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Torture and the Future

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There is a popular belief that Western history constitutes a progressive move from more to less torture. Iron maidens and racks are now museum exhibits, crucifixions are sectarian iconography and scientific experimentation on twins is History Channel infotainment. This narrative of progress deftly blends ideas about “time,” “place” and “culture.” In the popular imagination, “civilized societies” (a.k.a. “us”) do not rely on torture, whereas those societies where torture is still common remain “uncivilized,” torture being both a proof and a problem of their enduring “backwardness.”

George W. Bush epitomizes and mines the American popular imagination with his mantra of “spreading freedom,” which carries a strong implication of stopping torture. Saddam Hussein’s horrific legacy of mass torture was one of the arguments deployed to justify preemptive war against Iraq, and torture has become retroactively more important since weapons of mass destruction have failed to materialize. On April 30, 2004, Bush said, “A year ago I [gave a] speech...saying we had achieved an important objective, accomplished a mission, which was the removal of Saddam Hussein. As a result, there are no longer torture chambers or mass graves or rape rooms in Iraq.”

Even as Bush spoke those words, he and millions of newspaper readers and television viewers across the world were aware that torture chambers, rape and sexual abuse of detainees in Iraq are not a thing of the past. The public exposure of torture of Iraqi detainees by US soldiers, working in interrogation wings run by military intelligence and American “security contractors,” at Abu Ghraib prison outside of Baghdad—as well as allegations of torture of other Iraqis by British soldiers—are headline news. The shocking revelations and photographs provide stark proof that torture is not a relic of “our past.” Nor does torture provide a meaningful geographical or cultural demarcation between “civilized” and “uncivilized” societies.

Implicatory Denial

The fact is that, today, people are being tortured in two thirds of the world’s countries. Yet if one were to accept the rhetoric of the world’s states at face value, there is no torture in the world. No torturing regime defends or even acknowledges its own torture as

torture. Stanley Cohen, author of *States of Denial*, identifies three common forms of denial of torture and other atrocities.^[1] “Literal denial” is when a state accused of torture responds by saying that nothing happened and that those who claim something happened are liars or “enemies of the state.” “Interpretative denial” is when a state refutes allegations by saying that what happened is not torture but “something else”—like “moderate physical pressure” or “stress and duress.” “Implicatory denial”—that is, denial by implicating others—occurs when a state acknowledges torture but blames it on “aberrant agents,” claiming that rogue elements have breached official norms and policies. Official US responses to the Abu Ghraib prison photos are a classic example of implicatory denial.

In the story on CBS “60 Minutes II” that exposed the abusive US practices in Abu Ghraib, Brig. Gen. Mark Kimmitt said, “All of us are disappointed by the actions of the few.... Number one, this is a small minority of the military, and number two, they need to understand that the army...is a values-based organization...[The] acts that you see in these pictures may reflect the actions of individuals, but by God, it doesn’t reflect my army.” Secretary of State Colin Powell agreed with Kimmitt when he condemned the six soldiers who have been arrested in the Abu Ghraib incidents: “But I want to remind the world it was a small number of troops...compared to the hundreds of thousands who have served around the world, who have come to build hospitals and schools and restore civil society.” These implicatory denials were echoed, with a grander sweep, by Defense Secretary Donald Rumsfeld, who in Congressional testimony described the abuses depicted in the now infamous photos as “un-American.”

Many Americans can doubtless relate to Rumsfeld’s attempt to relegate the Abu Ghraib torturers—all, apparently, Americans—to another discursive time, place and culture. But before Rumsfeld spoke, investigative journalist Seymour Hersh, writing in the *New Yorker*, had already rebutted the implicatory denials so ambient in the Pentagon and the media sphere.^[2] Hersh obtained a copy of a report from another US army general, Antonio Taguba, who investigated prisons and interrogation centers in Iraq between October and December 2003, and found “sadistic, wanton and criminal abuses” that were systemic and rampant. According to Hersh, “Taguba saved his harshest words for the military intelligence officers and private contractors.” Brig. Gen. Janis Karpinski, who oversaw 16 prisons in Iraq and has been relieved of those duties because of the scandal, said, “The [Abu Ghraib] prison, and that particular cell block where the events took place, were under the control of the MI (military intelligence) command.” Karpinski sought to defend herself and lay the blame elsewhere when she noted that military intelligence officers went “to great lengths to try to exclude the International Committee of the Red Cross from access to that interrogation wing.”

Denial of torture is articulated in many ways, but all states deny it for the same reason. Torture must be practiced in secret and denied in public because, in the mid-twentieth century, torture became an international crime. Irrespective of what penalties the arrested soldiers may face under the Uniform Code of Military Justice, the pictures from Abu Ghraib—whose authenticity no one has denied—document offenses of an especially heinous kind.

Law and (International) Order

The international criminalization of torture is inextricable from the history of human rights. The unprecedented horrors and violence of World War II provided the negative inspiration for a revolution in international law to forge the principle that people should have rights as humans, and not merely as protected classes of subjects, such as citizens, civilians or prisoners of war. However, the creation of international human rights did not undermine or substantially alter the power of states. Rather, it entailed the elaboration of new internationalized norms of government to which all states would be expected to adhere, while preserving states' sovereign rights. Human rights obtained their "universalizing" character from the fact that people are subjects of states and states are subjects of international law.

The right not to be tortured became a human right when international law prohibited the practice, and established legal liabilities and penalties.^[3] The right not to be tortured is one of many human rights, but it is stronger than almost any other human right because the prohibition of torture is absolutely non-derogable and because the law recognizes no exceptions.^[4] What this means is that no one—ever, anywhere—has a "right" to torture, and that everyone—always, everywhere—has a right not to be tortured. It also means that anyone who engages in or abets torture is committing a crime.

The international prohibition of torture illuminates something very important about the rights of human beings. The right not to be tortured represents an ideal type of human rights norm because it invests people, regardless of their social status, their political identity or affiliations, with a kind of sovereign right over their bodies and minds, albeit limited to situations that fall within the legal definition of torture. In contrast, the right of persons not to be exterminated through genocide hinges on a collective identity as members of a national, religious or ethnic group. The right not to be deliberately targeted in war hinges not on one's humanity but rather on one's status as a civilian or non-combatant, or a surrendered or captured soldier.

The prohibition of torture is customary international law and therefore attaches universal jurisdiction. Universal jurisdiction means that if a perpetrator is not prosecuted in his or her own country, he or she can be prosecuted in any competent legal system anywhere in the world. Therefore, the right not to be tortured is accorded greater weight in law than the sovereign rights of states because torture is prohibited under all circumstances, including the "ticking bomb" scenario. In the words of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture." The US ratified this convention in 1994.

Shades of Pinochet

Perhaps the most vivid illustration of the strength of the prohibition on torture and the universal jurisdiction that attaches to it is the case of former Chilean dictator Augusto Pinochet. Pinochet was arrested in 1998 in London when the British government conceded to act on an indictment by Spanish judge Balthazar Garzon. The Spanish indictment charged Pinochet with genocide and other forms of murder, but the only charge that held up as the case made its way through the British legal system was torture. Although Pinochet ultimately was released from British custody because of “ill health,” the “Pinochet precedent”—holding that he was indictable—was a landmark. No *raison d’etat* could be invoked to justify torture, and no one, not even a former head of state, could claim legal immunity from prosecution on charges of torture.

Of course, the Pinochet case did not solve or even alter the problem of torture. But the Pinochet precedent does illustrate that the right not to be tortured is stronger—substantially stronger—than the right to life. There are many circumstances under which people legally can be killed, but none under which people legally can be tortured. Even forms of killing that constitute international crimes do not have the same robust non-derogability as torture. War crimes are no less illegal than torture, but the obscuring effects of the “fog of war” make it difficult to ascertain liability. And unlike war crimes and genocide, the “chain of command” is irrelevant to bringing a case against a torturer, though the chain of command can be used to broaden the scope of legal liability. This last factor is crucial for understanding why states whose agents are caught torturing people resort to implicative denial. Blaming “aberrant agents” is a means of trying to prevent legal action against those further up the chain of command. Pinochet probably never tortured anyone personally, but he was responsible—and liable—for torture by his jailers.

Indeed, the lawyers of the six American soldiers who are facing court martial for torturing Iraqis are saying that their clients, who are reservists, are “scapegoats.” Their defense will seek to put into evidence those responsible for interrogation at the Abu Ghraib prison. One soldier, Staff Sgt. Ivan “Chip” Frederick, has said that when he asked for some guidelines on the treatment of prisoners because he was disconcerted by how they were being treated, a military intelligence officer told him that this was “how things are done.” Frederick continued that he and other military police were encouraged to abuse and humiliate detainees to soften them up for interrogation.

Why Is the Prohibition of Torture So Strong?

Torture refers to purposefully harming someone who is in custody—unfree to fight back or protect himself or herself and imperiled by that incapacitation. Other violent practices, like domestic violence and battery, also involve the purposeful causing of pain, and in some ways these practices might “look like” torture. But they lack the public dimension of custodianship. The distinction does not turn on what happens, because if it did, torture would be difficult if not impossible to distinguish from domestic violence and battery. Pain and suffering, humiliation and injury are common to all. But, legally, severe pain, suffering, humiliation and injury constitute torture only if they serve some public purpose

and if the status and role of the torturer emanates from a public authority and if the person being harmed is in custody.[5]

Contrary to the implications of some, the forced public nakedness, forced public masturbation and forced simulation of homosexual acts depicted in the Abu Ghraib photos do not qualify as torture or as “especially” torturous because the Iraqi detainees are Arab and, presumably, Muslim. Hersh himself implies that maltreatment crossed the line to become torture because, “such dehumanization [as is shown in the photos] is unacceptable in any culture, but it is especially so in the Arab world.” Would persons of any ethnicity or culture find such abuse anything other than severely and sadistically humiliating? What was done to the Iraqi detainees was torture because the detainees were in the custody of the US military and private contractors, because they were compelled by their captors to assume the humiliating positions and because they were powerless to resist their humiliation. While the detainees’ cultural sensitivities were undoubtedly offended, the relevant point is that the most inalienable of their human rights was violated by their American jailers.

Notwithstanding these qualifications, there is no bright line empirically distinguishing torture from “everything else.” Rather, torture is like a core within layers of violence. For example, being beaten while being arrested changes from “cruel treatment” to “torture” only when “custody” has been achieved, obviously a very blurry and contestable line. The combination of “torture” and “cruel, inhumane and degrading treatment” in the same laws contributes to this confusion, which is further compounded by the exclusion of painful—but lawful—punishments such as floggings, amputations or the death penalty. Many forms of violence may lead to torture and many forms of violence may result from torture, but the core violence that is torture—and what makes torture a “core international crime”—is violence (physical or psychological) against a person already in the custody of an authority.

An “authority” is a category that obviously would include states and their agents, but it would not exclude non-state groups and their agents, or civilians. Torture is not contingent on legitimacy, jurisdiction or international recognition. It is contingent on an organized rather than individualized capacity to take people into custody and then harm them for a purpose that is public rather than personal.

On this point, the use of private contractors to run prisons and conduct interrogations in Afghanistan and Iraq has been a subject of confusion. American media are reporting, and many people are assuming, that because these private contractors are civilians, they are not subject to military or international laws. Peter W. Singer of the Brookings Institution, writing in the May 2 Los Angeles Times, quotes Phillip Carter, a former Army officer now at UCLA Law School as saying that, “Legally speaking, [military contractors in Iraq] actually fall into the same gray area as the unlawful combatants detained at Guantanamo Bay.” Carter may be correct in some respects, but the contractors have been hired and authorized to fulfill a public function of handling and interrogating detainees on behalf of the US government. As another military analyst, Paul C. Forage, told the Baltimore Sun on May 4, the private contractors could be prosecuted under either the

Military Extraterritorial Jurisdiction Act of 2000 or a 1996 federal law. “I think it’s a pretty clear case,” Forge concluded. “It’s not an area of legal limbo.”

Torture and Terror

If torture is so strongly prohibited, and denied by all states because it is fundamentally illegitimate, then why is it so common in today’s world? While states torture people for numerous reasons, one common reason invoked by many states is that they claim to be engaged in conflicts with “terrorists.”^[6]

Terrorism is a broad and flexible concept, and there is no clear, internationally accepted definition.^[7] It is used, variously, to describe certain kinds of actions, including attacks on civilians, hijackings, organized resistance or repression, and to identify certain types of actors. In US national security discourse, the term terrorism typically is used to refer to non-state actors or organizations engaged in attacks or struggles against the state, emphasizing but not necessarily limited to violence, to which the state responds with “counter-terrorism.”

Terrorism is not a figment of the politically paranoid imagination. The September 11, 2001 attacks were indisputably terrorist attacks, and al-Qaeda operates as a terrorist organization. Any and every instance of deliberately targeting civilians or civilian infrastructures as a tactic in the furtherance of some cause, whatever the political or ideological motivation and whomever the targeting agents, is terroristic. If the deliberate targeting of civilians constitutes terrorism, then we must acknowledge that states can be as culpable as non-state groups. However, as Richard Falk explains:

With the help of the influential media, the state over time has waged and largely won the battle of definitions by exempting its own violence against civilians from being treated and perceived as “terrorism.” Instead, such violence was generally discussed as “uses of force,” “retaliation,” “self-defense” and “security measures.”^[8]

National security is a legitimate interest of any state, and states have a responsibility to provide for the security of their citizens. But the tendency to characterize and treat all “enemies” as “terrorists” or “terrorist sympathizers” contributes to the delineation between “legitimate” and “illegitimate” communities, leaving the latter vulnerable to state violence, and enabling the state to justify that violence as a necessary reaction to terror. Pointing out the limits and obfuscations of national security discourse is not an apologia for terrorism. Rather, it is an effort to understand, evaluate and criticize violence in a manner that is not glazed by partisan or statist ideology.

Around the world, some of the most egregious human rights violations have been perpetrated by states in the name of counter-terrorism. Terrorism is, by definition, a violation of human rights. Michael Ignatieff, director of the Carr Center of Human Rights Policy at Harvard, writes:

The two terms—human rights and terror—look like a simple antithesis: human rights good, terror bad. [But] the antithesis is not so simple. Of course, human rights and terror stand opposed to each other. Terrorist acts violate the right to life, along with many other rights. But equally, human rights—notably the right to self-determination—have constituted major justification for the resort to violence, including acts of terror....[9]

Ignatieff correctly points out that it is not international human rights law—which is inherently pacifist—but rather, international humanitarian law that obtains in any war, including a war on terrorism. The Geneva Conventions, which compose the main body of international humanitarian laws, are agnostic about the causes of war or the justness of the aims of adversaries.[10] Rather, they govern what is legally permissible in war. Their aim is to minimize suffering and destruction, and to provide guidelines for the detention and treatment of enemy civilians and combatants. International humanitarian law is not pacifist, but on the issue of torture it concurs with human rights law. Even in war, the right not to be tortured is absolutely non-derogable, and the use of torture in the context of conflict can constitute a war crime.

Since September 11, the Bush administration has articulated positions and pursued policies that blatantly contravene the Geneva Conventions, on the grounds that terrorists do not deserve legal rights and protections. These policies include the invention of a category, “unlawful combatants,” that does not exist in international law. These unlawful combatants are being held incommunicado, at Guantánamo Bay and other locations, and subjected to years of interrogation with no judicial oversight, no public accountability and virtually no visitation by representatives of the International Committee of the Red Cross. Although the US government claims that no torture is used in the interrogation of these detainees, these clandestine and extralegal conditions are an invitation for abuse. The Abu Ghraib images are a piece of hard evidence indicating that the US has joined the list of countries—Egypt, Israel, Uzbekistan—that are fighting wars on terrorism partly through the use of torture.

Still, because torture is illegal, it remains necessary for states to deny torture, even the torture of terrorists. In the US, the terrorist attacks of September 11 have raised for debate several vexing and related questions: should “terrorists” have a right not to be tortured? Is torture a necessary and effective tactic in the fight against terrorism? If so, why deny torture?

A Distinction Is Born

Israel was the first state in the world to break the “torture taboo” by publicly authorizing interrogation practices that constitute torture. Israel has been in an official state of emergency and war since it was established in 1948. In the 1967 Arab-Israeli war, Israel captured and occupied the West Bank and Gaza and established a military administration to rule the Palestinians residing in these areas. A military court system was established to prosecute Palestinians suspected of violating Israel’s military and emergency laws. These laws criminalized not only violence, sabotage and militancy, but also a vast array of

political and non-violent activities. Israel used prosecution as one of its key strategies to rule Palestinians and to thwart and punish resistance to the occupation. Since 1967, over half a million Palestinians have been prosecuted in the military court system, out of a population that now numbers 3.2 million. There have been periods when incarceration rates in the West Bank and Gaza were among the highest in the world.

For two decades, allegations that Israeli soldiers and interrogators were routinely torturing Palestinian detainees were consistently refuted by Israeli officials as lies and fabrications of “enemies of the state.” Then in 1987, for reasons unconnected to the interrogation of Palestinians, the Israeli government established an official commission of inquiry to investigate the General Security Services.

The report produced by the Landau Commission was path-breaking in a number of ways. It confirmed that, in fact, GSS agents had used violent interrogation methods routinely on Palestinian detainees since at least 1971, and that they had routinely lied about such practices when confessions were challenged in court on the grounds that they had been coerced. The Landau Commission was harsh in its criticism of GSS perjury, but adopted the GSS’s own position that coercive interrogation tactics were necessary in the struggle against “hostile terrorist activity.” The Landau Commission accepted the broad definition of terrorism utilized by the GSS, which encompassed not only acts or threats of violence, but virtually all activities related to Palestinian nationalism.

The most path-breaking aspects of the Landau report were its conclusions and recommendations. The report’s authors argued that national security requires physical and psychological coercion in the interrogation of Palestinians, and that the state should sanction such tactics in order to rectify the problem of perjury. The Landau Commission’s justification for this recommendation was based on a three-part contention: that Palestinians have no right to legal protections given their predisposition for terrorism, that the GSS operates morally and responsibly in discharging its duties to preserve Israeli national security, and that GSS interrogation methods do not constitute torture. The Landau Commission offered a way for the state to engage in torture while simultaneously denying it by renaming it as “moderate physical pressure.”

This euphemism traces back to British torture of Irish prisoners in Northern Ireland, but the Landau report adds a distinctive wrinkle. A legal challenge was mounted against Britain’s “five techniques” in the interrogation of suspected Irish Republican Army members on the grounds that they violate the European Convention on Human Rights. The majority decision by the European Court of Human Rights ruled that the five techniques (wall standing, hooding, subjection to noise, sleep deprivation, and deprivation of food and drink) do not amount to “torture” but to the lesser—and also prohibited—category of “inhumane and degrading treatment.” But the British government accepted the minority opinion of the Court that the techniques constitute (or come close to) torture, and decided to forego their use. The Landau Commission, noting that Israeli interrogation tactics resembled the five techniques, embraced the Court’s majority decision that they do not constitute “torture.” Thus was born the euphemization of “moderate physical pressure” as “not torture.”

The Israeli government adopted the Landau Commission's recommendations to "legalize" torture, and this stimulated enormous debate and criticism in Israel. Since 1987, there has been a concerted campaign by Israeli lawyers and human rights organizations to end Israeli interrogation practices that constitute torture. One of the main sites of struggle was the Israeli High Court of Justice which, in 1999, finally issued a ruling prohibiting the routine use of "pressure" tactics (though not calling these tactics "torture") while preserving the option to use such tactics in "exceptional circumstances."

In the US today, many of the people who point to Israel as a model for good interrogation tactics are pointing implicitly to the Landau Commission report, rather than the struggles, scandals and changes that have emanated in its wake. The Landau Commission had adopted an apocalyptic view of the world where nothing less than survival of the Israeli state and the Jewish nation were deemed to be at stake in the interrogation of "hostile terrorists." It concluded that survival and security trump other valued considerations, including due process and the right not to be tortured. Read on its own terms, the Landau Commission report is a blueprint for "absolute security" in a war on terror.

"Stress and Duress"

In a sense, the US already has its own Landau Commission report. On December 26, 2002, Dana Priest and Barton Gellman published a lengthy story in the Washington Post revealing that US security agents were utilizing "stress and duress" tactics in the interrogation of people captured in Afghanistan and elsewhere. The tactics they described are identical to Israeli "moderate physical pressure." Priest and Gellman wrote that: "Those who refuse to cooperate inside this secret CIA interrogation center [at the Bagram air base in Afghanistan] are sometimes kept standing or kneeling for hours, in black hoods or spray-painted goggles, according to intelligence specialists familiar with CIA interrogation methods. At times, they are held in awkward, painful positions and deprived of sleep with a 24-hour bombardment of lights—subject to what are known as 'stress and duress' techniques."

Priest and Gellman also reported that detainees who could not be broken by the "restrained" stress and duress tactics might be given mind-altering drugs or "turned over—'rendered,' in official parlance—to foreign intelligence services whose practice of torture has been documented by the US government and human rights organizations." They continued, "While the US government publicly denounces the use of torture, each of the current national security officials interviewed for this article defended the use of violence against captives as just and necessary. They expressed confidence that the American public would back their view. The CIA...declined to comment."

Like the Landau Commission report when it was published in Israel in 1987, this Washington Post story dramatically altered both what is known about American interrogation and how torture is talked about in the US. Human rights advocates assailed official admissions of "stress and duress" as defenses of torture. On January 11, 2003, in a letter to the Washington Post, two former Justice Department officials who served

under Presidents Ronald Reagan and George Bush cited the European Court ruling as evidence that “stress and duress” is not torture. “Indeed,” they retorted to the human rights advocates, “to say these practices do [constitute torture] ultimately trivializes the torture that does take place in so many areas of the world.” So far, the pictures of grinning American soldiers forcing nude Iraqis into sexual positions seem to have dimmed the vigor of this particular defense for the “stress and duress” at Abu Ghraib. However, an ex-US Army interrogation instructor named Tony Robinson, appearing on the Fox News Channel’s “Hannity and Colmes” show on April 30, did say of the pictures that “frat hazing is worse than this.”

More to the point, the use of tactics by US officials that arguably constitute torture, and the rendering of prisoners to states with well-established records of torture—including Jordan, Egypt, Syria, Morocco, Pakistan and the Philippines—illuminate the conundrum of what to do about terrorism. Priest and Gellman recounted the testimony of Cofer Black, former head of the CIA Counterterrorist Center, before Congress on September 26, 2002, to the effect that the CIA and other security agencies need “operational flexibility,” and therefore cannot be held to the “old” standards. Black said, “There was before 9/11, and there was an after 9/11. After 9/11 the gloves come off.”

Tale of Two Clichés

Taking the gloves off in interrogation is a thinly veiled reference to torture, but calling torture “stress and duress” or “abuse” is the homage paid to the still current imperative of denial. The presumptions that torture is both necessary and effective, and the implications of breaking the torture taboo by legalizing torture are shaping debates in the US. This debate circles around two clichés: the slippery slope and the lesser evil.

Jeremiads against the slippery slope argue that no cause or crisis justifies the erosion of the absolute prohibition against torture. Variations on this theme include: there is no such thing as just a “little torture,” once you start torturing “terrorists” you open the door to torturing anyone in the future and using torture makes you no better than your enemy. Defenders of the lesser evil argue that the absolute prohibition on torture is immoral if it ties the hands of security agents from finding that “ticking bomb” and saving innocent lives. On CNN’s “Crossfire,” conservative commentator Tucker Carlson said, “Torture is bad. [But] some things are worse. And under some circumstances, it may be the lesser of two evils. Because some evils are pretty evil.”

Interestingly, the example of Israel is invoked to bolster each case. The slippery slopers point the realities of torture in Israel-Palestine, where torturing tens of thousands of people has neither ameliorated the conflict nor enhanced Israeli security; rather it has exacerbated conflict and thus contributed to Israeli insecurity. According to Yael Stein, a researcher at the Israeli human rights organization B’tselem, “Israel’s experience shows you can’t stop the slippery slope: they tortured almost all the Palestinians they could. It was in the system. The moment you start, you can’t stop.”^[11] The lesser evilers argue that Israel has preserved its “democratic character” by bringing torture “into the law” and

that its security services have a fabulous success rate of averting many “ticking bombs” by torturing terrorists.^[12]

While coercive Israeli interrogation tactics have provided information about militant organizations and arms caches and foiled plans of some would-be bombers, there is no public record that the use of torture has ever averted an actual ticking bomb in Israel—that is, a bomb that was imminently set to explode.^[13] American lesser evilers who invoke the Israeli example either misunderstand or misrepresent the fact that Israeli officials use the “ticking bomb” scenario loosely, not literally. But American lesser evilers like Alan Dershowitz invoke the literal ticking bomb—not the future bomb, not the general danger, not the malevolent enemy—to argue that the US should follow Israel’s example and legalize torture. Dershowitz writes:

If American law enforcement officers were ever to confront the law school hypothetical case of the captured terrorist who knew about an imminent attack but refused to provide the information necessary to prevent it, I have absolutely no doubt that they would try to torture the terrorists into providing the information. Moreover, the vast majority of Americans would expect the officers to engage in that time-tested technique for loosening tongues, notwithstanding our unequivocal treaty obligations never to employ torture, no matter how exigent the circumstances. The real question is not whether torture would be used—it would—but whether it would be used outside of the law or within the law.^[14]

Dershowitz offers a suggestion as to how torture can be brought “into the law”: “torture warrants” issued by judges. He also offers a helpful suggestion for tactics: sterilized needles under the fingernails. He told an interviewer for Salon.com: “I wanted to come up with a tactic that can’t possibly cause permanent physical harm but is excruciatingly painful.... [T]he point I wanted to make is that torture is not being used as a way of producing death. It’s been used as a way of simply causing excruciating pain.... I want maximal pain, minimum lethality.”

Lesser evilers like Dershowitz criticize the slippery slopers as human rights fundamentalists who would sacrifice innocent civilians to preserve a legal principle. They are not suggesting that we forsake the principle that torture is illegal, but rather that we suspend that principle in the handling of some people on the grounds that they are necessarily and legitimately “torturable.” The implicit rationale is that terrorists are not human, and therefore are undeserving of inclusion in the universe of human beings covered by international and constitutional law that categorically prohibits torture. But the most glaring problem with this argument, as many critics have pointed out, is the implausibility of knowing with absolute certainty that the torture candidate possesses information about an imminent threat. The speculation would translate into a license to use violence on a person assumed to be guilty. Following Dershowitz’s suggestion to involve judges in the dispensing of torture warrants would, at best, narrow the pool of candidates.

Oren Gross refines the lesser evil position by arguing for what he terms an “extralegal model.”^[15] This model would uphold the illegality of torture while enabling it to be used at the discretion of authorities. They would then be potentially subject to punishment, which they could avoid by gaining the approval of the public ex post facto. In some ways, this “extralegal model” already characterizes US policies in the war on terrorism. Depending on how the Supreme Court rules in the cases of José Padilla, Yasser Hamdi and the Guantánamo Bay detainees, it might very well become the controlling norm for executive power.^[16] The extralegal model proposes that the US have its rule of law cake while eating its unfettered executive power, too. Many legal issues are at stake, including habeas corpus, incommunicado detention, the right to counsel, and the transparency and accountability of government agents and agencies. But torture is a distinct issue of concern because the prohibition against it is so strong.

No Room for Mistakes

The slippery slopers present a valuable and worthy defense of taking the moral and legal high road. Those who invoke the slippery slope tend to focus on the tortured and worry—with good cause, as the Abu Ghraib photos have shown—that they are defenseless and susceptible to abuse in custody. But making slippery slope arguments against torture to a public gripped by fear of “evildoers” and willing to sacrifice the rights of “enemies” is not an effective rebuttal to advocates of torture as a lesser evil.

Those who invoke the lesser evil tend to focus on the public that is vulnerable to terrorism and violence. Their arguments have appeal because many people are willing to accept the legitimacy of torturing terrorists as necessary and effective. Much of the public is willing to trust that government agents empowered to decide whom to torture are capable of discerning real from imagined threats, and restricting torture to the former. But at least 22 Guantánamo Bay detainees—people described as “the worst of the worst” by Rumsfeld—have been released, an implicit acknowledgement that their very detention in a place where torture is likely being used had been a mistake. On May 5, the New York Times published an interview with an Iraqi advancing a credible claim to be the man infamously pictured naked and hooded in Abu Ghraib prison, a female soldier pointing jokingly at his genitalia—was the torture that he is now compelled to relive also a “mistake”? Without effective oversight by a judicial body, the public cannot know or trust that other such “mistakes” will not be made. When it comes to torture, there is no room for a mistake.

Naturally, it is important to focus both on the tortured and on the vulnerable public, but the case of Abu Ghraib shows that it is most important to focus on the torturers. They are representatives of the public they serve. If torture is practiced by agents of a state that claims to be a democracy, then “we the people” are responsible for torture. Citizens of a democracy cannot or at least should not be comforted by blaming a few “aberrant agents” if torture is systemic and routine. Those citizens cannot or should not be quiescent as democratic values and laws are being trampled in a panic. “We the people” are responsible for stopping, protesting and preventing torture.

Keeping torture illegal and struggling to enforce the prohibition are the front lines, quite literally, of a global battle to defend the one core right that all human beings can claim. If torture is legitimized and legalized in the future, it is not “the terrorists” who will lose but “the humans.” Should proponents of torture as a lesser evil succeed in regaining legitimacy for the execrable practice, there would be no better words than George Orwell’s from 1984: “If you want a picture of the future, imagine a boot stamping on a human face—forever.”

Notes

[1] Stanley Cohen, *States of Denial: Knowing About Atrocities and Suffering* (Cambridge: Polity Press, 2001), p. 103.

[2] Seymour Hersh, “Torture at Abu Ghraib,” *New Yorker*, May 10, 2004.

[3] Torture is defined and prohibited in a number of international instruments, including the Universal Declaration of Human Rights (1948), the Geneva Conventions (1949) and the UN Convention Against Torture or Other Cruel, Degrading or Inhuman Treatment or Punishment (1984). See Love Kellberg, “Torture: International Rules and Procedures,” in Bertil Duner, ed. *An End to Torture: Strategies for Its Eradication* (London: Zed Books, 1998).

[4] The only other absolutely non-derogable rights are the right not to be enslaved and the right not to be prosecuted for something that was not a crime at the time it was done. See Joan Fitzpatrick, “Protection Against Abuse of the Concept of ‘Emergency,’” in Lawrence Henkin and John Lawrence Hargrove, eds. *Human Rights: An Agenda for the Next Century* (Washington, DC: American Society of International Law, 1994).

[5] Precise definitions of torture are still a subject of intense debate among the international human rights community, with many advocates arguing for a more expansive definition. The definition here—the most widely accepted formulation—comes from the UN Convention Against Torture or Other Cruel, Degrading or Inhuman Treatment or Punishment (1984).

[6] See the extensive background in Human Rights Watch, *In the Name of Counter-Terrorism: Human Rights Abuses Worldwide* (New York, October 2003). The report is accessible online at: <http://www.hrw.org/un/chr59/counter-terrorism-bck.htm>

[7] See “Report of the Policy Working Group on the United Nations and Terrorism,” A/57/273, S/2002/875, www.un.org/terrorism/.

[8] Richard Falk, *The Great Terror War* (New York: Olive Branch Press, 2002), p. xix.

[9] Michael Ignatieff, "Human Rights, the Laws of War and Terrorism," *Social Research* 69/4 (2002).

[10] Additional Protocol 1 of the Geneva Conventions (1977) regulates "asymmetrical" warfare between states and non-state groups.

[11] Quoted in Flore de Preneuf, "Time to Torture?" *Salon.com*, November 16, 2001.

[12] See, for instance, Mark Bowden, "The Dark Art of Interrogation: A Survey of the Landscape of Persuasion," *The Atlantic Monthly* (October 2003).

[13] The Public Committee Against Torture in Israel, Israel's premier watchdog organization for torture, confirmed this fact on May 4, 2004.

[14] Alan Dershowitz, "Let America Take Its Cues from Israel Regarding Torture," *Jewish World Review*, January 30, 2002.

[15] Oren Gross, "Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?" *Yale Law Journal* 112 (March 2003).

[16] See Tim Grieve, "Above the Law," *Salon.com*, April 28, 2004.