

### A Utilitarian Account of Article 3 ECHR

There is much philosophy of human rights law, and much utilitarian philosophy, but there is almost no utilitarian philosophy of human rights law.

This has practical consequences. There is a tendency in political discourse to understate the true value of international human rights law. And this tendency is conceptually reinforced by the lack of any systematic utilitarian account of human rights law – because the absence of utilitarian grounds for human rights leads naturally to the presumption that legal issues about human rights should be framed solely in terms of justice for the individual, whereas political debate is framed principally in terms of optimistic outcomes for society as a whole (i.e., in terms of producing maximally good consequences).<sup>1</sup>

In other words, the lack of any systematic utilitarian account of legal human rights creates an unnatural divide between the conceptual basis of public policy debate and the conceptual basis of human rights law. If the political sphere is dominated by essentially utilitarian thinking and the sphere of human rights law is understood to be dominated by essentially deontological thinking, then the two seem to be on an inevitable collision course.

A utilitarian interpretation of the European Convention on Human Rights (ECHR) can address the apparent clash between the conceptual basis of public policy discourse and the conceptual basis of European human rights law. By demonstrating to those in the political sphere that protecting human rights is crucial to maximising well-being, and at the same time demonstrating to those engaged in the practice of human rights law that maximising well-being entails respect for human rights, a utilitarian interpretation of the ECHR can help to dissolve the tension between political discourse and human rights law.

There is, however, a great impediment to the acceptance of a utilitarian theory of human rights law – namely, the perceived inability of any utilitarian account to deal with absolute rights, such as those contained in Article 3 ECHR.

It would not be surprising if utilitarianism could account for *qualified* Convention rights and for the European Court of Human Rights' (ECtHR, or Court) doctrine of proportionality. Indeed, the received 'orthodoxy' is that the doctrine of proportionality is a tool used by the ECtHR to balance the interests protected by rights against competing public interests, with the aim of *maximising* the overall satisfaction of the interests at stake.<sup>2</sup> This 'maximising' interpretation of the ECtHR's jurisprudence on proportionality positively calls out for a theory that grounds qualified rights in well-being and thus provides a natural basis for balancing rights against public interests. Although there are a number of non-maximising<sup>3</sup> and sceptical

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<sup>1</sup> As the philosopher David Wiggins observes, 'even now, at the beginning of the twenty-first century, utilitarianism, with all its difficulties and equivocations, is still our public philosophy' (D Wiggins, *Ethics: Twelve Lectures on the Philosophy of Morality* (Penguin 2006) 146).

<sup>2</sup> For example, R Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002); A Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press 2012); DM Beatty, *The Ultimate Rule of Law* (Oxford University Press 2004); M Klatt and M Meister, *The Constitutional Structure of Proportionality* (Oxford University Press 2012); LB Tremblay, 'An Egalitarian Defense of Proportionality-Based Balancing' (2014) 12(4) *International Journal of Constitutional Law* 864.

<sup>3</sup> For example, K Möller, *The Global Model of Constitutional Rights* (Oxford University Press 2012); G Letsas, 'Rescuing Proportionality', in *Philosophical Foundations of Human Rights*, R Cruft, M Liao, and M Renzo (eds), (Oxford University Press 2015) 317; M Kumm and A Walen, 'Human Dignity and Proportionality: Deontic Pluralism in Balancing', in *Proportionality and the Rule of Law*, G Huscroft, B Miller, and G Webber (eds),

accounts of proportionality,<sup>4</sup> these accounts are self-consciously ‘heterodox’ and at odds with the ‘received wisdom’.

Not so for absolute rights, such as those contained in Article 3. Almost all philosophical accounts of Article 3 are deontological in character<sup>5</sup> and most philosophical accounts of the right not to be tortured are non-consequentialist.<sup>6</sup> There are obvious explanations for this state of affairs. Such absolute rights seem to fit naturally with deontological accounts, which can explain their character by reference to the absolute nature of the underlying wrongs. By contrast, any utilitarian attempts to explain absolute rights, such as the right not to be tortured, face the severe difficulty that it is always possible to imagine extreme situations in which absolutely prohibited conduct, such as torture, can be presented as having optimific consequences, and the consistent utilitarian thus seems to have no choice but to hold that torture is obligatory in such circumstances.

Despite this difficulty, I maintain that a sufficiently sophisticated form of indirect utilitarianism can, in fact, provide a plausible foundation for the Convention right not to be tortured or subjected to inhuman or degrading treatment or punishment (IDT), and can provide a plausible account of the ECtHR’s jurisprudence in relation to that right. Although the analysis here is restricted to Article 3 ECHR, a similar line of argument could be applied in relation to other absolute Convention rights, such as the prohibition on slavery, or to quasi-absolute rights, such as the right to life.

This line of argument is not intended to suggest that the indirect utilitarian account of Convention rights is primarily justified by its ability to explain absolute rights or that the indirect utilitarian account is the most natural or obvious justification for absolute rights. On the contrary, if all Convention rights were absolute, non-consequentialist accounts would have a distinct competitive advantage. However, if the indirect utilitarian account has a competitive advantage when it comes to explaining proportionality and balancing, and if it can also furnish a plausible justification for absolute Convention rights, then it can claim to be a unified account of the Convention as a whole, which, if followed consistently, might not only enable the political and juridical realms to avoid undesirable conceptual conflict, but also enable the ECtHR to increase the coherence and completeness of its judgments.

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(Cambridge University Press 2014) 67; S Smet, *Resolving Conflicts Between Human Rights: The Judge’s Dilemma* (Routledge 2017); M Luteran, ‘The Lost Meaning of Proportionality’, in *Proportionality and the Rule of Law*, G Huscroft, B Miller, and G Webber (eds), (Cambridge University Press 2014) 21.

<sup>4</sup> For example, FJ Urbina, *A Critique of Proportionality and Balancing* (Cambridge University Press 2017); G Verdirame, ‘Rescuing Human Rights from Proportionality’, in *Philosophical Foundations of Human Rights*, R Cruft, M Liao, and M Renzo (eds), (Oxford University Press 2015) 342; S Tsakyrakis, ‘Proportionality: An Assault on Human Rights?’ (2009) 7 *International Journal of Constitutional Law* 468; J Tasioulas, ‘Saving Human Rights from Human Rights Law’ (2019) 52 *Vanderbilt Journal of Transnational Law* 1167; G Webber, *The Negotiable Constitution: On The Limitation Of Rights* (Cambridge University Press 2009).

<sup>5</sup> For example, N Mavronicola, *Torture, Inhumanity and Degradation Under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (Bloomsbury 2021); E Webster, *Dignity, Degrading Treatment and Torture in Human Rights Law: The Ends of Article 3 of the European Convention on Human Rights* (Routledge 2018); S Smet, ‘Conflicts Between Absolute Rights: A Reply to Steven Greer’ (2013) 13(3) *Human Rights Law Review* 469.

<sup>6</sup> For example, D Sussman, ‘What’s Wrong with Torture?’ (2005) 33(1) *Philosophy & Public Affairs* 1; D Luban, *Torture, Power, and Law* (Cambridge University Press 2014); FM Kamm, *Ethics for Enemies: Terror, Torture, and War* (Oxford University Press 2011); J Griffin, ‘What Should We Do about Torture?’, in *Ethics and Humanity: Themes from the Philosophy of Jonathan Glover*, N Davis, R Keshen, and J McMahan (eds), (Oxford University Press 2010) 4.

In the first section of my argument, I develop an indirect utilitarian account of the moral right to be free from torture and of the moral right to be free from IDT. I argue that it is logically consistent for indirect utilitarians to adopt an absolute moral right to be free from torture, and that indirect utilitarians are logically compelled to support some form of qualified moral right to be free from IDT.

In the second section, I argue that there are weighty reasons, within the indirect utilitarian approach, for believing that the legal Convention right to be free from torture and IDT should have a greater stringency than the underlying moral rights, and that these legal rights should be absolute.

In the remaining sections, I examine some key elements of the ECtHR's Article 3 jurisprudence in order to show how the indirect utilitarian account is consistent with them. There are, of course, many different elements of the ECtHR's Article 3 jurisprudence from which to choose, and I do not claim to provide an exhaustive or comprehensive account. But, by illustrating how the indirect utilitarian account of Article 3 can be applied to 'worked examples' of the Court's doctrines (which at least suggest how the theory might be applied to the rest of the ECtHR's Article 3 jurisprudence), I aim to establish that indirect utilitarianism can stand as a plausible account of that jurisprudence. To this end, I set out: how the indirect utilitarian account of Article 3 is coherent with the ECtHR's conclusion that the *Gäfgen* case did not involve a conflict of Convention rights;<sup>7</sup> how the indirect utilitarian account is coherent with the ECtHR's answer to the question 'what counts as torture?'; and how the indirect utilitarian account is coherent with the ECtHR's jurisprudence on the difference between the scope of the obligation to prevent torture and the scope of the obligation to prevent IDT.

## **1 An Indirect Utilitarian Account of the Moral Right to be Free from Torture and Inhuman or Degrading Treatment or Punishment**

Utility, in the version of utilitarianism adopted here, is conceived in terms of informed-preference satisfaction.<sup>8</sup> What is valued are the desires or preferences that agents would have if they were: not subject to a lack of information;<sup>9</sup> not liable to make logical mistakes; and understood what makes life go well.<sup>10</sup> This informed-preference satisfaction account of utility ultimately leads us to a series of substantive states of affairs, such as accomplishment, autonomy, liberty, understanding, enjoyment, and deep personal relations, towards which we would aim if our preferences were properly informed.<sup>11</sup>

As well as conceiving of utility in these terms, the form of indirect utilitarianism that I am advancing holds that there is a difference between the correct 'criterion of rightness' and the correct 'decision procedure'.<sup>12</sup> For the criterion of rightness, at the 'critical level' of moral thinking, we are to use utilitarian calculation (i.e., whether an action is right is ultimately determined by whether that action maximises the satisfaction of informed preferences). But

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<sup>7</sup> *Gäfgen v Germany* [GC] 22978/05 (ECtHR, 1 June 2010).

<sup>8</sup> The version of the informed-preference satisfaction conception of well-being adopted here is derived from – but is not identical to – that proposed by Griffin (J Griffin, *Well-Being: Its Meaning, Measurement and Moral Importance* (Oxford University Press 1986)).

<sup>9</sup> *Ibid* 12-15.

<sup>10</sup> *Ibid* 10-20.

<sup>11</sup> *Ibid* 67.

<sup>12</sup> See, E Bales, 'Act-Utilitarianism: Account of Right-Making Characteristics or Decision-Making Procedure' (1971) 8(3) *American Philosophical Quarterly* 257.

that criterion is intended to be used only rarely, when we have lots of time.<sup>13</sup> In order to make everyday moral decisions, people should not ascend to this ‘critical level’ of moral thinking. Everyday moral decisions are to be made, not by direct calculation, but by reference to a set of intuitive principles with the highest ‘acceptance-utility’ (i.e., the principles which, if widely accepted, lead to the greatest satisfaction of informed preferences).<sup>14</sup> Ordinarily, people ought to make moral decisions by reference solely to these intuitive principles, rather than by reference to the principle of utility itself. Having used critical thinking to determine the intuitive principles with the highest acceptance utility and having inculcated these principles within ourselves, we are to resort again to critical thinking only in certain situations where the intuitive principles conflict.

Within this framework, moral rights are not conceived as mere ‘rules of thumb’,<sup>15</sup> nor are they seen as mere ‘secondary principles’ (of the sort for which Mill argues).<sup>16</sup> A decision procedure in which all intuitive principles were subject to continuous supervision by the principle of utility would *not* be optimific because it would preclude an agent from developing the kind of lifelong commitments to intuitive principles needed in order to live a life in which informed preferences are maximally realised. Indirect utilitarianism consequently conceives of moral rights as especially stringent intuitive principles, which are deeply held and stable through time, and which are to be re-assessed through resort to the underlying principle of utility only in the most exceptional circumstances.<sup>17</sup>

Although these features allow the indirect utilitarian to explain the stringency of many moral rights, they do not alone solve the problem of absolute rights. If all intuitive principles must ultimately be sanctioned by the principle of utility, it will always be impermissible for agents to hold completely inviolable principles, because it is always at least theoretically possible that they will not be optimific. If we accept the premiss that answers to every moral question can be systematically deduced from the single ultimate moral principle of utility, then it follows that there can be no absolute principles aside from the principle of utility itself.<sup>18</sup>

However, there is good reason to doubt the premiss that answers to every moral question can be systematically deduced (even by the most thoroughgoing utilitarian) from the single ultimate moral principle of utility. Forms of utilitarianism which suppose that such systematic deduction is possible, I will call ‘unrealistic’, because they fail to take into account the fact that the limits on our knowledge of the consequences of our actions continue to exist even when we ascend to the critical level of moral thinking.<sup>19</sup> The problem of ‘cluelessness’ means that there are some circumstances in which, even when operating at the critical level, we cannot choose between options by reference to the maximisation of utility alone and must accept the need for

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<sup>13</sup> RM Hare, *Moral Thinking* (Oxford University Press 1981) section 2.6.

<sup>14</sup> *Ibid* section 2.4.

<sup>15</sup> JJC Smart and B Williams, *Utilitarianism: For and Against* (Cambridge University Press 1973) 42-43.

<sup>16</sup> JS Mill, *The Collected Works of John Stuart Mill, Volume X – Essays on Ethics, Religion, and Society* (University of Toronto Press 1833) 110-11.

<sup>17</sup> See, Hare (n 13); RM Hare, *Essays on Political Morality* (Oxford University Press 1989) Chapter 9.

<sup>18</sup> There may be other ‘absolutes’ in this form of utilitarianism, but these will be extremely highly specified norms. They will thus be less like principles and more like specific imperatives. By saying that there can be no absolute *principles* in this form of utilitarianism, I mean no absolute imperatives which are relatively general in their form, rather than highly specific.

<sup>19</sup> As Frey puts it, there is in fact ‘a gulf between archangel thinking...and our own critical thinking’. See, RG Frey, ‘Act-Utilitarianism, Consequentialism, and Moral rights’, in *Utility and Rights*, RG Frey (ed), (University of Minnesota 1984) 61.

some consideration of practicalities.<sup>20</sup> We must adopt a more ‘realistic’ form of utilitarianism which recognises that, given the limits on our knowledge of the future effects of present causes, it is not possible always systematically to deduce answers to moral questions from the principle of utility alone.

Where the realistic indirect utilitarian faces a choice between a set of options, each of which might be optimific, and between which there is not (and never will be) any way to choose rationally by reference to the principle of utility alone (because of the limits on our knowledge of the consequences of our actions), then both options are permissible and the choice between them must be made by an exercise of will rather than reason.<sup>21</sup> One such exercise of will may be to adopt absolute, inviolable moral principles other than the principle of utility itself, which govern action under circumstances in which there cannot be sufficient knowledge of the future to permit the calculation, from the principle of utility, of a singular, optimific choice.<sup>22</sup> This form of ‘realism’ is important because (as I argue in the following section) it is a large part of what allows the indirect utilitarian to recognise an absolute moral right not to be tortured.

### ***1.1 The Moral Right to be Free from Torture***

The ordinary language meaning of torture is described by Sussman as ‘the deliberate infliction of great pain or some other intensely distressing affective state (fear, shame, disgust, and so forth) on an unwilling person for purposes that person does not and could not reasonably be expected to share’.<sup>23</sup> Although by no means universally accepted as the ordinary language meaning of torture, this provides a relatively uncontentious starting point for developing a conception of the moral right to be free from torture.<sup>24</sup>

The first step in developing an indirect utilitarian conception of the moral right to be free from torture is to say what is wrong with torture in utilitarian terms – in other words, to identify the negative consequences of torture.

The most obvious and immediate disutility of torture is the ‘great pain or some other intensely distressing affective state’ that it causes to the victim and those close to them. Victims are subjected to pain both in the short-term, during the acts of torture themselves, and in the long-term, because a surviving victim may suffer significant distress when reminded of their torture,

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<sup>20</sup> See, J Lenman, ‘Consequentialism and Cluelessness’ (2000) 29(4) *Philosophy & Public Affairs* 342; H Greaves, ‘Cluelessness’ (2016) CXVI(3) *Proceedings of the Aristotelian Society* 311.

<sup>21</sup> Compare, J Raz, ‘Incommensurability and Agency’, in *Incommensurability, Incomparability and Practical Reason*, R Chang (ed), (Harvard University Press 1997) 127.

<sup>22</sup> J Griffin, *What Can Philosophy Contribute to Ethics?* (Oxford University Press 2015) Chapter 6.

<sup>23</sup> Sussman (n 6) 5. Though this definition is far from universally accepted, there is significant consensus around it. See, for example, W Twining and B Paskins, ‘Torture and Philosophy’ (1978) 52 *Proceedings of the Aristotelian Society, Supplementary Volumes* 143, 150-161.

<sup>24</sup> My purpose here is not to adjudicate between competing definitions of the ordinary language meaning of the term ‘torture’ or to draw any definitive distinction between an act of torture and the consequences of that act. Rather, I seek only to develop a particular conception of the moral right to be free from torture. The scope of a conception of the moral right to be free from torture will not necessarily be coterminous with the scope of the ordinary language concept of torture. Whether a particular act (with or without taking account of its consequences) comes within the natural meaning of the term ‘torture’ in ordinary language is one question; whether a particular act or its consequences count as an interference with the moral right not to be tortured is another question. On the utilitarian approach adopted here, whether an act interferes with the moral right not to be tortured depends solely on the consequences of that act. However, this does not entail the view that whether an act comes within the scope of the natural meaning of the term ‘torture’ depends solely on the consequences of that act. Indeed, such a view would obviously be mistaken.

may lose the capacity to build close personal relationships, and may suffer from a range of other long-term psychological issues.<sup>25</sup> Though utilitarian explanations for the disvalue of pain vary slightly – hedonists treat pain as having inherent disvalue, informed-preference theorists treat it as having instrumental disvalue – all utilitarians have an easy time explaining why intense pain or distress are of significant disvalue. In comparison, non-welfarist moral theories less naturally cohere with the idea that pain or distress are themselves morally significant, and can less easily explain the wrong of torture by reference to the fact that it causes significant pain or distress.<sup>26</sup> Whereas, for the utilitarian, a central part of what is wrong with torture is the pain and distress caused, for dignity-based conceptions of torture, the pain and distress caused are only of peripheral importance. Accordingly, utilitarianism has the upper hand when it comes to explaining why torture is wrong due to the fact that it causes significant pain.

This has the consequence that, whereas dignity-based conceptions of torture hold that the right not to be tortured ought to cover situations in which there is no substantial concrete harm to the victim, the utilitarian conception of torture is more likely to hold that the right ought not to cover such situations. Mavronicola, for example, discusses ‘the scenario of ‘failed’ torture through the deliberate beating of the soles of a victim’s feet in circumstances where the victim, unbeknownst to the torturer, cannot feel pain’, and concludes that although the scenario might involve very little or no pain to the victim, because such treatment still involves the requisite intention on the part of the perpetrator, it should still be considered as a violation of the right to be free from torture.<sup>27</sup> The utilitarian, by contrast, is likely to draw the scope of the right not to be tortured more narrowly, so that it includes only situations in which intense pain or distress actually materialise. However, in another sense, the utilitarian’s focus on pain will lead him to draw the contours of the right more broadly. Whereas some non-consequentialists might hold that situations in which an individual is subjected to intense pain but in which their agency is not fundamentally disrupted fall outside the scope of the moral right not to be tortured, the utilitarian can recognise that where intense pain is combined with other distinctive features of torture (apart from disruption of agency) then the situation should fall within the scope of the moral right not to be tortured.

As well as the pain and distress that it causes, torture also negatively impacts the autonomy and personhood interests of the victim. Both autonomy and personhood interests have significant weight in the informed-preference satisfaction conception of utility, and rank highly as ‘global’ desires within the structure of informed desires.<sup>28</sup> Torture negatively affects an individual’s autonomy interests because it involves the infliction of pain on ‘an unwilling person for purposes that person does not share’ – it is normally inflicted on individuals in order to force them to reveal information, to break their will, or to punish them. As Sussman puts it, this places the individual ‘into the position of colluding against himself through his own affects and emotions, so that he experiences himself as simultaneously powerless and yet actively complicit in his own violation’.<sup>29</sup> Torture constitutes an especially severe impact on autonomy interests, because it not only involves limiting an individual’s autonomy through coercion, but also involves turning that individual’s own autonomy against them: torture makes the victim ‘an active participant in his own abuse’, turns an individual’s rational capacities into something serving the will of the torturer, and makes ‘the victim an accomplice in his own violation’.<sup>30</sup>

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<sup>25</sup> See, GR Randall and EL Lutz, *Serving Survivors of Torture* (AAAS Books 1991) 28-30.

<sup>26</sup> See, A Sen, ‘Utilitarianism and Welfarism’ (1979) 76(9) *The Journal of Philosophy* 463.

<sup>27</sup> Mavronicola (n 5) 51.

<sup>28</sup> Griffin (n 8) 67.

<sup>29</sup> Sussman (n 6) 4.

<sup>30</sup> *Ibid* 22 and 30.

Torture also undermines the personhood interests of the victim because it undermines a victim's view of themselves as inviolable, and creates within the victim the impression that they do not have equal 'human standing'.<sup>31</sup> As Mavronicola puts it, 'torture is thus a form of radical othering. In torture, the...human person is treated as profoundly – even limitlessly – violable, to be manipulated and bent to the torturer's purposes'.<sup>32</sup>

Of course, the informed-preference utilitarian is likely to take a slightly different view of the nature of these wrongs from that which is likely to be taken by non-consequentialists. While non-consequentialists might see torture as undermining the human standing of the victim regardless of the victim's desires, the informed-preference utilitarian will see the heart of the problem as being that the victim, against their wishes, is made to feel that human standing has been undermined. However, the fact that one group of theorists sees torture as detrimental to the autonomy and personhood of an individual, and another group of theorists sees torture as detrimental to an individual's *desire* to be autonomous and to have their personhood interests respected, does nothing in itself to undermine the latter group's case against torture.

Torture not only affects the victim, but can also have negative effects on broader public interests. I consider later the negative consequences which follow from institutionalising and legalising torture, but even isolated instances of torture will often have broader effects than just their impact on the victim. Whenever a public official is implicated in torture, even if the torture is conducted in secret and is not sanctioned or institutionalised, there is always a risk that the torture will become public and reduce confidence and trust in officials. Even a supposedly one-off instance of torture in exceptional circumstances can set a precedent for future officials and citizens, and can lead to a kind of 'expressive harm' – where citizens know that officials have lost respect for the prohibition of torture and can themselves lose respect for that prohibition.<sup>33</sup> Much of the utility of upholding the moral right not to be tortured comes from what Raz calls its 'contribution to a common liberal culture',<sup>34</sup> which is beneficial even to those who are not themselves likely to be subject to torture. In fact, even torture committed by private individuals has the capacity to create broader systemic effects, undermining citizens' view of themselves as safe and inviolable, and undermining their confidence in their fellow citizens' respect for their personhood interests.

Apart from the negative effects on the victim and on society generally, there is one set of negative consequences not yet mentioned: torture's effect on torturers themselves. Most straightforwardly, many people have strong preferences not to subject others to intense pain. Members of the police or security services who find themselves in situations in which they feel compelled to engage in torture in order to protect the general public might suffer severe long-term impacts on their own well-being. In many cases, even the indifferent torturer who acts in conformity with their immediate desires may suffer negative long-term consequences, such that they would not desire to torture if they were properly informed. In short, torture has the capacity not only to ruin the lives of victims but also the lives of its perpetrators.

More important than the negative effects on the torturer's well-being though, are the negative effects on the torturer's moral character. Torture is a paradigmatically vicious act, which undermines the torturer's view of other people as inviolable. As Sussman observes, a torturer

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<sup>31</sup> JM Bernstein, *Torture and Dignity: An Essay on Moral Injury* (University of Chicago Press 2015) 171.

<sup>32</sup> Mavronicola (n 5) 42.

<sup>33</sup> See, R Pildes, 'Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism' (1998) 17 *Journal of Legal Studies* 725, 755.

<sup>34</sup> J Raz, *Ethics in the Public Domain* (Oxford University Press 1994) 55.

becomes a kind of ‘perverted God’ who has absolute control over their victim, and this can fundamentally affect the way in which the torturer relates to other people in the long-term.<sup>35</sup> By relating to other people in this fundamentally vicious manner, the torturer becomes vastly more likely to treat others inhumanly in the future. Even where the torturer believes that they are doing the right thing by torturing, this same issue still arises because it is impossible for humans entirely to compartmentalise their dispositions, and so impossible for the torturer to compartmentalise their torture and remain virtuous despite it.<sup>36</sup> It is, I would argue, impossible for most humans to hold a set of dispositions which allows for torture but which is optimistic in all other respects. The individual who believes that they were right to torture cannot help but have a character that is likely to lead them to act less than optimistically in the rest of their lives.

Explanations of the disutility of torture have often missed the importance of this tendency for torture to affect the character of the torturer.<sup>37</sup> This is perhaps understandable given the paradoxical nature of the idea that part of the wrong of torture might be visited upon the person doing the torturing rather than upon the person being tortured. But the oversight has left utilitarians seemingly unable to capture the distinctive category of wrong that torture constitutes. This has left utilitarians struggling to explain why torture is any more wrong than morally legitimate forms of warfare. As Sussman argues:

It is doubtful that there is any form of pain or injury that can be delivered by a torturer that is categorically worse than the harms that can result from bullets and bombs. The torture victim may experience such terror and helplessness as to leave him permanently shattered psychologically, but so too may besieged soldiers subjected to artillery or aerial bombardments intended to destroy their morale. Yet such tactics are not met with the sort of categorical condemnation that the torture of enemy soldiers receives...[W]e do seem to have a moral reason not to serve as someone's torturer that is qualitatively different, and more stringent, than the reasons we have not to make war on him.<sup>38</sup>

At least some of the special condemnation that is reserved for torture (as opposed to warfare) can be explained by the indirect utilitarian in terms of the effect that torture has on the moral character of the torturer. In morally legitimate forms of warfare, combatants do not need to exploit the pain of their victims in order to achieve their purposes, and they do not need to use their victim's autonomy as a weapon which the victim turns against themselves. Although many combatants in legitimate warfare suffer severe psychological distress, they do not develop the kind of exploitative relationship with their victims that torture necessitates, and it is thus at least possible for their moral character to emerge from combat intact. In contrast, it is essential to torture that the torturer develops a relationship with their victim and understands how their victim's pain and autonomy can be turned against them, and it is thus nearly impossible for the torturer's moral character to remain intact – with nearly inevitable consequences for their ability to act optimistically outside the torture-chamber.

As well as all the negative consequences which follow from torture, there are, of course, positive consequences which might follow from it. In the infamous ‘ticking time bomb

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<sup>35</sup> Sussman (n 6) 26.

<sup>36</sup> On the impossibility of compartmentalising and fine-tuning dispositions too far, see, R Adams, ‘Motive Utilitarianism’ (1976) 73(14) *Journal of Philosophy* 467; D Parfit, *Reasons and Persons* (Oxford University Press 1984); J Driver, *Uneasy Virtue* (Cambridge University Press 2001); Griffin (n 22).

<sup>37</sup> For example, J Arrigo, ‘A Utilitarian Argument Against Torture Interrogation of Terrorists’ (2004) 10 *Science and Engineering Ethics* 543; R Morgan, ‘The Utilitarian Justification of Torture: Denial, Desert and Disinformation’ (2000) 2(2) *Punishment and Society* 181; Twining and Paskins (n 23).

<sup>38</sup> Sussman (n 6) 13.



scenario', torture may appear to be the only way in which information can be obtained which could save a great number of lives. However, as is very well-known, there are various reasons why the simple ticking time-bomb scenario – where an individual who certainly knows where a bomb is planted, will certainly give up the information when tortured, which will certainly lead to the bomb being located and diffused, and lead to optimistic consequences overall – vastly overstates the utility which is likely to result from real acts of torture. In reality, we can never be anything like close to certain that there are no other means of obtaining the whereabouts of the bomb apart from torture, that the individual truly knows where the bomb is planted, that they will give up the information when tortured, that any information they do give up will be reliable, and that having obtained the information it will be possible to neutralise the threat. Indeed, there is much empirical evidence to suggest that torture is, in fact, an inherently unreliable method of obtaining accurate information.<sup>39</sup>

Given these points about the manifest disutilities of torture and the highly uncertain utilities of it even in extreme circumstances, the question now emerges: which set of intuitive principles ought the realistic indirect utilitarian to adopt about torture as generally optimistic guides to practical moral conduct? There are three broad types of intuitive principles which are at least *prima facie* candidates: (i) an absolute moral right to be free from torture; (ii) a moral right to be free from torture, with a short list of specific and narrowly tailored exceptions; or (iii) a moral right to be free from torture, with an open-ended list of qualifications, which is generally 'limitable'.<sup>40</sup>

Only the first two of these principles are plausible candidates. The third principle will clearly not be optimistic: there is no need for the right to be free from torture to be generally limitable by reference to an open-ended list of qualifications because the circumstances in which torture could even potentially be optimistic are so limited. First, unlike for many other moral rights, interferences with which frequently promote a wide range of interests, the positive consequences of torture are necessarily limited. Whereas, for example, protecting an individual's right to a private life often comes at a cost to others' interests in free expression, or at a cost to the economic well-being of the state, such conflicts do not arise between the right not to be tortured and these other interests. Second, given the weight of the negative consequences which torture is likely to produce, even where the right does come into a *prima facie* conflict with other interests, only a small handful of those interests are close to being weighty enough for there to be any serious question about which set of interests is weightier. So, for example, although a sadist might get considerable pleasure from torturing, there is no possibility that their pleasure could, at least in the real world, ever outweigh the negative consequences which torture produces. There are, as a result, only a highly constrained number of circumstances in which torture might, even arguably, be capable of producing optimistic consequences (such as where torture would be necessary to avert a national security threat, to save lives, or to prevent others being tortured).

One might, of course, agree that there do appear to be very limited circumstances in which torture could be optimistic, but argue that the right not to be tortured should nonetheless be generally limitable because it is possible that there might exist other unforeseen circumstances in which torture could be optimistic. The problem is that a right which is generally limitable is open to abuse. The danger is especially pronounced in relation to torture, because any scenario in which the question of whether to torture seriously arises is likely to be an emergency; the

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<sup>39</sup> See, Arrigo (n 37).

<sup>40</sup> On the idea of a 'limitable' as opposed to a 'limited' right, see, Verdirame (n 4).

potential torturer who does not have clear strict rules to apply and who must weigh up all the considerations for themselves is likely, in an emergency, incorrectly to weigh these considerations by focusing excessively on the immediate dangers and the immediate benefits. Between the two sets of options – having a limited moral right (which comes with the danger of some unforeseen circumstance arising that is outside of the limited exceptions in which violation of the moral right is permitted) and having a limitable moral right (which comes with the danger that this limitable moral right is prone to being abused and might lead to the widespread use of torture) – the latter option evidently presents the greater danger in utilitarian terms.

It is, however, much less clear whether it is optimific for the indirect utilitarian to adopt as an intuitive moral principle (i) an absolute moral right to be free from torture, or (ii) a moral right to be free from torture with a short list of specific and narrowly tailored exceptions. In fact, the choice between these two alternative intuitive moral principles is subject to such persistent uncertainty and involves such large scale, complex, and conflicting systemic effects that it is not by any means obvious how the indirect utilitarian can rationally decide between the two, even when operating at the critical level of moral thinking. In order to make an accurate assessment of the consequences of each principle, one would have to know things which seem permanently beyond our reach. As Griffin puts it:

we need to know not just what disasters, if any, were averted by torture, which we might one day learn, but also how much torture was necessary to extract the information, how institutionalized or uninstitutionalized the torture was, if it was institutionalized, what other sorts of institutions might there be, what the effects of different possible social decisions about torture would be for society at large...what ways are there, other than torture, of getting the sort of information we need (e.g., the willing cooperation of a sympathetic public), whether torture impedes these other ways (e.g., the alienation of the Iraqi public by the brutality of the coalition forces), and so on and on.<sup>41</sup>

There is good reason to suppose that both principles might have large scale negative systemic effects – an absolute moral right not to be tortured might, if observed, increase the likelihood of murders, terrorist attacks, and could ultimately lead to nuclear war; whereas, a moral right not to be tortured with some exceptions might, if the exceptions were applied, increase the likelihood of the widespread use of torture, lead to a lack of respect for moral rights in general, and even ultimately lead to tyranny. While much evidence could be adduced for both of these conflicting points of view, there is no obvious way to choose, by reference to consequences alone, which of the proposed rules is superior. As Griffin argues, ‘sometimes our identification of consequences and our calculation of their probabilities are so unreliable that we would not be willing to base our lives on them’<sup>42</sup> – and the question of which of the two principles about torture we ought to adopt is exactly this sort of choice.

Where the realistic indirect utilitarian faces a choice between a set of options, each of which might be optimific, and between which there is not (and never will be) any way to choose rationally by reference to the principle of utility alone, then both options are permissible, and the choice between them must be made by an exercise of will rather than reason. This is the situation in which we find ourselves concerning the choice between an absolute moral right not to be tortured and a moral right not to be tortured with limited specific exceptions: no rational

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<sup>41</sup> Griffin (n 6) 14-15.

<sup>42</sup> Ibid.

choice can be made in utilitarian terms, and it is accordingly coherent for the indirect utilitarian to adopt either principle.

Of course, even if the realistic indirect utilitarian does choose to adopt the absolute moral right (rather than the moral right with specific limited exceptions) it might be argued that there is still an important sense in which the right that they have adopted is not properly absolute. If it is legitimate for the realistic indirect utilitarian to choose either option, then the supposedly absolute moral right does not have a claim to absolute universal application and obedience – it is ‘absolute’ only for those who choose to obey it and there is no rational obligation to do so. For deontologists, by contrast, it is a feature of any absolute right that it has an absolute claim to universal obedience and acceptance. It may, therefore, be more accurate to say that the right adopted is not an absolute right, properly speaking, but rather a right which for all practical purposes some indirect utilitarians choose to apply as if it were an absolute right – in other words, a decision procedure in which the right is treated as if it were absolute for all intents and purposes.

### ***1.2 The Moral Right to be Free from Inhuman or Degrading Treatment or Punishment***

‘Inhuman’ and ‘degrading’ are terms which are more deeply contested than ‘torture’. But it is nonetheless possible to make some uncontroversial observations about their meaning in ordinary language. The term ‘inhuman’ has both a perpetrator-oriented and a victim-oriented sense. As Waldron observes, someone who acts inhumanly behaves in a way that ‘is in some sense *untrue* to their undoubted humanity’. Someone who suffers inhuman treatment suffers:

treatment which cannot be endured in a way that enables the person suffering it to continue the basic elements of human functioning such as self-control, rational thought, care of self, ability to speak, and so on...Treatment may be described as inhuman if it fails in sensitivity to the most basic needs and rhythms of a human life: the need to sleep, to defecate or urinate, the need for daylight and exercise, and perhaps even the need for human company.<sup>43</sup>

The term ‘degrading’ is even more difficult to define, but it is broadly understood to denote treatment which causes feelings of ‘fear, anguish, and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance’.<sup>44</sup> As Waldron notes, degrading treatment often involves forms of bestialisation, instrumentalisation, infantilisation, or demonisation.<sup>45</sup>

The most significant difference between the negative consequences of torture and the negative consequences of IDT is that, while torture necessarily causes a victim to experience highly distressing affective states, IDT does not. IDT can occur even where a victim is unaware that it is occurring; thus, the wrong of IDT cannot be explained generally by reference to distressing affective states (even though many particular instances of it might cause such states and might be wrong partially by virtue of this effect).

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<sup>43</sup> J Waldron, ‘Inhuman and Degrading Treatment: The Words Themselves’ (2010) XXIII(2) *Canadian Journal of Law and Jurisprudence* 269, 280

<sup>44</sup> *Ireland v the United Kingdom* 5310/71 (ECtHR, 18 January 1978) para 167.

<sup>45</sup> Waldron (n 43) 282-283.

In other respects, however, although the consequences of IDT are often less extreme than those of torture, and although some of the key negative consequences of torture are absent, IDT has negative consequences similar to those of torture.

As with torture, IDT negatively impacts the autonomy and personhood interests of the victim, although in importantly differing ways. From the point of view of an informed-preference satisfaction conception of utility, we can see inhuman treatment as robbing a victim of their capacity to satisfy their basic informed preferences relating to their survival (such as the need to sleep).<sup>46</sup> The negative consequences of degrading treatment, on the other hand, are less about the way that they impact an individual's interests directly, and more about the way they impact an individual's interest in being seen by others in a particular light and in having a particular social standing. Whether or not an individual is actually aware that they have been subject to degrading treatment, they have a strong interest in not being, and in not being viewed by others as having been, humiliated and debased. So, for example, although an individual who is molested while unconscious might not be aware that they have been subjected to degrading treatment, their informed-preferences may nonetheless be negatively impacted by that degrading treatment.

Again, as with torture, some of the negative consequences of IDT are attributable to its effects on the population generally. Whereas torture promulgates a lack of respect for the inviolability of the individual, IDT expresses a lack of respect for basic human needs and desires, and might, in some cases, have an impact on the interests and informed preferences of citizens generally even more widespread than in the case of torture – as we see, for example, in the current treatment of the Uighurs in Xinjiang. Such widespread and institutionalised IDT is also likely to undermine the moral character of the perpetrators in a similar, albeit perhaps less severe, way than torture.

IDT is also often less likely than torture to produce positive consequences, in at least some important respects. In emergency or ticking time-bomb scenarios, IDT is unlikely to be an effective means of procuring information, because it does not involve the victim suffering the same level of pain or other distressing affective states that is experienced in torture, and is thus less likely to coerce the victim into giving up information. In such scenarios, IDT may be the worst of both worlds – it is likely to result in all of the negative consequences listed above, but it is unlikely to achieve any positive consequences. Moreover, most of the time IDT does not arise in the context of such emergency situations, but instead it is used as a form of punishment, or is the result of police brutality, or poor conditions of detention. In such situations, IDT is not even designed to achieve any positive consequences and may be simply an expression of cruelty, lack of respect for a victim, or mere carelessness. Where IDT occurs in this context, it will ordinarily result in a very limited set of positive consequences.

However, despite the fact that IDT has many of the same negative consequences of torture and seems (at least in some circumstances) to lack even the purported positive consequences associated with torture, it nonetheless appears that there are some situations in which treatment, which is properly classified as IDT, may nonetheless lead to significant positive consequences and might be justifiable on utilitarian grounds. One example might be where an impoverished state needs to detain dangerous criminals in order to incapacitate them, but only has the resources to detain them in conditions that are inhuman or degrading. Detention in very poor conditions has all the hallmark negative consequences of IDT: the fact that the victim might be

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<sup>46</sup> Waldron (n 43) 280.

a dangerous criminal whose behaviour makes their incarceration justified does not mean that their autonomy or personhood interests are any less negatively affected by being incarcerated in very poor conditions. This example – and the possibility of other similar examples – illustrates that even true IDT may sometimes have significant positive consequences, and that these positive consequences may sometimes, from a utilitarian perspective, justify IDT.

The question now emerges: in light of these similarities to and differences from torture, which set of intuitive principles ought the indirect utilitarian to adopt about IDT? Unlike for torture, an absolute right to be free from IDT is not a plausible candidate because it seems clear that there are circumstances in which IDT will be optimific. Indirect utilitarianism can only support either (i) a right to be free from IDT, with a short list of specific and narrowly tailored exceptions, or (ii) a right to be free from IDT, with an open-ended list of qualifications, and which is generally ‘limitable’. Which of these specific intuitive principles indirect utilitarianism supports is itself a complex and interesting question, but it is not important for our purposes. What is important (and what remains to be argued, in the following section) is that despite its inability to justify an absolute moral right to be free from IDT, indirect utilitarianism can nonetheless justify an absolute Convention right to be free from IDT.

## **2 From the Moral Right to the Convention Right to be Free from Torture and Inhuman and Degrading Treatment or Punishment**

The relationship between moral rights and legal human rights can best be understood in terms of the ‘formative aim thesis’, according to which the point of international human rights law is that ‘it is primarily concerned with giving effect to universal moral rights, insofar as it is appropriate for international law to do so, through the technique of assigning a uniform set of individual legal rights to all human beings’.<sup>47</sup> If the correctness of this formative aim thesis is taken as a given, then it follows that an indirect utilitarian account of the moral right to be free from torture and of the moral right to be free from IDT can in principle be translated into an account of Article 3 ECHR.

This does not, however, imply a one-to-one correspondence between the scope of the moral right and the scope of the matching international legal right. In what follows, I examine the reasons for Article 3 ECHR to diverge from the moral rights that underlie it. I argue that, even though indirect utilitarianism does not require its adherents to accord absolute or universal status to the moral right to be free from torture and IDT, indirect utilitarianism does nevertheless justify the absolute character of the legal rights written on the face of Article 3.

The view that torture is sometimes morally justifiable, but should nonetheless be absolutely prohibited in law, is widely held.<sup>48</sup> This view is based on the contention that even if the moral costs of torture may sometimes be lower than its benefits, the moral costs of institutionalising torture are always higher than its benefits.

McMahan, for example, argues that although torture is sometimes morally justified, it should be absolutely prohibited in law because: (i) those with unjust goals are likely to believe that they are just; (ii) even those who know their goals are unjust are likely to claim that they are just; (iii) even those whose goals are just will be tempted to claim justification for torture where none exists; (iv) it will not be practicable to enforce a non-absolute rule; and, (v) the

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<sup>47</sup> Tasioulas (n 4) 1174.

<sup>48</sup> For example, J McMahan, ‘Torture in Principle and in Practice’ (2008) 22(2) *Public Affairs Quarterly* 91; Arrigo (n 37); S Miller, *Terrorism and Counter-Terrorism: Ethics and Liberal Democracy* (Wiley 2008).

phenomenon of unjustified torture is much more widespread than the phenomenon of people refraining from torture in circumstances in which it would be justified.<sup>49</sup> Similarly, Miller argues that although torture is sometimes morally justified, it should be absolutely prohibited in law because its legalisation is very likely to have a negative impact on the culture of liberal democratic institutions, especially on the military, police, and correctional institutions. This argument is founded on historical and empirical evidence which shows that institutionalising torture has a ‘major impact on the direction, culture and practices of these institutions’,<sup>50</sup> making them less effective and making them lose respect for the moral rights of suspects. Again, Arrigo argues that, at least in relation to terrorist suspects, torture is likely to be ineffective without massive institutionalisation, the costs of which outweigh the benefits. As he summarises:

The use of sophisticated torture techniques by a trained staff entails the problematic institutional arrangements I have laid out: physician assistance; cutting edge, secret biomedical research for torture techniques unknown to the terrorist organization and tailored to the individual captive for swift effect; well trained torturers, quickly accessible at major locations; pre-arranged permission from the courts because of the urgency; rejection of independent monitoring due to security issues; and so on. These institutional arrangements will have to be in place, with all their unintended and accumulating consequences, however rarely terrorist suspects are tortured. Then the terrorists themselves must be detected while letting pass without torture a thousand other criminal suspects or dissidents, that is, avoiding a dragnet interrogation policy. The moral error in reasoning from the ticking bomb scenario arises from weighing the harm to the prospective innocent victims against the harm to the guilty terrorist. Instead—even presuming the doubtful, long-term success of torture interrogation—the harm to innocent victims of the terrorist should be weighed against the breakdown of key social institutions and state-sponsored torture of many innocents.<sup>51</sup>

Each of these accounts of why torture ought to be absolutely prohibited in law, is essentially consequentialist in character. Even though each thinker’s view of the *moral* justifiability of torture might be based partly on deontic considerations, when it comes to their views on the justifiability of torture *in law*, their accounts are based solely on a cost-benefit analysis of institutionalising torture. Their mode of reasoning in relation to the legal rights in Article 3 ECHR is, therefore, compatible with the form of utilitarianism for which I argue.

But, beyond this, if McMahan, Miller, and Arrigo are right to argue on utilitarian grounds that torture should be absolutely prohibited in law despite being sometimes *morally* justified, then, *a fortiori*, torture should be absolutely prohibited in law if we begin from the indirect utilitarian view of the moral right not to be tortured – since, according to our indirect utilitarian account, it is not clear that torture is ever even morally justifiable; rather, a choice must be made by an exercise of will to adopt either the principle of an absolute moral right not to be tortured or the principle of a moral right not to be tortured with limited specific exceptions.

In addition, there is an even stronger indirect utilitarian case for the absolute prohibition of torture in the ECHR than there is for the absolute prohibition of torture recommended by McMahan, Miller, and Arrigo in relation to general domestic legal systems. First, the High Contracting Parties are highly economically developed nations with well-funded institutions

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<sup>49</sup> McMahan (n 48) 104-107.

<sup>50</sup> Miller (n 48) 170-179.

<sup>51</sup> Arrigo (n 37) 564.

capable of carrying out effective investigations and interrogations without the use of torture. Second, the High Contracting Parties are, in general, liberal democracies, the institutions of which are premised on the value of personal autonomy. As Miller argues, ‘to weave the practice of torture into the very fabric of liberal-democratic institutions, would be...an inherent contradiction – torture being an extreme assault on individual autonomy’.<sup>52</sup> Third, an absolute prohibition on torture in the Convention is capable of being applied and enforced with some success, whereas such a prohibition might be wholly ineffective in states where torture is much more commonplace. As Miller argues, ‘the recent history of police, military and other organizations in liberal democracies has demonstrated that torture cultures and sub-institutions of torture can be more or less eliminated, albeit with considerable difficulty’.<sup>53</sup> Finally, the High Contracting Parties are in general relatively orderly nations with relatively highly educated and interconnected populations. Any arguments in favour of legalising torture which might apply to situations of anarchy or revolution, or in relation to warlike or primarily tribal populations, do not apply in the context of the ECHR.

For an indirect utilitarian, therefore, the conclusion must be that optimistic results will be obtained by a thoroughgoing and absolute prohibition of torture in Convention law of exactly the kind that we find on the face of Article 3.

As with torture, indirect utilitarianism can justify an absolute prohibition against agents of the High Contracting Parties treating anyone in an inhuman or degrading fashion. We can see this by returning again to the example of an impoverished state which needs to detain dangerous criminals in order to incapacitate them, but only has the resources to detain them in conditions which are inhuman or degrading and in which an exception to the moral right of freedom from IDT can thus be justified on utilitarian grounds. The situation is clearly different when it comes to the High Contracting Parties to the Convention. None of these states are so impoverished that it could ever be justifiable for them to detain criminals in inhuman or degrading conditions. Insofar as prison conditions in such states fall below the threshold of IDT, it is the responsibility of the state to remedy that situation – lack of resources does not provide an excuse.

The same point is borne out by examining another example. Imagine there is a large group of protestors, some of whom are peaceful innocents, but others of whom are intent on violence and likely to kill. Imagine too that there are very limited numbers of police officers in the area, and that the only way of preventing death and injury is for the police to ‘kettle’ all of the protestors without adequate supplies, toilet facilities, or bedding, innocent and guilty alike, for an entire day, until re-enforcements arrive and the protestors can be managed and dispersed in an orderly fashion.<sup>54</sup> In such a situation, it seems clear that at least the innocent protestors are subjected to IDT, but it also seems morally justifiable, from a utilitarian perspective, to subject them to such treatment given the exceptional circumstances. However, the fact that such IDT might be theoretically morally justifiable from a utilitarian perspective does not entail that such IDT *within the Convention system* would be justifiable from a utilitarian perspective. A law permitting such treatment might be morally justified in extreme circumstances in a state with a small police force with very limited resources, and in which reinforcements could not quickly be brought to remote areas. But such a justification cannot be given by any of the High Contracting Parties to the Convention, all of which have large law enforcement capacities with

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<sup>52</sup> Miller (n 48) 175.

<sup>53</sup> Ibid 176.

<sup>54</sup> This is a more extreme example of the facts in, *Austin v the United Kingdom* [GC] 39692/09, 40713/09, and 41008/09 (ECtHR, 5 March 2012).

a high degree of mobility. For this reason, the absolute prohibition of IDT expressed on the face of Article 3 comes as no surprise to the indirect utilitarian.

It is, however, not merely the absolute character of the rights expressed on the face of Article 3 ECHR that are consistent with the indirect utilitarian account. Key elements of the ECtHR's Article 3 jurisprudence can also be grounded by the indirect utilitarian. To show this, I begin with the ECtHR's judgment that there was no conflict of Convention rights involved in the *Gäfgen v Germany* case.

### 3 The *Gäfgen* Case Involved No Conflict of Convention Rights

The *Gäfgen* case concerned the kidnapping of a child, Jakob von Metzler, by the applicant, Magnus Gäfgen. Gäfgen kidnapped Jakob and demanded a ransom from his parents. After picking up the ransom, Gäfgen was arrested by German police. The ransom money was found in his bank account and flat, along with a note planning the crime. At this time, Jakob's whereabouts were unknown. Gäfgen told the police that Jakob was being held by accomplices, but refused to tell the police Jakob's location. On the evidence available to the police, it seemed likely that Gäfgen had been acting alone and that Jakob was trapped somewhere and would soon die if not discovered due to lack of food or hypothermia. The police decided to threaten Gäfgen with torture, and he quickly capitulated, admitting that Jakob was already dead and disclosing the location of his body. Gäfgen himself was ultimately convicted for murder. The police officers who were involved in Gäfgen's mistreatment were also convicted, but were sentenced leniently with suspended fines and transferred to non-investigative police duties.

Relevant for our purposes, the majority of the Grand Chamber of the ECtHR concluded that Gäfgen's mistreatment 'was sufficiently serious to amount to inhuman treatment prohibited by Article 3, but that it did not reach the level of cruelty required to attain the threshold of torture'.<sup>55</sup> The Court concluded that the sentencing of the police officers was excessively lenient and that Gäfgen thus remained a victim of a violation of Article 3. Crucially, in coming to that conclusion, the Grand Chamber did not consider there to be any 'conflict of rights' – the Court recognised that the police officers who mistreated Gäfgen had good reasons for doing so, but the Court did not consider that Jakob's Convention rights had been engaged and did not think that Jakob's rights had to be weighed against those of Gäfgen.

It is important that the indirect utilitarian account of Article 3 should be able to justify the judgment of the Grand Chamber that *Gäfgen* was a case in which no conflict of Convention rights arose. *Gäfgen* is a key case, and is perhaps the judgment of the ECtHR which most emphatically affirms the absoluteness of Article 3. It is also a case in which the application of a crude act utilitarian approach might be taken to imply that there is a conflict of rights or that the police officers' mistreatment of Gäfgen was optimific. In addition, *Gäfgen* is one of the Court's most discussed judgments and has provoked much sophisticated academic commentary.<sup>56</sup>

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<sup>55</sup> *Gäfgen* (n 7) para 108.

<sup>56</sup> The commentary critical of the Court's judgment in *Gäfgen* implicitly adopts a crudely utilitarian 'lesser of two evils' approach, and much of the commentary that defends the Court's judgment is grounded in deontological foundations. It is thus important to show how the Court's judgment is defensible on utilitarian grounds as well as on deontological grounds. See, S Greer, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law?' (2015) 15 *Human Rights Law Review* 101; N Mavronicola, 'Is the Prohibition Against Torture and Cruel, Inhuman and Degrading Treatment Absolute in International Human Rights Law? A Reply to Steven Greer' (2017) 17 *Human Rights Law Review* 479; Mavronicola (n 5) 15-17; Smet (n 5).



We accordingly need to ask: would it be optimific, in indirect utilitarian terms, to frame *Gäfgen* as involving a conflict of Convention rights, by holding that Jakob's Convention rights gave the police a reason to mistreat Gäfgen? Or was the Court acting in a way that the indirect utilitarian account would regard as optimific when it decided that Jakob's Convention rights were not engaged?

*Gäfgen* was clearly a case in which the police officers holding Gäfgen faced a conflict of interests and had to balance Gäfgen's *interests* against those of Jakob. Jakob's interests clearly provided the police with some reasons to mistreat Gäfgen, at least from a utilitarian perspective. But it would, however, not be optimific to hold that every conflict of *interests* is a conflict of *rights*. Rights are more than just interests: they are interests which provide a sufficient reason for holding some other person to be under a duty.<sup>57</sup> We have many interests which are not sufficiently important to ground the imposition of duties on others. Conflating Convention rights with interests would rob those rights of their special normative force, giving them no distinctive place in legal reasoning and making them a practically useless tool.<sup>58</sup> It would leave the ECtHR having to find that every interference with every interest related to a Convention right, however small, constituted an interference with the right also. The fact that Gäfgen's interests were in conflict with Jakob's does not, therefore, in itself make *Gäfgen* a case involving a conflict of rights.

Nor, at the opposite end of the spectrum, would it be optimific to hold a 'specificist' view of rights, according to which rights arise only in the specific circumstances of a case in which they are represented by conclusive duties – which, being conclusive, can never conflict. According to that view, *Gäfgen* cannot involve a conflict of rights – but only because no case can ever involve a conflict of rights. The problem with this view is that it robs rights of their capacity to provide *ex ante* guidance to judges in their legal reasoning and renders Convention rights practically useless.<sup>59</sup> There would be no room for the ECtHR to reason generally about the nature and application of Convention rights and the Court would simply have to ask whether a specific duty applied to a specific individual in a specific situation. As Schauer opines, 'the only sensible way in which rights can operate in legal argument is by way of being...logically antecedent to the particular case in which a claimant's success might be deemed to be the recognition of a right'.<sup>60</sup> From the indirect utilitarian perspective then, both the conflation of Convention rights with interests and the conflation of Convention rights with conclusive duties would rob those rights of their practical utility to the Court and would not be optimific.<sup>61</sup>

Having cleared away these two unproductive confluations, we are left with the question whether it would be optimific to frame *Gäfgen* as involving a conflict of Convention rights by holding that Jakob's Convention rights gave the police a reason to mistreat Gäfgen. And, in the absence of either of the unproductive confluations, this question has to be answered by starting with a reasonable view about when Convention rights are interfered with or engaged in the first place.

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<sup>57</sup> J Raz, *The Morality of Freedom* (Oxford University Press 1986) Chapter 7.

<sup>58</sup> See, J Tasioulas, 'Taking Rights Out of Human Rights' (2010) 120(4) *Ethics* 647.

<sup>59</sup> See, RM Hare, 'Principles' (1972-73) 73 *Proceedings of the Aristotelian Society* 1; Mavronicola (n 5) 18-19.

<sup>60</sup> F Schauer, 'The Generality of Rights' (2000) 6 *Legal Theory* 323, 329.

<sup>61</sup> Another way of expressing substantially the same point is by reference to Gewirth's tripartite classification, of 'rule absolutism', 'principle absolutism', and 'individual absolutism'. See, A Gewirth, 'Are There Any Absolute Rights?' (1981) 31(122) *The Philosophical Quarterly* 1.

While recognising that there is a family of reasonable views about when it is useful or optimific to speak of a Convention right having been ‘interfered’ with,<sup>62</sup> and without attempting to settle the finer points in the debate between these views, we can adopt a working definition that a Convention right is interfered with where a *pro tanto* duty which is grounded in that right is not complied with.<sup>63</sup> Conceiving of Convention rights in this way allows them to retain their important distinctive role as ‘intermediate conclusions in arguments from ultimate values to duties’,<sup>64</sup> rather than being mere ‘starting points’, and also allows them to continue to provide *ex ante* guidance to judges of the ECtHR rather than being mere ‘finishing points’.

If we adopt the view that a Convention right is interfered with where a *pro tanto* duty which is grounded in that right is not complied with, then we can reframe the question ‘would it be optimific to frame *Gäfgen* as involving a conflict of Convention rights?’, more clearly, as the question: ‘would it be optimific for the ECtHR to adopt a principle which imposes a *pro tanto* duty on the police to mistreat Gäfgen in order to obtain information about Jakob’s whereabouts?’.

There are reasons to think that, even when the *Gäfgen* case is considered in isolation, it would not have been optimific to impose a *pro tanto* duty on the police officers to mistreat Gäfgen in order to obtain information about Jakob’s whereabouts. Even though, had Jakob been alive, the police’s actions might have turned out to be optimific, the *expected* utility of their actions was not optimific.<sup>65</sup> First, although the police found ransom money in Gäfgen’s possession and a note planning the crime, they could not be absolutely sure that Gäfgen even knew Jakob’s location. Second, the police had no solid evidence that Jakob was still alive (and, indeed, he was not). Third, the police had a mere suspicion, and no sound basis for assuming, that Jakob might be being kept in circumstances where he would die if left alone – indeed, Gäfgen told the police that Jakob was being held by accomplices. Fourth, as Graffin argues, it was far from certain that the police officers had no other option but to mistreat Gäfgen – they could have continued to investigate and question Gäfgen and it is possible that this would have succeeded.<sup>66</sup> Fifth, the police had no evidence that threats to torture Gäfgen would be successful. The result of all of these uncertainties is that the expected utility of mistreating Gäfgen was lower than the expected (indeed, the certain) disutility of mistreating him. Even if we could assume that the same actions as in *Gäfgen* might succeed in rescuing kidnapped children from death more often than not, the proportion of occasions in which innocent people might be mistreated or in which guilty individuals might be mistreated with no positive consequences arising from their mistreatment will inevitably still be high. It is, therefore, at least arguable that, even when considered in isolation from their systemic effects, actions such as these which have a significant chance of resulting in the inhuman treatment of the innocent or in fruitless inhuman treatment of the guilty are not optimific in utilitarian terms, even though they might sometimes save lives.

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<sup>62</sup> See, Mavronicola (n 5) Chapter 2; S Smet and E Brems (eds), *When Human Rights Clash at the ECtHR* (Oxford University Press 2017).

<sup>63</sup> See, Smet (n 5) 23. Smet draws this model of rights from the work of, *inter alia*, JJ Thomson, *The Realm of Rights* (Harvard University Press 1990), and J Feinberg, ‘Voluntary Euthanasia and the Inalienable Right to Life’ (1978) 7 *Philosophy & Public Affairs* 93.

<sup>64</sup> Raz (n 57) 181.

<sup>65</sup> See, on expected utility, P Railton, ‘Alienation, Consequentialism, and the Demands of Morality’ (1984) 13(2) *Philosophy and Public Affairs* 134.

<sup>66</sup> N Graffin, ‘*Gäfgen v Germany*, the Use of Threats and the Punishment of Those Who Ill-treat During Police Questioning: A Reply to Steven Greer’ (2017) 17 *Human Rights Law Review* 681, 694.

But, of course, if we adopt an indirect utilitarian standpoint, we cannot consider *Gäfgen* in isolation, without considering (1) the nature of the principle which the ECtHR would be adopting if it found *Gäfgen* to involve a conflict of rights, and (2) the negative systemic effects that the adoption of such a principle might have. If the ECtHR had held that there was a *pro tanto* duty on the police officers to mistreat Gäfgen, they would also have been holding, in effect, that there was a *pro tanto* duty on all police officers in all relevantly similar circumstances to mistreat individuals in order to obtain information. The rulings of the ECtHR necessarily stand for principles which are more general than the rulings themselves, and these more general principles inevitably have some precedential value, providing guidance for domestic institutions and for the ECtHR itself in the future.

Even if the principle for which the imposition of a *pro tanto* duty on the police officers to mistreat Gäfgen stands is formulated relatively narrowly, it will still have overwhelmingly negative systemic effects. Let us suppose that the imposition of a *pro tanto* duty on the police officers to mistreat Gäfgen could be justifiable by the following principle:

P.1. Where the police: (i) know beyond reasonable doubt, that some guilty person, X, has placed some innocent child, Y, in a situation where they will die, be tortured, or suffer inhuman or degrading treatment; (ii) know beyond reasonable doubt, that X knows information which, if disclosed, will save Y; and (iii) have reason to believe, on the balance of probabilities, that X will disclose the information if threatened with torture; then, the police have a *pro tanto* duty to threaten to torture X in order to obtain information about Y's whereabouts.

This principle is in fact unrealistically narrow. For example, if the police have a duty to threaten torture, then a duty to subject people to other forms of inhuman treatment might be thought logically to follow. If police have a duty to mistreat an individual, X, who has placed some other innocent person, Y, in a situation where they will die, be tortured, or suffer inhuman or degrading treatment, then a duty to mistreat X might also seem to follow even where we switch person Y, with person Z, where Z is neither a child nor an innocent, but an individual embroiled in criminal activity. If police have such duties, then why not other state agents such as the army, the intelligence services, or even doctors, who might be similarly well-placed to obtain information which could prevent death, torture, or inhuman or degrading treatment? And if there is a duty to mistreat individuals whom we suspect to be guilty, why not also a duty to mistreat individuals who are innocent, but who are likely to know information which could save someone? The point is that any principle which could make the imposition of a *pro tanto* duty on the police officers to mistreat Gäfgen justifiable has uncertain boundaries and might end up providing justification for a wider set of actions than initially intended. Even if P.1. itself on its own were optimific, it seems to entail – or at least, naturally to lead to – a *pro tanto* duty on a wide range of state agents to treat a wide range of individuals inhumanly in order to obtain information, and that wider duty brings with it all the negative consequences of institutionalising inhuman treatment discussed above. The very same considerations apply to any principle that one might attempt to construct in order to justify IDT in situations which are similar to Gäfgen. Even if one imagines that, unlike in Gäfgen, there is a real ticking bomb, evidence that the kidnapped child is alive, and reliable means of retrieving information, the principle which justifies IDT in such a case still seems naturally to lead to judgements which bring with them all the negative consequences of institutionalising IDT.

However, even principle P.1., formulated in an unrealistically narrow fashion, would not be optimific in its own right. First, the principle leaves significant room for discretion and requires

the police to exercise judgement about when the principle applies. As argued above, room for such discretion means that the principle is open to abuse – because those with unjust goals are likely to believe that they are just, because even those who know that their goals are unjust are likely to claim that they are just, and because even those whose goals are just will be tempted to claim justification for inhuman treatment where none exists – and is thus likely to allow instances of unjustified inhuman treatment and to provide a warrant for such treatment.<sup>67</sup>

Second, the adoption of the principle would create a host of negative consequences in relation to the police officers on whom the *pro tanto* duty is imposed. As Graffin argues, the imposition of this duty on the police would require them ‘to step outside the ethical framework of their profession’ and would ‘have an impact on [a] police officer's personal integrity’.<sup>68</sup> Even if a single instance of mistreatment might not undermine public confidence in the police and undermine their personal integrity, the institutionalisation of a duty on the police to mistreat suspects is likely to have serious negative consequences for the direction and culture of the police, for the public confidence in the police, and for the personal integrity of the police officers who have to consider whether they ought to treat suspects inhumanly.

Third, principle P.1. is ultimately self-defeating, because if it became publicly known that the police had a duty to threaten to torture suspects but also had a duty not to follow through with that torture, then threats to torture would become useless. Suspects would know that the threats were empty and would not disclose any information to the police. Unless torture were in fact a real option, threats to torture would cease to have any effect. Of course, it might be theoretically possible to create a system in which the police ensured secrecy about whether torture would actually occur and created the impression in the public at large that torture was a measure of last resort, even if it were not. But this would itself produce many of the overwhelmingly negative consequences that institutionalising torture has on the public confidence in the institutions of the state and would also lead the police into duplicitousness and lies, diminishing public accountability and transparency, and creating a culture of secrecy.

In short, the judgment made by the ECtHR in *Gäfgen* is justifiable in indirect utilitarian terms. The Court had ample grounds for believing that any decision on its part that the child's Convention rights were engaged would imply the existence of a *pro tanto* duty on the part of the police officers to threaten torture. And the Court also had ample reasons to conclude that, in indirect utilitarian terms, it would not be optimistic to establish any such *pro tanto* duty to threaten torture because of the likelihood that any (highly uncertain) positive consequences would be significantly outweighed by the likelihood of promoting widespread abuse, corrupting the culture of the law enforcement agencies, and diminishing public confidence in the system of law enforcement. Hence, the indirect utilitarian account is coherent with this particularly absolutist judgment of the Court.

#### **4 The Specification of Torture Under Article 3 ECHR**

Although both torture and IDT are absolutely prohibited under Article 3, torture is a more serious wrong than IDT, carrying a particular stigma and entailing a particularly stringent set of positive obligations. It is thus important that the indirect utilitarian account of Article 3 is also able to justify the ECtHR's jurisprudence on what counts as torture. To show that the indirect utilitarian can pass this test, I compare the account offered by the indirect utilitarian

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<sup>67</sup> See, McMahan (n 48).

<sup>68</sup> Graffin (n 66) 693.

with one of the most compelling and sophisticated alternative accounts of the specification of Article 3 – the dignity-based interpretation offered by Mavronicola.<sup>69</sup>

According to the indirect utilitarian account of the right to be free from torture, torture is wrong solely by virtue of its negative consequences. As argued above, there are five sets of negative consequences of torture that explain why the indirect utilitarian should adopt a right to be free from torture: first, the ‘great pain or other intensely distressing affective state’ torture causes to the victim and those close to the victim; second, the special impact that torture has on autonomy interests by turning the victim’s autonomy against themselves; third, the special impact that torture has on personhood interests by undermining the victim’s view of themselves as inviolable; fourth, the expressive harms and damage to liberal culture which occur when public officials are implicated in torture, and can occur even when private citizens torture one another; and finally, the effect on the torturer themselves which occurs as a result of the exploitative nature of torture. For the indirect utilitarian, then, acts should be identified legally as torture only if they have these negative consequences. Of course, there will still be difficult questions about exactly where to draw the line between torture and IDT (for example, where acts have all these consequences but only to a low degree, or where acts have only some of these consequences but have them to an especially high degree). But for the indirect utilitarian, all of these line-drawing disputes should be resolved by reference to the consequences of the relevant acts alone, and the issue becomes an essentially ‘quantitative’ one about whether the relevant acts produce sufficiently significant disutility of these kinds to count as torture.

In contrast, Mavronicola’s account of the right to be free from torture focuses on the way in which torture undermines human dignity – which Mavronicola understands as ‘the equal and elevated moral status of all persons above objects and non-human animals’.<sup>70</sup> For Mavronicola, there are two central wrongs of torture. On the one hand, torture undermines the dignity of victims – it ‘fundamentally violates a person in body and/or spirit’.<sup>71</sup> On the other, torture involves a particular relation between the torturer and the victim. As Mavronicola puts it, ‘torture radically denies the deontic, relational claim to (mutual) respect and concern that human dignity makes. Torture therefore fundamentally wrongs the person subjected to it, but also strikes more broadly at this egalitarian premise of human rights’.<sup>72</sup> Mavronicola’s account of the wrong of torture thus differs from the indirect utilitarian account in a number of important ways. First, pain is not a central feature of Mavronicola’s account of torture. Rather, it is the intention to cause suffering, the aim of breaking the will of the victim, and the relationship of domination between torturer and victim that are seen as central to torture. Second, the impact that torture has on the autonomy and personhood of a victim is regarded as being intrinsically important, rather than instrumentally important. For Mavronicola, torture is wrong because it undermines the human standing of the victim regardless of the victim’s desires, whereas for the indirect utilitarian, the heart of the problem is that the victim, against their wishes, is made to feel that human standing has been undermined. Third, the relationship between torturer and victim to which torture gives rise is regarded as being intrinsically, rather than instrumentally, wrong. For Mavronicola, acts which give rise to a relationship of domination and absolute control of one party over another are regarded as intrinsically wrong, whereas, for the indirect utilitarian, the problem is that torture degrades the moral character of the torturer and leads them to act non-optimifically in the future. For Mavronicola, then, disputes about where to draw the line between torture and IDT should be settled not by

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<sup>69</sup> Mavronicola (n 5).

<sup>70</sup> Ibid 39.

<sup>71</sup> Ibid 41.

<sup>72</sup> Ibid 43.

reference to ‘quantitative’ considerations about the amount of disutility which the act in question produces, but rather by reference to deontic, ‘relational and qualitative’ considerations.<sup>73</sup> What matters for Mavronicola, is the deontic quality of the act or conduct in question, not the repercussions or consequences of that act or conduct.<sup>74</sup>

At least three significant elements of the ECtHR jurisprudence on the specification of torture align as well, or better, with the indirect utilitarian account as with Mavronicola’s deontic account.

First, the Court views the intensity of pain and suffering that a victim endures as a crucial factor in deciding whether torture occurred. As the Court stated in *Ireland v UK*, the distinction between torture and IDT ‘derives principally from a difference in the intensity of the suffering inflicted.’<sup>75</sup> In *Selmouni v France*, the Court recited the severe ill-treatment to which the applicant had been subject, and then concluded its judgment by stating that:

Under these circumstances, the Court is satisfied that the physical and mental violence, considered as a whole, committed against the applicant’s person caused “severe” pain and suffering and was particularly serious and cruel. Such conduct must be regarded as acts of torture for the purposes of Article 3 of the Convention.<sup>76</sup>

As the Court stated in a recent summary of its own jurisprudence on torture in *Cestaro v Italy*: ‘In its reasoning, the Court has, in some cases, based its finding of torture not so much on the intentional nature of the ill-treatment as on the fact that it had “caused ‘severe’ pain and suffering” and had been “particularly serious and cruel”’.<sup>77</sup> And, in *Cestaro*, the Court recognised that the specific intentions of the putative torturer, although important, are not alone determinative of torture – where great enough suffering has been caused, the specific intentions of the torturer become less important.

Mavronicola’s account struggles to accommodate these clear indications by the Court of its own reasoning. According to her account, ‘torture is an aggravated wrong because of its particular wrongfulness, not just the additional pain or suffering it inflicts in comparison to IDT’,<sup>78</sup> and, therefore, the extent of suffering caused should not be a key criterion distinguishing torture from IDT. This leaves Mavronicola in the position of rejecting the Court’s conscious line of reasoning. She is reduced to arguing that the Court’s practice of distinguishing torture from IDT by reference to the intensity of suffering should be ‘challenged on a wholesale basis’.<sup>79</sup> By contrast, the indirect utilitarian account is coherent with the Court’s view that the pain and suffering are a central part of what is wrong with torture. The pain and suffering are the first and most obvious senses in which torture is non-optific.

Mavronicola recognises, of course, that her theory fits poorly with the Court’s focus on the intensity of pain as a central distinguishing feature of torture. However, she contends that in recent years the Court is beginning to move away from its approach based on the quantitative *intensity* of pain as a central feature of torture, towards a more holistic approach based on the

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<sup>73</sup> Ibid 66.

<sup>74</sup> Ibid 67 and 84.

<sup>75</sup> *Ireland* (n 44) para 167.

<sup>76</sup> *Selmouni v France* [GC] 25803/94 (ECtHR, 28 July 1999) para 105.

<sup>77</sup> *Cestaro v Italy* 6884/11 (ECtHR, 7 April 2015) para 173.

<sup>78</sup> Mavronicola (n 5) 67.

<sup>79</sup> Ibid 66.

qualitative *severity* of pain as a central feature of torture. She points to a number of elements of the Court's jurisprudence to substantiate this claim. One element is the Court's focus on the 'severity' of treatment as a whole, rather than on the intensity of pain and suffering caused.<sup>80</sup> Another element is the Court's focus on 'cruelty', which Mavronicola regards as 'primarily a perpetrator-focused concept' which recognises the way torture 'ruptures the deontic mutual bond that human dignity encapsulates'.<sup>81</sup> An additional element is the Court's focus on whether or not ill-treatment was inflicted within 'a short period of heightened tension and emotions', which Mavronicola regards as indicative of an attempt by the Court to look at whether the treatment was 'deliberate and purposeful', not just at the intensity of pain.<sup>82</sup> Finally, Mavronicola argues that 'conduct- and perpetrator-focused criteria have, in many instances, taken centre stage over intensity and consequences in the Court's delineation of torture',<sup>83</sup> and she cites cases such as *Egmez v Cyprus* and *Skomorokhov v Ukraine* as instances of the Court adopting such an approach.<sup>84</sup>

However, none of the cases on which Mavronicola relies show the Court rejecting wholesale the intensity of pain as a central distinguishing feature of torture; rather, they simply display that there are other relevant features. Indeed, many of the judgments on which Mavronicola relies still display an explicit concern with the quantitative intensity of pain and suffering caused to the applicant. In *Cestaro*, for example, it is true that the Court referred to 'the severity of the ill-treatment' at issue and to its cruel, intentional, and premeditated nature;<sup>85</sup> but the Court also placed significant emphasis on the fact that the applicant was struck with 'potentially lethal' truncheon blows leading to multiple fractures and 'severe physical consequences', and on the fact that the applicant suffered intense 'feelings of fear and anguish'.<sup>86</sup> In *Egmez*, it is true that the Court held that there was no torture partly in virtue of the fact that police ill-treatment was not intended to extract a confession and the fact that injuries had been inflicted 'over a short period of heightened tension and emotions';<sup>87</sup> but the Court also placed emphasis on the fact that 'no convincing evidence was adduced to show that the ill-treatment in question had any long-term consequences for the applicant'.<sup>88</sup> In *Skomorokhov*, it is true that the Court, in the process of holding that torture had occurred, emphasised the intentional nature of the ill-treatment, the fact that it was aimed at extracting confessions, and the fact that the applicant had no means of resisting; but the Court placed equal emphasis on the 'extensive injuries sustained by the applicant', the long term consequences of those injuries, and the applicant's 'feelings of helplessness, acute stress and anxiety'.<sup>89</sup>

What the Court does in all of these cases – holding that the intensity of pain is a central distinguishing feature of torture, but that other factors are relevant – is coherent with the indirect utilitarian account, in which the intensity of pain is also a central feature but in which other factors are also relevant. Indeed, this becomes even clearer when we look at the other factors that the Court considers relevant and the way the Court treats those factors. One such factor is 'cruelty'. Mavronicola is right that the Court has placed emphasis on the idea of cruelty

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<sup>80</sup> Ibid 66 and the sources cited therein: footnotes 64-67 of Chapter 4.

<sup>81</sup> Ibid 68.

<sup>82</sup> Ibid; *Selmouni* (n 76) para 104.

<sup>83</sup> Ibid.

<sup>84</sup> *Egmez v Cyprus* 30873/96 (ECtHR, 21 December 2000); *Skomorokhov v Ukraine* 58662/11 (ECtHR, 26 September 2019).

<sup>85</sup> *Cestaro* (n 77) para 183-185.

<sup>86</sup> Ibid para 178.

<sup>87</sup> Mavronicola (n 5) 68; *Egmez* (n 84) para 78.

<sup>88</sup> *Egmez* (n 84) para 78.

<sup>89</sup> *Skomorokhov* (n 84) para 69.

as a distinguishing feature of torture. But ‘cruelty’ is not solely a deontological idea. For the indirect utilitarian, the effect on the torturer themselves which occurs as a result of the exploitative nature of torture is regarded as one of the most important negative consequences of torture. As argued above, whether or not these negative effects on the perpetrator’s moral character occur depends largely on whether the perpetrator develops an exploitative and ‘cruel’ relationship with their victim. So, the Court’s focus on the idea of cruelty as a distinguishing feature of torture is consistent with the indirect utilitarian account. And the same logic is applicable to the Court’s focus on whether or not the ill-treatment was ‘deliberate and purposeful’ or inflicted ‘over a short period of heightened tension and emotions’.<sup>90</sup> If the perpetrator acted in the heat of the moment, then their acts are much less likely to have the relevant negative consequences on their moral character, whereas, if they acted in a pre-meditated fashion with the aim of extracting a confession or the aim of punishing the victim, then their acts are likely to corrupt their moral character and lead them to act non-optimifically in the future.

The second crucial factor that the Court takes into account to distinguish torture from IDT is the purpose or aim of the ill-treatment in question. As the Court has often stated, ‘in addition to the severity of the treatment, there is a purposive element to torture’ – it involves the infliction of severe pain or suffering ‘with the aim, *inter alia*, of obtaining information, inflicting punishment or intimidating’.<sup>91</sup> The Court has also placed special emphasis on the idea that, where severe pain is inflicted with the aim of ‘extracting a confession’, this is a paradigmatic case of torture.<sup>92</sup> Indeed, there are a range of cases where the Court has found that no torture occurred on the basis that the perpetrators of ill-treatment lacked the requisite intention.<sup>93</sup>

The Court’s focus on the aims of eliciting a confession, obtaining information, inflicting punishment, or intimidating, is coherent with the indirect utilitarian account of torture. On this account, a large part of the wrong of torture is constituted by the negative consequences that it has on the moral character of the torturer, which arise where the intent of the torturer is to exploit the pain of the victim to achieve their purposes and to use the victim’s own autonomy as a weapon against them. Where the perpetrator of ill-treatment has some other set of unrelated aims or where the ill-treatment is unintentional – and will not have the same negative effect on the torturer’s moral character – then the indirect utilitarian account will (just like the Court) be less likely to class that ill-treatment as torture.

For Mavronicola’s account, in contrast, what matters is not the effect of the ill-treatment on the moral character of the perpetrator, but rather whether the intention of the perpetrator is contrary to the value of human dignity. This renders her account of the purposive element of torture overly broad: for example, Mavronicola argues that ‘there is cause for systematically treating discrimination as a central element in the specification of torture’<sup>94</sup> and that a discriminatory intention is sufficient for establishing torture. However, as Mavronicola herself freely admits, ‘the ECtHR does not systematically focus on discrimination in its specification of torture’.<sup>95</sup>

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<sup>90</sup> Mavronicola (n 5) 68; *Selmouni* (n 76) para 104.

<sup>91</sup> *Cestaro* (n 77) para 171. See also, *İlhan v Turkey* [GC] 22277/93 (ECtHR, 27 June 2000) para 85; *Gäfgen* (n 3) para 90; *El-Masri v The Former Yugoslav Republic of Macedonia* [GC] 39630/09 (ECtHR, 13 December 2012) para 197.

<sup>92</sup> For example, *Othman (Abu Qatada) v the United Kingdom* [GC] 8139/09 (ECtHR, 17 January 2012) para 270.

<sup>93</sup> For example, *Jalloh v Germany* [GC] 54810/00 (ECtHR, 11 July 2006) para 82; *Denizci v Cyprus* 25316-25321/94 and 27207/95 (ECtHR, 23 May 2001) para 384.

<sup>94</sup> Mavronicola (n 5) 79.

<sup>95</sup> *Ibid.*



There is a series of cases in which a discriminatory intention has clearly been a major element of the ill-treatment at issue, and in which the Court has either found discriminatory intent to be insufficient to establish torture or in which the Court has relied on the existence of an intent to obtain information or to punish, rather than on the discriminatory intent, in order to establish torture.<sup>96</sup> This fits naturally with the indirect utilitarian account – since, for the indirect utilitarian, a discriminatory intention does not involve the specific wrong of intending to turn a victim’s autonomy against themselves and thus does not create the kind of negative consequences which are symptomatic of torture. The indirect utilitarian account is, therefore, at least equally as coherent with the ECtHR’s specification of the required intention for torture as is Mavronicola’s dignity-based account – even if the utilitarian account can be criticised for being overly narrow in some respects, it is no more overly narrow than competing accounts, such as Mavronicola’s, are overly broad.

Third, the Court has often focused on the level of state involvement as a crucial factor in deciding whether torture occurred. The ECtHR has never made a positive finding of torture absent a significant degree of involvement from the state – the Court has never, for example, found that torture occurred where a state merely failed to put in place appropriate institutional arrangements.<sup>97</sup> And in a great many judgments, the Court treats significant state involvement as an aggravating factor which makes the treatment in question more likely to be classified as torture. In *Zontul v Greece*, for example, the Court emphasised the fact that sexual violence had been inflicted by a state agent and concluded that the ill-treatment at issue constituted torture.<sup>98</sup> In *Krastanov v Bulgaria*, the Court considered that the fact that the ‘acts of violence against the applicant were committed by the police officers in the performance of their duties’ weighs in favour of a finding of torture rather than IDT (even though the Court ultimately concluded, for other reasons, that only IDT had occurred).<sup>99</sup> In *El-Masri v Macedonia*, the Court emphasised that because state agents had been present for the applicant’s ill-treatment at the hands of foreign officials, and because the ill-treatment had occurred with ‘the acquiescence or connivance’ of those state agents, the state should be held responsible for the applicant’s torture.<sup>100</sup> In *Cirino and Renne v Italy*, the Court took into account, ‘as an overarching consideration...the fact that the treatment was inflicted in the context of the applicants being in the custody of prison officers’, and concluded that the ill-treatment at issue constituted torture.<sup>101</sup>

There are, however, some instances where the Court has seemed willing to accept the theoretical possibility that torture could occur even in the absence of direct state involvement. In *Kaya v Turkey*, for example, the Court stated that no state agent was responsible for ill-treatment and yet nonetheless continued to consider whether the treatment constituted torture (even though it ultimately concluded that torture had not occurred).<sup>102</sup> Nonetheless, the point remains that the ECtHR has never made a positive finding of torture absent a significant degree of involvement from the state.

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<sup>96</sup> For example, *Aydin v Turkey* [GC] 23178/94 (ECtHR, 25 September 1997) para 85; *Zontul v Greece* 12294/07 (ECtHR, 17 January 2012) paras 31 and 92. See also, Mavronicola (n 5) 78 and the sources cited therein: footnotes 151-152 of Chapter 4.

<sup>97</sup> See, C McGlynn, ‘Torture and the European Convention on Human Rights’ (2009) 58(3) *The International and Comparative Law Quarterly* 565; Mavronicola (n 5) 80.

<sup>98</sup> *Zontul* (n 96) para 88. See, Mavronicola (n 5) 81.

<sup>99</sup> *Krastanov v Bulgaria* 50222/99 (ECtHR, 30 September 2004) para 53.

<sup>100</sup> *El-Masri* (n 91) para 206.

<sup>101</sup> *Cirino and Renne v Italy* 2539/13 and 4705/13 (ECtHR, 26 October 2017) para 80.

<sup>102</sup> *Mahmut Kaya v Turkey* 22535/93 (ECtHR, 28 March 2000) para 118.

None of this is easily accommodated by Mavronicola. For deontological accounts of Article 3 such as hers, state involvement should not be seen as an aggravating factor, because it is viewed as having the potential to ‘distort, or simply unduly narrow, the specification of torture’.<sup>103</sup> Mavronicola argues that what is salient to defining torture is not the degree of state involvement, but only the degree of control that the perpetrators have over their victim. By focusing solely on the dignity of the victim and on the deontic relationship between victim and perpetrator, Mavronicola’s deontological account struggles to justify the importance that the Court attaches to the broader negative consequences of torture for society as a whole, and thereby struggles to explain why the Court gives the degree of state involvement significant importance, as a factor with independent weight in determining whether a given set of acts under given circumstances constitute torture.

By contrast, in the indirect utilitarian account, a large part of what is wrong with torture is the expressive harms and damage to liberal culture which occur when public officials are implicated in torture.<sup>104</sup> Though the indirect utilitarian account recognises that these kinds of harms can also occur when private citizens subject one another to ill-treatment and where the state fails to prevent private citizens from so doing, the negative consequences of ill-treatment are seriously exacerbated by the direct involvement of state agents. Hence, for the indirect utilitarian (just as for the ECtHR) direct state involvement will be an aggravating factor weighing strongly in favour of a finding of torture rather than merely IDT, even though (again, just as for the ECtHR) it might be possible in rare circumstances for torture to occur absent direct state involvement.

For the indirect utilitarian, as for the Court, both the relative power of perpetrator and victim and the degree of state involvement are pertinent, but in different ways. The relative power of the perpetrator and victim are pertinent because this relationship affects how severe the negative consequences for the victim will be. The autonomy and personhood interests of the victim who is entirely under the control of the torturer will clearly be more severely affected than the same interests of a victim who is only under the partial control of the torturer. But the degree of state involvement in ill-treatment is pertinent because this affects how severe the negative consequences for society as a whole will be. Within the indirect utilitarian account, such negative social consequences are relevant to the determination of torture, whereas Mavronicola’s account struggles to accommodate their relevance.

## **5 The Different Scope of the Obligation to Prevent Torture and the Obligation to Prevent IDT**

The plausibility of the indirect utilitarian account is reinforced by its ability to provide a plausible justification both of the ECtHR’s foundational judgment in *Gäfgen* and of the ECtHR’s definition of torture. There is, however, at least one further interpretative advantage of the indirect utilitarian account – namely, its ability to make sense of the ECtHR’s distinction between the scope of the absolute right to be free from torture and the scope of the absolute right to be free from IDT.

On the face of Article 3, no such distinction of scope is apparent. Both torture and IDT are expressly and unequivocally prohibited. But, in a string of ECtHR judgements, the Court has established a subtle, and largely unacknowledged, distinction of scope.

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<sup>103</sup> Mavronicola (n 5) 83.

<sup>104</sup> See, Pildes (n 33).

In a wide range of judgments, including the *Gäfgen* judgment, the Court has decided that the prohibition of torture is to be taken as involving three separate but connected specific prohibitions: (i) individuals acting as agents of the High Contracting Parties ought never to be allowed to torture anybody under any circumstances whatsoever; (ii) every High Contracting Party ought to adopt laws absolutely prohibiting private citizens from torturing one another; and (iii) the High Contracting Parties ought to take reasonable measures to enforce the absolute prohibition on private citizens torturing one another. The Court's jurisprudence shows that where agents of the state know that there is a significant risk that individuals will be subjected to torture by other private individuals in the state's jurisdiction, those agents of the state are under an absolute obligation to take reasonable steps to prevent that torture occurring.

By contrast, in a number of cases the Court has decided that although there is an absolute requirement for High Contracting Parties to prohibit the carrying out of IDT by individuals acting as agents of the state under any circumstances whatsoever, there is a more nuanced general requirement for High Contracting Parties to prohibit (and to enforce the prohibition of) IDT being carried out by private citizens who are not acting as agents of the state, with a recognition that such prohibition (and the enforcement of such prohibition) may, under certain circumstances, be modified by and balanced against other considerations. In short, the Court's jurisprudence shows that not every single circumstance in which agents of the state know that there is a significant risk that individuals will be subjected to IDT necessarily gives rise to an obligation to take reasonable steps to prevent that IDT occurring.

In *Pretty v UK*, for example, UK law prevented the applicant's husband from assisting her to commit suicide.<sup>105</sup> It was clear that without such assistance, the applicant would undergo severe suffering before her death and that such suffering would – in ordinary circumstances – be severe enough to engage Article 3. However, the Court held that 'Article 3 must be construed in harmony with Article 2...[which] is first and foremost a prohibition on the use of lethal force or other conduct which might lead to the death of a human being'.<sup>106</sup> The Court therefore concluded that 'no positive obligation arises under Article 3 of the Convention to require the respondent State either to give an undertaking not to prosecute the applicant's husband if he assisted her to commit suicide or to provide a lawful opportunity for any other form of assisted suicide'.<sup>107</sup> In *Hristozov v Bulgaria*,<sup>108</sup> the applicants were terminally ill cancer patients who had exhausted all conventional treatments. Bulgarian authorities denied them the ability to use an experimental cancer treatment which was unregulated, but which had been allowed for 'compassionate use in a number of other countries and which the producer was willing to provide free of charge. The Court agreed that:

the refusals, inasmuch as they prevented the applicants from resorting to a product which they believed might improve their chances of healing and survival, caused them mental suffering, especially in view of the fact that the product appears to be available on an exceptional basis in other countries.<sup>109</sup>

Thus, the ECtHR effectively admitted that the applicants were undergoing suffering which would – in ordinary circumstances – be severe enough to engage Article 3. However, the Court

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<sup>105</sup> *Pretty v the United Kingdom* 2346/02 (ECtHR, 29 April 2002).

<sup>106</sup> *Ibid* para 54.

<sup>107</sup> *Ibid* para 56.

<sup>108</sup> *Hristozov and Others v Bulgaria* 47039/11 and 358/12 (ECtHR, 13 November 2012).

<sup>109</sup> *Ibid* para 113.

nonetheless held – relying on the authority of *Pretty* – that no violation of Article 3 had occurred.<sup>110</sup> Indeed, in a number of cases the Court has held that Article 3 does not impose unlimited burdens on states to prevent IDT even where the state is aware that an individual is subject to treatment which, at least morally speaking, appears to be severe enough to engage Article 3 – Article 3 does not, for example, oblige states to ‘provide everyone in their jurisdiction with a home’, ‘entail any general obligation to give refugees financial assistance’, or entail an obligation on states to provide ‘free and unlimited health care to all aliens without a right to stay within its jurisdiction’.<sup>111</sup> The Court has held that to do so ‘would place too great a burden on the Contracting States’.<sup>112</sup>

The point is *not* that the obligations on the state to prevent IDT must be reasonable and are relative to the state’s resources – this is well-recognised, and the same issue arises in relation to torture. Rather, the point is that, even where agents of the state know that an individual is being subjected to IDT, the Court does not place an absolute obligation on those state agents to take any steps whatsoever (whether within their resources or otherwise) to prevent that IDT from occurring – and the situation is, therefore, different in relation to IDT than it is in relation to torture.

For deontic accounts, this distinction of scope poses real interpretative difficulties. It is not at all clear why rights to be free from IDT which are derived directly from dignity or other relational concepts, without reference to consequences, should be subject to exceptions merely on the grounds that the perpetrator of the *prima facie* prohibited act is not an agent of the state, or on the grounds that the *prima facie* prohibited suffering is attributable to natural causes rather than directly attributable to the state.

For the indirect utilitarian, however, this distinction of scope is entirely natural. For the indirect utilitarian, the rule that every High Contracting Party ought to adopt laws absolutely prohibiting private citizens from subjecting one another to IDT is not justifiable. Of course, it will be optimific for High Contracting Parties to prohibit citizens from subjecting one another to IDT in almost all circumstances. But, there may be some circumstances in which laws prohibiting private citizens from subjecting one another to IDT or laws ensuring that private individuals have the opportunity to end IDT which results from natural causes would interfere with other rights or would have other adverse consequences, and in which an absolute prohibition would therefore not be optimific. This arises because of the subtlety and near-invisibility of some IDT when contrasted with the crudity and perspicuous nature of torture. For example, it seems undeniable that a person who tells their partner every day that they are worthless and stupid subjects their partner to degrading treatment which could never be morally justifiable. But it is at least arguable that it is intrusive and undesirable, even for states as sophisticated as the High Contracting Parties, to have laws prohibiting such treatment when it does not rise to the level of perspicuous abuse or harassment. Even though, morally speaking, such treatment has all the hallmarks of IDT, it is justifiable from the indirect utilitarian perspective for the ECtHR not to classify it as such.

Similarly, while indirect utilitarianism can certainly justify the rule that High Contracting Parties ought to take measures to enforce prohibitions on private citizens subjecting one another to IDT on obvious consequentialist grounds, the requirement will depend on balancing

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<sup>110</sup> *Ibid.*

<sup>111</sup> *MSS v Belgium and Greece* [GC] 30696/09 (ECtHR, 21 January 2011) para 249; *Hunde v Netherlands* 17931/16 (ECtHR, 5 July 2016) para 54.

<sup>112</sup> *Hunde* (n 111) para 54.

the consequences of the intrusiveness of the enforcement measures against the consequences of the wrong prohibited. The state will need to consider, for example, whether it is truly optimistic to seek to enforce moral rights as subtle as the right not to be repeatedly (but mildly) denigrated by one's partner given the level of intrusiveness into family life required in order to engage in such enforcement. The indirect utilitarian approach is, of course, particularly well equipped to deal with such trade-offs.

## 6 Conclusion

I began by arguing that a form of 'realistic' indirect utilitarianism can account for the moral rights to be free from torture and IDT. I argued that there are five sets of negative consequences which explain why the indirect utilitarian should adopt a moral right to be free from torture: first, the 'great pain or other intensely distressing affective state' that torture causes to the victim and those close to the victim; second, the special impact that torture has on autonomy interests by turning the victim's autonomy against themselves; third, the special impact that torture has on personhood interests by undermining the victim's view of themselves as inviolable; fourth, the expressive harms and damage to liberal culture which occur when public officials are implicated in torture, and can occur even when private citizens torture one another; and, finally, the effect on the torturer themselves which occurs as a result of the exploitative nature of torture. I argued that, in light of the strength of these five sets of negative consequences, the indirect utilitarian is compelled to adopt either an absolute moral right to be free from torture or at least a moral right with specific limited exceptions. Moreover, I argued that the similar negative consequences associated with IDT explain why the indirect utilitarian should adopt at least some moral right to be free from IDT. In the case of torture, I argued that the realistic indirect utilitarian cannot rationally choose between an absolute moral right to be free from torture and a moral right with specific limited exceptions, because the choice is subject to such persistent uncertainty and involves such large scale, complex, and conflicting systemic effects. In the case of IDT, I argued that the indirect utilitarian need not adopt an absolute moral right but only a relatively stringent moral right.

I then argued that even though indirect utilitarianism does not require its adherents to accord absolute status to the *moral* right to be free from torture and IDT, indirect utilitarianism can nevertheless justify the absolute character of the *legal* rights written on the face of Article 3. That argument was grounded in the contention that even if the moral costs of torture may sometimes be lower than its benefits, the moral costs of institutionalising torture are always higher than its benefits.

I then examined some key elements of the ECtHR's Article 3 jurisprudence in order to show how the indirect utilitarian account is consistent with them. I described: how the indirect utilitarian account of Article 3 is coherent with the ECtHR's conclusion that the *Gäfgen* case did not involve a conflict of Convention rights; how the indirect utilitarian account is coherent with the ECtHR's answer to the question 'what counts as torture?'; and how the indirect utilitarian account is coherent with the ECtHR's jurisprudence on the difference between the scope of the obligation to prevent torture and the scope of the obligation to prevent IDT.

Does any of this prove beyond reasonable doubt that an indirect utilitarian can plausibly explain all aspects of ECtHR jurisprudence on Article 3?

Manifestly, the answer to this question is no. Important though *Gäfgen* is, one case does not a jurisprudential summer make. Nor can the capacity to account for the distinctions between the

substance and scope of torture and IDT be taken as an argument for, let alone a proof of, the capacity to explain all other relevant distinctions.

Nevertheless, the underlying conceptual ability of the indirect utilitarian to account for the absolute character of the Article 3 legal rights in terms that do not depend upon recourse to any deontological considerations gives grounds for hope that further investigation of other seminal cases, doctrines, and distinctions may strengthen the argument for indirect utilitarianism as a plausible account of Article 3. With each step on that path, we make a further advance towards the goal of uniting the conceptual basis of the ECHR with the conceptual basis of public policy debate.

Making that journey, towards the point at which the individual rights guaranteed by the ECHR are understood as contributing to, rather than conflicting with, general wellbeing is worth any amount of additional analytical effort.