

Cambridge University Press

978-0-521-73014-3 - The End of Reciprocity: Terror, Torture, and the Law of War

Mark Osiel

Index

[More information](#)

## Index

- Abou El Fadl, Khaled, 236
- Abu Ghraib, 162, 165, 229, 254, 282, 298, 299, 307, 321, 330, 338, 353
- Addington, David, 165
- Additional Protocols (*see* Geneva Conventions)
- Administrative Review Boards, 374
- “advantage, military,” 96, 101, 265, 282, 293, 304
- Afghanistan, Afghan, 52, 71, 87, 99, 217, 227, 233, 235, 261, 285, 286, 288, 294, 339, 341, 377
- “after-action reviews,” 146
- Agamben, Giorgio, 36, 118
- aggression, 46, 56, 64, 167, 176, 199, 203, 212, 248, 305, 315, 363
- Alexander, Jeffrey, 246
- Algeria, 61, 225
- Al-Marri, U.S. v.*, 82, 100
- Amnesty International, 113, 135, 390
- Anghie, Antony, 238
- animals, cruelty to, 125–26
- Annan, Kofi, 304
- anomalies,
  - child soldiers as, 93
  - valued role in social science, 9, 279
  - unprivileged combatant as, 89–95, 112
- anomie*, 39, 133, 146
- anthrax, 203
- anthropology, 12, 90, 94, 227, 314–16
- antitrust law, 132, 212
- Antony, Mark, 358
- Apaches, 226
- apocalypse, cultural framing of conflict as (*see also* melodrama; threat assessment, inflationary), 246, 248, 249
- Appomattox, 366
- Aquinas, Thomas, 316
- Arafat, Yassir, 287
- Arendt, Hannah, 39, 153, 251
- Aristotle, 194, 201, 238, 263, 316, 335, 379, 392
- armed conflict (*see also* war),
  - belligerents’ degree of organization in, 53, 59–61
  - existence/definition of, 16, 53, 59–61, 113–19, 126–27, 130, 155, 276–77
  - non-international (*see also* Geneva Conventions, Common Art. 3), 33, 42, 52, 54, 59, 80, 81, 82, 87, 103, 123, 254, 256–58, 282, 377
- “armed force,” legal definition of, 52, 89, 100
- as a formal bureaucracy, 1, 60
- arms control treaties (*see also* weapons treaties), 5, 41, 105, 106, 190, 270, 279
- Asad, Talal, 146, 291
- assassination, 2, 167, 334–35, 379
- asymmetrical warfare, 7, 8, 42–43, 196, 227, 230–31
- “audience costs,” 300
- Axelrod, Robert, 274
- balance of benefit & burden (*see also* symmetry of risk) 4, 7, 10, 19, 20, 21, 23, 58, 81, 83, 84, 87, 188, 190, 192, 216, 217, 312, 384–85, 395
- in Kant, 178–84, 217!
- in H. L. A. Hart, 185–86
- “balancing” of rights, 108, 109, 134, 137, 154
- barbarism, barbarity, barbarian, 31, 33, 54, 92, 221, 223, 238, 255, 310, 374
- Barry, Brian, 214
- Bataille, George, 311

- battlefield, 5, 113, 118, 119, 121, 127, 222, 230, 256, 372  
     concept's irrelevance, 6, 42, 93, 117, 118, 283  
 battleships, 293  
 Baudrillard, Jean, 205, 206, 208–09, 215, 258–59, 293  
     on “the spirit of terrorism,” 206  
 Baxter, Richard, 24  
 Beers, Charlotte, 301  
 beheadings/decapitation, 26, 250, 259, 283  
 Beinart, Peter, 347  
 Beitz, Charles, 140  
 beneficence, benevolence (*see also* signaling), 17, 177, 296, 312, 313, 314, 316, 322, 323, 325, 350, 372, 394  
 Benjamin, Walter, 36, 37, 39  
 Berlin, Isaiah, 108, 139  
 Berman, Paul, 298  
 Best, Geoffrey, epigraph page, 44, 54, 70, 109, 279, 284  
 Bettelheim, Bruno, 293  
 Bhutto, Benazir, 318  
 Biddle, Frances, 104  
 binary oppositions (*see also* differentiation, dynamic of), 89, 90, 91, 93, 233–37, 247, 355  
 Binder, Leonard, 238  
 Bin Laden, Osama  
     on reciprocity, epigraph page, 26–27, 183, 217, 284, 306  
 Black, Cofer, 356  
 “black hole,” legal status of detainees as, 94  
 Blackwater, Inc., 97  
 Blair, Tony, 246  
 bloggers, 7–8, 316  
 Bobbit, Philip, 60  
*Boumediene, U.S. v.*, 27  
 Bourdieu, Pierre, 315  
 Bradbury, Steven, 3  
 Brodie, Bernard, 41, 226  
 brutality,  
     in American life, 162  
     inconsistency with “rule of law,” 156  
     inherent in war, 154–56  
     in training of soldiers, 155, 162  
 Buchanan, Allen, 193, 194  
 Bull, Hedley, 114  
 burden of proof, 380  
 Buruma, Ian, 249  
 Bush, President George W., 3  
     Abu Ghraib and, 162  
     administration attitude toward int'l law, 12, 147  
     administration policy vis-à-vis Al Qaeda, 24, 25, 46, 51, 81, 86, 87, 90, 94, 97, 99, 100, 124, 126, 136, 226, 229, 235, 245, 248, 254, 271, 288, 312, 340, 343, 347, 373  
     binary thinking of, 236  
     geopolitical strategy, 40, 145, 296–97  
     Nietzschean themes in foreign policy of, 260  
     preventive war policy, 41, 228  
     regime change, and 297  
 Bybee, Jay, 306  
 Byers, Michael, 20  
  
 Camus, Albert, 379  
 Cassese, Antonio, 34, 66, 207  
 Central America, 255, 284  
 Central Intelligence Agency, 282, 293, 294, 351, 352, 383  
 chain of command, 6, 165, 239, 284, 286  
 character, (*see also* identity, honor, virtue), 13, 111, 257, 289, 322, 332, 352, 355, 357, 371, 386, 390, 391, 396  
     national, 353–54  
 Chechnya, 185, 217, 356  
 chemical and biological weapons, 5, 102, 203, 217  
 Cheney, Vice Pres. and Sec. of Defense, 26, 329, 339, 342, 381  
 child soldiers, 91–93  
 chivalry, 226, 366, 372  
 Churchill, Sir Winston, 102  
 civilians (*see also* Geneva Convention, Fourth; war, direct attacks on),  
     “directly participating in hostilities,” 23, 51, 59, 65, 89, 123, 271  
     innocence of, questioned, 283  
     inseparable from combatants (*see also* “shields,” civilian), 224, 227  
     “civilization,” (*see also* barbarism, savagery), 33, 101, 205, 221–22, 225, 231, 232–33, 238, 246, 255, 372, 397  
 Clausewitz, Carl von, 114, 210, 230, 379  
 Clinton, President Bill, 24, 66  
     accepts targeted killing of terrorist leaders, 24  
 Clinton, Senator Hillary, 3  
     accepts torture in “ticking time-bomb” case, 3  
 cluster munitions, 69

- cognitive distortions, cognitive psychology, 158, 257, 262, 293–94, 308, 360, 376–77  
organizational culture and, 293–94
- Cohen, G. A. 305
- Cohen, Stanley, 47
- coherence, legal, 7, 49, 50, 51, 54, 67, 70, 95, 101, 106–08, 151–52, 163
- Cold War, 33, 34, 41, 42, 47, 113, 130, 238, 241, 255, 257, 258, 269, 270, 300, 310–11, 368
- Cole, David, 375, 383
- Cole, Juan, 228, 233
- Coleman, Jules, 180, 202
- collateral/incidental damage (*see also* “double effect”), 16, 35, 91–92, 158, 159, 196, 306–07, 379  
Decreasing public tolerance for, 304–05
- collective responsibility, 122
- collective security, 34, 63, 70, 74, 171, 182, 238, 385
- colonialism, 19, 64, 101, 116, 145, 200, 210, 221–26, 228, 231, 255, 257, 280, 390
- “combatant,” 23, 123, 179, 282  
definition of, 23–24, 51–52  
“unlawful,” 63, 89, 92–93, 95, 100, 271  
unprivileged, 15, 24–25, 52, 59, 65, 90, 97, 112, 122–23, 130, 222
- combatant/civilian distinction, obsolescence of, 90–95
- Combatant Status Review Tribunals, 374
- comity, 290, 300, 324
- command influence, 338
- command responsibility, 60, 284, 288
- composition, fallacy of, 365, 368
- consequentialism, moral, 71, 305, 377, 382, 392
- constructivism, social, 191–92, 233, 266, 292, 348, 357, 358, 365, 373, 376
- contempt, coercive civil, 160
- contract law,  
analogy/disanalogy to humanitarian, 8, 33–34, 72, 73, 74, 75–77, 83, 84, 172, 265, 369, 385
- copyright law, reciprocity within, 11
- cosmopolitanism, 136, 249, 252, 349, 384, 393
- cost-benefit analysis, 9, 15, 109, 245, 259, 293–94, 297, 307, 335, 358, 359, 366, 381, 382, 383–84, 392
- counterinsurgency, 132, 227, 228, 230–31, 255, 284, 294, 341, 343  
U.S. Field Manual on, 132
- countermeasures, 2, 15, 36, 62, 71, 106, 281
- courts martial, 329, 333, 339, 378
- Cover, Robert, 45
- crimes against humanity, 2, 15, 50–57, 58, 76, 86, 96, 135, 140, 184, 186, 189, 195, 199, 216, 250, 389
- culpability/blameworthiness, moral, 58, 67, 98, 146, 305, 374, 387–88
- cultural property, 62
- customary int’l law (*see also* state practice, *opinio juris*), 20, 51, 56, 62, 64–67, 70, 72, 76, 78, 79, 81, 82, 85, 86, 87, 94, 97, 102, 104, 114, 120, 123, 130, 132, 147, 195, 207, 209, 248, 260, 266, 277, 278, 279, 283, 386, 395  
U.S. persistent objections to, 2, 51, 55, 57, 66, 70, 97, 395
- Davis, Col. Morris, 35, 351
- Dawes, James, 144, 145, 244–45
- De Gaulle, Charles, 225
- degradation, relation to punishment, 156–59  
“democratic peace,” 287
- democratic theory, 371, 379
- Derrida, Jacques, 217, 320
- Dershowitz, Alan, 91, 283
- Descartes, René, 45
- desuetude, of legal rules, 15
- Detainee Treatment Act, 7, 350, 352
- detention, sustained, 12, 50, 56, 57, 59, 61, 68, 95, 96, 109, 118, 124, 126, 129, 130, 209, 210, 216, 218, 239, 259, 261, 296, 297, 300, 313, 323, 343, 348, 352, 356, 364, 368, 372, 374, 388, 391, 392, 394, 395
- Dickens, Charles, 67
- differentiation, dynamic of, 240, 247, 395
- dignity, human, 2, 44, 100, 106, 112, 126, 127, 128, 136, 153, 156, 160, 192, 244, 250, 352, 371, 393
- diplomacy, 18, 86, 242, 246, 266, 297, 300, 315, 319, 324, 378, 396  
public, 297, 301
- disappearance, 218
- discipline  
military, 143–44, 222, 284  
within liberal society, 143–44, 162
- distinction/discrimination, principle of, 67, 114, 132, 147, 192, 196–97, 209, 224
- Dönitz, Adm. Karl, 104–05
- “double effect,” doctrine of, 159–60, 185, 305–07
- Douglas, Mary, 321
- due process, 24, 62, 112, 119, 121, 277, 350
- Dunlap, Gen. Charles, 349

Cambridge University Press

978-0-521-73014-3 - The End of Reciprocity: Terror, Torture, and the Law of War  
Mark Osiel

Index

[More information](#)

656

Index

- Durkheim, Emile, 146, 196, 250, 292, 344, 345, 387
- Dworkin, Anthony, 118, 372
- Dworkin, Ronald, 57, 100, 107, 138, 139, 141, 142, 151–54, 163  
on reciprocity, 168–69  
“dynamic” statutory/treaty interpretation, 135
- Eagleton, Terry, 231
- Eckhardt, Col. William, 335, 345
- Eichmann, Adolf, 154
- Egypt, 89, 179, 337
- Elias, Norbert, 239
- Elster, Jon, 16–17, 265, 322
- emergency, *see* national emergency
- environmental law, international, 129, 133, 267
- equality of soldiers, 301, 305–06
- equilibrium, cooperative, 19, 21, 38, 41, 104, 169, 171, 181, 217, 218, 265, 267, 268, 270, 273, 275, 293, 313
- erga omnes* duties, 10, 75, 76, 77, 86, 185, 299
- Ex ante* vs. *ex post*, effect of rules/policies, 8, 102, 104, 167, 180, 200, 268, 277, 290, 377, 379
- expert testimony, 146
- “expressive” function of law, 58, 78, 159, 163–64
- extermination, 214
- externalities, 71, 76
- “failed states,” 99
- fairness (*see also* balance of benefit/burden; symmetry of risk),  
as common rules for all, 4, 7, 8, 19, 20, 53, 64, 69–70, 78, 81, 84, 102, 103, 168–71, 188–92, 258, 378, 341, 391, 395  
as different rules for parties differently situated, 172  
in fighting terrorists,  
Kantian perspectives, 178–86, 391  
Rawlsian perspectives, 165–77  
procedural, as goal of humanitarian law, 166–68, 181–82, 186, 195, 198, 212, 222  
via symmetry of risk, 180, 185, 215
- Fallujah, 275
- Falwell, Rev. Jerry, 229
- Fanon, Frantz, 280
- Faust, Drew, 271
- fear, 14, 41, 47, 64, 101, 210, 211, 221, 225, 228–29, 255, 261–62, 295, 297, 301, 311, 312, 314, 321, 324, 354, 361, 375, 376, 378
- Federal Bureau of Investigation, 293, 294, 377
- Feith, Douglas, 39
- Feldman, Noah, 68
- feminism, 216
- firebombing, 104, 203, 204, 275, 300
- Fish, Stanley, 359
- Fitzpatrick, Peter, 231
- Fletcher, George, 207, 211, 262
- Fleischer, Ari, 380
- foreign aid, 41, 207, 311, 317–18, 323, 394
- Foucault, Michel, 90, 143, 144, 146, 162, 234–35, 346, 360, 396
- France, 16, 22, 23, 34, 42, 55, 66, 73, 113, 259, 268, 275, 300, 311
- franchise, Al Qaeda as, 60
- Friedman, Thomas, 298
- Frum, David, 245
- fundamentalisms, dueling (*see also* mirroring), 257
- Gallenga, Antonio, 221
- Galston, William, 139
- game theory, (*see also* tit-for-tat), 4, 9, 183, 239, 254, 258, 263, 267, 268, 270, 273, 274, 279, 290–91
- Gardner, John, 21, 58, 178
- Garland, David, 157–59, 163
- gas, poison, 101–02, 270, 307
- genealogy, moral, 228, 243, 259, 262–63
- General Agreement on Tariffs and Trade (GATT, *see also* World Trade Organization; trade, international), 273, 385
- Geneva Conventions,  
Additional Protocol I, 35, 54, 62, 63, 64, 65, 66, 69, 78, 81, 112, 130, 187, 200, 337, 342  
Additional Protocol II, 53, 69, 78, 83, 94, 116, 188, 282, 283  
Art. 75: 53  
effect on conduct in war, 14, 264–65, 277–87  
ICRC, interpretive role, 281  
implicit empirical assumptions of, 1  
inclusive membership of, 192  
limits on reprisals within, 35–36, 278  
Common Art. 2: 52, 68, 88  
Common Art. 3: 2, 15, 25, 52, 53, 54, 59, 67, 81, 82, 83, 84, 87, 88, 116, 271, 272, 282, 283, 332, 337, 343, 345, 347, 382  
Fourth (protected persons/civilians), 15, 24, 36, 52, 59, 63, 65, 73, 78, 89, 122, 271  
Gas Protocol of 1925, 101–02

Cambridge University Press

978-0-521-73014-3 - The End of Reciprocity: Terror, Torture, and the Law of War

Mark Osiel

Index

[More information](#)

## Index

657

- nationality of captives, 65, 71, 74, 78, 81, 85, 86, 87, 89, 215
- possible revisions of, 43, 95, 100, 146
- reciprocity, acceptance of, 15, 25, 64, 180, 186–87
- reciprocity, rejection of, 15, 16, 25, 50, 64, 77, 172–73, 187
- Third (*see also* Prisoners of War), 6, 15, 25, 27, 52, 59, 67, 79, 83, 88, 101, 122, 279
- Art. 4: 52, 53, 59, 85, 87, 94
- universal jurisdiction and, 189
- U.S. ratifications/nonratifications of, 65, 132, 391
- genocide, 113, 135, 138, 143, 189, 194, 195, 198, 229, 234
- Convention on, 135
- Gentili, Alberico, 32, 167
- Germany, 22, 23, 25, 66, 73, 101, 102, 104, 160, 234, 275, 279, 293, 300, 342, 357, 362
- Federal Constitutional Court, 104
- Ghandi, Mahatma, 280
- Gibbard, Alan, 193, 207, 208
- gift, gifts, 31, 99, 206, 231–32, 314–25, 368, 397
- as creating duties/debts, 31, 205, 324
- as reflection on giver, 318, 320, 322
- bankruptcy and, 315
- bribery and, 317
- circumstances of offering, 319, 321, 323
- electoral campaigns and, 212, 317
- extortion and, 317
- “generalized exchange” and, 205, 206, 208, 315, 368, 397
- gratitude and, 32, 323, 324
- humanitarianism as a, 315–19, 325
- negotiation and, 319
- self-interestedness of, 230–31, 394
- tax status of, 317
- Girard, René, 256, 257
- globalization, 312
- glory, 223
- Goffman, Erving, 369
- Goldberg, Jonah, 193
- Goldsmith, Jack, 228, 392
- Goodman, Ryan, 366
- Graham, Sen. Lindsay, 350, 351, 359, 373
- Grant, Gen. Ulysses S., 366
- “gravitational force,” (*see also* Dworkin, Ronald), 2, 53, 73, 100, 151, 152, 153, 164, 395
- Gray, John, 43, 47, 126
- Greeks, ancient
- ethics, 195, 263
- mythology, 141–42, 255
- warfare, 32, 222, 223
- Grenier, Robert, 353
- “grim trigger” (*see also* game theory), 254
- Grotius, Hugo, 137, 167, 316
- “grudge informing,” 377
- Guantánamo, 3, 15, 35, 52, 88, 94, 100, 118, 165, 229, 254, 259, 283, 298, 299, 308, 316, 320, 321, 324, 340, 345, 349, 350, 374
- habeas corpus*, 26, 27, 94, 321, 350
- Habermas, Jürgen, 174, 233
- Haditha, 275
- Hague treaties, regulations (*see also* weapons treaties), 5, 23, 50, 53, 64, 101, 102, 105, 106, 192, 195, 264, 265
- Halliburton, Inc., 96
- Hamas, 60, 116, 283, 305
- Hamdan, Salim Ahmed, 340, 346, 350
- Hamdan v. Rumsfeld*, 2, 53, 83, 87, 94, 272, 343, 350
- Hamdi, Yser Esam, 82
- Hand, Learned, 381, 383
- Haradinaj, Prosecutor v.*, 117
- Hardt, Michael, 227
- Hart, H. L. A., 185–86, 305
- Haskell, Thomas, 344
- hegemonic stability, 308–10, 312–13
- Held, Virginia, 216
- Hess, Rudolf, 279
- Hezbollah, 175, 283, 305
- Hiroshima, 275
- history, military, 114, 131, 138, 264, 273, 391
- Hobbes, Thomas, 135, 137, 138, 228
- Hollis, Martin, 169–70
- Holmes, Oliver W., 47, 277
- Holmes, Stephen, 259–63
- homo sacer* (*see also* Agamben, Giorgio), 118
- honor (*see also* martial honor, character, virtue), 32, 223, 265, 295, 325, 329–37, 339, 346, 350, 351, 352, 358–59, 365, 372, 374, 393
- codes of, 265, 331, 332, 334
- democratic theory and, 371
- modernity’s discomfort with, 31–32, 325, 346, 359
- more demanding than law, 332, 374, 396
- hostages, 195, 204, 213, 280

- humanitarianism, 14, 89, 111, 125, 128, 157–59, 168, 177, 229, 252, 279, 296, 312, 315, 316, 319, 324, 325, 346–47, 386, 387, 394
- humanitarian law (*see also* Geneva Conventions and Hague treaties),  
Al Qaeda members as protected/bound by, 78–89  
Al Qaeda's attitudes regarding, epigraph page, 26–27, 39, 41, 176–77, 242, 345  
armistice, 64  
as permitting brutality, 45, 154  
as seeking fairness in war, 102, 166–67  
attitude of Belgrade leaders toward, 269  
basis in pessimism about human nature, 47  
Brussels Conference of 1874, 64  
“civilization” and, 372, 397  
civil liability of states under, 197–98, 201, 304  
complexity of, 45, 81, 121  
compliance with, 277–87, 373  
consent to be bound, as first principle of, 82, 84, 120  
corrective justice and, 200–09  
cultural property, 62  
custody over detainees in, 67–68  
distinguishes war from murder, 204, 331  
duty to arrest under, 187  
effect on public rhetoric, 247  
“feasibility” as concept within, 131, 146  
global perceptions of, 304  
ignorance of, 340  
incoherence of, 49, 50, 51, 54, 67, 70, 95, 101, 106–08, 151–52, 163  
increasingly criminal focus of, 198–99  
perfidy, 63, 167  
periods of optimism over, 34, 47  
pragmatic approach to, 47–48, 108, 277  
professional identity of JAGs and, 366, 370  
prominence of reciprocity principle within, 49, 50, 53, 54–56, 62, 65, 84, 86, 106, 139  
“quarter,” duty to grant, under, 265  
questionable relevance of, 67  
regulating “plowshares into swords,” 147  
relation to human/civil rights law, 250, 340, 341, 344  
Renaissance views of, 19, 32, 92  
resource disparity, relevance of, 171–72, 195–98, 200, 213  
“shields,” use of civilian, 62, 101, 130  
sources of, 53  
state-centrism of, 6, 89, 92, 97, 99  
unfair disadvantage from unilateral adherence to, 4, 6–7, 20, 58–59, 65, 69, 74–75, 101–02, 105, 166, 171, 182, 186, 288, 372–73, 380, 392  
weak enforcement of, 4, 281, 283, 284, 373  
humanitarian intervention, 38, 54, 77, 194, 225, 317, 330  
human right(s), int'l, 39, 54, 71, 72, 73, 75, 77, 84, 102, 105, 107, 108, 109, 110, 136, 231, 232, 239, 251, 287, 289, 294, 298, 316, 342, 352, 353, 356, 357, 358, 372, 387, 391, 393  
relation to humanitarian law, 111–48, 250  
security of person as, 131–36, 139, 140  
Universal Declaration of, 112, 133, 140  
Human Rights Watch, 7, 55, 113, 283, 295  
“cruel, inhuman, and degrading treatment,” 2, 53, 345, 367  
humiliation, 157, 261  
Huntington, Samuel, 349  
Hurrell, Andrew, 47  
Hutson, JAG Adm. John, 330, 345, 373  
hybridity, cultural, 232, 237–39  
hypocrisy, 105, 159, 203, 221, 289, 356, 394  
identity (national, professional; *see also* “who we are”), 9, 90, 110, 191, 209, 210, 24, 310, 331, 334, 347, 348, 349, 351, 354, 355, 358, 359, 362, 365, 366, 369, 370, 371, 373, 374, 386, 393–97  
Ikenberry, John, 309  
incentives, 42, 57, 69, 70, 80, 190, 295, 311, 321, 341  
incompletely theorized agreements, 295  
Indonesia, 57, 299  
information, asymmetry, 122, 313  
insignia, identifying (*see also* uniforms), 6, 63, 97, 179  
insurgency (*see also* counterinsurgency), 64, 82, 88, 99, 114, 116, 130, 198, 227, 255, 284, 294, 343, 380  
intelligence agencies, 293, 294  
Inter-American Commission of Human Rights, 83, 116  
“internal morality” of law, of martial honor, 331  
Int'l Committee of the Red Cross (ICRC), 57, 69, 70, 71, 77, 83, 94, 112, 113, 119, 124, 126, 128, 281, 356  
Int'l Court of Justice (World Court), 36, 63, 66, 76, 112, 114, 120, 121, 124, 132, 199, 202

- Int'l Covenant on Civil and Political Rights, 72, 112, 119, 134, 259, 391  
Optional Protocol to, 128–29
- Int'l Covenant on Economic, Social, and Cultural Rights, 136
- Int'l Criminal Court, 21, 34, 57, 92, 93, 105, 135, 188–89, 200, 338, 339  
attitudes of U.S. officer corps toward, 339  
eliminating need for reprisal, retaliation, “victor’s justice,” 21, 105
- Int'l Criminal Tribunal for the former Yugoslavia, 50, 66, 82, 101, 104, 117, 142, 189
- interoperability, 69, 132, 341–42
- interrogation, 2, 26, 57, 59, 61, 67, 70, 76, 96, 109, 132, 210, 218, 250, 261, 263, 279, 282, 290, 296, 297, 305, 307, 308, 320, 329, 331, 336, 343, 348, 351, 352, 356, 368, 377, 378, 379, 380, 383, 392, 393, 394  
Support of U.S. Rep. Presidential candidates for coercive, 3
- Iraq, 52, 66, 71, 89, 117, 145, 195, 204, 215, 217, 227, 238, 240, 241, 261, 272, 279, 294, 296, 298, 300, 339, 341, 385
- Iran, 9, 13, 233, 238, 272, 287, 392
- Islam, 221, 226, 232, 236, 237–39, 257, 351  
Islamic law, *shari'a*, 141, 235, 238, 284, 287, 306
- Israel, 66, 97, 98, 111, 115, 116, 127, 202, 203, 224, 253, 276, 284, 405, 463, 469  
Supreme Court of, 127
- Jackson, Andrew, 225
- James, Clive, 64
- James, William, 252
- Japan, 23, 69, 104, 268, 271, 275, 279, 299, 308, 310, 357, 385  
Int'l Military Tribunal for the Far East, 104
- Jews, 362–64
- Jinks, Derek, 16, 78, 79, 85, 87, 185, 215, 366
- joint criminal enterprise, 60
- Judge Advocate Generals (JAGs), 6, 9, 13, 14, 15, 131, 132, 165, 272, 276, 287, 288, 297, 325, 329–50, 358, 359, 365, 366, 370, 371, 393, 394  
attitudes toward restraint in war, 272, 358, 370, 387  
controversy over three-star generals, 330, 339
- jurisdictional competence, 129
- jus ad bellum*, 63, 199, 200, 247
- jus cogens*/peremptory/non-derogable norms, 51, 56, 59, 73, 75, 76, 77, 82, 86, 95, 102, 103, 118, 129, 135, 140, 360, 380
- jus in bello*, 119, 167, 181, 199, 200, 248
- justice,  
corrective, 4, 180, 194–203, 209, 218, 212  
distributive, 133, 136, 200, 201, 212, 213, 215  
poetic, 262  
retributive, 57, 58, 156, 193, 198, 199, 200, 210, 218, 260
- Kagan, Robert, 141
- Kahan, Dan, 376
- Kahn, Paul, 184, 195–96, 202–05, 211, 213, 214, 215
- Kammen, Michael, 354
- Kant, Emmanuel (and nonconsequentialist/deontological ethics), 3, 7, 12, 16, 17, 20, 32, 58, 73, 132, 133, 156–57, 176, 180–83, 186, 194, 200, 209, 217, 252, 262, 348, 349, 368, 381, 384, 386, 391, 392, 393, 396
- Kateb, George, 181, 263
- Katyal, Neal, 340
- Keegan, John, 372
- Kelsen, Hans, 4, 55
- Kennedy, David, 144, 147, 281
- Kennedy, Duncan, 108
- Kennen, George, 299, 302
- Keohane, Robert, 17, 19, 324, 373, 384–85
- Khalid Sheikh Mohammed, 44, 282, 284
- Kilkullen, David, 231
- King, Rev. Martin Luther, 355
- Kissinger, Henry, 261
- Koran, 217, 221, 236, 253, 346
- Korean War, 268, 337
- Krause, Sharon, 336, 344, 371
- Kress, Ken, 212
- Kutz, Christopher, 348
- land mines, antipersonnel, 5, 270
- Lauterpacht, Sir Hersch, 4
- Lawrence, T.E., 226
- Leach, Sir Edmund, 222
- Lee, Gen. Robert E., 377
- legal ethics, 212
- Lévi-Strauss, Claude, 315, 324, 368, 397
- Levinas, Emmanuel, 364
- Lewis, C.S., 11
- lex specialis*, 120, 124, 343
- lex talionis*, 69, 208

- liberalism, liberal theory, liberal society (*see also* Berlin, Dworkin, R., Kant, Rawls, Waldron, Williams, ), 9, 12, 15, 38, 108, 135, 139, 141, 154, 161, 169, 176–77, 180, 186, 192–93, 228, 254, 257–58, 288, 305, 346, 348, 354, 381, 384
- Lieber Code, 33, 200
- Lieberman, Sen. Joseph, 163
- Lietzau, Col. William, 189
- Lincoln, Pres. Abraham, 143
- Locke, John, 385
- looting, 285
- Luban, David, 90, 210
- Luttwak, Edward, 255, 288
- MacArthur, Gen. Douglas, 337
- Machiavelli, Niccolò, 301
- MacIntyre, Alasdair, 335, 346, 371
- magnanimity, magnificence, 176, 263, 316, 322, 323, 352, 366
- mala in se* crimes, 164
- Malaysia, 276, 299
- Malinowski, Bronislaw, 18
- Mandela, Nelson, 284
- Margalit, Avishai, 249
- Marshall Plan, 310, 311, 318, 394
- Martens clause, 115, 120
- martial honor (*see also* virtue, honor), 9, 13, 14, 68, 131, 140, 223, 329–37, 336, 339, 340, 341, 344, 345, 346, 353, 358, 366, 357, 371, 374, 393, 395
- martyrdom, 91, 206, 291, 292–93
- Marxism, 137
- “material support” statutes, 95–96
- Mauss, Marcel, 320, 321
- May, Larry, 289
- McCain, Senator John, 3, 14, 241, 350, 351, 352, 359
  - on reciprocity in war, 350
  - on rights of detainees, 351
  - torture of, 351
- Mecca, 208
- Mégret, Frederic, 16, 222, 225, 230
- Meir, Golda, 179
- melodrama, 245, 247, 249
- memory, historical, 274, 275, 367
- mercenaries, 52
- Meron, Theodor, 65, 66, 143
- Military Commissions Act, 7, 13, 95, 96, 97, 271–72, 329, 344, 345
- “military objective,” 120, 131, 245
- militias (*see also* insurgency, partisans), 5, 24, 64, 119
- Mill, John Stuart, 138, 386
- Miller, Arthur, 301
- Miller, William Ian, 31–32, 159, 315
- Milošević, Slobodan, 189
- missile strikes, 67
- “mirroring,” 209, 248, 253–55, 258
  - fundamentalisms, 254
  - of monsters, 256
- modernity, modern, 1, 15, 31–32, 91, 143–44, 157, 162, 175, 198, 206, 211, 222–23, 238, 240, 241, 291, 301, 314, 325, 329, 336, 347, 360, 371, 372, 397
- Montaigne, Michel de, 291, 346, 352, 360, 361
- “moral hazard,” 8
- Morrow, James, 277–82, 287
- Mukasey, Attorney General Michael, 351, 353
- multiplier effect, 368
- Musharraf, Pervez, 235, 318
- mutation, of terrorism in response to law, 43
- Myers, Gen. Richard, 333
- My Lai, 275, 330, 335, 345
- Nagasaki, 275
- Nagel, Thomas, 123
- narcissism, of small differences, 256
- narrative (of threat),
  - deflationary, 247, 248, 249, 250, 252
  - inflationary, 246, 247, 248–49, 252
- national emergency, 36–40, 73, 129, 137
- national liberation movements, rights of, 63, 64, 172, 186–87, 200
  - contrast with terrorists, 186–87
- national security, 77, 95, 121, 233, 254, 295, 318, 361, 371, 374, 382
  - as discourse, 233, 237
- Native Americans/indigenous peoples, 101, 223–24, 227–28, 230, 232, 255, 319, 324
- NATO, 185, 189, 269, 272, 309, 342
- natural law, natural right, 85, 86, 92, 239–40, 385, 397
  - colonialism and, 239–40
  - law of nations and, 223–25
- necessity, military, 39, 111, 121, 127, 131, 146, 166, 167, 267, 282, 390
- Negri, Antonio, 227
- Nelson, Lord Horatio, 167
- neoconservatives, 296–97
- neo-realists, 286
- New York City Bar Association, 339

Cambridge University Press

978-0-521-73014-3 - The End of Reciprocity: Terror, Torture, and the Law of War

Mark Osiel

Index

[More information](#)

## Index

661

- New York Times*, 13, 348, 374, 376  
 neutrality, right to, 236  
 Nietzsche, Friedrich, 243, 260, 261, 262, 353  
 Nimitz, Adm. Chester, 104  
 nobility, 177, 263, 351, 393  
 No Gun Ri, 275  
 non-international armed conflicts, *see* armed conflicts  
 North Korea, 9, 238, 272, 284, 392  
 Nozick, Robert, 373  
 nuclear weapons, 13, 33, 66, 114, 115, 120, 144, 240, 373, 381  
 Nuremberg trial, 22–23, 82, 104, 105, 125, 199, 309  
 Nussbaum, Martha, 397  
 obedience, to superiors' orders, 268  
 "Occidentalism," 249  
 occupation, military, 97, 113, 138, 145, 195, 280, 307  
     legal duties of occupier, 22–23  
 O'Connell, Mary Ellen, 113–16  
 Office of Legal Counsel, Justice Dept., 3, 52, 228, 335, 338, 339, 342  
     authorization of interrogation methods by, 3, 165, 335, 338, 339  
 Omar Abdel Rahman, Sheik, 98  
*opinio juris*, 46, 55, 56, 57  
 Orientalism, 101, 221, 227, 236, 243, 249  
 pain, 210, 291  
 Pakistan, 17, 44, 67, 235, 286, 318, 381  
 Palestine, Palestinian Authority, Palestine Liberation Organization, 64, 97, 112, 116, 202, 253, 284, 287  
 panic, 360  
*Paquete Habana, The*, 278  
 Parker, Geoffrey, 264  
 Parks, W. Hays, 288  
 partisans (*see also* militias), 22–23, 197  
 Pascal's wager, 289  
 patent law, 132  
 peacekeeping, peace operations, 113, 120  
 Pearl, Daniel, 283–84  
 perfidy, 63, 167  
 Perle, Richard, 245  
 Peru, colonial, 208, 228, 229, 255  
 Peters, Lt. Col. Ralph, 197  
 Pew opinion surveys, 298, 299, 300, 301  
 Philippines, 217, 276  
 Piaget, Jean, 11, 93, 191, 369, 393  
 Pildes, Richard, 93  
 pillage, 285  
 Pinochet, Gen. Augusto, 189  
 piracy, pirates,  
     analogies/disanalogies to terrorists, 24, 63, 94, 289  
 Pizarro, Francisco, 229  
 Polanyi, Karl, 322  
 polemics, 396–97  
 Pope, Alexander, 367  
 Posner, Eric, 141, 163–64, 245, 265, 271, 272, 274, 286, 287, 295, 297, 300, 307, 309, 335, 359, 392  
 Posner, Richard, 245, 262, 321, 335  
 postcolonialism, 12, 221–22, 225, 227, 229  
     critique of counterterrorism discourse, 226, 227, 229, 230, 242  
 postmodernism (*see also* postcolonialism), 45, 142, 144, 205, 222, 233, 241–43, 258–59, 354, 355, 359, 394  
 potlatch, 207, 314, 324  
 Powell, Sec. of State Colin, 14  
 pragmatism, pragmatic, 108, 277  
     approach to regulating war, 19, 46–48  
     "preference falsification," 380  
*prima facie* case, 54, 71  
 prisoners of war (*see also* Geneva Convention, Third), 6, 15, 23, 25, 27, 52, 53, 59, 62, 63, 64, 65, 66, 79, 85, 87, 93, 94, 97, 119, 122, 180, 184, 188, 192, 197, 270, 271, 272, 275, 279, 282, 283, 287, 299, 321  
 professional ethics, professionalism, 9, 18, 329, 334, 344–45, 347, 349, 359, 370, 386, 395  
 professional networks, military lawyers', 300, 337–40, 343, 365, 366, 370, 392, 394  
 proportionality, in humanitarian law, 32, 56, 58, 97, 112, 114, 127, 131, 132, 146, 166, 192, 196, 199, 206, 207, 209, 282, 304  
     in Islamic law, 306  
 "protected persons" (*see* Geneva Conventions, Fourth)  
 precautionary principle, 381–82  
 private military contractors, 43, 113, 144  
 psychopathology, mass, 261  
 public choice, 75  
 "public good,"  
     int'l legal system as, 10, 138, 302, 309–10, 365, 366, 385, 387  
 public-private distinction (*see also* liberalism), 92

- Pufendorf, Samuel von, 20, 137  
 Putin, Vladimir, 356, 357
- Quirin, Ex Parte*, 25  
 Qutb, Sayyid, 238, 249
- Raeder, Adm. Erich, 104  
 rage, 261, 263  
 Ramadan, Tariq, 254  
 rape, 126, 372  
 rational choice theory (*see also* game theory),  
   217, 230, 263, 286, 294, 307, 364, 366,  
   367, 369, 395  
 Rawls, John, epigraph page, 7, 32, 124, 138, 166,  
   141, 194, 211, 212, 213, 214, 253, 392  
   “circumstances of justice,” 174–77, 181, 362,  
   386  
   “considered judgments,” 303  
   ideal vs. non-ideal theory, 170, 213  
   law of Peoples, 174–77  
   maximin principle, 173  
   on reciprocity, epigraph page, 168–73  
   original position, 168, 170, 173, 174, 211, 213  
   “reflective equilibrium,” 303  
   “strains of commitment,” 211, 213–14  
   “veil of ignorance,” 7, 168, 170, 171, 173, 174,  
   179, 211, 214  
 Reagan, Pres. Ronald, 238  
 “realism” in international relations, 8, 9, 10, 98,  
   141, 195, 266, 267, 270, 279, 285, 287, 296,  
   297, 300, 302, 303, 307, 331, 347, 365, 366,  
   384, 386, 395  
   soft power and, 302–03, 374  
 realism, legal, 47, 163, 277  
 reciprocity,  
   Adam Smith on, 17–18  
   Al Qaeda attitudes toward, epigraph page,  
   26–27, 39, 289–90  
   anticipatory self-defense and, 40–42  
   arms control treaties and, 105  
   as empirical regularity, 18, 19  
   as “master-rule” of int’l relations, 44  
   as moral/legal principle, 18, 25, 27, 28, 32,  
   180  
   as “quasi-social” norm, 16–17  
   as same rules for all, 19, 20, 24, 25, 53, 57, 64,  
   79, 103, 105, 172, 182, 188, 209, 280, 387,  
   392, 395, 396  
   as theme in U.S. counterterrorism debate,  
   15–16  
   as unduly binary mode of thought, 233–41  
   as “working engine of int’l humanitarian  
   law,” 55  
   bilateral, specific, short-term, 10–11, 12, 13,  
   68, 105, 109, 111, 169, 269–70, 307, 320,  
   324, 357, 368, 385, 387, 393, 396  
   biological basis of, 32, 124–25  
   deliberative, discursive, conversational, 21,  
   233, 239, 302, 391  
   impossibility with Al Qaeda, 240  
   differing conceptions of, 17–21, 79, 370  
   comity and, 290–91, 300, 324  
   commodification via, 311  
   “confidence-building” in negotiations via,  
   18, 319  
   dangers of law’s reliance on, 234  
   deterrence via, 33, 57, 58, 101, 102, 103, 192,  
   248, 392  
   diffuse, systemic, multilateral, long-term, 10,  
   11, 12, 105, 169, 269–70, 302, 320, 324,  
   357, 365, 368, 370, 384–87, 395  
   egalitarianism of, 19–20, 393  
   “fighting fire with fire” as, 262, 343  
   Geoffrey Best on, 54–55  
   humanitarian intervention and, 194  
   human rights as limit on, 193–94, 393, 394  
   “Golden rule” and, 11, 14, 16, 180  
   David Hume on, 32–33  
   H. L. A. Hart on, 185–86  
   implications of for institutional design, 19,  
   190–92  
   in animals, 124–26  
   in armistices, 64  
   in children, 11, 92–93, 191, 262, 369  
   inclusiveness/exclusiveness of int’l regimes  
   and, 190–92  
   in Cold War, 33, 41, 238–39, 255, 257, 269, 270  
   in copyright law, 11  
   in enforcing civil judgments, 290  
   in Magna Carta, 32  
   in regulatory regimes, 190–92  
   International Criminal Court and, 188–89  
   inter-state accusations of wrong as, 189–90  
   *jus ad bellum* and, 63  
   justice and, 309  
   Kant on, 178–84  
   law as strengthening workings of, 277, 279  
   martial honor and, 330  
   May, Larry, on, 289  
   McCain, Sen. John, on, 350  
   military attitudes toward, 347  
   mimetic, 253–56

- mutant form of, 258, 261
- national emergency and, 38–39
- natural law and, 224
- nobility and, 316
- non-democracies and, 287
- Nuremberg Tribunal, treatment of, 22–23
- peace and, 314, 324
- prevalent ambivalence toward, 11
- primitivism of, 31–32, 58
- private int'l law and, 290
- prominent place within humanitarian law
  - of, 49, 50, 53, 54–56, 76, 84, 86, 106, 140
- psychology of, 32–33, 168, 173
- rationality and, 1, 38, 235, 244, 246, 250, 284, 287, 292, 293–94, 331, 396
- Rawls on, 165–77
- “reactive” nature of norm, 16
- restraint in war through, 8–9, 244, 250, 265, 282
- risk of death and, 138, 193–94, 202, 322, 324, 373, 376
- “savages” incapacity for, 101, 221, 225
- second-strike nuclear capability and, 41
- self-defense as, 22, 34, 74
- si omnes* clauses as, 33
- social constructivism and, 191
- social contract through “systemic,” 12, 20, 83, 84, 85, 93, 111, 181, 194, 310, 320, 321, 369, 370, 384, 397
- sovereignty principle and, 19
- “strong,” 308–09
- supererogation and, 78, 316, 332, 351
- targeted killings/extrajudicial executions and, 271
- torture as, 391–92
- trade/travel as, 321
- under feudalism, 207
- weapons conventions and, 50, 65, 72, 101
- reconnaissance, 131
- refugees, 71, 113, 251, 317
- Reisman, W. Michael, 41
- remedies, civil, 103, 281, 375
- remorse, 367
- rendition, of terror suspects, 119
- reprisal, 2, 5, 15, 18, 34, 35, 45, 50, 51, 53, 54, 55, 56, 57, 58, 59, 65, 66, 67, 79, 81, 94, 97, 101, 102, 103, 112, 166, 171, 198, 206, 207, 209, 210, 216, 233, 235, 238, 248, 255, 273, 278, 280, 370, 388, 391, 395, 396
  - as corrective justice, 199, 209, 212, 213
  - effects on “solidarity” among belligerents, 370
  - as ineffective, counterproductive, 35
  - as legal justification, 34–35, 54
  - as punishing innocents, 2, 16
  - as replaced by collective security, 34, 70, 74, 171, 182
  - as expression of reciprocity principle, 16, 24, 36, 58
  - as source of deterrence, 9, 16, 19, 57, 58, 101, 103, 233
  - British views of, 35
  - children’s morality and, 191
  - German, against French during WWII, 22–23
  - proper mental state for legal defense of, 18
  - continuing availability of, 34
  - early effort to limit, 35
  - in decisions of World Court, 36
  - primitivism of, 36, 54, 58, 238
  - as source of inter-belligerent fairness, 102, 103, 166, 209, 392
  - U.S. stance toward legality of, 51–55
  - reputation, national, 265–66, 275, 302, 307–08, 392
  - restraint in war,
    - aristocratic sources of, 18, 265, 366, 371, 372, 393
    - JAGs/officers as source of, 370–72, 387
    - non-legal sources of, 148
    - political dynamics of, 14
    - realist arguments for, 10
    - reciprocity as basis of, 285, 286, 293
    - sociology of, 3, 10, 17, 131, 264
    - support for relaxing legal, 4
    - unilateral, 279, 283, 284–85, 313
    - world opinion as source of, 299, 300
  - retaliation, 9, 18, 41, 46, 51, 53, 56, 57, 58, 65, 70, 79, 101, 171, 190, 205, 209, 233, 248, 263, 277, 278, 280, 281, 284, 287, 343, 369, 392
    - against U.S. troops for their misconduct, 13, 14
    - retorsion as form of, 16, 56, 391
    - right to, as seen from “original position,” 171
    - “retorsion,” 16, 56, 278, 391
  - revenge, 11, 31, 261, 285
  - Rhodes, Howard, 371
  - Rice, Sec. of State Condoleezza, 40, 295
  - Ricoeur, Paul, 18
  - Ridge, Tom, 296
  - Rieff, David, 147

- risk, risks (*see also* symmetry of risk)  
 managing terrorism as a, 183, 184, 352, 376–82  
 of terrorism, 184, 375–77, 382  
 of violent death, 193–94, 322, 324, 373  
 public “misperception” of terrorist, 262
- River, JAG Gen. Jack, 333
- Roberts, Adam, 372
- Roman law, 118, 320
- Roth, Brad, 132
- Roth, Kenneth, 295
- “rule of law,”  
 as basis of U.S. global appeal, 299, 357  
 as bourgeois delusion, 36–37  
 as compatible with authoritarianism, 37  
 JAG Handbook on, 341, 342  
 post-conflict military operations and, 341, 342
- rules of engagement, 68, 127, 132, 342
- Rumsfeld, Donald, 329, 334
- Russia (*see also* Soviet Union), 57, 185, 239, 275, 299, 356
- Rutledge, Justice Wiley, 310
- Rwanda, 143, 234, 309
- sabotage, 25, 52
- Saddam Hussein, 66, 204, 213, 215, 296, 363, 380
- sadism, 263, 282, 306
- Sahlins, Marshall, 319, 320
- Said, Edward, 227
- saintliness, 78
- Sandel, Michael, 175, 238
- Saudi Arabia, 89, 285
- savagery, “savages,” 101, 218, 221–25, 228, 255  
 terrorists as, 16
- Scalia, Justice Antonin, 3
- scalping, 255
- Scanlon, Thomas, 364
- Scarry, Elaine, 46, 98, 156, 179, 247, 390
- Scheffler, Samuel, 211
- Schelling, Thomas, 41, 270, 369
- Schwebel, Judge Stephen, 36
- Schmidtz, David, 192
- Schmitt, Carl, 237
- Schmitt, Michael, 166
- Scowcroft, Brent, 296
- Scruton, Roger, 125
- Searle, John, 45–46
- security studies, “critical,” 233, 237
- selection bias, 266
- self-defense, 34, 58, 74, 96, 97, 112, 116, 127, 199, 216, 244, 248, 253, 260, 261
- anticipatory/preventive, 40–42, 245, 253
- self-interest,  
 national, collective, 4, 17, 72, 191, 209, 232, 265, 285, 286, 288, 291, 292, 300, 307, 311, 323, 325, 330, 331, 342, 347, 348, 357, 365, 370, 373, 384, 386, 394, 395, 396, 397  
 professional, 335–36, 345, 366  
 individual, 57, 265, 285, 292, 322, 331, 333, 335, 344
- self-respect, 9, 335, 336, 357, 358, 362, 364, 367
- Seneca, 291, 317, 322
- Serbia, 71, 198, 269, 309
- Shakespeare, William, 262, 360
- shame, 366–67
- Shaw, Martin, 254
- Sherman, Gen. William T., 45, 144, 203, 245
- Sierra Leone, Special Court for, 87
- “signaling, costly,” 275, 287, 312–18, 324–25, 378, 394
- Silver, Peter, 223, 225
- Simmel, Georg, 269
- Simon, Jonathan, 382
- slavery, enslavement, 45, 94, 137, 144, 190, 211, 214, 221, 223, 225, 231, 239, 252, 255, 293
- Smith, Adam, 17–18, 321, 373
- Smith, Philip, 246, 247, 250
- “social contract,” 83, 84, 85, 93, 111, 194, 198, 310, 320, 321, 369, 370, 384, 385, 386, 395, 397
- socialization, 366
- social mobility, 315
- social science, 9, 60, 109, 207, 216, 218, 263, 265, 275, 279, 288, 295, 361, 377, 391
- society, international, 75, 111, 214, 221, 242, 385, 386  
 world, 242
- sociology, 12, 101, 239, 258, 264–65, 325, 345, 348, 366, 369, 370, 376  
 cultural, 12, 243, 246, 365  
 functionalist, 370  
 of “undiscussability,” 380
- “soft power,” 10, 13, 280, 297, 301–04, 322, 347, 367, 374, 380, 387, 392, 394  
 as “essentially a byproduct,” 322  
 martial restraint and, 297–98
- solidarity, social, 76, 250–52, 320–21
- Somalia, 185, 217, 227
- Sontag, Susan, 162
- South Africa, Rep. of, 136, 283, 284
- South Korea, 270, 284
- sovereignty, 19, 22, 52, 87, 91, 107, 300, 314, 318, 384
- Soviet Union, 33, 41, 42, 269, 302, 310, 311

Cambridge University Press

978-0-521-73014-3 - The End of Reciprocity: Terror, Torture, and the Law of War

Mark Osiel

Index

[More information](#)

- Spain, 238, 283
- Special Operations Forces, U.S., 13, 226
- specific intent (*see also* double effect and collateral damage), 306–07
- Spence, Michael, 313
- spies, 52
- stateless societies, 314–16, 319, 320, 321
- “state practice,” (*see also* Customary int’l law), 15, 50, 53, 54, 55, 56, 57, 106, 139, 278–79
- statistics, social, 375–79
- false negatives, 374, 377, 378
- false positives, 374, 377, 378, 387
- “statistical lives,” 376–77
- Stendhal (Marie-Henri Beyle), 256, 257
- Stevens, Justice John Paul, 303
- Stone, Julius, 104
- strategy, military/geopolitical, 7, 19, 41, 43, 57, 90, 109, 117, 130, 145, 167, 184, 196, 198, 203, 207, 213, 226–27, 230, 235, 236, 239, 245, 249, 255, 263, 268, 269, 292, 293, 294, 296, 300, 335, 343, 363, 369, 379, 396
- submarine warfare, 23, 270, 293
- suffering, superfluous/unnecessary 50, 105, 111, 114, 125, 128, 166, 167, 168, 201, 212, 265, 267, 384
- suicide bombing, 92, 173, 174, 177, 197, 205, 206, 240, 248, 250, 258, 286, 292, 316
- Sunnis, 117, 294
- Sunstein, Cass, 295, 376, 381
- superpower rivalry, 255, 257–58, 270, 275, 280, 302, 311
- surrender, 33, 157, 179, 197, 215, 223, 230, 248, 265, 268, 270, 271, 304, 366
- Sussman, David, 179, 180, 184
- Swift, Lt. Comm. Charles, 330, 346
- Sykes, Alan, 71
- symmetry of risk, (*see also* risk) 1, 7, 8, 20, 72, 180–81, 184, 186, 202, 207, 211, 215, 368, 391, 396
- Paul Kahn on, 184, 202, 204, 211
- taboo, 90, 163, 240, 381
- against discussing permissibility of torture, 381
- Tadić, Prosecutor v. Dusko*, 82, 117
- Taliban, 25, 65, 79, 94, 99, 285, 288, 318
- targeted killing/extrajudicial execution, 2, 4, 23–24, 50, 51, 55, 56, 57, 61, 67, 122, 123, 127, 210, 211, 216, 228, 239, 245, 250, 261, 271, 364, 380, 382, 390, 391, 395
- acceptance by U.S. Presidential candidates, 4
- Taussig, Michael, 208, 228, 229, 239, 242, 254, 255, 256, 314
- Tawney, R. H., 344, 345
- Taylor, Charles, 141, 210
- temperantia belli*, 316
- Tenet, George, 383
- “terms of trade,” 179, 186, 206–08, 210, 215–16, 218, 317, 318, 319, 385
- territorial control, as goal of war, 6, 53, 67, 99, 117, 187, 197, 284, 285, 286, 392
- terror, terrorizing of civilian populations, 23, 115, 188, 211, 255, 258
- The 9/11 Commission Report, 240
- Thomas, Justice Clarence, 87, 88
- Thompson, Dennis, 28
- Thucydides, 32, 223
- “ticking time-bomb” scenario, 95, 346
- tit-for-tat, (*see also* game theory), 4, 9, 17, 18, 19, 20, 21, 41, 53, 71, 101, 103, 141, 171, 181, 217, 218, 233, 234, 235, 236, 237, 238, 244, 258, 261, 267, 269, 273, 274, 275, 277, 278, 284, 288, 289, 291, 302, 313, 324, 365, 378, 387, 391, 392, 393, 395, 396
- parties’ self-enforcement of rules through, 4, 19, 64, 70, 79, 171, 216, 233, 293, 391
- Tocqueville, Alexis de, 344, 359
- torture (*see also* interrogation), 3, 12, 27, 35, 40, 51, 55, 56, 59, 75, 76, 86, 94, 98, 119, 129, 130, 134, 135, 140, 143, 151–64, 186, 208, 214, 215, 216, 245, 261, 263, 272, 282, 287, 303, 306, 307, 313, 314, 329, 334, 336, 341, 343, 347, 364, 366, 380, 389, 390, 395
- American public’s acceptance of, 3, 261, 340, 347, 353, 367, 380
- Bush administration’s interpretation of law on, 27, 253, 356
- capacity to withstand, 291
- civilian bar’s opposition to, 339–41
- colonial, 255
- Convention Against, 76, 94, 159, 119, 129, 135, 189, 299, 303, 306, 350, 360, 375, 391
- fear of, 210, 211, 261
- in tribal warfare, 224
- legal definitions of, 155, 291
- methods of, 163
- moral wrongfulness of, as risk asymmetry, 184
- on continuum with other
- degradation/brutality, 163–64, 395
- terrorizing effect of, 210–11
- war as, 155–57

- trade, international, 10, 38, 133, 267, 309, 385
- tragedy, 47, 138, 247
- “tragedy of the commons,” 369
- transaction costs, 266, 283
- Traub, James, 245
- treachery, 167, 177
- treaties (*see also* Vienna Convention on the Law of),  
 “dynamic” interpretation of, 135–36  
 reservations to, 55, 66, 76, 86, 102, 129, 395  
 suspension/withdrawal as standard remedy for breach, 65, 70, 72, 79, 105, 106, 395
- trial, right to fair, 2, 13
- Trotsky, Leon, 132
- Tuck, Richard, 137, 382
- tu quoque*, as defense, 103–05
- uniforms, military (*see also* insignia), 91, 97, 179, 200, 388
- United Nations, 34, 98, 113, 124, 129, 188, 200  
 Charter, 54, 61, 63, 70, 100, 135, 247  
 collective security through, 34, 70, 74, 171, 385  
 General Assembly, 318  
 Human Rights Commission, 83  
 Secretary-General, 83, 113, 304  
 Security Council, 38, 54, 135, 189
- United States,  
 “after-action reviews,” military, 146  
 Army Field Manual, 345  
 as an “empire,” 301, 367  
 Defense Dept., 13  
 “soft power” of, 10, 13, 297–302, 307, 323  
 Civil War, 33, 197, 268, 271  
 Congress, 96, 341, 393  
 dependence on allies in counterterrorism efforts, 17, 299–300, 307  
 desire to be “loved,” 301  
 “exceptionalism” of, 350  
 foreign policy, 86, 175, 288, 323  
 future adversaries, 13–14, 68, 365, 370, 387, 393  
 global leadership of, 312–18, 323, 356, 361, 380, 387, 392, 393, 395  
 ICC and, 188–89  
 in Cold War, 33, 34, 41, 130, 241, 255, 257, 269, 270, 300, 310–11, 368  
 influence abroad, 9, 13, 249, 280, 297–99, 303, 307, 323, 392, 393, 394, 395  
 Americans’ concern about preserving, 303  
 Joint Chiefs of Staff, 333  
 military lawyers (*see* Judge Advocate Generals)
- National Security Council, 95
- Office of Legal Counsel, Justice Dept., 3, 52, 228, 335, 338, 339, 342  
 authorization of interrogation methods by, 3, 165, 335, 338, 339
- Operational Law Handbook, 130, 132
- Pakistan, relations with, 318
- posture toward int’l law, int’l courts, 294, 309
- racial strife in, 222, 225, 300, 310
- Senate Armed Services Committee, JAG  
 testimony, 329, 330, 332, 338, 344, 370, 393
- State Dept., 6, 165, 374
- Supreme Court, 53, 54, 59, 83, 87, 89, 94, 116
- Uniform Code of Military Justice, 333, 336, 338, 350  
 veterans, 385
- vulnerabilities, military, 196–98
- world’s perception of, 262, 308, 312, 351, 365, 367, 387, 392, 393, 305
- universal jurisdiction, 188–90
- Updike, John, 304
- utilitarianism (*see also* consequentialism, moral), 3, 134, 137, 141, 214, 244, 246, 261, 291, 292, 382–83, 386, 396
- vagueness, of relevant law, 76, 121, 127, 128, 133, 164–65, 282, 317, 342
- “value pluralism,” 108, 139
- Vattel, Emerich de, 32, 223–24
- Veblen, Thorsten, 314
- vengeance (*see also* revenge), 18, 31, 32, 315
- vicarious liability, 253
- “victor’s justice,” 21, 105
- victory, meaning of military, 167, 183
- Vermeule, Adrian, 163–64, 392
- Vienna Convention on the Law of Treaties, 56, 65, 70, 72, 73, 86, 95, 135
- Vietnam War, 24, 66, 232, 241, 279, 294, 333, 351, 369
- Villa, Dana, 226
- virtue, virtues (*see also* honor, martial honor), 140, 175, 177, 241, 263, 291, 292, 295, 308, 316, 323, 332–36, 343–46, 351, 352, 366, 367, 371, 386  
 as habit, 333, 347  
 caste and, 347, 366, 371, 387  
 moral psychology and, 333–34  
 social esteem and, 334  
 “virtue ethics,” 331–48, 355, 371, 386, 395
- Voltaire, 210

- Waldron, Jeremy,  
 on law's "expressive" function, 134  
 on torture, 27, 100, 151–56, 159–65, 360  
 on legal positivism, 153  
 on inconsistency of brutality with law, 100,  
 152–56
- Walker, Gen. James, 336
- Walzer, Michael, 37, 38, 102, 332, 358, 379
- war, warfare (*see also* armed conflict),  
 as collective, not individual, 122–23  
 as "constituted" via humanitarian law, 45  
 as "social" in nature, 45  
 civilian morale in, 101  
 colonial, 223–25, 229, 230, 255  
 conflict with Al Qaeda as, 46, 51, 114–21, 388  
 counterinsurgency, 227, 230–31, 255, 284, 294,  
 380  
 Crimean, 102  
 "declaration" of, by Al Qaeda, 97  
 direct attacks on civilians in, 11, 57, 101, 115,  
 138, 143, 204, 205, 209, 283, 286, 287, 288,  
 300, 305  
 "fog of," 117, 273  
 future, 13–14, 68, 365, 370, 387, 393  
 indifference of int'l lawyers toward, 129–32,  
 278, 402  
 just, 214  
 law of, as oxymoron, 44–45  
 medieval, 128, 222, 346  
 misperceptions in, 257–58  
 "primitive" methods of, 197, 223, 226,  
 230–32, 238  
 rationality in, 227, 244, 246, 250, 287, 288,  
 292, 293–94, 331, 396  
 ruthlessness in, 45, 261  
 submarine, 23, 270  
 tribal, 224, 231
- Warner, Sen. John, 350, 351, 359
- Warnke, Georgia, 233
- Washington, U.S. Pres. George, 5
- waterboarding, 13, 165, 193, 255, 272, 282, 350  
 in training of NATO soldiers, 272
- Waxman, Matthew, 305
- weapons, treaties prohibiting/controlling (*see also* arms control), 5, 33, 50, 65, 70, 72,  
 101, 102, 105, 106, 207, 270, 279, 395  
 chemical & biological, 5, 66, 102, 307, 373
- Weber, Max, 339, 358  
 on "elective affinity," 139
- Weeramantry, ICJ Judge Christopher, 120,  
 131
- Weil, Simon, 334
- Weinberger-Powell doctrine, 296
- Weinrib, Ernest, 201
- Wendel, Bradley, 332
- Wendt, Alexander, 191
- Whitman, James, 157
- "who we are/what we stand for" (*see also*  
 identity), 9, 241, 249, 289, 347, 348, 351,  
 352, 355–59, 373, 393, 396
- Wieselstier, Leon, 242
- Williams, Bernard, 137, 141, 358, 381, 390
- Wisse, Ruth, 362–63
- Wittgenstein, Ludwig, 331
- Wolf, Markus, 103
- Wolfowitz, Paul, 292
- Wolstetter, Albert, 41
- World Court (*see* Int'l Court of Justice)
- World Trade Organization (WTO), 10, 38, 129,  
 269, 273, 308
- World War I, 264, 299, 382
- World War II, 22–23, 25, 44, 47, 69, 101, 102, 114,  
 119, 130, 226, 268, 270, 271, 273, 279, 286,  
 300, 307, 310, 357, 382
- Xenophon, 31
- Yamashita, U.S. v.*, 310, 346
- Yemen, 55
- Yoo, John, 25, 27, 74, 94, 133, 306, 337, 339, 340,  
 349–50, 392
- Zelikow, Philip, 295
- Žižek, Slavoj, 356, 390, 391