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Reverse-Rhetorical Entrapment: Naming and Shaming as a Two-Way Street

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Reverse-Rhetorical Entrapment: Naming and Shaming as a Two- Way Street

*Suzanne Katzenstein**

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I. INTRODUCTION

“Naming and shaming,” the process of exposing, publicizing, and condemning human rights abuses, is one of the most important and common strategies used by human rights advocates. In an international political system where power is typically defined in terms of military strength and market size, advocacy groups draw on a mixture of moral and legal means to pressure governments to improve their human rights behavior. In general, the mere act of naming and shaming can promote human rights norms by reinforcing the shared understanding that some types of government conduct are beyond the pale.¹

* Visiting Assistant Professor, Duke University School of Law. Many thanks to Chris Griffin and Daniela Pisoiu for their insightful comments, to Graham Cronogue for superb research assistance, and to the editors of the *Vanderbilt Journal of Transnational Law* for editorial assistance.

1. See, e.g., Matthew Krain, *J'accuse: Does Naming and Shaming Perpetrators Reduce the Severity of Genocides or Politicides?*, 56 INT'L STUD. Q. 574, 576 (2012) (“In

Naming and shaming may also work more specifically through a dynamic of “rhetorical entrapment.”² Moral and legal censure pressure the targeted government to respond to criticisms about its conduct either by expressing public support for human rights norms or by signing human rights treaties.³ Over time, advocacy groups use such instrumental concessions to press the targeted government further to stop its abusive practices.⁴ Words that initially appear to be cheap gestures can, with the passing of time, have powerful effects.

Some scholars have offered compelling analyzes of naming and shaming, including cases involving Israel’s human rights policies in the West Bank and Gaza Strip in the early 1990s⁵ and Uganda’s repressive policies in the mid-1980s.⁶ Others warn that naming and shaming can be ineffective and even backfire, moving authoritarian regimes to shift to other more discrete forms of repression.⁷ Many scholars argue that the efficacy of naming and shaming depends on a

sum, naming and shaming by HROs, the media, and IGOs works because it: creates common knowledge about the abuses based on [sic] reliable reports; frames perpetrators as violating international norms and as untrustworthy partners in future interactions . . .”).

2. For more information on rhetorical entrapment, see Frank Shimmelfennig, *The Community Trap: Liberal Norms, Rhetorical Action, and the Eastern Enlargement of the European Union*, 55 INT’L ORG. 47, 48 (2001) (noting that rhetorical entrapment results from “rhetorical action” in which “[a]ctors who can justify their interests on the grounds of the community’s standard of legitimacy are therefore able to shame their opponents into norm-conforming behavior”).

3. See Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Into Domestic Practices: Introduction*, in THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE 16 (Thomas Risse, Stephen C. Ropp & Kathryn Sikkink eds., 1999) (describing the process by which governments initially become involved in the moral discourse for instrumental reasons).

4. Repressive governments tend to engage, rather than evade, human rights naming and shaming and become rhetorically entrapped because they miscalculate the effects of doing so or because they are offered material inducements, such as foreign aid, to make concessions. See Beth A. Simmons, *From Ratification to Compliance: Quantitative Evidence on the Spiral Model*, in THE PERSISTENT POWER OF HUMAN RIGHTS: FROM COMMITMENT TO COMPLIANCE 48–49 (Thomas Risse, Stephen C. Ropp & Kathryn Sikkink eds., 2013).

5. See Anja Jetschke & Andrea Liese, *The Power of Human Rights a Decade After: From Euphoria to Contestation?*, in PERSISTENT POWER OF HUMAN RIGHTS, *supra* note 4, at 29–32 (citing Andras Laursen, *Israel’s Supreme Court and International Human Rights Law: The Judgment on ‘Moderate Political Pressure’*, 69 NORDIC J. INT’L L. 413 (2000)) (describing Laursen’s application of the “spiral model” to Israel’s human rights policy).

6. See generally Hans Peter Schmitz, *Transnational Activism and Political Change in Kenya and Uganda*, in THE PERSISTENT POWER OF HUMAN RIGHTS, *supra* note 4, at 39–77 (examining the effects of naming and shaming in Kenya and Uganda).

7. See generally Emilie M. Hafner-Burton, *Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem*, 62 INT’L ORG. 689, 692–93 (2008) (arguing that naming and shaming can produce unintended consequences in which governments turn to less visible forms of repression).

range of factors, such as the regime type of the targeted government,⁸ the type of actors doing the naming and shaming,⁹ and the presence of domestic human rights organizations in the targeted state.¹⁰ Finally, some scholars have shifted attention away from efficacy altogether to understand better why human rights advocates choose to shame some governments but not others. They have analyzed the effect of factors such as media reports,¹¹ the presence of human rights organizations in the targeted state,¹² the gravity of the human rights situation,¹³ previous reporting efforts,¹⁴ and U.S. military assistance.¹⁵ In all these inquiries, scholars have devoted almost no attention to the possibility that naming and shaming strategies are at times influenced by a government's rhetorical response.¹⁶ The existing scholarship assumes that rhetorical entrapment is a one-way street.

This Article argues that, rather than being mere targets, governments can and do engage in "reverse rhetorical entrapment," thus shaping the strategies of human rights organizations.¹⁷ Specifically,

8. See, e.g., Jetsche & Liese, *supra* note 5, at 33–34 (describing the empirical research on the correlation of regime types and respect for human rights).

9. See James Franklin, *Shame on You: The Impact of Human Rights Criticism on Political Repression in Latin America*, 52 INT'L STUD. Q. 187, 204–07 (2008) (As an example, "[h]uman rights criticism emanating from NGOs (both domestic and international) and religious groups was slightly more effective at reducing subsequent repression than criticism emerging from foreign governments, while criticism from inter-governmental organizations was ineffective").

10. See Amanda M. Murdie & David R. Davis, *Shaming and Blaming: Using Events Data to Assess the Impact of Human Rights INGOs*, 56 INT'L STUD. Q. 1, 13 (2012) ("[S]haming can have a powerful impact on basic physical integrity rights when it is . . . combined with a domestic presence of HROs.").

11. See Daniel W. Hill, Jr., Will. H. Moore & Bumba Mukherjee, *Information Politics Versus Organizational Incentives: When are Amnesty International's "Naming and Shaming" Reports Biased?*, 57 INT'L STUD. Q. 219, 219–21 (2013) (examining the effect human rights reporting by media outlets has on international NGOs' likelihood of engaging in naming and shaming tactics).

12. See generally James Meernik et al., *The Impact of Human Rights Organizations on Naming and Shaming Campaigns*, 56 J. CONFLICT RESOL. 233 (2012) (building upon existing naming and shaming research by addressing the effect a human rights organization presence has on "the international human rights agenda").

13. See James Ron, Howard Ramos & Kathleen Rodgers, *Transnational Informational Politics: NGO Human Rights Reporting, 1986–2000*, 49 INT'L STUD. Q. 557, 568–73 (2005) (empirically comparing the "severity of human rights conditions" and Amnesty International's relative coverage of the abuses).

14. *Id.* at 569.

15. See *id.* at 571–73 (discussing the effect of U.S. military aid on Amnesty International reporting).

16. For an exception, see Jetschke & Liese, *supra* note 5, at 40 (summarizing scholarship that focuses on government use of justifications and excuses as strategies for shaping human rights discourse and recognizing that both strategies "can be quite effective in undermining the strength of transnational advocacy").

17. In *Deterrence, Democracy, and the Pursuit of International Justice*, Leslie Vinjamuri argues that the discourse surrounding the prosecution of human rights violators has recently shifted from being primarily "principled" or "duty-based" to "results-based." Leslie Vinjamuri, *Deterrence, Democracy, and the Pursuit of International Justice*, 24 ETHICS & INT'L AFF. 191, 193 (2010). Vinjamuri attributes

justifications for egregious conduct—at least when made by powerful governments¹⁸—may draw human rights advocates into consequentialist debates about the utility of specific rights-violating practices. Using the case of coercive interrogation in the United States, this Article shows how Human Rights Watch (HRW) was entrapped by the consequentialist justifications of President George Bush's Administration. In explaining and defending its interrogation practices, the administration turned to the "war on terror" discourse that aimed to deflect and undermine human rights critiques.¹⁹ For reasons of political practicality, HRW could not simply rely on moral and legal naming and shaming. Rather, it responded with its own consequentialist arguments about torture, focusing specifically on three outcomes:²⁰ (1) the unreliability of intelligence gathered through coercive interrogation, (2) the effect of U.S. interrogation tactics in galvanizing terrorist groups and influencing the interrogation practices of other governments, and (3) the impact of coercive interrogation on the moral standing of the United States and its ability to attract support for its counterterrorism policies.

The normative implications of this shift to consequentialist arguments are complex. On one hand, HRW's arguments about the inefficacy of torture may have shielded the unconditional norm against torture from being viewed by the American public as utopian and divorced from the political reality of post-9/11 attacks.²¹ At the same time, when a leading human rights group treats human rights as means not ends, it legitimizes, at least indirectly, the notion that torture is, in specific circumstances, acceptable.²² The logic of

this shift to a number of interrelated factors rather than either governments or advocacy groups simply dictating the evolution of discourse. The idea for this Symposium contribution was influenced by her Article.

18. Human rights groups may be under less pressure to respond to such justifications made by weaker states.

19. For careful analyses of the Bush Administration's rhetorical and discursive strategies, see Richard Jackson, *Language Policy and the Construction of a Torture Culture in the War on Terrorism*, 33 REV. INT'L STUD. 353, 355–61 (2007).

20. Consequentialism is a methodology that gauges the desirability of an action based on the results it produces. This results-oriented approach differs from deontological methodologies in that consequentialism does not inquire into the character of the conduct itself. For more information on consequentialism, see *Consequentialism*, STAN. ENCYCLOPEDIA PHIL., <http://plato.stanford.edu/entries/consequentialism/> (last visited Sept. 28, 2013) ("Consequentialism, as its name suggests, is the view that normative properties depend only on consequences.").

21. Jackson, *supra* note 19, at 361 n.35. This point about the antitorture norm being viewed as utopian is also made by Oren Gross. See Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481, 1554 (2004).

22. This suggestion is specific to leading human rights advocates—groups whose primary role is to serve as principled voices in a cacophony of power politics. The argument does *not* imply that all debates about the utility of torture risk having this legitimizing effect. For a discussion of this point, see Gross, *supra* note 21, at 1554 ("By refusing to discuss torture, we do not make it go away; we drive it underground.").

rhetorical entrapment suggests two reasons why this is so. First, the very process, rather than the content of the debate, may contribute to the development of a norm that supports a consequentialist metric to evaluate the practice of torture. For human rights advocates, this is deeply problematic if the public does not share HRW's view of torture's inefficacy in protecting U.S. security. Second, just as a government's instrumentalist rhetoric about human rights may subsequently be turned against it, so may the consequentialist arguments of human rights advocates. New studies suggesting the efficacy of torture or new information about intelligence gained from past practices of torture could undermine the credibility of HRW's position, even as the group continues to denounce torture on traditional moral and legal grounds. Yet, HRW had little choice in deciding whether to engage the government's justifications for violating human rights. Remaining silent in the face of consequentialist justifications for rights-violating policies would have risked signaling an acceptance of the government's logic. The U.S. government's discourse thus pressured HRW to switch roles from critical commentator to direct interlocutor with the White House.

After introducing the strategy of naming and shaming in Part II, Part III briefly summarizes HRW's naming and shaming tactics before 9/11, the U.S. government's defense of its interrogation policies after 9/11, and HRW's subsequent move to engage in a consequentialist debate. This cycle demonstrates how, in response to the consequentialist justifications proffered by the U.S. government, HRW shifted its discursive tactics. This Article concludes with a discussion of the normative implications of this shift.

II. HUMAN RIGHTS ADVOCACY: NAMING AND SHAMING

Described as "the most commonly used weapon in the arsenal of human rights proponents," naming and shaming is one of the most important tactics of human rights advocacy groups.²³ It involves

23. Franklin, *supra* note 9, at 52; see Stephan Sonnenberg & James L. Cavallaro, *Name, Shame, and Then Build Consensus? Bringing Conflict Resolution Skills to Human Rights*, 39 WASH. U. J.L. & POL'Y 257, 261 (2012) (describing the mobilization of shame as a "signature advocacy methodology"). Executive director of HRW, Kenneth Roth states, "The core of our methodology is our ability to investigate, expose and shame. We are at our most effective when we can hold governments (or, in some cases, nongovernmental) conduct up to a disapproving public." *Id.* at 262 (quoting Kenneth Roth, *Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization*, 26 HUM. RTS. Q. 63, 63 (2004)). To be sure, human rights advocacy NGOs use a variety of strategies to improve human rights beyond naming and shaming, including influencing legislation, supporting civil and criminal litigation, capacity building, and norm building. *Id.* at 263. See also Thomas Risse & Stephen C. Ropp, *Introduction and Overview*, in *THE PERSISTENT POWER OF HUMAN RIGHTS*, *supra* note 4, at 16 (listing in a table various strategies of human

investigating human rights violations, usually by governments, and raising public awareness with the ultimate goal of pressuring repressive governments into changing their behavior.²⁴ Through issuing press releases, issue reports, annual reports, media and action alerts, and commentaries and letters, human rights groups are able to place government misconduct onto the global political agenda.²⁵

Naming and shaming can influence the conduct of human rights violators either directly or indirectly.²⁶ In the direct pathway, shaming occasionally leads governments to reevaluate their actions and refrain from future abuse.²⁷ Governments may respond directly to shaming because they wish to protect their reputation, their grasp on power, or their legitimacy.²⁸ A second effect is more indirect: shaming can provide incriminatory information to global elites, transnational networks, and domestic civil society.²⁹ This information, in turn, can inspire political mobilization and pressure governments from above and below.³⁰ The strategic logic of change is, however, the same as in direct shaming: negative exposure leads to government concern about reputation, power, and legitimacy.

rights advocacy groups, including legal enforcement, sanctions, awards, arguing, discursive power, institution building, education, and training).

24. Ann Marie Clark, *The Normative Context of Human Rights Criticism: Treaty Ratification and UN Mechanisms*, in *THE PERSISTENT POWER OF HUMAN RIGHTS*, *supra* note 4, at 126 (describing naming and shaming as “shorthand for the act of framing and publicizing human rights information in order to pressure states to comply with human rights standards”). Although any actor can engage in naming and shaming tactics, including states and international governmental organizations like the UN, this Article focuses exclusively on naming and shaming by human rights advocacy groups.

25. See, e.g., Krain, *supra* note 1, at 575–76 (discussing the process by which transnational advocacy networks influence government action and raise awareness of human rights violations); Murdie & Davis, *supra* note 10, at 1, 2–3 (“HROs and other INGOs were critical in first getting human rights on the international agenda.”).

26. For a discussion of the role of direct and indirect pressure, see Murdie & Davis, *supra* note 10, at 2–3 (“Through the same shaming behavior that HROs use to directly pressure a state, HROs are able to call on the international community, including third-party states, individuals, and organizations, to help pressure a target-state ‘from above.’”).

27. See *id.* at 3 (describing the ways in which shaming by HROs can influence government actions).

28. See Risse & Sikink, *supra* note 3, at 14–17 (exploring the impact of shaming on governments).

29. Murdie & Davis, *supra* note 10, at 3; see Krain, *supra* note 1, at 575 (“Domestic human rights activists seek to change severely repressive state behavior but are unable to do so directly. They act to circumvent state authorities and hope that international attention to their plight will lead to international condemnation of, or action against, the perpetrators of abuses . . .”).

30. For a recent summary of how naming and shaming indirectly influences government conduct, what some scholars refer to as the “boomerang model,” see Krain, *supra* note 1, at 575.

Whether having a direct or indirect effect, scholars suggest that naming and shaming works through “rhetorical entrapment.”³¹ In response to being shamed, governments may initially deny charges of wrongdoing.³² If bad publicity and public pressure persist, however, the shamed government often makes tactical concessions, such as releasing some political prisoners, ratifying some human rights treaties, or expressing a commitment to human rights obligations.³³ Human rights advocates can then use these rhetorical commitments to shame the government into adhering to its promises.³⁴ Targeted governments may eventually internalize legal and human rights norms rather than abide by them merely out of instrumental calculations.³⁵ Naming and shaming is therefore not only a strategy to influence government conduct but also a tool to shape broader human rights norms.

Current scholarship on naming and shaming tends to mistakenly assume that rhetorical entrapment constitutes a one-way street where human rights groups shape government conduct and broader human rights discourse but are not influenced by governments in return.³⁶ Some scholars are beginning to reassess this assumption.³⁷ The emergence of post-9/11 counterterrorism strategies, in particular, has prompted some scholars to provide compelling analyzes of how governments have facilitated a “counter-discourse” about security,

31. See, e.g., Schimmelfennig, *supra* note 2, at 47–80 (2001) (suggesting that the expansion of the European Union to Central and Eastern Europe was the result of rhetorical entrapment); see also Risse & Sikink, *supra* note 3, at 16.

32. Risse & Ropp, *supra* note 23, at 6. See generally Stanley Cohen, *Government Responses to Human Rights Reports: Claims, Denials and Counterclaims*, 18 HUM. RTS. Q. 517, 522–534 (1999) (discussing various types of denial responses to human rights reports).

33. Risse & Ropp, *supra* note 24, at 6.

34. See Darren Hawkins, *Explaining Costly International Institutions: Persuasion and Enforceable Human Rights Norms*, 48 INT'L STUD. Q. 779, 783 (2004) (“[S]elf-interested actors are shamed into adopting new positions when others demonstrate the gap between professed values and actual behavior.”). For an example of rhetorical entrapment leading to improved human rights behavior, see Sieglinde Gränzer, *Changing Discourse: Transnational Advocacy Networks in Tunisia and Morocco*, in *THE PERSISTENT POWER OF HUMAN RIGHTS*, *supra* note 4, at 109–10. See also *infra* note 3.

35. Risse & Ropp, *supra* note 23, at 7.

36. For a compelling critique making this point, see Jetschke & Liese, *supra* note 5, at 35 (arguing that one of the main theoretical models of transnational advocacy “did not allow for conceptualizing mutual persuasion or the interactive construction of the meaning of norms” or “the possibility that various domestic and international audiences might actually accept the arguments of norm-violating governments”).

37. Most relevant for this Article, see Andrea Liese, *Exceptional Necessity: How Liberal Democracies Contest the Prohibition of Torture and Ill-Treatment When Countering Terrorism*, 5 J. INT'L L. & INT'L REL. 17–48 (2009) (comparing “norm contestation in several national contexts under conditions of the war on terror”).

war, human rights, and how such discourse has served to “block” human rights advocacy.³⁸

An understanding of the blocking effect of government discourse is not the same, however, as recognizing that governments may shape directly or indirectly the naming and shaming and rhetorical practices of human rights advocacy groups. In a kind of reverse rhetorical entrapment, human rights advocacy groups may themselves feel pressured into engaging government arguments about the justifiability of human rights violations, rather than simply naming and shaming them. This Article explores one example of this dynamic in Part III, analyzing HRW advocacy strategies with respect to the Bush Administration’s coercive interrogation program.

III. HUMAN RIGHTS WATCH (HRW), THE UNITED STATES, AND TORTURE: FROM NAMING AND SHAMING TO CONSEQUENTIALIST ARGUMENTS

For decades, HRW has been the leading advocacy voice naming and shaming governments accused of human rights abuses in general and specifically regarding torture.³⁹ Since 9/11, HRW has shifted from its traditional blanket strategy of naming and shaming governments that use coercive interrogation to a double-pronged approach. Rather than insisting on the absolute prohibition of torture as an end in itself, it has argued the case against torture on consequentialist grounds. This incorporation of consequentialist argumentation, this Article argues, was a response to the Bush Administration’s discourse justifying its coercive interrogation tactics.⁴⁰ The shift—or expansion—in HRW advocacy strategies attests to a broader point: governments are not only shaped by, but also shape the rhetorical strategies of human rights groups.

38. See Jetschke & Liese, *supra* note 5, at 40 (summarizing scholarship that focuses on governmental use of justifications and excuses as strategies for shaping human rights discourse and recognizing that both strategies “can be quite effective in undermining the strength of transnational advocacy”).

39. See, e.g., Hafner-Burton, *supra* note 7, at 693 (highlighting HRW’s extensive employment of naming and shaming strategies).

40. This strategy persisted into President Barack Obama’s Administration as well, but the Article’s analysis focuses on HRW’s publications between 1989 and 2007. HRW continues to deploy consequentialist arguments about the Bush Administration’s interrogation policies. See Andrea Prasow, *How Illegal Interrogations Hurt the U.S.*, THE DAILY BEAST (May 7, 2011, 5:06 PM), <http://www.thedailybeast.com/articles/2011/05/07/does-torture-work-how-illegal-interrogations-hurt-the-us.html> (“We will never know how much information the U.S. lost because it failed to use time-tested, effective, and humane methods of interrogation.”).

A. *Shaming Torture Before 9/11: The Crimes Speak for Themselves*

Prior to 9/11, HRW's naming and shaming tactics entailed providing detailed factual accounts of episodes of torture and usually letting the brutality of such accounts speak for themselves.⁴¹ Occasionally, HRW analysts highlighted the moral depravity and illegality of the torture they described but did not engage in consequentialist arguments. In 1990, for instance, HRW released three reports chronicling the use of torture by the Chinese, Burmese, and Indonesian governments that typified its naming and shaming strategy.⁴² The authors of the China report refrained from including a discussion of the government's legal obligations.⁴³ Instead, they provided a string of accounts by torture survivors.⁴⁴ They also issued a corresponding "question-answer" press release centering on the psychological trauma and pain of one of the victims.⁴⁵ The Burmese report similarly avoided legal or moral editorializing instead documenting only the various forms of torture used against student protestors and prisoners.⁴⁶ The Indonesian report, by contrast, exposed the use of torture in prisons, framing the practice in more explicitly moral and legal terms.⁴⁷ For instance, in a strategy of rhetorical entrapment, the authors discussed Indonesia's failure to live up to its legal obligations under the United Nations Standard Minimum Rules.⁴⁸

41. For this analysis, I examined all of HRW's news releases and special reports, available by microfiche or online, that devoted at least some section to interrogation and torture practices. I examined these documents for the following periods: 1989–1993, 1997–2001, and 2003–2007. I did not examine documents that concerned related issues, such as extraordinary renditions and prosecution of government officials. I focused on HRW because, in contrast to organizations such as Amnesty International, it engages primarily in informational advocacy, such as naming and shaming, and direct lobbying of governments not grass roots mobilization.

42. See Press Release, Human Rights Watch, *Torture in China* (July 1990), *microformed on* HUMAN RIGHTS WATCH: ASIA WATCH COMMITTEE, 2 NEWS FROM ASIA WATCH (1999); Press Release, Human Rights Watch, *Human Rights in Burma (Myanmar)* (May, 1990), *microformed on* HUMAN RIGHTS WATCH: ASIA WATCH COMMITTEE, ASIA WATCH REPORT (1990); HUMAN RIGHTS WATCH, *PRISON CONDITIONS IN INDONESIA 31* (1990) available at <http://www.usp.com.au/fpps/docs/indonesi908.pdf> (discussing the use of torture in Indonesian prisons).

43. Press Release, Human Rights Watch, *Torture in China*, *supra* note 42.

44. *Id.*

45. See Press Release, Human Rights Watch, *Yao Yongzhan: A Year in Chinese Jail* (Sept. 1, 1990), available at <http://www.hrw.org/reports/pdfs/c/china/china909.pdf> (interviewing Yao Yongzhan about his detainment).

46. Press Release, Human Rights Watch, *Human Rights in Burma (Myanmar)*, *supra* note 42.

47. See HUMAN RIGHTS WATCH, *PRISON CONDITIONS IN INDONESIA*, *supra* note 42, at 31 (discussing violations of the UN Standard Minimum Rules for the Treatment of Prisoners in the Indonesian prison system).

48. *Id.*

For many years, HRW steered clear of engaging consequentialist arguments about the justifiability of torture. A 1992 report contains a series of harrowing accounts of torture by the Egyptian State Security Investigations Service (SSI).⁴⁹ Foreshadowing the type of arguments later used by the Bush Administration, the HRW report quotes one Interior Ministry official's explanation: "We are dealing with fanatics who use violence."⁵⁰ Rather than engage the argument's underlying assumption about the need to use torture to protect the public, HRW's response directly dismissed the consequentialist argument on legal grounds, underscoring the absolute prohibition of torture, including during public emergencies:⁵¹

It is undeniable that Egypt has faced internal violence attributed to clandestine Islamist groups and factions over the last decade, and that this violence—coupled with often-violent responses by security forces—continues until today. But the fact that torture victims may be suspected radical or violent Islamists does not justify the practice of torture, which is proscribed by the Egyptian Constitution, Egyptian law and international law. Indeed, torture victims' alleged actions and political affiliations are irrelevant to this serious human rights abuse. The International Covenant on Civil and Political Rights, which Egypt has ratified, proscribes torture absolutely, even in the event of a public emergency that threatens the life of the nation.⁵²

In a similar vein, HRW's purely moral and legalist naming and shaming persisted until 9/11 and into the period right after the September 2001 attacks. In a 1999 press release condemning Belgrade's prosecution of alleged terrorists, HRW discussed the defendants' claims that they had been tortured into giving confessions and highlighted Yugoslavia's legal obligation under both

49. See HUMAN RIGHTS WATCH, BEHIND CLOSED DOORS: TORTURE AND DETENTION IN EGYPT 10 (1992) (summarizing instances of torture by the SSI in Egypt).

50. *Id.*

51. The closest HRW appears to have come to engaging consequentialist arguments about the need to dispense with human rights in the fight against terrorism was in a 1996 report on Peru. HUMAN RIGHTS WATCH, PERU: PRESUMPTION OF GUILT: HUMAN RIGHTS VIOLATIONS AND THE FACELESS COURTS IN PERU (1996), available at <http://www.hrw.org/legacy/reports/1996/Peru.htm>. There, it noted in passing that such arguments justifying detainment (not torture) were self-undermining:

We are disturbed by the view commonly expressed by government officials that due process restrictions are a necessary price to pay to deal effectively with terrorism. Some variant of this argument, that it is impossible to make an omelette without breaking eggs, is used by governments of every hue to justify human rights violations. Certainly governments are obliged to protect citizens against arbitrary violence. But it is self-defeating, as well as immoral, to arbitrarily deprive innocent citizens of their liberty as a collateral cost of achieving that aim. Moreover, even those who participated in heinous crimes are entitled to due process under international human rights treaties ratified by Peru.

Id. This one passage, however, does not begin to approach the amount of space HRW later devoted to responding to consequentialist justifications.

52. BEHIND CLOSED DOORS, *supra* note 49, at 10–11.

the Convention Against Torture (CAT) and its own penal code without mentioning the consequences of torture.⁵³ In another press release that same year, HRW condemned U.S. support for the Colombian government, which relied on and condoned brutal tactics, including torture, conducted by paramilitary forces.⁵⁴ The naming and shaming in this instance was moral, not legal.⁵⁵ While recognizing that the Colombian regime needed stability, HRW authors argued, "It is much too early for the United States to climb into bed with a force that continues to violate human rights . . ." ⁵⁶ What is striking about HRW's naming and shaming of torture before 9/11 is the organization's evident reluctance to rely on any consequentialist arguments in favor of banning torture. Consistent with a traditional rights-based approach, HRW treated the prohibition of torture as an ends, not a means.

B. 9/11, Torture, and Consequentialist Justifications

Following the 9/11 attacks, the Bush Administration's discourse on counterterrorism began to challenge the foundational premise of HRW's naming and shaming tactics, which had treated aggressive interrogation and torture as unquestionably illegal and morally indefensible.⁵⁷ The Bush Administration did not publicly challenge the legality or morality of the absolute prohibition on torture.⁵⁸

53. Press Release, Human Rights Watch, Belgrade Tries Ethnic Albanian Students for "Terrorism": Defendants Allege Torture (Dec. 16, 1999), available at <http://www.hrw.org/news/1999/12/15/belgrade-tries-ethnic-albanian-students-terrorism-0>.

54. See Press Release, Human Rights Watch, Sanctioning Brutality in Colombia (Aug. 10, 1999), available at <http://www.hrw.org/news/1999/08/09/sanctioning-brutality-colombia> (criticizing a U.S. proposal to provide aid to Colombia without addressing paramilitary human rights abuse).

55. See *id.* ("[T]he United States risks complicity in atrocities, covering its eyes and ears to the pleas of Colombia's civilians.").

56. *Id.*

57. There is an extensive legal literature debating the Bush Administration's interrogation program, and the justifiability of torture, particularly, under the ticking-time bomb scenario. This Article eschews that debate since its primary focus is on how governments and advocacy groups shape the discourse surrounding torture rather than on the practice of torture itself.

58. See Liese, *supra* note 37, at 33 ("It is noteworthy that the American delegation did not once indicate the wish or the necessity to re-define or to re-interpret the prohibition of torture in the context of countering terrorism when discussing its State Report with the Committee against Torture . . . in May 2006."). There, its main strategy had been to challenge the applicability of the Geneva Conventions and the CAT in "situations of armed conflict, i.e. on operations in Guantanamo, Afghanistan, and Iraq." *Id.* In private, some Bush Administration officials were more willing to express explicit support for aggressive torture tactics. In now notorious torture memorandums, then Assistant Attorney General Jay Bybee narrowed the definition of torture to instances in which physical pain is "of an intensity akin to that which accompanies serious physical injury such as death or organ failure" and stated that international laws prohibiting torture "may be unconstitutional if applied to

Rather, it relabeled specific tactics generally considered to be torture, such as water boarding, as “coercive interrogation” and offered numerous justifications for their use.⁵⁹ Three among them receive frequent attention: legal arguments (the tactics do not qualify as torture),⁶⁰ exceptional necessity arguments (extraordinary times require extraordinary measures),⁶¹ and security-over-liberty arguments (the fear of a “ticking time bomb”).⁶² The most pervasive form of justification in the Bush White House, however, was a narrow, consequentialist one.⁶³ In a systematic analysis of 781 executive branch documents intended for public consumption, Daniela Pisiou finds that both the Bush and Obama Administrations cited the efficacy of various counter-terrorism measures, including the Central Intelligence Agency’s (CIA) interrogation program, more than any other reason—including exceptional circumstances and legality.⁶⁴ This “operational effectiveness” justification, as Pisiou calls it, is narrowly consequentialist.⁶⁵ It focuses on the functional benefits of

interrogations.” Gregory Hooks & Clayton James Mosher, *Outrages Against Personal Dignity*, 83 *SOCIAL FORCES* 1627, 1634–35 (2005) (citing Elizabeth Eaves, *Defining Deviancy Down*, *HARPER’S* 6 (Sept. 2004)), available at https://muse.jhu.edu/journals/social_forces/v083/83.4hooks.html; Robert Scheer, Commentary, *Tout Torture, Get Promoted: Defending Cruelty Can Be a Career Booster in Bush’s Administration*, *L.A. TIMES*, June 15, 2004, at B13; see also Kathryn Sikkink, *The United States and Torture: Does the Spiral Model Work?*, in *THE PERSISTENT POWER OF HUMAN RIGHTS*, *supra* note 4, at 148 (“The US government never actually said that it was going to torture or engage in cruel or degrading treatment. But its rhetorical positions were so extreme that they went well beyond attempts to reinterpret the norm, and can only be understood as a rejection of the norm itself.”); Lisa Hajjar, *Does Torture Work? A Sociological Assessment of the Practice in Historical and Global Perspective*, 5 *ANN. REV. L. & SOC. SCI.* 311, 330 (2009), available at <http://www.annualreviews.org/doi/pdf/10.1146/annurev.lawsocsci.093008.131501> (“This wealth of information makes any serious denial that the United States engaged in systematic and pervasive torture unsustainable.”).

59. See Ryder Mckeown, *Norm Regress and the Slow Death of the Torture Norm*, 23 *INT’L REL.* 5, 14 (2009) (describing the 2002 torture memorandums, and noting that then Vice President Dick Cheney defended water boarding by stating that it is a “no-brainer” if it means American lives are saved); see also Hooks & Mosher, *supra* note 58, at 1630 (quoting then Secretary of Defense Donald Rumsfeld as stating that “[m]y impression is that what has been charged thus far is abuse, which, I believe, is technically different from torture”).

60. Daniela Pisiou, *Pragmatic Persuasion in Counterterrorism*, 5 *CRITICAL STUD. ON TERRORISM* 297, 301–02 (2012) (assessing the frequency with which actors engage in legal justifications for various counterterrorism measures). Scholarship analyzing the Bush Administration’s counterterrorism discourse is rich and includes Jackson, *supra* note 19 among others.

61. Pisiou, *supra* note 60, at 301–02 (describing the exception argument).

62. Liese, *supra* note 37, at 27.

63. Pisiou refers to this as pragmatic because this justification did not engage normative questions or arise in the context of debates about security over liberty. Pisiou, *supra* note 60, at 302.

64. *Id.* at 301–02.

65. See *id.* at 302 (noting the “pragmatic logic” of these arguments and the focus on “chances of success”).

counterterrorism policies rather than on their legality or normative justifications.⁶⁶ The next two most frequently referenced explanations by the Bush Administration were also consequentialist.⁶⁷ They focused on broader outcomes, namely: the need to prevent future attacks and protect public safety.⁶⁸ As PISOIU writes, despite the tendency of scholars to focus on the Bush Administration's nonconsequentialist justifications, "The major 'player' on the argumentative field was not exception, but rather operational effectiveness."⁶⁹

Examples of the post-9/11 consequentialist logic abound. Speaking in broad terms about the government's counterterrorism strategy, President Bush stated in 2006, "As we work with the international community to defeat the terrorists and extremists, to provide an alternative to their hateful ideology, we must also provide our military and intelligence professionals with the tools they need to protect our country from another attack."⁷⁰ About the CIA interrogation program specifically, he stated in the same speech, "[W]e need to be able to question them, because it helps yield information, the information necessary for us to be able to do our job."⁷¹ A year later, in response to growing criticisms of the interrogation program, President Bush used slightly broader consequentialist logic:

There's been a lot of talk in the newspapers and on TV about a program that I put in motion to detain and question terrorists and extremists. I have put this program in place for a reason, and that is to better protect the American people. And when we find somebody who may have information regarding an – a potential attack on America, you bet we're going to detain them, and you bet we're going to question them – because the American people expect us to find out information – actionable intelligence so we can help protect them. That's our job. Secondly, this government does not torture people. You know, we stick to U.S. law and our international obligations.⁷²

One year later, the administration was still relying heavily on consequentialist justifications.⁷³ Speaking about legislation that would prevent the CIA from engaging in "specialized interrogation procedures," President Bush argued that it "would take away one of the most valuable tools in the war on terror—the CIA program to detain and question key terrorist leaders and operatives. This

66. *Id.*

67. *See id.* (presenting data showing that, after operational effectiveness, prevention (21 percent) and protection (20 percent) were the most frequent justification patterns used by the Bush administration).

68. *Id.* at 302.

69. *Id.* at 305.

70. *Id.* at 303 (alteration removed).

71. *Id.* (alteration removed).

72. *Id.* at 308 (alteration removed).

73. *See id.* at 303 (offering a 2008 statement from President Bush using operational effectiveness as a justification).

program has produced critical intelligence that has helped us prevent a number of attacks.”⁷⁴

The Bush Administration’s strategy was to profess its support for an absolute ban on torture while at the same time using consequentialist arguments for defending a practice that amounted to torture.⁷⁵ To be sure, this strategy was not new to the international human rights realm. As Andrea Liese documents, the United Kingdom and Israel have used a version of this strategy as well.⁷⁶ Kathryn Sikkink highlights what she has termed “the anti-terrorism norm” when noting that the United Kingdom, Argentina, and South Africa have all pointed to terrorism in the past to justify “the use of extraordinary policies.”⁷⁷

C. After 9/11: HRW and Consequentialist Argumentation

In contrast to its reactions to prior government justifications, HRW began to adopt a broader discursive tactic in the years following 9/11. Although it continued to rely on naming and shaming in its news releases and reports on torture, its use of consequentialist argumentation surged. This change did not occur immediately after 9/11, however. Two months after the attacks, HRW issued a news release titled, “Torture Not an Option.”⁷⁸ It adhered strictly to legal arguments, emphasizing the impermissibility of torture even during periods of crisis.⁷⁹ The next HRW publication concerning the United States and torture immediately followed the December 2002 *Washington Post* exposé on CIA interrogation tactics at Bagram Air Force Base in Afghanistan.⁸⁰ In its news release, “United States

74. *Id.* President Bush also stated, “The main reason this program has been effective is that it allows the C.I.A. to use specialized interrogation procedures to question a small number of the most dangerous terrorists under careful supervision.” *Text: Bush on Veto of Intelligence Bill*, N.Y. TIMES (Mar. 8, 2008), <http://www.nytimes.com/2008/03/08/washington/08cnd-ptext.html>.

75. See Pisoiu, *supra* note 60, at 308–09 (“[W]ith respect to public argumentation, the torture ban was constantly reaffirmed, while, of course, also pushing the pragmatic argument, as if the two could miraculously coexist.”); Hajjar, *supra* note 58, at 330 (“This wealth of information makes any serious denial that the United States engaged in systematic and pervasive torture unsustainable . . .”).

76. See generally Liese, *supra* note 37 (discussing the justifications of torture in Israel and the United Kingdom).

77. Sikkink, *supra* note 58, at 146.

78. See Press Release, Human Rights Watch, Torture Not an Option (Nov. 20, 2001), available at <http://www.hrw.org/news/2001/11/19/torture-not-option-0> (responding to comments suggesting that torture should be permitted against September 11 detainees).

79. See *id.* (“The prohibition against torture is absolute and applies even during times of armed conflict or when national security is threatened.”).

80. See Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST (Dec. 26, 2002), <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060901356.html> (describing a secret CIA interrogation center in U.S.-occupied Afghanistan).

Reports of Torture of [Al-Qaeda] Suspects,” HRW again focused exclusively on the illegality of torture, underlining the criminal liability of government officials who “take part in torture, authorize it, or even close their eyes to it.”⁸¹ In a more extensive report on torture a few months later, HRW began to employ consequentialist arguments.⁸² At the time, the Bush Administration had not yet developed a coherent discursive strategy of justifying its interrogation policies; HRW, therefore, did not begin to use consequentialist arguments solely in response to a shift in government discourse. Soon after, however, the White House appeared to have rhetorically entrapped HRW into challenging consequentialist justifications for coercive interrogation with their own consequentialist arguments. HRW could no longer assume that its audience shared its legal and normative premise that torture is and should be proscribed under all circumstances. Rather, it had to respond to government claims about the need for and efficacy of aggressive interrogation tactics.⁸³ That is, to defend the legitimacy of an absolutist antitorture norm, HRW had little choice but to address the utility—not simply the legality or morality—of torture tactics.

Since its first extensive report on U.S. interrogation methods in 2003, HRW has advanced three types of consequentialist arguments about coercive interrogation: (1) it leads to unreliable intelligence, (2) it increases global insecurity, and (3) it undermines U.S. moral standing in the world, thus making it harder to fight terrorism effectively.

In its first report responding to allegations of U.S. torture in March 2003, HRW outlined not only the immorality and illegality of torture⁸⁴ but also the unreliability of the information gathered from torture victims. In a typical statement combining all three arguments, for instance, HRW authors stated, “Indeed, most seasoned interrogators recognize that torture is not only immoral and illegal, but ineffective and unnecessary as well. Given that people being tortured will say anything to stop the pain, the information

81. Press Release, Human Rights Watch, United States: Reports of Torture of Al-Qaeda Suspects (Dec. 27, 2002) (quoting Kenneth Roth, Executive Director of HRW), available at <http://www.hrw.org/news/2002/12/26/united-states-reports-torture-al-qaeda-suspects>.

82. See *The Legal Prohibition Against Torture*, HUMAN RIGHTS WATCH (Mar. 11, 2003), <http://www.hrw.org/news/2003/03/11/legal-prohibition-against-torture#laws> (arguing that torture is an undesirable and ineffective means of gaining information and maintaining security).

83. Polls taken between 2001 and 2006 found that between 32 and 61 percent of Americans believe that torture is acceptable in certain conditions. See Jackson, *supra* note 19, at 361 n.35.

84. See *The Legal Prohibition Against Torture*, *supra* note 82 (explaining that torture is universally condemned and illegal under international law).

yielded from torture is often false or of dubious reliability.”⁸⁵ In a rather rare philosophical departure, the authors further elaborated:

Torture is as likely to yield false information as it is to yield the truth. Cesare Beccaria, the eighteenth century philosopher whose critique of torture remains influential today, observed that when a person is tortured, the “impression of pain . . . may increase to such a degree, that, occupying the mind entirely, it will compel the sufferer to use the shortest method of freeing himself from torment . . . [H]e will accuse himself of crimes of which he is innocent.” Beccaria also pointed out the problem of using torture to discover the accused’s accomplices: “Will not the man who [under torture falsely] accuses himself yet more readily accuse others?” [Beccaria, Cesare, *Of Crimes and Punishments*. (15 Nov. 2001).]. Contemporary law enforcement professionals concur. Oliver Ravel, former deputy director of the FBI, has stated that force is not effective: “people will even admit they killed their grandmother, just to stop the beatings.” Indeed, the unreliability of forced confessions was one of the principal reasons that U.S. courts originally prohibited their use.⁸⁶

Since then, HRW has regularly highlighted the diminished reliability of torture-based intelligence. In a May 2004 news release on U.S. interrogation policies, HRW engaged in classic naming and shaming, highlighting how U.S. interrogation practices were prohibited on both moral and legal grounds: “The prohibition of torture and cruel, inhuman, or degrading treatment or punishment is absolute and unconditional, in peace or in war. This dehumanizing practice is always wrong.”⁸⁷ It then made its consequentialist claim: “Moreover, resorting to abusive interrogation is counterproductive. People under torture will say anything, true or not.”⁸⁸ Two years later, in a 2006 news release, HRW authors quoted a senior intelligence officer: “No good intelligence is going to come from abusive practices. I think history tells us that. I think the empirical evidence of the last five years, hard years, tells us that.”⁸⁹

In a related consequentialist move, HRW has frequently argued that torture *increases* global insecurity. This “security” framing

85. *Id.*

86. *Id.*

87. Press Release, Human Rights Watch, Time to Stop ‘Stress and Duress’ (May 13, 2004), available at <http://www.hrw.org/news/2004/05/12/time-stop-stress-and-duress>.

88. *Id.* This consequentialist argument was not the only one that HRW advanced at this early point. In an implicit concession that torture might produce useful information in emergency situations, HRW argued that the problem with the ticking-time-bomb argument was its malleability, not the practice of torture itself. “[T]he problem with this ‘ticking bomb’ scenario is that it is infinitely elastic. . . . The slope is very slippery.” *Id.* In later publications, HRW did not rely on the “slippery slope” consequentialist argument.

89. Press Release, Jennifer Daskal, Human Rights Watch, Detainee Legislation Clearly Outlaws “Alternative” Interrogation Techniques (Nov. 8, 2006), available at <http://www.hrw.org/news/2006/11/07/detainee-legislation-clearly-outlaws-alternative-interrogation-techniques> (quoting U.S. Army General Jeff Kimmons).

sometimes emphasizes that U.S. interrogation practices can backfire, fueling terrorism rather than suppressing it. In a June 2004 report, in addition to its traditional legal naming and shaming, HRW insisted:

Ironically, the administration is now finding that it may be losing the war for hearts and minds around the world precisely because it threw those rules out. Rather than advance the war on terror, the widespread prisoner abuse has damaged efforts to build global support for countering terrorism. Indeed, each new photo of an American soldier humiliating an Iraqi could be considered a recruiting poster for al-Qaeda. Policies adopted to make the United States more secure from terrorism have in fact made it more vulnerable.⁹⁰

In a news release five months later, it reiterated the same point: “Despite the information apparently gleaned from some of these suspects, overall the U.S. treatment of its prisoners has been a boon rather than a setback for Al Qaeda, and has thereby made the world less safe from terror.”⁹¹ Less than a year later, it echoed, “One of the dangerous results of the now tarnished image of the United States is that it plays into the hands of politicians who stoke religious anger in the Muslim world. They have used accounts of U.S. detainee abuse, as well as the single Newsweek story, to foment discord against governments allied with the United States.”⁹² In a July 2006 report, HRW Executive Director Kenneth Roth asked, “Are we really safer when our governments’ investigative technique becomes a boon for terrorist recruiters, arguably generating more terrorists than it stops?”⁹³

U.S. interrogation practices also contribute to global insecurity, HRW argued, by setting a precedent for other governments, which in turn puts U.S. military at risk. In an October 2003 news release, HRW highlighted how U.S. interrogation and torture policies had “invited” countries, such as Sudan and Zimbabwe, to engage in similar practices and had put U.S. military in a vulnerable position. The report noted that “the torture and ‘disappearance’ of prisoners by

90. HUMAN RIGHTS WATCH, *THE ROAD TO ABU GHRAIB 4* (2004).

91. Press Release, Reed Brody, Human Rights Watch, *Prisoners Who Disappear* (Oct. 13, 2004), available at <http://www.hrw.org/news/2004/10/12/prisoners-who-disappear>.

92. Press Release, Saman Zia-Zarifi & John Sifton, Human Rights Watch, *A Genuine Inquiry Into Abuses* (May 22, 2005), available at <http://www.hrw.org/news/2005/05/21/genuine-inquiry-abuses>; see also Press Release, Tom Porteous, Human Rights Watch, *A Fig Leaf for Britain* (Feb. 27, 2007), available at <http://www.hrw.org/news/2007/02/26/fig-leaf-britain> (“Extremist groups like al-Qaida have long been led and inspired by victims of state torture. . . . None of that makes us any the safer.”).

93. Press Release, Kenneth Roth, Human Rights Watch, *Who Profits the Most from Torture* (July 14, 2006), available at <http://www.hrw.org/news/2006/07/13/who-profits-most-torture> (“One of the dangerous results of the now tarnished image of the United States is that it plays into the hands of politicians who stoke religious anger in the Muslim world.”).

the United States invites all the unsavory governments in the world to do the same. Indeed, countries from Sudan to Zimbabwe have already cited Abu Ghraib and other U.S. actions to justify their own practices or to blunt criticism.”⁹⁴ In an April 2005 report, HRW stated, “Indeed, when a government as dominant and influential as that of the United States openly defies laws prohibiting torture, . . . it virtually invites others to do the same.”⁹⁵ And a few months later it repeated the same point: “Making the Geneva Conventions optional and failing to properly punish those responsible for war crimes will place captured American soldiers and civilians in future wars at greater risk.”⁹⁶

HRW’s final consequentialist argument appears to overlap with a moral one but is in fact distinct. This claim focuses on the implications of interrogation practices for the United States’ moral standing on the global stage. Rather than caring about moral standing for its own sake, however, HRW warned that a tarnished reputation would impede the United States’ ability to fight terrorism effectively.⁹⁷ For instance, in a 2004 report, HRW observed, “If the United States embraces the torture and ‘disappearance’ of its opponents, it abandons its ideals . . . and becomes a lesser nation.”⁹⁸ It then goes on to extend the implications of this abandonment: “Maintaining the moral high ground and winning what Brown calls the ‘struggle of ideas and ideals’ are also essential in the high-stakes struggle with terrorist recruiters.”⁹⁹ In a different news release, HRW

94. Press Release, Prisoners Who Disappear, *supra* note 91.

95. HUMAN RIGHTS WATCH, UNITED STATES: GETTING AWAY WITH TORTURE: THE BUSH ADMINISTRATION AND MISTREATMENT OF DETAINEES 5 (2011).

96. Press Release, James Ross, Human Rights Watch, Bush, Torture and Lincoln’s Legacy (Aug. 1, 2005), available at <http://www.hrw.org/news/2005/07/31/bush-torture-and-lincoln-s-legacy>. A 2007 news release reiterated that “[t]his attempt to legalize torture has also put American military personnel and civilians serving overseas in grave danger” and that “[t]he Justice Department’s painstaking efforts to legalize torture has also undermined American security.” Later in the news release, the authors continued, “By stating that methods that have long been deemed torture are legal, the Department of Justice has essentially stated that it would be okay for a foreign force to utilize the same tactics on a captured American.” Press Release, Jennifer Daskal, Human Rights Watch, The Next Attorney General Must Renounce Torture (Oct. 16, 2007), available at <http://www.hrw.org/news/2007/10/15/next-attorney-general-must-renounce-torture>.

97. HRW, of course, is not the only one to advance this type of consequentialist claim. Indeed, in one of its reports, HRW quotes the 9/11 Commission statement that “allegations that the United States abused prisoners in its custody make it harder to build the diplomatic, political, and military alliances the government will need.” Press Release, Prisoners Who Disappear, *supra* note 91.

98. Press Release, Human Rights Watch, U.S.: Detained al-Qaeda Suspects “Disappeared” (Oct. 12, 2004), available at <http://www.hrw.org/news/2004/10/12/us-detained-al-qaeda-suspects-disappeared-0>.

99. Kenneth Roth, *Tap, Tap, Tap to Wear Down the Terrorists*, HUMAN RIGHTS WATCH (July 9, 2007), <http://www.hrw.org/news/2007/07/08/tap-tap-tap-wear-down-terrorists>.

authors state: “[W]hatever marginal advantage interrogators might gain by applying these techniques is vastly outweighed by the global disgust at American use of them.”¹⁰⁰

HRW’s turn to consequentialist rhetorical questions attests to a dynamic that most scholars have neglected. Naming and shaming can pressure and rhetorically entrap governments into engaging criticisms about their human rights practices; yet, governments do not lack discursive strategies of their own. Consequentialist justifications for practices like coercive interrogation to some extent shield governments from the costs typically associated with being publicly named and shamed, including increased public opposition, a tarnished reputation, and a loss of legitimacy. More importantly, governments can shift the terms of the debate. To respond to government discourse, human rights advocacy groups are forced away from their moral and legal terrain and onto less familiar instrumentalist grounds and argumentation.

IV. CONCLUSION—NORMATIVE IMPLICATIONS

With polls suggesting that between 36 and 61 percent of Americans support the use of torture under specific circumstances,¹⁰¹ HRW was right to tailor its discursive strategy in response to the Bush Administration’s consequentialist justifications. Merely reiterating its moral and legal condemnations of torture would have rung hollow for many Americans.¹⁰² But HRW’s rhetorical shift has

100. Press Release, Time to Stop ‘Stress and Duress’, *supra* note 87. In a 2006 report, Executive Director Kenneth Roth asks:

Are we really safer when, by equating counterterrorism with a technique that many abhor, our governments discourage the public cooperation—the volunteered tips about suspicious activity—that experts say is far more important for cracking secretive conspiracies than anything wrung from a suspect? . . . Are we really safer when the loss of the moral high ground leaves our governments less able to dissuade dictators from closing the avenues for peaceful political change that might discourage resort to violence?

Press Release, Who Profits the Most from Torture, *supra* note 93.

101. See *Poll Finds Support for Use of Torture in War on Terror*, WASH. TIMES (Dec. 6, 2005), <http://www.washingtontimes.com/news/2005/dec/6/20051206-114042-3526r/?page=all> (“On the issue of torture, 61 percent of Americans refused to rule it out.”); *World Citizens Reject Torture, Global Poll Reveals*, BBC WORLD SERV., http://www.globescan.com/news_archives/bbctorture06/ (last visited Aug. 5, 2013) (citing poll results that suggest 36 percent of Americans favor torture in certain circumstances); *Why Torture Makes us Less Safe*, HUMAN RIGHTS FIRST, <http://www.humanrightsfirst.org/our-work/law-and-security/torture-on-tv/less-safe/> (last visited Sept. 29, 2013) (referencing a poll that shows that 61 percent of Americans approve of torture in rare occasions).

102. Oren Gross makes precisely this point with respect to legal scholars debating the justifiability of torture. Gross, *supra* note 21, at 1554 (“Moreover, by refusing to acknowledge that the notion of torture is more complex than many

come at a price. When one of the world's leading human rights groups employs consequentialist justifications for an absolute ban on torture, the message it conveys is two fold: torture is never effective, and efficacy is a valid yardstick for judging torture. The price is this: HRW may not persuade the public of the first message, and its second message may legitimize efficacy as a criterion to evaluate the use of torture. Beyond this legitimizing effect, consequentialist justifications run the risk of later being proved wrong. Were this to occur, the antitorture norm would be weakened and probably more so than if it had been endorsed exclusively on legal and moral grounds.

Some scholars suggest an alternative. Far from undermining the norm against torture, government discourse and the surrounding debate about coercive interrogation policies may in fact have strengthened it. Liese, for instance, claims that "[a]lthough subject to contestation, the international prohibition of torture has neither been renegotiated nor reformulated. Rather, there are signs of a strengthening of international law on the issue."¹⁰³ She points to evidence such as the adoption of an Optional Protocol for CAT, the establishment of a special rapporteur at the United Nations, and the creation of some regional level organizations.¹⁰⁴ In her view, "the meaning of the ban on torture and its surrounding rules . . . has not changed at all."¹⁰⁵ Sikkink writes that although the Bush Administration adhered to its support for aggressive interrogation even in the face of domestic and international pressure, the Obama Administration has reversed course and "moved the United States back to both prescriptive status and rule consistent behavior . . ." ¹⁰⁶ In this view, consequentialist justifications for torture—and presumably consequentialist challenges to those justifications—do not threaten the moral and legal foundation of human rights norms that have been widely embraced.

Yet, if discourse matters in the way that scholars of naming and shaming suggest, then it is not clear why human rights advocacy groups should be any more immune from discursive engagements than governments and why human rights norms should be any more insulated. Consistent with models that explain how tactical concessions by governments can lead to rhetorical entrapment,

supporters of the 'torture-is-banned-and-that-is-all-there-is-to-it' approach would have us believe, we run the risk of having the general public perceive the legal system as either utopian or hypocritical.").

103. Liese, *supra* note 37, at 35.

104. *See id.* (listing recent agreements that maintain a prohibition on torture).

105. *Id.* at 22 ("Despite this cross-national contestation, the meaning of the ban on torture and its surrounding rules, as held and promoted by transnational networks and legal bodies, has not changed at all.").

106. Sikkink also notes, however, that the Obama Administration had not renounced extraordinary rendition, nor shut down Guantanamo or Bagram, nor sought to prosecute Bush Administration officials. Sikkink, *supra* note 58, at 160–61.

instrumentalist argumentation by advocacy groups can boomerang in ways that undermine their rhetorical stance and substantive arguments.¹⁰⁷ Ultimately, it may be years before the dynamics of reverse rhetorical entrapment and the shift to a consequentialist discourse take effect. As Regina Heller and her coauthors suggest, whether the U.S. government's rhetoric has undermined the norm against torture is "an empirical question and cannot be decided on purely conceptual grounds."¹⁰⁸ They argue for the possibility that "under 'usual' contestation processes norms get only temporarily off balance and may ultimately lead to the reaffirmation of the established norm."¹⁰⁹ Global and domestic consternation over the Bush Administration's torture policy may have pushed the antitorture norm back to its more secure, unconditional status. The tug of war of moral, legal, and consequentialist discourse and the reciprocal discursive interaction between governments and human rights organizations are substantively important and real. Its implication for the status of a given norm is, however, politically uncertain.

107. See Risse & Sikkink, *supra* note 3, at 18 ("A 'boomerang' pattern of influence exists when domestic groups in a repressive state bypass their state and directly search out international allies to try to bring pressure on their states from outside.")

108. Regina Heller, Martin Kahl & Daniela Pisoiu, *The 'Dark' Side of Normative Argumentation—The Case of Counterterrorism Policy*, 1 GLOBAL CONSTITUTIONALISM 278, 283 (2012).

109. *Id.*
