefly concerned.<sup>17</sup>

#### RECIPROCITY AND HUMANITARIAN LAW

Historically, humanitarian law embraced the role of reciprocity. Many early treaties explicitly included provisions that allowed for the reciprocal treatment of the enemy that was otherwise prohibited.<sup>18</sup> The Lieber Code required that the enemy be allowed quarter, but stated that enemy troops known to give no quarter should receive none.<sup>19</sup> Likewise, the 1907 Hague Convention stated that a violation of an armistice by

10. Osiel, *supra* n. 5, at 18-19.

11. *Id.* at 18.

12. *See id.*

13. *See id.*

14. *See id.* at 18.

15. Osiel, *supra* n. 5, at 19.

16. *Id.* at 21. Osiel also describes a fourth form, “deliberative reciprocity” that involves a reasoned discussion between both parties that seeks to establish the rules to be equally applied to all parties, but indicates that such a form of reciprocity is not possible between the United States and Al Qaeda. *Id.* at 240.

17. *Id.* at 21.

18. *See e.g.* Intl. Comm. of the Red Cross, *Instructions for the Government of Armies of the United States in the Field (Lieber Code)* (Apr. 24, 1863), <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument>.

19. *Id.* at art. 60, 62.

one party would grant the opposing party the right to recommence hostilities.<sup>20</sup> Even when reciprocity was not explicitly provided for in the text of a treaty, states often insisted upon their reciprocal rights. Forty parties to the 1925 Gas Protocol included reservations allowing them to retaliate with poison gas against an enemy that used it first.<sup>21</sup>

The Gas Protocol reservations illustrate the practical application of tit-for-tat during wartime. A state might retaliate in kind against the use of poison gas for the purpose of restoring symmetry between the parties and attempting to encourage the rule breaker to restore the equilibrium of non-use. After this reprisal, symmetrical gas warfare may continue or the first user may cease using gas, thus restoring the symmetry of non-use. This right of reprisal, which must be exercised proportionately to be lawful, also appeals to a sense of fairness that should not allow the rule breaker to gain a military advantage from violating a treaty. When the lack of any other effective enforcement mechanism is considered, particularly any form of inter-conflict enforcement mechanism, the practical importance of tit-for-tat reciprocity for IHL becomes clear. "If humanitarian law is to reject reciprocity in key places, how may it do so without discrediting only itself - that is, through its likely failure effectively to discipline actual conduct between belligerents?"<sup>22</sup> It is on this issue of the right of reprisal that Osiel focuses his attention. If the United States possesses a right of reprisal in its conflict with Al Qaeda, then such a right might allow the use of coercion, indefinite detention, and targeted killings even though each of those measures may be otherwise prohibited by humanitarian law.<sup>23</sup>

Osiel concedes that the role of reciprocity in humanitarian law has diminished greatly in the past half century. He cites numerous anti-reciprocal provisions from the 1949 Geneva Conventions and Additional Protocol I ("AP I").<sup>24</sup> With respect to reprisals specifically, the Geneva Conventions greatly restricted their application and AP I forbade them almost entirely.<sup>25</sup> But he points out that the United States has not ratified

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20. *Convention (IV) Respecting the Laws and Customs of War on Land and Annex to the Convention: Regulations Respecting the Laws and Customs of War on Land* sec. 1, ch. 5, art. 40 (Oct. 18, 1907), [http://avalon.law.yale.edu/20th\\_century/hague04.asp#art40](http://avalon.law.yale.edu/20th_century/hague04.asp#art40).

21. Osiel, *supra* n. 5, at 102.

22. *Id.* at 48.

23. An intuitively accessible justification for the right of reprisal can be found in the 2008 Colombian rescue of hostages from the FARC. Colombian agents disguised themselves as members of an international health NGO and infiltrated the FARC camp to locate the hostages. They then sent a Colombian military helicopter painted with Venezuelan markings to pick up the hostages and a FARC leader. The FARC leader was captured and the hostages were freed. Humanitarian law would consider this operation to be perfidious (a state disguising its agents as members of an NGO) and therefore illegal if not for the right of reprisal that allowed a proportionate response to the initial wrongdoing of hostage taking by the FARC. *Id.* at 231 n. 78.

24. *Id.* at 62-64.

25. See e.g. *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* art. 46 (Aug. 12, 1949), <http://www.icrc.org/ihl.nsf/FULL/365?OpenDocument> (prohibiting reprisals against the sick and wounded); *Geneva Convention (III) Relative to the Treatment of Prisoners of War* art. 13 (Aug. 12, 1949), <http://www.icrc.org/ihl.nsf/FULL/375?OpenDocument> (prohibiting reprisals against POW's); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)* art. 51-55 (June 8, 1977), <http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument> (prohibiting reprisals against civilians, civilian objects, cultural objects, objects essential for the civilian population, and the natural environment).

AP I, that it has persistently objected to any absolute prohibition of civilian reprisals,<sup>26</sup> and that it is not alone in its reservations about the prohibition of civilian reprisals. Both the United Kingdom and France entered formal reservations against this prohibition when they acceded to AP I.<sup>27</sup> Further, state practice has also continued to support the existence of a right of reprisal.<sup>28</sup> This last point is particularly problematic for any claims that a prohibition against civilian reprisals has become part of customary international law, and most leading experts agree that reprisals are not absolutely prohibited, but rather are “subject to stringent conditions.”<sup>29</sup>

A challenge to the view that the United States could be legally correct in justifying its use of coercion, indefinite detention, and targeted killings in response to the threat of Al Qaeda comes from the human rights community.<sup>30</sup> This challenge follows two parallel lines of argument. The first argument is that humanitarian law and its right of reprisal does not apply to the conflict between the United States and Al Qaeda because the conflict does not meet the threshold requirements of an “armed conflict.” Because humanitarian law only applies during armed conflicts, the absence of an armed conflict means that human rights law is the only applicable source of law.<sup>31</sup> The second challenge concedes that an armed conflict exists, but insists that certain core human rights provisions continue to apply during times of armed conflict, establishing a different floor for conduct than that created by humanitarian law.<sup>32</sup>

Osiel’s response to these claims is sharp, incisive, and exceptionally important for those that work in this field. He broadly decries the lack of practical seriousness displayed by many of those involved in these debates. While satisfyingly clean deontological lines are often drawn and defended by scholars, a refusal to consider the actual consequences and the messy realities of the conflicts which these rules are being asked to govern risks subjecting humanitarian law to ridicule by the practitioners (the military) that must believe in humanitarian law if it is to act as any sort of practical limitation on behavior.<sup>33</sup> Practitioners of humanitarian law have underscored the importance that such credibility has for fostering compliance with the law’s restrictions,<sup>34</sup> but the academic community rarely appears interested in such practicalities.

In response to the claim that the United States and Al Qaeda are not involved in an

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26. This was in large part due to the Cold War logic of Mutually Assured Destruction. The United States refused to recognize an absolute prohibition of the right of reprisal against a civilian population in response to persistent, deliberate, and massive attacks directed against its own civilian population.

27. Osiel, *supra* n. 5, at 55.

28. Consistent state practice by itself does not prevent a prohibition from becoming a customary norm. The mere fact that many states engage in torture does not undermine the customary prohibition against torture, in part because torturing states do not claim to be legally justified in using torture. In contrast, states employing reprisals often claim that such actions are legal adding the element of *opinio juris* to the practice. *Id.* at 55-57.

29. *Customary International Humanitarian Law vol. I: Rules* 513 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., Cambridge U. Press 2005).

30. See Osiel, *supra* n. 5, at 98-101.

31. See *id.*

32. See *id.*

33. *Id.* at 109-110 n. 319.

34. See e.g. Geoffrey S. Corn et. al., *The War on Terror and the Laws of War: A Military Perspective* (Oxford U. Press 2009).

armed conflict, Osiel adds a concern about the politicization of scholarship to his broader critique of scholarly disengagement. He describes the efforts of Mary Ellen O'Connell to greatly narrow the definition of armed conflict and the application of humanitarian law. O'Connell begins from the premise that legally "armed conflict should be treated as a declining category of human conduct" despite the existence of numerous significant military confrontations.<sup>35</sup> She cites the intensity requirement used by the International Criminal Tribunal for the Former Yugoslavia ("ICTY") in certain cases and describes a "zone of combat" in which such an intensity requirement is met, as representing the temporal and physical boundaries of humanitarian law's application.<sup>36</sup> However, in establishing the criteria for determining the threshold of armed conflict, O'Connell ignores other decisions that would lower such a threshold and she creates a territorial control requirement that is not found in either the Geneva Conventions or Additional Protocol II, instead relying on statements of "[I]earned European commentators."<sup>37</sup> To Osiel this appears less like a scholarly attempt to describe the current state of the law and more like a piece of litigation advocacy.<sup>38</sup> Moreover, adopting such vague temporal and physical boundaries, which are much more difficult to discern in the moment than they are with the benefit of hindsight, are practically unworkable.

No serious scholar or practitioner of military affairs would define war so narrowly as to be abruptly discontinuous in the way O'Connell suggests – to begin, end, and start up again every time a soldier picks up or puts down a rifle on a given street corner. One is almost embarrassed to have to mention such considerations since they may appear self-evident. Yet prominent legal critics of the Bush administration like O'Connell make no effort to anticipate and refute them.<sup>39</sup>

In responding to the claim that human rights law should apply co-extensively with humanitarian law, Osiel returns to the important role that international relations theorists believe reciprocity can play in ordering anarchic systems.<sup>40</sup> Because human rights law generally focuses on the universal application of fundamental norms, it leaves very little room for reciprocity.<sup>41</sup> The importation or overlay of human rights law into humanitarian law threatens to remove or greatly diminish the effectiveness of the only existing inter-conflict ordering mechanism, the use of tit-for-tat reciprocity. But even if this undesirable result were not the case, Osiel points out that human rights law suffers from internal conflicts of its own that will limit the clarity that many advocates see as its contribution to humanizing armed conflict. While the United States' response to terrorism clearly abridges the guarantees that human rights law grants to all people (including terrorists), there is a question about how broadly such individual guarantees can be read before they begin to interfere with the human right to personal security that

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35. Osiel, *supra* n. 5, at 114.

36. *Id.* at 116-118.

37. *Id.* at 116.

38. *Id.* at 116 n. 28.

39. *Id.* at 114-115.

40. Osiel, *supra* n. 5, at 111, 120-121.

41. *Id.* at 111.

is supposed to be enjoyed by the terrorists' targets.<sup>42</sup>

Recasting the discussion about the amount of legal restraint humanitarian law imposes on the principles of proportionality and military necessity into an argument about the "boundaries" between competing "fundamental" human rights of freedom and personal security is not likely to yield clearer or "better" answers. Rather, Osiel urges human rights advocates to pay more attention to existing humanitarian law doctrines (such as proportionality) that are as amenable to "objective" expert analysis as any rights-based claim. Although he recognizes that such engagement from the human rights community is unlikely, because in order to effectively engage in an internal critique of humanitarian law, one must first acquire a sufficient knowledge of the subject, a knowledge that most human rights advocates disdain.<sup>43</sup>

Osiel concludes part one by reaffirming his view that humanitarian law should remain the predominant body of law governing war, and that the principle of reciprocity retains a central place within humanitarian law. As a result, he believes that the United States' use of coercion, indefinite detentions, and targeted killings was not contrary to international law as such law was understood and adopted by the United States.<sup>44</sup>

#### RECIPROCITY AND MORALITY

In assessing the morality of the Bush administration's responses to Al Qaeda, Osiel examines the jurisprudential argument advanced by Jeremy Waldron, Rawlsian, and Kantian conceptions of fairness and the role of humanitarian law as a vehicle for corrective justice. He ultimately concludes that morality does not preclude the responses to terrorism taken by the United States.

Waldron's jurisprudential claim is that a prohibition of brutality transcends ordinary legal rules and positive law that are subject to revision in changing circumstances. He describes the ban on torture as "archetypal" for liberal societies, and, therefore, a ban that cannot be relaxed without dire consequences for the very legal framework upon which liberal society stands.<sup>45</sup> Retaining his eye for the practical, before engaging Waldron's main argument Osiel first mentions that the article which was ostensibly directed towards the White House and national security policy makers was made without apparently consulting any specialists in national security law or intelligence gathering, another reminder of the apparent academic disinterest in actual consequences.<sup>46</sup>

Osiel takes issue with Waldron's conception that law is rooted in the principle of non-brutality. If that is so, he asks, then how can law permit war, which is the epitome of brutality even when all the "unnecessary" suffering has been eliminated?<sup>47</sup> He goes on to discuss the far more subtle "brutality" (mental as well as physical) that incarceration inflicts upon its sufferers and points to cognitive psychology research that explains why

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42. *Id.* at 134-136.

43. *Id.* at 146.

44. *Id.* at 147-148.

45. Osiel, *supra* n. 5, at 152-154.

46. *Id.* at 153 n. 12.

47. *Id.* at 154.



torture will always be perceived as much more brutal than other sanctions which may cause more damage.<sup>48</sup> Finally, he addresses Waldron's argument for desirable ambiguity in the law. Waldron believes that we should not attempt to define torture clearly, because drawing a line invites conduct to approach that line. If our morality demands an absolute prohibition on brutality, then inviting near-brutality is indefensible.<sup>49</sup> Osiel responds by pointing out that the other side of ambiguity is the loss of accountability. If torture is vaguely defined it will immunize public officials committing torture from civil suits and may even do so for criminal actions.<sup>50</sup> As a result, Osiel finds Waldron's concept that morality demands an absolute prohibition on brutality unconvincing.

To the extent that "fairness" underlies the morality or justice of humanitarian law, Osiel next examines Rawlsian and Kantian views of fairness and reciprocity. Osiel describes<sup>51</sup> Rawlsian reciprocity as the pre-conflict agreement between parties about the rules that will govern their interactions. This agreement takes place behind a "veil of ignorance" which prevents either party from knowing which position it will occupy once the rules are established.<sup>52</sup> In this way, each party decides what minimal protections it finds acceptable should it find itself in a disadvantaged position. Rawls, however, requires that both parties behind the veil of ignorance are interested in existing within the same society.<sup>53</sup> Where that shared interest does not exist, as Osiel believes it does not exist between the United States and Al Qaeda based upon Al Qaeda's insistence that the West be destroyed and upon American unwillingness to accept civilian targeting, Rawlsian reciprocity cannot apply. For Rawls, "[t]hose who will not sign this social contract remain in the state of nature, where nothing done to or by them can hence be considered unjust."<sup>54</sup> Osiel stresses, however, that although the two sides do not currently share a compatible vision of society, thus permitting the moral choice of adopting harsh measures against one another, this does not relieve the United States from the responsibility of trying to seek some future mode of coexistence.<sup>55</sup> Osiel describes a Kantian view of fairness as one that allows each participant in a social interaction to impose risks upon others only so long as the other may impose the same risks on him or her.<sup>56</sup> Unlike Rawls, Kant does not require the participants to share a vision for society, but instead only requires that "a given maxim of conduct can, in principle, be extended to all concerned, governing them equally."<sup>57</sup> The only qualification is that such a

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48. *Id.* at 157-159. He discusses the "mental 'heuristics'" which make the mental conception of graphic punishment far more available and mentally "comprehensible" to outside observers than the more subtly damaging effects of less graphic sanctions. There is an argument to be made that corporal punishment is more ethically defensible than incarceration in some circumstances, a claim that observers would find psychologically hard to comprehend. *Id.* at 158.

49. Osiel, *supra* n. 5, at 164-165; Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 Colum. L. Rev. 1681, 1695-1717 (2005).

50. Osiel, *supra* n. 5, at 165.

51. My own limited knowledge of Rawls and Kant does not allow me to fairly critique Osiel's characterization of their works and those of their many interpreters. Therefore, this portion of the review will be limited to describing Osiel's characterization of their works and the conclusions he draws from them.

52. *Id.* at 168-177.

53. *Id.* at 173.

54. *Id.* at 176.

55. *Id.* at 176-177.

56. Osiel, *supra* n. 5, at 180.

57. *Id.* at 181.

generalized maxim of conduct must be sustainable.<sup>58</sup>

Terrorism is “unfair” because of the choice to which it puts its victims. Osiel illustrates this choice by recalling a statement attributed to Golda Meir in her conversation with an Egyptian interlocutor: “We can perhaps someday forgive you for killing our children, but we cannot forgive you for making us kill *your* children.”<sup>59</sup> By making its targets choose between protecting their own innocents and waging war upon other innocents, terrorism strikes at the heart of western liberal identity, thus disrupting the symmetry of risk between the parties. Were the West to restore symmetry by joining with Al Qaeda and applying this maxim of conduct equally, it would be unsustainable, for a truly reciprocal response to the 9/11 attacks that took into account both the symbolic value of the targets and the magnitude of the civilian harm would involve capturing a Saudi Arabian airliner and flying it into Mecca during the Hajj.<sup>60</sup> Because such a response is unthinkable, then to some extent we have already reached the end of reciprocity.

But if the task of legal justice is to restore the symmetry of risk by imposing offsetting risks upon rule violators and tit-for-tat reciprocity presently offers the only means for imposing offsetting risks, then might other less horrific and more sustainable responses be justified?<sup>61</sup> This leads to a central question that Osiel says has never even been posed in the public debate over torture: “Are torture, sustained detention, and targeted killing ever a commensurate response to terror? Do they contribute to restoring the symmetry of risk that humanitarian law seeks to maintain?”<sup>62</sup> Although he does not purport to directly answer this question, Osiel does remind the reader that humanitarian law understands fairness as a matter of process, not of result. *Jus in bello* rules apply to aggressor and victim alike and are not subject to modification for the purposes of facilitating the just result that aggression should fail.<sup>63</sup> This can cut both ways in answering the question posed. On the one hand, because humanitarian law is not designed to yield a specific outcome to a conflict (e.g. that terrorists should lose), then it will not grant those opposing terror any special exemptions from its restrictions. On the other hand, terrorists clearly violate humanitarian law and if it can be shown that the use of proportionate reprisals (coercion, etc.) serves to restore the symmetry of risk thereby improving the overall process between the parties, then it could be argued that such reprisals are justified.

Osiel concludes his discussion of morality by saying that, like law, morality operating exclusively on its own, does not prohibit coercion, indefinite detention, and targeted killings of Al Qaeda leadership. But he also reiterates that just because morality, like law, allows something does not mean that it recommends it.

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58. *Id.* at 182. It is this sustainability requirement that made the logic of Mutually Assured Destruction immoral. Even though the maxim of conduct (mutual annihilation) was extended to both parties, its implementation was not sustainable and therefore immoral from a Kantian perspective.

59. *Id.* at 179-180.

60. *Id.* at 208.

61. Osiel, *supra* n. 5, at 181.

62. *Id.* at 211.

63. *Id.* at 212.

## RECIPROCITY AND THE SOCIAL SCIENCE OF WAR

If law and morality accept the use of tit-for-tat reciprocity as an ordering mechanism during armed conflict, the question still remains whether it is a mechanism that the United States should resort to in responding to Al Qaeda. Osiel's discussion of cultural sociology in wartime calls into doubt the advisability of employing tit-for-tat reciprocity because of its likely ineffectiveness in restoring symmetry and because of the costs that it will impose upon the United States for resorting to reciprocal measures.

One fundamental risk associated with tit-for-tat reciprocity is the possibility of escalation. To return to the Gas Protocol example used at the beginning of this review, one scenario envisions the initial violator (A) reacting to retaliation in kind (by B) by returning to the equilibrium of non-use. Another possible response from A would be to increase the use of gas and spread it across other sectors of the battlefield. B might respond in kind and A might react to that retaliation by attacking B's cities with gas. If this sort of escalation is one foreseeable outcome of tit-for-tat reciprocity, it behooves us to understand the likelihood of this undeniably negative outcome. The social science of war tells us that escalation is not only a possible result of tit-for-tat reciprocity, but that it is the likely result.<sup>64</sup> Because the language of war inherently inflates the threat, portrays opponents negatively, and because the fog of war is likely to prevent an accurate understanding of an opponent's counter moves, tit-for-tat is more likely to lead to an escalating spiral of violence rather than a restoration of pre-violation equilibrium.<sup>65</sup>

This compelling narrative not only casts doubt on the wisdom of employing tit-for-tat reciprocity in this case, it seems to potentially undercut Osiel's earlier conclusions about reciprocity's place in humanitarian law. But a close inspection of his conclusion after part one confirms that he is focused on whether the American belief that humanitarian law includes the right of reprisal can be legally justified, not on making a prescriptive recommendation that tit-for-tat reciprocity remain undisturbed by humanitarian law. Still, the prescriptive tone that much of part one takes seems to be placed in doubt by this sociological view of tit-for-tat reciprocity.

Osiel also challenges the wisdom of the American response to Al Qaeda on purely self-interested grounds. America's place in the world matters. Its ambition to spread its best ideals and institutions throughout the world are a source of tremendous "soft power" that positively influences the actions of other nations toward the United States in both subtle and profound ways. To the extent that a lack of American restraint in its response to Al Qaeda damages that power, that lack of restraint should be reexamined. "In the 'war on terror,' it is the ambition for power - through power's own logic - that should lead to American restraint, more than any norms of law or morality."<sup>66</sup>

Still another view that counsels American restraint builds on the importance of soft power and America's place in the world. If the United States occupies the position of hegemon, then it benefits greatly from stability in the world order. To preserve this systemic stability, self-interested hegemons willingly incur short-term costs in order to

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64. *Id.* at 244-248.

65. *Id.* at 246, 258-259, 273-274.

66. Osiel, *supra* n. 5, at 303.

punish rule violators that challenge stability. Osiel indicates that the United States has often behaved this way in trade disputes, accepting short-term costs for itself in order to punish other rule violators and restore stability to a system from which the United States derives a tremendous overall benefit.<sup>67</sup> Similarly, American restraint in its response to Al Qaeda would “punish” the rule violator in the long term by confirming its complete isolation from the world community. The short-term costs of foregoing coercion and limiting detention, and Osiel acknowledges that these may represent real short-term costs in terms of lost intelligence and reduced incapacitation of our enemies, are outweighed by the long-term benefit of isolating our enemies and reestablishing our international standing. “America can better advance its claims to global stewardship by sponsoring systemic reciprocity of this latter sort than by indulging more specific forms of reciprocity, whether tit-for-tat or fighting fairly by morally abominable rules.”<sup>68</sup>

#### CONCLUSION

*The End of Reciprocity: Terror, Torture, and the Law of War* makes a compelling case for the voluntary exercise of American self-restraint in its continuing conflict with Al Qaeda. Unlike so much of the scholarship that deals with the issues of torture and terrorism in this context, Osiel retains a professional distance from the political implications of his conclusions. He also manages to retain a pragmatic grounding throughout his wide ranging review of the opinions offered on this subject by the disciplines of legal and moral philosophy and sociology. By doing so, Osiel has put together a book that needs to be read carefully by anyone that thinks seriously about the issues of war and counterterrorism confronting the United States.

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67. *Id.* at 309.

68. *Id.* at 387.

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