

# The Dark Knight's War on Terrorism

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## I. INTRODUCTION

Terrorism and counterterrorism have long been staple subjects of Hollywood films. This trend has only become more pronounced since the attacks of September 11, 2001, and the resulting increase in public concern and interest about these subjects.<sup>1</sup> In a short period of time, Hollywood action films and thrillers have come to reflect the cultural zeitgeist of the war on terrorism.<sup>2</sup>

This essay discusses one of those films, Christopher Nolan's *The Dark Knight*,<sup>3</sup> as an allegorical story about post-9/11 counterterrorism. Being an allegory, the film is considerably subtler than legendary comic book creator Frank Miller's proposed story about Batman defending Gotham City from terrorist attacks by al Qaeda.<sup>4</sup> Nevertheless, the parallels between the film's depiction of counterterrorism and the war on terrorism are unmistakable.

While a blockbuster film is not the most obvious starting point for a discussion about the war on terrorism, it is nonetheless instructive to see what *The Dark Knight*, a piece of popular culture, has to say about law and justice in the context of post-9/11 terrorism and counterterrorism.<sup>5</sup> Indeed, as scholars of law and popular culture such as Lawrence Friedman have argued, popular culture has something to tell us about society's norms: "In society, there are general ideas about right and wrong, about good and bad; these are templates out of which legal norms are cut, and they are also ingredients from which song- and script-writers craft their themes and plots."<sup>6</sup>

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<sup>1</sup> See Carl Boggs & Tom Pollard, *Hollywood and the Spectacle of Terrorism*, 28 NEW POL. SCI. 335, 344-47 (2006).

<sup>2</sup> STUART CROFT, *CULTURE, CRISIS AND AMERICA'S WAR ON TERROR* 254-55 (2006).

<sup>3</sup> *THE DARK KNIGHT* (Warner Bros. Pictures 2008). See J. M. Tyree, *American Heroes*, 62 FILM Q. 28, 32 (2009).

<sup>4</sup> *Comic Book Hero Takes on al-Qaeda*, BBC NEWS (Feb. 15, 2006, 5:51 p.m.), <http://news.bbc.co.uk/2/hi/entertainment/4717696.stm>.

<sup>5</sup> For some other examples of scholarship on law and popular culture, see Paul Joseph & Sharon Carton, *The Law of the Federation: Images of Law, Lawyers, and the Legal System in "Star Trek: The Next Generation"*, 24 U. TOL. L. REV. 43 (1992); Amar Khoday, *Prime-Time Saviors: The West Wing and the Cultivation of a Unilateral American Responsibility to Protect*, 19 S. CAL. INTERDISC. L.J. 1 (2009); Andrew E. Taslitz, *Daredevil and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 699 (2004).

<sup>6</sup> Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L.J. 1579, 1589 (1989). See also Michael Asimow, *Bad Lawyers in the Movies*, 24 NOVA L. REV. 531, 549 (2000)

However, popular culture does not simply reflect the societal status quo; it also influences and frames people's views about law, legal institutions, and justice. This is because most people have little direct experience with the law and legal institutions, meaning that much of their knowledge is second-hand and often derived from popular culture.<sup>7</sup> At the same time, popular culture is pervasive and accessible.<sup>8</sup> This gives it the power to shape people's views about the law and legal issues,<sup>9</sup> including views about the war on terrorism and the legal issues that arise out of it.<sup>10</sup> The potential power of popular culture was certainly not lost on the Bush Administration. Shortly after the 9/11 attacks, Karl Rove, then a senior adviser to President George W. Bush, met with Hollywood executives to explore how Hollywood could assist the Administration in communicating the appropriate message about the war on terrorism.<sup>11</sup>

*The Dark Knight* grossed more than \$533 million in the United States alone, and it remains the third-highest-grossing film of all time.<sup>12</sup> It is therefore a safe bet that more people have seen the film than will ever read law review articles or books about the war on terrorism.<sup>13</sup> This makes it worthy of study as a reflection on legality and security in the post-9/11 era.

The essay proceeds in the following way: Part II provides a basic outline of the plot of *The Dark Knight*; Part III first discusses the film as an allegory about post-9/11 counterterrorism by focusing on three notable aspects of the war on

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("Unquestionably, popular culture *reflects* attitudes and myths that are already deeply rooted in the common psyche.").

<sup>7</sup> Friedman, *supra* note 6, at 1593; Stewart Macaulay, *Images of Law in Everyday Life: The Lessons of School, Entertainment, and Spectator Sports*, 21 LAW & SOC'Y REV. 185, 197 (1987).

<sup>8</sup> Lance McMillian, *The Death of Law: A Cinematic Vision*, 32 U. ARK. LITTLE ROCK L. REV. 1, 10–11 (2009) ("Popular culture reaches the democratic masses through avenues that the court system does not. In many ways, John Grisham is more readily accessible to the person on the street than John Roberts."). See also Naomi Mezey & Mark C. Niles, *Screening the Law: Ideology and Law in American Popular Culture*, 28 COLUM. J.L. & ARTS 91, 94 (2005) (observing that many more people watch court proceedings depicted in film and television than will ever watch actual court proceedings).

<sup>9</sup> McMillian, *supra* note 8, at 11. See also Michael Asimow, *Popular Culture and the Adversary System*, 40 LOY. L.A. L. REV. 653, 669–72 (2007) (discussing the influence of popular culture on views about social phenomena including law); Mezey & Niles, *supra* note 8, at 95 (arguing that fictional depictions of law affect "collective expectations, societal myths and the national psyche").

<sup>10</sup> CROFT, *supra* note 2, at 204.

<sup>11</sup> Rick Lyman, *Hollywood Discusses Role in War Effort*, N.Y. TIMES, Nov. 12, 2001, at B2; Rick Lyman, *White House Sets Meeting With Film Executives to Discuss War on Terrorism*, N.Y. TIMES, Nov. 8, 2001, at B8.

<sup>12</sup> See *All Time US Box Office*, N.Y. TIMES (Feb. 28, 2010), [http://movies.nytimes.com/indexes/2010/02/28/movies/boxoffice/alltime\\_us/index.html](http://movies.nytimes.com/indexes/2010/02/28/movies/boxoffice/alltime_us/index.html) (last visited Oct. 7, 2011).

<sup>13</sup> Andrew Taslitz makes the same point in relation to *Daredevil* and the study of vigilantism. See Taslitz, *supra* note 5, at 712.

terrorism depicted in the film and then argues against the view that the film is a paean to the counterterrorism policies of the Bush Administration; and Part IV advances my reading of the film. I argue that the film is about the need for public resoluteness in the face of terrorism and about the inherent limitations of relying on vigilantism. Therefore, unusually for a film about a superhero, the film is ultimately about reaffirming law, legal institutions, and popular courage.

## II. THE FILM

*The Dark Knight* is the second film in Nolan's Batman franchise. Together with its predecessor, *Batman Begins*,<sup>14</sup> it is faithful to the classic Batman story in which the young Bruce Wayne witnesses the murder of his two parents, motivating him to wage a campaign against the criminals of Gotham City as the vigilante Batman.<sup>15</sup> Unusually for a superhero, Batman has no superhuman powers as such.<sup>16</sup> He also forswears the use of firearms<sup>17</sup> and instead relies on his wits, superior physical training, and an array of high-tech gadgets. These gadgets include the famous bat-suit, which provides physical protection and also allows Wayne to appropriate the iconography of the bat to strike fear in his enemies.

According to Batman canon, Gotham City is the kind of place that needs a masked vigilante to restore law and order, as both its legal system and government are corrupt and dysfunctional.<sup>18</sup> *Batman Begins* is certainly true to this vision. Police officers are openly crooked, while politicians and judges are also in the pocket of mob boss Carmine Falcone. Wayne himself is let down by the legal system as prosecutors reach a deal granting his parents' killer parole in exchange for testimony against Falcone. (The deal ultimately proves fruitless, as Falcone has an assassin take care of the would-be informant.)

By the time of *The Dark Knight*, things have improved in Gotham City. Batman and his police contact, Lieutenant (and later Commissioner) Jim Gordon, have had dramatic success cleaning up the streets of Gotham and have been combating the mob by constricting its cash flow. Their success has been paralleled by the emergence of crusading District Attorney Harvey Dent. Dent, known as Gotham's "white knight," is the apparently incorruptible and upright public servant that the city has been lacking.

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<sup>14</sup> BATMAN BEGINS (Warner Bros. Pictures 2005).

<sup>15</sup> See RICHARD REYNOLDS, SUPER HEROES: A MODERN MYTHOLOGY 66–68 (1992).

<sup>16</sup> Except perhaps his tremendous inherited family wealth. One estimate puts Bruce Wayne's net worth at more than \$6 billion. See David M. Ewalt, *Being Batman*, FORBES.COM – MSNBC.COM, <http://www.msnbc.msn.com/id/8305017> (June 21, 2005).

<sup>17</sup> Although this was not always the case in Batman's early incarnations. See Lou Anders, *Two of a Kind*, in BATMAN UNAUTHORIZED: VIGILANTES, JOKERS, AND HEROES IN GOTHAM CITY 17, 19 (Dennis O'Neil ed., 2008).

<sup>18</sup> Scott Vollum & Cary D. Adkinson, *The Portrayal Of Crime And Justice in the Comic Book Superhero Myths*, J. CRIM. JUST. & POPULAR CULTURE 96, 100 (2003).

After Batman snatches the mob's money-launderer, Lau, from Hong Kong, the leaders of Gotham's underworld are arrested for racketeering on the basis of Lau's testimony. Consequently, Gotham's mobsters decide to take up the offer of the Joker, an anarchic villain, to kill Batman. The Joker starts a reign of terror in Gotham, delivering on his promise to kill until Batman reveals his true identity. His killing spree begins with one of Batman's well-meaning impersonators. He then turns to symbols of Gotham's politico-legal establishment, including the judge hearing the racketeering case against Gotham's mobsters, the Police Commissioner, and Dent. The Joker succeeds in killing the first two, but Batman's intervention prevents him from killing Dent. The Joker then attempts to kill Gotham's mayor at the Police Commissioner's funeral but is foiled by Wayne and Gordon, although at the ostensible cost of the latter's life.

Unwilling to bear the responsibility for the death of innocents at the hands of the Joker, Wayne prepares to reveal his secret identity. Dent, who is against Batman revealing his true identity, vainly attempts to soothe public demands that Batman do just that. This forces Dent's hand: Dent claims that he is Batman and has himself taken into custody. As Dent is being transported to county jail, the Joker attacks. However, the real Batman appears and, with the help of the apparently resurrected Gordon, captures the Joker and saves Dent.

Later, at the police station, Batman brutally interrogates the Joker after the Joker reveals that his men have taken both Dent and Assistant District Attorney Rachel Dawes hostage. The Joker reveals their locations knowing that Batman does not have time to save both. Batman chooses to save Dawes, his oldest friend and the center of a love triangle between himself and Dent. However, unbeknownst to Batman and Gordon, the Joker's information is deceptive and leads Batman to Dent's location instead. Batman manages to save Dent from the ensuing explosion, while Dawes is killed before Gordon can reach her. Meanwhile, the Joker, who had meant to be captured all along, grabs Lau and escapes from police custody.

Next, a lawyer named Reese, having ascertained Batman's identity after examining documents while performing a due diligence on Wayne Enterprises, threatens to reveal what he knows on television since Batman has proven unwilling to reveal himself. This causes the Joker to change the game and threaten to blow up a hospital in Gotham if Reese is not killed within one hour. Widespread panic ensues, together with several unsuccessful attempts on Reese's life.

At Gotham General Hospital, the Joker confronts an injured Dent. Dent has been horribly scarred by his ordeal; half of his face is disfigured, and the emotional trauma he has suffered causes him to descend into criminality. The Joker completes Dent's corruption by giving Dent the opportunity to kill him. Dent flips a coin, and chance dictates that the Joker lives. Both the Joker and Dent leave before the Joker triggers a massive explosion that destroys the entire hospital complex. From this point on, Dent is the villain Two-Face and exacts vengeance upon those whom he holds responsible for Dawes' death. All his important decisions, including whether or not to kill, are made with the flip of his coin.

In the film's climactic set piece, the Joker declares that he rules Gotham City and that anyone who wishes to leave should do so immediately. He also hints that points of exit such as bridges and tunnels have been wired to explode. One of the remaining ways out of the city is via ferry. Two ferries depart the city in the evening. One is full of ordinary citizens while the other is full of convicted criminals. Both ferries come to a stop, and it turns out that the Joker has packed each ferry with explosives. Each ferry also has a detonator that will set off the other ferry's explosives. The Joker informs all the people on the ferries that he will destroy both ferries at midnight, although if the passengers on one ferry use their detonator, they will be spared. The passengers on the two ferries do not use their detonators, and Batman, who has located the Joker with the help of technology-wizard Lucius Fox, manages to subdue the Joker. The Joker accepts that Batman, who has resisted his repeated goading to violate his rule against killing, is incorruptible.<sup>19</sup> However, he also reveals that his real plan was to corrupt Dent.

Meanwhile, Dent/Two-Face has taken Gordon's family hostage in order to make Gordon experience the same trauma that he suffered. Batman emerges and asks Dent/Two-Face to point his gun at those responsible for his loss. Dent/Two-Face obliges: he flips his coin and shoots Batman. He then flips for himself, but chance dictates that he spare himself. He then flips for Gordon's son instead of flipping for Gordon. But before he can catch his coin, Batman tackles Dent/Two-Face, knocking him off the building's ledge. Batman manages to save Gordon's son, but Dent/Two-Face is killed by the fall. Batman and Gordon agree that Dent/Two-Face's crimes must be covered up to preserve Dent's legacy, because otherwise the spirit of Gotham's citizens would be broken, and the Joker would win. *The Dark Knight* ends with Batman assuming responsibility for Dent/Two-face's crimes and being pursued by the police as an outlaw.

### III. *THE DARK KNIGHT* AS A TALE ABOUT COUNTERTERRORISM

*The Dark Knight's* vision of the world is brooding and gritty. In particular, certain motifs—the Joker's grainy homemade videos, cell phone-detonated human bombs, burnt-out remains of buildings swarming with rescue workers—give the film a distinctly post-9/11 aesthetic. The Joker himself presents as a terrorist figure who intimidates, threatens and inflicts violence and mayhem upon a civilian population in furtherance of his anarchic ideological purpose.<sup>20</sup> As Alfred

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<sup>19</sup> On the significance of Batman's one rule, see Anders, *supra* note 17, at 30–31.

<sup>20</sup> See also Waleed Aly, *A Dark Knight for Politics*, THE AGE (Oct. 4, 2008, 12:01 a.m.), <http://www.theage.com.au/opinion/a-dark-knight-for-politics-20081003-4tev.html>. The Joker's brand of terrorism is, however, an imperfect fit for Osama Bin Laden's. In fact, the villain from *Batman Begins*, Ra's Al Ghul (Arabic for "the Demon's Head") is a better stand-in for Bin Laden. Ra's Al Ghul is the head of an insidious secret organization known as the League of Shadows. In the film, the League has the goal of cleansing the world of its decadence, and is based in a mountainous Asian state. In the climax to the film, Batman foils Ra's Al Ghul's plans to smash a train into Wayne

Pennyworth, Wayne's Butler, emphasizes, the Joker is someone quite different from the "ordinary decent criminals"<sup>21</sup> that Batman is used to dealing with: "Some men aren't looking for anything logical, like money . . . They can't be bought, bullied, reasoned or negotiated with. Some men just want to watch the world burn."

In telling the story of Batman's struggle against the Joker, *The Dark Knight* can clearly be read as a parable about the dilemmas that face society when confronting terrorism and terrorists.<sup>22</sup> One notable interpretation of the film is that of Andrew Klavan, who read *The Dark Knight* as an endorsement of the Bush Administration's war on terrorism and the character of Batman as being representative of President Bush.<sup>23</sup> Klavan's view was endorsed by Jeffrey Lord, who argued that *The Dark Knight* was a kind of political barometer showing the public as being in favor of Senator John McCain's election to the Presidency in 2008.<sup>24</sup> *The Dark Knight* also rated as one of the *National Review's* best "conservative movies" from the past twenty-five years.<sup>25</sup>

The particular reading of *The Dark Knight* as an affirmation of Bush-era counterterrorism policy is mistaken. The film does portray three specific counterterrorism policies associated with the Bush Administration's war on terrorism, namely rendition, coercive interrogation, and surveillance. However, as will be detailed below, none of the film's depictions of these actions can plausibly be read as endorsement of their Bush Administration-era equivalents.

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Tower, the symbolic heart of Gotham City. See Michael Marano, *Ra's Al Ghul: Father Figure as Terrorist*, in *BATMAN UNAUTHORIZED: VIGILANTES, JOKERS, AND HEROES IN GOTHAM CITY*, *supra* note 17, at 69, 81.

<sup>21</sup> The origin of this term is discussed in Clive Walker, *Keeping Control of Terrorists Without Losing Control of Constitutionalism*, 59 *STAN. L. REV.* 1395, 1396 (2007).

<sup>22</sup> Spencer Ackerman, *Batman's 'Dark Knight' Reflects Cheney Policy*, *WASH. INDEP.* (July 21, 2008, 5:15 p.m.), <http://washingtonindependent.com/509/batmans-dark-knight-reflects-cheney-policy>; The Editorial Board, *Batman and the War on Terror*, *N.Y. TIMES* (July 21, 2008, 4:26 p.m.), <http://theboard.blogs.nytimes.com/2008/07/21/batman-and-the-war-on-terror/> ("It does not take a lot of imagination to see the new Batman movie that is setting box office records, 'The Dark Knight', as something of a commentary on the war on terror.")..

<sup>23</sup> Andrew Klavan, *What Bush and Batman Have in Common*, *WALL ST. J.* (July 25, 2008), <http://online.wsj.com/article/SB121694247343482821.html>. See also Glenn Beck: *Dark Knight = W?*, *GLENN BECK* (Aug. 4, 2008, 1:25 p.m.), <http://www.glennbeck.com/content/articles/article/198/13390/> (discussing and endorsing Klavan's interpretation). Klavan's view was of course disputed. See, e.g., Bart Motes, *W. is not Batman*, *HUFFINGTON POST* (Aug. 4, 2008, 4:14 p.m.), [http://www.huffingtonpost.com/bart-motes/w-is-not-batman\\_b\\_116847.html](http://www.huffingtonpost.com/bart-motes/w-is-not-batman_b_116847.html); see also Christopher Orr, *Batman as Bush, Ctd.*, *THE NEW REPUBLIC* (July 25, 2008, 11:23 a.m.), <http://www.tnr.com/blog/the-plank/batman-bush-ctd>.

<sup>24</sup> Jeffrey Lord, *Batman and Rush: Why McCain Will Win*, *THE AMERICAN SPECTATOR* (Aug. 19, 2008, 12:08 a.m.), <http://spectator.org/archives/2008/08/19/batman-and-rush-why-mccain-wil>.

<sup>25</sup> John J. Miller, *The Best Conservative Movies*, *NATIONAL REVIEW ONLINE* (Feb. 23, 2009, 6:25 a.m.), <http://nrd.nationalreview.com/article/?q=YWQ4MDlhMWRkZDQ5YmViMDM1Yzc0MTE3ZTIiY2E3MG> M=.

### A. Lau's Rendition

Lau, the mob's money-launderer, having been tipped off about Gordon's impending raids on the mob's banks, moves all the money to a secure location and leaves for Hong Kong. He later advises a meeting of Gotham's top gangsters via video-link that he has moved their money and that, in Hong Kong, he is beyond Dent's reach because the Chinese government will refuse any request to extradite him.

However, the Joker, who has crashed the meeting uninvited, knows better: "Batman has no jurisdiction," he says. Sure enough, Gordon and Dent turn to Batman to secure Lau's return to the jurisdiction. Before leaving, Batman asks, "If I get him to you, can you get him to talk?" Dent replies that he will "get him to sing." Batman duly snatches Lau from Hong Kong in spectacular fashion and delivers him to Gordon's doorstep. Under questioning from Dawes about the location of the money, Lau instead gives up his clients, agreeing to testify in return for immunity and repatriation to Hong Kong. This leads to the arrest of Gotham's mobsters for racketeering.

Batman's dramatic snatch-and-grab of Lau from Hong Kong recalls the practice of rendition. Rendition was employed by the United States as far back as the presidency of Ronald Reagan and grew out of the difficulty of bringing certain terrorist suspects to trial through a formal process of extradition. Rendition in this context involved the capture and transfer, sometimes forcible, of a suspect for the purpose of allowing that person to face charges in the United States.<sup>26</sup>

The rationale behind rendition, as employed by the Bush Administration after 9/11, was quite different. The snatching and removal of terrorist suspects from one state remained the same. However, terrorist suspects were not sent to the United States or another receiving state to face trial, but rather to allow them to be coercively interrogated.<sup>27</sup> Such renditions, known as extraordinary renditions, were carried out by the Central Intelligence Agency (CIA) and involved the transfer of terrorist suspects to a network of secret detention sites.<sup>28</sup>

Extraordinary rendition, then, consists of the transfer, without formal legal process, of an individual (typically a terrorist suspect) from one state to another

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<sup>26</sup> Margaret L. Satterthwaite, *The Story of El-Masri v. Tenet: Human Rights and Humanitarian Law in the "War on Terror"*, in HUMAN RIGHTS ADVOCACY STORIES 535, 538–41 (Deena R. Hurwitz, Margaret L. Satterthwaite & Doug Ford eds., 2008) [hereinafter Satterthwaite *Human Rights*].

<sup>27</sup> See James Ross, *Black Letter Abuse: The US Legal Response to Torture Since 9/11*, 89 INT'L REV. OF THE RED CROSS 561, 575 (2007).

<sup>28</sup> Monica Hakimi, *The Council of Europe Addresses CIA Rendition and Detention Program*, 101 AM. J. INT'L L. 442, 443–44 (2007); see also Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, NEW YORKER, Feb. 14, 2005, at 106, available at [http://www.newyorker.com/archive/2005/02/14/050214fa\\_fact6](http://www.newyorker.com/archive/2005/02/14/050214fa_fact6) (discussing the Bush administration's extraordinary rendition program).

state, where that individual faces the danger of torture or similar mistreatment.<sup>29</sup> The conventional view, and virtually the consensus outside the United States, is that extraordinary rendition is illegal under international human rights law.<sup>30</sup> Although extraordinary rendition can be analyzed as a violation of several different rights,<sup>31</sup> it is most obviously a violation of Article 3 of the Convention Against Torture (CAT)<sup>32</sup> and Article 7 of the International Covenant on Civil and Political Rights (ICCPR),<sup>33</sup> which both prohibit the sending of a person to another state where they are in danger of facing torture.<sup>34</sup>

What is depicted in *The Dark Knight* is not extraordinary rendition. Lau is not returned to Gotham City in order to face coercive interrogation but rather to facilitate the criminal prosecution of Gotham's major gangsters. The closer real-world analogue is not extraordinary rendition but the earlier version of rendition, known as "rendition to justice," which occurred where formal extradition was, for whatever reason, not feasible.<sup>35</sup> Indeed, given that Dent and Gordon seek Lau's return not for the purpose of prosecution but in order to find out what Lau knows about the mob's finances, the most accurate term might be "material witness rendition." In any case, Lau's rendition cannot be interpreted as any kind of endorsement of the Bush Administration's practice of extraordinary rendition, because—simply stated—it is not that kind of rendition.

#### B. Torture and Coercive Interrogation

Unlike extraordinary rendition, acts of torture and coercive interrogation are shown in *The Dark Knight*. There are three such depictions. In one instance, Dent interrogates one of the Joker's underlings who has been captured after the attempt on the mayor's life. Once Dent learns that his partner Dawes will be one of the Joker's next targets, he becomes enraged and interrogates the suspect by threatening him with a gun. The two other instances involve Batman. In one

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<sup>29</sup> Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333, 1336 (2007) [hereinafter Satterthwaite *Rendered Meaningless*]. The best known examples of (innocent) individuals caught up in the extraordinary rendition program are Maher Arar and Khaled El-Masri. See *id.* at 1338–40; Satterthwaite *Human Rights*, *supra* note 26.

<sup>30</sup> Satterthwaite *Human Rights*, *supra* note 26, at 550–51.

<sup>31</sup> See David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 HARV. HUM. RTS. J. 123 (2006).

<sup>32</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85.

<sup>33</sup> International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966, 999 U.N.T.S. 171.

<sup>34</sup> Article 7 also extends to situations where someone is in danger of facing cruel, inhuman or degrading treatment. The provision is understood to include an implicit *non-refoulement* obligation. See Satterthwaite *Rendered Meaningless*, *supra* note 29, at 1357–58.

<sup>35</sup> Satterthwaite *Human Rights*, *supra* note 26, at 538–39.

scene, Batman questions the uncooperative mobster Sal Maroni after dropping him from a fire escape and breaking his ankles. In a much longer sequence, Batman violently interrogates the Joker in a police interrogation room.

The Bush Administration's authorization of the use of torture and coercion during the war on terrorism, despite legal prohibitions both at the domestic<sup>36</sup> and international level,<sup>37</sup> was perhaps the starkest indicator of the paradigm shift that occurred after 9/11. The clearest example was the CIA's program for the interrogation of a relatively small number of so-called "high value" al Qaeda detainees thought to have critical information about further attacks on the United States (although the use of coercive interrogation techniques inevitably spread beyond this program).<sup>38</sup> The Department of Justice's Office of Legal Counsel provided legal cover for the CIA's program in the form of legal memoranda that purported to exclude the CIA's activities from the scope of the Federal Torture Statute.<sup>39</sup> These early legal memoranda have now rightly achieved notoriety,<sup>40</sup> although they represent only a portion of the efforts to skirt the various legal prohibitions on torture and coercion and to preserve legal space for the CIA's interrogations.<sup>41</sup>

Although President Barack Obama issued a January 2009 executive order requiring that all persons detained by the United States be treated humanely and that CIA detention facilities be closed,<sup>42</sup> the debate over the use of torture and coercion has periodically reemerged with the release of official Bush Administration-era documents<sup>43</sup> and with former Administration figures—most

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<sup>36</sup> Torture committed domestically in the United States would be subject to the general criminal law. Torture committed outside the United States is covered by the Federal Torture Statute. See 18 U.S.C. §§ 2340–2340A (2006 & Supp. V. 2011).

<sup>37</sup> See, e.g., Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 32, at art. 2 (prohibiting the use of torture under any circumstances), art. 16 (obliging states to take measures to prevent acts amounting to "cruel, inhuman or degrading treatment or punishment . . .").

<sup>38</sup> See ALFRED W. MCCOY, A QUESTION OF TORTURE: CIA INTERROGATION, FROM THE COLD WAR TO THE WAR ON TERROR 120–50 (2006).

<sup>39</sup> See OFFICE OF INSPECTOR GENERAL, CENTRAL INTELLIGENCE AGENCY, COUNTERTERRORISM DETENTION AND INTERROGATION ACTIVITIES (SEPTEMBER 2001 – OCTOBER 2003) para. 22–44 (2004), available at <http://www.aclu.org/oigreport> [hereinafter COUNTERTERRORISM DETENTION AND INTERROGATION ACTIVITIES].

<sup>40</sup> See Memorandum from Jay Bybee, Assistant Att'y General, to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002), <http://f11.findlaw.com/news.findlaw.com/hdocs/docs/doj/bybee80102mem.pdf>; see also Memorandum from Jay Bybee, Assistant Att'y General, to John Rizzo, Acting General Counsel of the Central Intelligence Agency, Interrogation of al Qaeda Operative (Aug. 1, 2002), [http://www.washingtonpost.com/wp-srv/nation/pdf/OfficeofLegalCounsel\\_Aug2Memo\\_041609.pdf](http://www.washingtonpost.com/wp-srv/nation/pdf/OfficeofLegalCounsel_Aug2Memo_041609.pdf) (applying the general threshold for torture set out in the first memorandum to the interrogation of al Qaeda detainee Abu Zubaydah).

<sup>41</sup> See generally DAVID COLE, THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE 25–35 (2009) (discussing subsequent legal memoranda asserting the legality of CIA interrogation practices).

<sup>42</sup> Ensuring Lawful Interrogations, 74 Fed. Reg. 4893 (Jan. 27, 2009).

<sup>43</sup> See, e.g., COLE, *supra* note 41, at 152–274.

notably, former Vice President Dick Cheney—continuing to justify the Administration’s actions as both necessary and effective.<sup>44</sup>

Moreover, subsequent developments in the war on terrorism have provided further iterations of the debate. The Obama Administration’s decision to employ the criminal justice paradigm to deal with Umar Farouk Abdulmutallab, who attempted to detonate explosives hidden in his underwear while travelling on an airliner bound for Detroit on Christmas Day, 2009,<sup>45</sup> met with criticism from some quarters. These critical voices were at their most strident regarding Abdulmutallab’s interrogation, the none-too-subtle suggestion being that tougher, coercive interrogation techniques would have revealed more information and better safeguarded national security.<sup>46</sup> The killing of Osama Bin Laden in May 2011 sparked the most recent round of argument, with some former Bush Administration officials asserting that certain intelligence leading to the discovery of Bin Laden’s hideout were the fruits of coercive interrogation and that this vindicated the CIA’s interrogation program.<sup>47</sup>

Advocates of the use of torture and coercion have invariably relied—whether explicitly or implicitly—on the ticking bomb scenario, a hypothetical where an interrogator is confronted with an uncooperative terrorist plotter who has information critical to defusing a bomb that will destroy a major city.<sup>48</sup> Indeed, the ticking bomb scenario is so commonly invoked that one might posit a variation on Godwin’s Law of Nazi Analogies: as a discussion about the use of torture grows longer, the probability of the ticking bomb scenario being invoked approaches one.<sup>49</sup>

The ubiquity of the ticking bomb scenario is matched only by its unreality, as it depends on a whole combination of assumptions that render it suspect as a guide to action.<sup>50</sup> One of those assumptions is that torture and coercion is an effective

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<sup>44</sup> Rachel L. Swarns, *Cheney Offers Sharp Defense of C.I.A. Tactics*, N.Y. TIMES, Aug. 31, 2009, at A1.

<sup>45</sup> Charlie Savage, *Nigerian Man is Indicted in Attempted Plane Attack*, N.Y. TIMES, Jan. 7, 2010, at A14.

<sup>46</sup> Pam Benson, *Analysis: Were Mistakes Made in AbdulMutallab Interrogation?*, CNN.COM (Jan. 27, 2010, 1:45 a.m.), <http://www.cnn.com/2010/CRIME/01/27/analysis.abdulmutallab.interrogation/index.html>; Thomas Catan, *Cheney Attacks Obama on National Security*, WALL ST. J. (Feb. 15, 2010, 6:15 a.m.) <http://online.wsj.com/article/SB10001424052748704543804575065361936288390.html>.

<sup>47</sup> Scott Shane & Charlie Savage, *Bin Laden Raid Revives Debate on Value of Torture*, N.Y. TIMES (May 3, 2011), [http://www.nytimes.com/2011/05/04/us/politics/04torture.html?\\_r=1](http://www.nytimes.com/2011/05/04/us/politics/04torture.html?_r=1).

<sup>48</sup> See generally John Ip, *Two Narratives of Torture*, 7 NW. U. J. INT’L HUM. RTS. 35 (2009) (discussing manifestations of the ticking time bomb scenario in academic writing, official discourse and popular culture).

<sup>49</sup> Godwin’s Law of Nazi Analogies states, “As an online discussion grows longer, the probability of a comparison involving Nazis or Hitler approaches one.” See Mike Godwin, *Meme, Counter-meme*, WIRED, Oct. 1994, available at <http://www.wired.com/wired/archive/2.10/godwin.if.html>.

<sup>50</sup> See David Luban, *Unthinking the Ticking Bomb* 7–8 (Georgetown Public Law Research Paper No. 1154202), available at <http://ssrn.com/abstract=1154202>.

means for eliciting truthful information. Much debate has focused on this point, presumably because it obviates the need to grapple with the broader moral question.

Given the impossibility of conducting ethical research on the matter, discussions about the effectiveness of torture and coercion inevitably take the form of a battle of the anecdotes, and many of the anecdotes that advocates rely on—the Gestapo in occupied Europe, the French in Algeria, and the General Security Service in Israel—are less persuasive than they might first appear to be.<sup>51</sup> A recent example is former CIA agent John Kiriakou's account of the interrogation of Abu Zubaydah, an al Qaeda operative captured in March 2002. According to Kiriakou, Zubaydah became fully compliant after the application of less than thirty-five seconds of a form of torture known as waterboarding. Kiriakou's claims were widely circulated by the media.<sup>52</sup> The subsequent release of the CIA Inspector General's report, which stated that Zubaydah was waterboarded eighty-three times, cast doubt upon Kiriakou's account,<sup>53</sup> as did the differing account told by one of Zubaydah's FBI interrogators, Ali Soufan, who stated that much of the actionable intelligence from Zubaydah was gained non-coercively.<sup>54</sup> Kiriakou subsequently retracted his claim, admitting that he had no first-hand knowledge of the interrogation.<sup>55</sup>

It is difficult, however, to maintain the oft-repeated position that torture is pointless because in all cases the victim will say anything to make the torture stop. This universal claim is falsified as soon as one counterexample can be found. But by the same token, this does not mean that torture and other coercive interrogation techniques can be said to be effective in eliciting truth either; the effectiveness of these techniques is, at best, equivocal.<sup>56</sup>

The picture presented on this issue in popular culture is, however, for the most part unequivocal.<sup>57</sup> The popular view of the effectiveness of torture and coercion is exemplified by Fox Television's *24*, described by one television critic as the

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<sup>51</sup> See DARIUS REJALI, *TORTURE AND DEMOCRACY* 480–518 (2007). Advocates of interrogational torture also generally do not discuss instances where torture has demonstrably produced bad information.

<sup>52</sup> Brian Stelter, *How '07 ABC Interview Tilted a Torture Debate*, N.Y. TIMES, Apr. 28, 2009, at A1.

<sup>53</sup> COUNTERTERRORISM DETENTION AND INTERROGATION ACTIVITIES, *supra* note 39, ¶ 223.

<sup>54</sup> Ali Soufan, *My Tortured Decision*, N.Y. TIMES, Apr. 23, 2009, at A27. The same point can be made about Abdulmutallab, the “Christmas Bomber”. See Jeff Zeleny & Charlie Savage, *Officials Say Jet Plot Suspect is Cooperating*, N.Y. TIMES, Feb. 3, 2010, at A11.

<sup>55</sup> Jeff Stein, *CIA Man Retracts Claim on Waterboarding*, FOREIGN POLICY, Jan. 26, 2010, available at [http://www.foreignpolicy.com/articles/2010/01/26/cia\\_man\\_retracts\\_claim\\_on\\_waterboarding](http://www.foreignpolicy.com/articles/2010/01/26/cia_man_retracts_claim_on_waterboarding).

<sup>56</sup> See generally REJALI, *supra* note 51, at 446–518 (documenting the shortcomings of torture as a tool of eliciting truthful information).

<sup>57</sup> See generally Ip, *supra* note 48 (discussing depictions of the ticking time bomb scenario in popular culture).

nearest thing to “the Official Cultural Product of the War on Terrorism.”<sup>58</sup> From November 2001 to May 2010, 24’s hero, Jack Bauer, protected the United States from all manner of national security threats and frequently employed torture in the face of ticking bomb scenarios. Invariably, Bauer’s torture led (usually almost instantaneously) to the victim divulging critical information,<sup>59</sup> thus enshrining the myth of the virtuous life-saving torturer in the popular consciousness.<sup>60</sup>

By contrast, the use of torture and coercion in *The Dark Knight* is uniformly ineffective. Dent’s interrogation reveals nothing because the Joker’s man knows nothing. Batman, who prevents Dent from continuing his interrogation, has superior information: the Joker’s man is a paranoid schizophrenic and is of no use in trying to find the Joker. There is a certain irony in Batman’s moral superiority here, because he himself has just tried—also unsuccessfully—to obtain a lead on the Joker’s whereabouts by questioning mobster Sal Maroni after dropping him off a fire escape.

Torture is again ineffective in *The Dark Knight’s* longest and most obvious interrogation scene. As he questions the Joker as to Dent’s whereabouts, Batman resorts to physical force. Once he learns that the Joker’s men have kidnapped Dawes as well, Batman becomes increasingly brutal, punching the Joker and throwing him against various objects in the interrogation room. Beaten and bloodied, the Joker reveals the location of Dent and Dawes. However, he does this not because Batman’s physical torture has broken him but because he wishes to make Batman choose whom to rescue. Moreover, knowing that Batman will choose to rescue Dawes, the Joker consciously sends Batman in the wrong direction, which is why Batman ends up saving Dent.

*The Dark Knight’s* depiction of the effectiveness of torture and coercive interrogation is therefore skeptical: at no point does it lead to the divulging of any useful information. Therefore, the film is plainly not an endorsement of perhaps the most controversial aspect of the Bush Administration’s war on terror. Indeed, it is better seen as a critique.

### C. *Batman’s Surveillance System*

*The Dark Knight* portrays one instance of highly intrusive surveillance. Late in the film, Batman reveals to Lucius Fox a surveillance system that he has created to find the Joker. The system turns every cell phone in Gotham City into a microphone, allows sonar imaging of the entire city, and can triangulate the Joker’s position as soon as he speaks in range of a phone. Fox is disturbed by what the

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<sup>58</sup> See James Poniewozik, *The Evolution of Jack Bauer*, TIME (Jan. 14, 2007), <http://www.time.com/time/magazine/article/0,9171,1576853,00.html>.

<sup>59</sup> See Ip, *supra* note 48, at 48–52; see also Tung Yin, *Jack Bauer Syndrome: Hollywood’s Depiction of National Security Law*, 17 S. CAL. INTERDISC. L.J. 279 (2008) (considering 24’s depiction of torture and Arab villains).

<sup>60</sup> See Ip, *supra* note 48, at 73–75.

system is capable of, calling it “unethical,” “dangerous,” and “wrong.” He also tells Batman that “[s]pying on thirty million people isn’t part of [his] job description” and that “[a]s long as this machine is at Wayne Industries, [he] won’t be.” Despite his misgivings, Fox agrees to operate the system on this one occasion, although his agreement comes hand in hand with his resignation. With Fox’s help, Batman is able to locate the Joker swiftly once he announces his plans for the passengers on the two ferries.

This surveillance system is a clear allusion to the surveillance program run by the National Security Agency (NSA) after 9/11. Revealed by *The New York Times* in December 2005,<sup>61</sup> the “terrorist surveillance program” or “TSP”<sup>62</sup> involved the NSA engaging in electronic surveillance outside of the parameters of the Foreign Intelligence Surveillance Act of 1978 (FISA),<sup>63</sup> the law governing electronic surveillance for the purpose of acquiring foreign intelligence.<sup>64</sup>

The TSP involved the NSA monitoring certain communications between people inside the United States and overseas, where one party was reasonably suspected of having ties to al Qaeda or associated terrorist organizations.<sup>65</sup> It is now also clear that the President authorized the NSA to conduct other intelligence activities—likely including data-mining<sup>66</sup>—together with the TSP, although the full extent of the NSA’s activities remains unknown to this day.<sup>67</sup>

The revelation of the TSP, one of the Bush Administration’s most closely held secrets,<sup>68</sup> stirred immediate controversy as it appeared to violate FISA, which itself came into existence because of revelations of surveillance excesses by various intelligence and law enforcement agencies in the 1970s.<sup>69</sup> FISA generally required that the government obtain a warrant from a judicial body, the Foreign Intelligence

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<sup>61</sup> James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

<sup>62</sup> The term “TSP” is, of course, loaded but used here for convenience.

<sup>63</sup> The Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95–511, 92 Stat. 1783.

<sup>64</sup> FISA, together with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90–351, 82 Stat. 211, are the “exclusive means” of authorizing electronic surveillance. See 18 U.S.C. § 2511(2)(f) (2006). FISA further provides that it is a crime to conduct electronic surveillance without statutory authorization. See 50 U.S.C. § 1809 (2006 & Supp. III 2009).

<sup>65</sup> INSPECTORS GENERAL OF THE DEP’T OF DEFENSE, DOJ, CIA, NSA AND THE OFFICE OF THE DIR. OF NATIONAL INTELLIGENCE, UNCLASSIFIED REPORT ON THE PRESIDENT’S SURVEILLANCE PROGRAM, REP. NO. 2009-0013-AS (July 10, 2009), available at <http://www.fas.org/irp/eprint/psp.pdf> [hereinafter INSPECTORS GENERAL]; see generally ERIC LICHTBLAU, *BUSH’S LAW: THE REMAKING OF AMERICAN JUSTICES 142–211* (2008) (outlining the inception, operation and eventual disclosure of the TSP).

<sup>66</sup> See JAMES BAMFORD, *THE SHADOW FACTORY: THE ULTRA-SECRET NSA FROM 9/11 TO THE EAVESDROPPING ON AMERICA 289* (2008).

<sup>67</sup> INSPECTORS GENERAL, *supra* note 65, at 6.

<sup>68</sup> See LICHTBLAU, *supra* note 65, at 137–40.

<sup>69</sup> For the historical background to FISA, see William C. Banks, *The Death of FISA*, 91 MINN. L. REV. 1209, 1216–28 (2007).

Surveillance Court (FISC), before conducting electronic surveillance in the United States. For a warrant to be issued, the government had to show that there was probable cause to believe that the target was “a foreign power or an agent of a foreign power,”<sup>70</sup> a term defined broadly enough to include terrorist organizations and terrorists.<sup>71</sup> Importantly, the FISA regime operated on the assumption that the state already had an identifiable target for surveillance.<sup>72</sup>

The Bush Administration had not sought an appropriate amendment of FISA, which had been amended several times to respond to new situations since its enactment.<sup>73</sup> Instead, once the TSP’s existence was revealed, President Bush argued that the program was necessary in order to catch terrorists before they could carry out their plans.<sup>74</sup> The Administration also gamely but unpersuasively attempted to justify the program based on the existing law.<sup>75</sup>

In January 2007, the Administration announced that it had reached an understanding with the FISC and would no longer conduct surveillance outside of FISA. However, this détente proved short-lived and, at this point, efforts to find a legislative solution accelerated. In August 2007, Congress enacted the Protect America Act (PAA), which excluded from FISA’s coverage electronic surveillance that was directed at “persons reasonably believed to be located outside the United States.”<sup>76</sup> The Act allowed the Director of National Intelligence and the Attorney General to authorize the collection of foreign intelligence information concerning persons reasonably believed to be outside the United States subject to certain conditions, including that a significant purpose of the acquisition was the obtaining of foreign intelligence information. No warrant from the FISC was necessary.<sup>77</sup>

The PAA expired upon the activation of its 120-day sunset clause, meaning that the original requirements of FISA came back into play.<sup>78</sup> However, Congress subsequently enacted the FISA Amendment Act of 2008 (FAA), which essentially made the PAA’s changes permanent, albeit subject to some additional safeguards, including some provision for legislative and judicial oversight.<sup>79</sup> The FAA, like the PAA, permits the targeting of a person “reasonably believed to be located

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<sup>70</sup> 50 U.S.C. § 1805(a)(2) (1978) (amended 2008) (current version at 50 U.S.C § 1805(a)(2) (2006 & Supp. V. 2011).

<sup>71</sup> 50 U.S.C. §§ 1801(a)(4), (b)(3) (2006 & Supp. V. 2011).

<sup>72</sup> William C. Banks, *Is the FISA Amendments Act of 2008 Good Policy? Is it Constitutional?*, 35 WM. MITCHELL L. REV. 5007, 5008 (2009).

<sup>73</sup> Paul M. Schwartz, *Warrantless Wiretapping, FISA Reform, and the Lessons of Public Liberty: A Comment on Holmes’s Jorde Lecture*, 97 CALIF. L. REV. 407, 418–19 (2009).

<sup>74</sup> *Id.* at 413.

<sup>75</sup> Banks, *supra* note 72, at 5010–11.

<sup>76</sup> Protect America Act of 2007, Pub. L. No. 110–55 § 2, 121 Stat. 552.

<sup>77</sup> *Id.*

<sup>78</sup> Schwartz, *supra* note 73, at 415.

<sup>79</sup> FISA Amendments Act of 2008, Pub. L. No. 110–261, 122 Stat. 2436.

outside of the United States” subject to certain preconditions being certified.<sup>80</sup> William Banks summarizes the effect of this change: “FAA targets do not have to be suspected of being an agent of a foreign power or, for that matter, they do not have to be suspected of terrorism or any national security offense, so long as the collection of foreign intelligence is a significant purpose of the surveillance.”<sup>81</sup>

So unlike the TSP, the FAA does not require that there be a reasonable suspicion that one party is affiliated with al Qaeda or a related terrorist organization. For this reason, it may be underselling the FAA to say that it made the substance of the TSP permanent.<sup>82</sup> As the report of the Inspectors General of the intelligence agencies involved in the TSP concluded, “[the FAA] gave the government even broader authority to intercept international communications than did the provisions of the Presidential Authorizations governing the activities that the President acknowledged in December 2005 as the Terrorist Surveillance Program.”<sup>83</sup>

Can *The Dark Knight's* portrayal of surveillance be interpreted as an endorsement of the TSP and its related surveillance activities? Again, the answer is no, because the situation depicted in the film differs from reality in significant ways. First, Batman is looking for one specific person, and in a piece of cinematic, technological wish-fulfilment, his system is so advanced that it can pinpoint the Joker's location almost instantly. By contrast, the NSA was engaged in “vacuum cleaner” surveillance, data-mining and analysis of large amounts of phone and e-mail traffic, looking for potential terrorist threats.<sup>84</sup>

Second, the view that this part of the film is some kind of endorsement of the TSP assumes that the Bush Administration had no legitimate means of surveilling a known terrorist figure (that is, a real-world equivalent to the Joker). This is quite untrue because of the existence of FISA, and it obscures the fact that the debate over the TSP was not about surveillance or no surveillance but rather whether that surveillance was in accordance with law.

Third, in the film's final sequence, the audience sees Fox follow Batman's instructions and activate the system's self-destruct function. Fox then exits, smiling as the banks of computer screens spark and fizzle behind him. This, of course, indicates that the surveillance was a one-off response; normalcy has returned, and there is no danger of the machine's exceptional surveillance powers being used again. Reality was different. The Bush Administration first pressured Congress into passing the PAA in 2007 by implying that inaction would create an “intelligence gap” and make the country more vulnerable to terrorist attack.<sup>85</sup>

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<sup>80</sup> *Id.* at § 702.

<sup>81</sup> Banks, *supra* note 72, at 5014.

<sup>82</sup> Schwartz, *supra* note 73, at 414–15.

<sup>83</sup> INSPECTORS GENERAL, *supra* note 65, at 31.

<sup>84</sup> Banks, *supra* note 72, at 5010.

<sup>85</sup> Eric Lichtblau, James Risen & Mark Mazzetti, *Reported Drop in Surveillance Spurred a Law*, N.Y. TIMES, Aug. 11, 2007, at A1.

After the expiry of the PAA in February 2008, Democrats in the House of Representatives delayed the passage of permanent legislation over the issue of immunity for telecommunications companies who had cooperated with the Bush Administration on the TSP. This prompted President Bush to warn that delaying the enactment of a permanent amendment to FISA was endangering American lives.<sup>86</sup> Congressional resistance eventually wavered, and the Bush Administration got what it wanted in the form of the FAA.<sup>87</sup> And so the TSP proved not to be a temporary exception, but rather the baseline for new, quasi-permanent surveillance laws.<sup>88</sup>

#### IV. THE LIMITS OF VIGILANTISM

If none of the depictions of counterterrorism measures in *The Dark Knight* can be read as an endorsement of their Bush Administration-era counterparts, then this undermines the view that the film as a whole is an affirmation of the Bush Administration's war on terrorism. In this part, I argue instead that *The Dark Knight* is a story about the difficulties with relying on vigilantism and about the importance of law and popular courage.<sup>89</sup> I begin by discussing popular courage in the context of the film's climactic action sequence with the two ferries before addressing the film's emphasis on Batman's illegitimacy.

##### A. *The Heroism of Ordinary People*

For much of *The Dark Knight*, Gotham City's citizens come across poorly, behaving like a self-serving, fearful mob once the Joker begins his campaign of terror. For example, the people will not listen to Dent as he argues that they should not force Batman to reveal himself. As Dent emphasizes, they are not demanding that Batman turn himself in because he has violated the law—something which they were happy to let him do as he cleaned up the streets of Gotham—but because they are fearful. Members of the public behave in a similar skittish and self-interested manner when the Joker threatens to blow up a hospital unless the lawyer Reese is killed.

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<sup>86</sup> Press Release, The White House Office of the Press Secretary, President Bush Discusses Protect America Act (Feb. 13, 2008), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2008/02/print/20080213.html>.

<sup>87</sup> BAMFORD, *supra* note 66, at 305–07.

<sup>88</sup> FISA Amendments Act of 2008, § 403(b)(1). For an explanation on why the new model of surveillance is unlikely to expire, see my paper on sunset clauses: John Ip, Sunset Clauses and Counterterrorism Legislation (May 26, 2011) (unpublished manuscript), *available at* [http://papers.ssm.com/sol3/papers.cfm?abstract\\_id=1853945](http://papers.ssm.com/sol3/papers.cfm?abstract_id=1853945).

<sup>89</sup> As John Lawrence and Robert Shelton observe, there is a dearth of what might be termed heroic democratic or popular narratives in films, particularly in comparison to the plentiful tales of superheroes saving the people with righteous extralegal violence. See JOHN SHELTON LAWRENCE & ROBERT JEWETT, *THE MYTH OF THE AMERICAN SUPERHERO* 350–52 (2002).

In the sequence with the two passenger ferries, an opportunity for redemption arises. As noted earlier, the Joker sets up a version of the prisoner's dilemma: either one ferry's passengers decide to blow up the other ferry along with its passengers, or the Joker blows up both ferries. The Joker's purpose in setting up this "social experiment" is to demonstrate the capriciousness of modern civility, a point he intimates to Batman during his interrogation in the police station: "Their morals, their code . . . it's a bad joke. Dropped at the first sign of trouble. They're only as good as the world allows them to be. I'll show you . . . . When the chips are down, these civilized people . . . they'll eat each other."

On the ferry with the ordinary passengers, the audience is treated to shots of terrified women and children; on the other ferry with the convicts, there is simply chaos. The rational outcome, namely that one set of passengers will use the detonator, seems likely. Indeed, the passengers on the "good" ferry observe that the convicts have had their chance and presumably deserve no better. They eventually decide to vote on what to do. The secret ballot diffuses responsibility for the ensuing decision, which is to destroy the other ferry. However, as midnight approaches, no one is ultimately willing to take direct responsibility and activate the detonator. On the other ferry, one of the convicts seizes control of the detonator, presumably with the intention of using it to destroy the "good" ferry. But he confounds the audience's expectations by throwing the detonator out the window.

Therefore, passengers on both ferries, by failing to destroy the passengers on the other ferry, act against their self-interest. In doing so, they hang onto their humanity and defy the Joker's expectations.<sup>90</sup> What is significant is that the people demonstrate sufficient moral courage to save themselves, as Batman is at that point locked in combat with the Joker (indeed at midnight, he is trapped under a steel beam and at the mercy of the Joker). The Joker expresses surprise that the passengers have not behaved as he expected—"Can't rely on anyone these days!" he quips—and pulls out his own detonator. But before he can use it, Batman manages to incapacitate him. So, in a sense, Batman saves the day, but the point is that he would not have had the chance had the people on both ferries not first acted in a manner that contrasts markedly with the hysterical behaviour of the public up to that point. The film's message here is that even if the occurrence of terrorism is beyond control, people do have a measure of control over how they choose to respond to its occurrence.<sup>91</sup>

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<sup>90</sup> See Todd McGowan, *The Exceptional Darkness of The Dark Knight*, 51 JUMP CUT (2009), <http://www.ejumpcut.org/archive/jc51.2009/darkKnightKant/text.html>. *But cf.* Shaun Treat, *How America Learned to Stop Worrying and Cynically ENJOY! The Post-9/11 Superhero Zeitgeist*, 6 COMM. & CRITICAL/CULTURAL STUD. 103, 107 (2009).

<sup>91</sup> Bruce Schneier has made this argument about the responsibility of ordinary people to remain resolute even in an age of terrorism. See Bruce Schneier, *Refuse to be Terrorized*, WIRED (Aug. 24, 2006), <http://www.wired.com/print/politics/security/commentary/securitymatters/2006/08/71642> ("It's time we calm down and fight terror with antiterror. This does not mean that we simply roll over and accept terrorism. There are things our government can and should do to fight terrorism, most of them involving

### B. Recognizing Batman's Illegitimacy

In addition to placing more of the responsibility for salvation upon the people themselves, *The Dark Knight* also portrays Batman as a second-best, stopgap solution to the problems faced by Gotham City. Although the film clearly establishes the need for Batman, it also depicts the problems created by tolerating his extra-legal behavior. In particular, I focus on the film's contrasting of Batman (Gotham's "dark knight") and Harvey Dent (Gotham's "white knight").

Batman, of course, works outside the law and outside the system.<sup>92</sup> His vigilante actions are illegal since he infringes the state's monopoly on the legitimate use of force. Nevertheless, Batman is out in Gotham's streets night after night, in the words of Lucius Fox, "beating criminals to a pulp with his bare hands," subject to his one rule against killing.<sup>93</sup> In short, Batman's story fits the classic narrative of the virtuous vigilante violently cleansing a cowering community beset by an impotent legal system. This type of story has a long pedigree in American popular culture, and it includes the tales of heroic gunslingers of the old West<sup>94</sup> and any number of comic book superheroes.<sup>95</sup>

From the film's opening, it is clear that Batman's actions have been legalized to some degree on a de facto basis. He has a *modus vivendi* with Gordon. Batman leaves criminals tied up for the police, and Gordon uses the bat signal both to deter and to summon Batman when he wishes to meet. The police unit tasked with investigating Batman—officially a vigilante "to be arrested on sight"—is quite deliberately not trying too hard.

*The Dark Knight* shows why an exception is made for Batman's vigilantism: Gotham remains a dark and dangerous city, and there are still bad apples amongst

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intelligence and investigation—and not focusing on specific plots. But our job is to remain steadfast in the face of terror, to refuse to be terrorized.”). Charles Fried has made a similar argument in relation to the use of torture and coercion. See Charles Fried, *History's Verdict*, N.Y. TIMES, Jan. 11, 2009, at WK11 (“Some argue that torture is justified if our survival is threatened, but even apart from the elasticity of this justification, it is flawed because it depends on an equivocation. Our physical survival is not what is of overriding moral importance . . . but our survival as decent human beings acting for a decent society. And we cannot authorize indecency without jeopardizing our survival as a decent society.”).

<sup>92</sup> See Jason Bainbridge, “This is the Authority. This Planet is Under Our Protection” - An Exegesis of Superheroes' Interrogations of Law, 3 L., CULTURE & HUMAN. 455, 456–58 (2007).

<sup>93</sup> Many superheroes obey their own moral codes, which may or may not be congruent with the law of the land. See REYNOLDS, *supra* note 15, at 16–17.

<sup>94</sup> See LAWRENCE & JEWETT, *supra* note 89, at 6; Andreas Leisner, *Law and (Dis)Order: The Janus-Faced Myth of the Lawman in U.S. History and Popular Culture*, in LEGAL NARRATIVES 101, 110–11 (Gudrun M. Grabher & Anna Gamper eds., 2009); RICHARD SLOTKIN, *GUNFIGHTER NATION: THE MYTH OF THE FRONTIER IN TWENTIETH-CENTURY AMERICA* 379–404 (1992).

<sup>95</sup> Nickie D. Phillips & Staci Strobl, *Cultural Criminology and Kryptonite: Apocalyptic and Retributive Constructions of Crime and Justice in Comic Books*, 2 CRIME, MEDIA, CULTURE 304, 318–20 (2006); Treat, *supra* note 90, at 104.

the ranks of law enforcement. Moreover, once the terrorist figure of the Joker appears in the film, the ordinary criminal justice system—as evidenced by the deaths of the judge and Police Commissioner and the Joker's escape from custody—proves unable to deal with the new threat.

At the same time, *The Dark Knight* shows why making an exception for Batman's illegal conduct is problematic. Batman has inspired several imitators, and although their intentions are laudable, they make Batman's job more difficult. In one of the film's early sequences, he leaves his imitators trussed up along with the criminals. One of them asks Batman, "What gives you the right? What's the difference between you and me?" Batman quips in response, "I'm not wearing hockey pads." But the fact remains that Batman has no greater claim to the legitimate use of force than his imitators, even if his vigilantism is more effective. This highlights the difficulty of permitting Batman's vigilantism. Once an exception has been made for Batman, there is no principled reason why the exception should be limited to Batman alone.<sup>96</sup>

This tension between legality and necessity, particularly in the context of emergency, is explored more closely in a scene that takes place in a restaurant with Wayne, Dent, Dawes, and Wayne's date, Natascha. Natascha expresses concern about "the kind of city that idolizes a masked vigilante" and says to Dent that "Gotham needs heroes like you—elected officials, not a man who thinks he's above the law." Wayne appears to agree: "Exactly. Who appointed the Batman?" Dent places the responsibility on the people, who let the city degenerate. He points to the Roman Republic's institution of the dictatorship: "When their enemies were at the gates, the Romans would suspend democracy and appoint one man to protect the city. It wasn't considered an honor. It was considered a public service."<sup>97</sup> However, as Dawes observes, the institution of dictator was not without its own dangers: "The last man they asked to protect the Republic was named Caesar."<sup>98</sup> Dent concedes this but appreciates that Batman does not want to be a vigilante crime-fighter forever and needs "someone to take up his mantle."

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<sup>96</sup> See McGowan, *supra* note 90 ("Batman has no inherent right to guard exceptionality for himself, and as long as he occupies this position, others will be drawn to it. And a self-multiplying exceptionality portends the destruction of the social order.").

<sup>97</sup> Dent's words echo Alexander Hamilton's: "Every man the least conversant in Roman history knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of dictator . . ." See THE FEDERALIST No. 70, at 422 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>98</sup> As a historical matter, the institution of dictatorship deteriorated along with the Republic itself, eventually emerging in a more authoritarian version in the late Republic. See Kim Lane Scheppele, *Legal and Extralegal Emergencies*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 165, 167 (Keith E. Whittington, R. Daniel Kelemen & Gregory A. Caldeira eds., 2008). The dictatorship of Sulla dispensed with the customary six-month time limit before Julius Caesar eventually became *dictator perpetuo*. See ANDREW LINTOTT, THE CONSTITUTION OF THE ROMAN REPUBLIC 112–13 (1999).

In this conversation, Batman is juxtaposed with the Roman dictator, in whom the Republic temporarily entrusted exceptional powers in order to respond to emergency.<sup>99</sup> Both have exceptional powers, and both are in a sense foreign to the ordinary legal system.<sup>100</sup> Significantly, Wayne recognizes that the law and the legal system, embodied by Dent as District Attorney, provides the better way for dealing with Gotham City's problems. Although Batman, as a vigilante superhero, is able to act free of certain legal constraints, Dent, as an officer of the law and public official, can do things that Batman cannot, namely fight crime openly and legally and provide Gotham with, in Wayne's words, "a hero with a face." Dent and the law he represents have the legitimacy that even Wayne accepts is lacking in Batman. This realization leads Wayne to throw his full support behind Dent.<sup>101</sup>

Dent's importance to Wayne and to Gotham City is emphasized throughout the film. For example, after he has stopped Dent's attempted coercive interrogation of the Joker's henchman, Batman reminds him of who he is: "You're the symbol of hope I could never be. Your stand against organized crime is the first legitimate ray of light in Gotham in decades." This point becomes even clearer in a conversation Wayne has with Alfred after Dent has suffered his trauma: "Gotham needs its true hero. And I let that murdering psychopath [the Joker] blow him half to hell." Alfred replies, "Which is why, for now, they're gonna have to make do with you."

The importance Wayne places on Dent explains the decision he makes at the end of the film to tell a noble lie and cover up Dent/Two-Face's crimes. Batman learns of Dent's fate after he has subdued the Joker the final time. The Joker taunts Batman, suggesting that he has won the battle but lost the war because Dent has been corrupted: "I took Gotham's white knight, and I brought him down to our level. It wasn't hard. You see, madness, as you know, is like gravity; all it takes is a little push." After Batman has saved Gordon's family, the reality of what the Joker has done dawns upon Gordon as well: "The Joker won. Harvey's prosecution, everything he fought for, undone. Whatever chance you gave us of

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<sup>99</sup> See OREN GROSS & FIONNUALA NÍ AOLÁIN, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* 17–26 (2006); see also CLINTON ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* 21–26 (2d ed. 2002)

<sup>100</sup> Ferejohn and Pasquino, for example, describe the dictatorship as involving the calling up of "a special agent outside the ordinary constitutional structure." See John Ferejohn & Pasquale Pasquino, *Emergency Powers*, in *THE OXFORD HANDBOOK OF POLITICAL THEORY* 333, 338 (John S. Dryzek, Bonnie Honig & Anne Phillips eds., 2006).

<sup>101</sup> Stephen Holmes has made this very point regarding post-9/11 counterterrorism. See Stephen Holmes, *In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror*, 97 CALIF. L. REV. 301, 304–05 (2009) ("Defenders of unchecked (or only weakly checked) executive discretion in the war on terror typically ignore the liberal paradox that constraints can be empowering, and that legal and constitutional restraints can increase the government's capacity to manage risk and crisis.").

fixing our city dies with Harvey's reputation. We bet it all on him. The Joker took the best of us and tore him down. People will lose hope."

Batman responds that the people must therefore never find out about Dent's crimes. He reiterates that "Gotham needs its true hero." He accepts that he is not a hero like Dent was and can therefore take the blame for Dent/Two Face's crimes: "You'll hunt me. You'll condemn me, set the dogs on me . . . because that's what needs to happen. Because sometimes, truth isn't good enough . . . . Sometimes people deserve more." The film ends with police pursuing Batman and Gordon smashing the bat signal, symbolically severing their relationship and ending the *de facto* legalization of Batman's vigilante activities.

By accepting responsibility for Dent's crimes, Batman accepts his status as an outlaw and impliedly acknowledges that his previous acts of vigilantism, while laudable and even necessary, must nonetheless be treated as illegal.<sup>102</sup> With this act of self-sacrifice, Batman preserves Dent's legacy and by extension saves the legal system from taint. *The Dark Knight* therefore endorses something akin to Oren Gross' model of extra-legal measures, which posits that public officials may act extra-legally (that is to say, illegally or even criminally) where they consider that course of action to be necessary in an exceptional case, provided that they openly acknowledge their actions and await the consequences, whether they be some form of public ratification, criminal prosecution or something in between.<sup>103</sup> The underlying idea is that although illegal acts may sometimes be needed to preserve the legal order, the necessity of those acts does not render them legal.

## V. CONCLUSION

*The Dark Knight* was the biggest Hollywood blockbuster of 2008. At the same time, as an example of post-9/11 popular culture, it is an interesting source to examine for what it says about the tension between legality and necessity in the context of counterterrorism. I have argued that for various reasons the film's depiction of controversial counterterrorism measures is better seen as a critique rather than as an approval of the Bush Administration's war on terrorism. The message of *The Dark Knight* is that society ideally should not rely on heroic vigilantes, that the people themselves need to show resoluteness and courage, and that, in the long run, the law—together with the legitimacy it confers—is not a liability, but an asset.

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<sup>102</sup> McGowan, *supra* note 90 ("When he agrees to appear as a criminal at the end of the film, Batman avows simultaneously the need for the heroic exception and the need for this exception to appear as criminality.").

<sup>103</sup> GROSS, *supra* note 99, at 110–70.