

January 2004

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Recommended Citation

Alan M. Dershowitz, *The Torture Warrant: A Response to Professor Strauss*, 48 N.Y.L. SCH. L. REV. (2003-2004).

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THE TORTURE WARRANT: A RESPONSE TO PROFESSOR STRAUSS

ALAN M. DERSHOWITZ*

Professor Strauss characterizes me as “figuring most prominently in [the] debate” over whether torture “would be justified to prevent mass casualties . . . [the] ‘ticking bomb scenario.’”¹ She says that I have “*seemingly* advocated the use of torture in certain very limited circumstances.”² In light of how much I have written about this issue, Strauss’s use of the word “seemingly” is surprising.³ But at least she does not claim, as others have, that I advocate “circumventing constitutional prohibitions on torture,”⁴ that I have given “thumbs up to torture,” that I have “proposed torture for captured terrorist leaders,”⁵ that I believe “U.S. agencies should be accorded the right to torture those suspected of withholding information in a terrorist case,”⁶ and that I “advocate . . . shoving a sterilized needle under the fingernails of those subjects being interrogated.” One reviewer has even called me “Torquemada Dershowitz,” a reference to the notorious torturer of the Inquisition.⁷ No one, however, reminded readers that it was the liberal Jeremy Bentham who made the most powerful utilitarian case for limited torture of convicted criminals to gather information necessary to

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1. Marcy Strauss, *Torture*, 48 N.Y. LAW SCH. L. REV. 203, 207 (2004).

2. *Id.* at 207 (emphasis added).

3. *See infra* note 15.

4. Brendon O’Leary, *In Defence of the Indefensible*, TIMES HIGHER EDUCATION SUPPLEMENT, Oct. 4, 2002, at 23.

5. Jed Babbin, *The Silence of the Lambs: Torture is Not Appropriate Treatment for Terrorists*, WASH. TIMES, Mar. 21, 2002, at A19.

6. Paul William Roberts, *September 11: Islamists and Their Enemies*, GLOBE & MAIL, September 7, 2002 at, D2 (book review).

7. Babbin, *supra* note 5, at A19. (“Torquemada Dershowitz then defines the liberal view of ‘permissible’ torture, saying that it would be limited to ‘nonlethal means, such as sterile needles, being inserted beneath the nails to cause excruciating pain without endangering life.’”).

prevent serious future crime.⁸ Perhaps the most surprising mischaracterization of my actual position on torture comes from Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit. He alleged that I “recommend . . . that suspected terrorists be tortured for information by having needles stuck under their fingernails . . .”⁹ a suggestion that he characterizes as “tinged with sadism.”¹⁰ He also said, in his generally positive review of my book, *Why Terrorism Works*, that there “is no discussion” of alternatives such as “truth serums” in the book.¹¹ There is, however, a lengthy discussion of truth serum in a textual footnote that Posner apparently missed: “Let’s start with truth serum.”¹² Following a legal analysis of the use of these drugs, it continues, “what if truth serum doesn’t work?”¹³ Only then does it introduce the idea of a “torture warrant.”¹⁴

Anyone who actually bothers to read my writings on torture,¹⁵ and especially the detailed chapter in *Why Terrorism*

8. See Jeremy Bentham, *Value of a Lot of Pleasure or Pain, How to be Measured*, in AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Clarendon Press 1907), available at <http://www.econlib.org/library/Bentham/bnthPML4.html> (last visited October 9, 2003). Bentham outlines in broad strokes what has come to be known as “felicific calculus.” His basic argument is that happiness can be calculated and quantified mathematically based on a wide variety of variables. According to Bentham’s formula, if an act results in the “pleasure” of the many it is generally good even if it results in the infliction of pain upon the individual; “[t]ake the *balance* which if on the side of *pleasure*, will give the general *good tendency* of the act, with respect to the total number or community of individuals concerned; if on the side of pain, the general *evil tendency*, with respect to the same community.” In other words, it is acceptable to inflict pain and suffering on the few so long as the wants and needs of the many are served.

9. Richard A. Posner, *The Best Offense*, NEW REPUBLIC, Sept. 2, 2002, at 28.

10. *Id.*

11. *Id.*

12. ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS* 248 (Yale University Press 2002).

13. *Id.*

14. *Id.*

15. See, e.g., Alan M. Dershowitz, *German Issue Is One For U.S. Too: Can Torture, Or The Threat Of It, Be Right?*, L.A. TIMES, Apr. 17, 2003, at B15; Alan M. Dershowitz, *A Challenge to House Master Hanson*, JERUSALEM POST, Oct. 2, 2002, at 9; Alan M. Dershowitz, *The Public Must Know If Torture Is Used*, AGE, Mar. 15, 2003, at 9; Alan M. Dershowitz, *Warrant Would Make Those Using Torture Accountable*, FIN TIMES, June 8, 2002, at 8; Alan M. Dershowitz, *Yes, It Should Be ‘On The Books’*, BOSTON GLOBE, Feb. 16, 2002, at A15; Alan M. Dershowitz, *Want to Torture? Get a Warrant*, S.F. CHRON., Jan. 22, 2002, at A19 (I did not choose or approve the headlines for these articles.) *But cf.* David Abel,

Works,¹⁶ will quickly see that each of the descriptions of my proposals is categorically false. Since I pride myself on writing quite clearly and have never shied away from expressing controversial views unambiguously, I suspect that at least some of these mischaracterizations have been quite deliberate.

Although Strauss comes closer to the truth than most, she too confuses my empirical observations (what I think *will* happen as a matter of *fact*) with my normative proposals (what I think *should* happen as a matter of *morality*). Let me once again — for perhaps the dozenth time — state my actual views on torture, so that no one can any longer feign confusion about where I stand, though I am certain the “confusion” will persist among some who are determined to argue that I am a disciple of Torquemada.¹⁷

I am generally against torture as a *normative* matter, and I would like to see its use minimized. I believe that at least moderate forms of non-lethal torture are in *fact* being used by the United States and some of its allies today.¹⁸ I think that if we ever confronted an actual case of imminent mass terrorism that could be prevented by the infliction of torture we would use torture, (even lethal torture), and the public would favor its use. That is my empirical conclusion. It is either true or false, and time will probably tell.

I then present my *conditional normative* position, which is the central point of my chapter on torture.¹⁹ I pose the issue as follows: If torture is in fact being used and/or would in fact be used in an actual ticking bomb mass terrorism case, would it be *normatively* better or worse to have such torture regulated by some kind of warrant, with accountability, record-keeping, standards, and limitations.²⁰ This is an important debate, and a *different one* from

Dershowitz Makes Case For Antiterror Measures, BOSTON GLOBE, Nov. 6, 2002, at C8; Melissa Radler, *Enrolling in Anti-Semitism 101*, JERUSALEM POST, Dec. 6, 2002, at C8.

16. DERSHOWITZ, *supra* note 12, at 131-64.

17. See Babbitt, *supra* note 5.

18. See DERSHOWITZ, *supra* note 12, at 134-64.

19. DERSHOWITZ, *supra* note 12, at 134-64.

20. Although my specific proposal is for a judicial warrant, my general point relates to visibility and accountability. Accordingly, an executive warrant or an explicit executive approval would also serve these democratic values. A judicial warrant has the added virtue of a decision-maker who — at least in theory — is supposed to balance liberty and security concerns. A legislative warrant for specific cases would be both

the old, abstract Benthamite debate over whether torture can ever be justified. It is not so much about the substantive issue of torture, as it is over accountability, visibility, and candor in a democracy that is confronting a choice of evils. For example, William Schulz, the Executive Director of Amnesty International USA, asks whether I would favor “brutality warrants,” “testilying warrants” and “prisoner rape warrants.”²¹ Although I strongly oppose brutality, testilying, and prisoner rape, I answered Schulz with “a heuristic ‘yes,’ if requiring a warrant would subject these horribly brutal activities to judicial control and accountability.”²² In explaining my preference for a warrant, I wrote the following:

The purpose of requiring judicial supervision, as the Framers of our Fourth Amendment understood better than Schulz does, is to assure accountability and judicial neutrality. There is another purpose as well: It forces a democratic country to confront the choice of evils in an open way. My question back to Schulz is, Do you prefer the current situation, in which brutality, testilying and prison rape are rampant, but we close our eyes to these evils?

There is, of course, a downside: legitimating a horrible practice that we all want to see ended or minimized. Thus we have a triangular conflict unique to democratic societies: If these horrible practices continue to operate below the radar screen of accountability, there is no legitimation, but there is continuing and ever-expanding sub rosa employment of the practice. If we try to control the practice by demanding some kind of accountability, we add a degree of legitimation to it while perhaps reducing its frequency and severity. If we do nothing, and a preventable act of nuclear terrorism occurs, then the public will demand that we constrain liberty even more. There is no easy answer.

I praise Amnesty International for taking the high road—that is its job, because it is not responsible for mak-

cumbersome and violative of the spirit of the Bill of Attainder Clause, though a general legislative enactment requiring judicial or executive approval would be desirable.

21. Alan Dershowitz, *Torture “Off the Books”?*, NATION, June 10, 2002, at 2 (Letter to the Editor) (responding to review by William Schulz).

22. *Id.*

ing hard judgments about choices of evil. Responsible government officials are in a somewhat different position. Professors have yet a different responsibility: to provoke debate about issues before they occur and to challenge absolutes.²³

That is my position! I cannot state it any more clearly, and no intelligent and honest commentator should have any difficulty understanding it.

The strongest argument against my preference for candor and accountability is the claim that it is better for torture — or any other evil practice deemed necessary during emergencies — to be left to the low visibility discretion of low level functionaries than to be legitimated by high level, accountable decision makers. Posner makes this argument, without offering much to support it:

Dershowitz believes that the occasions for the use of torture should be regularized — by requiring a judicial warrant for the needle treatment, for example. But he overlooks an argument for leaving such things to executive discretion. If rules are promulgated permitting torture in defined circumstances, some officials are bound to want to explore the outer bounds of the rules. Having been regularized, the practice will become regular. Better to leave in place the formal and customary prohibitions, but with the understanding that they will not be enforced in extreme circumstances.²⁴

The classic formulation of this argument was offered by Justice Robert Jackson in his dissenting opinion in *Korematsu*:

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order

23. *Id.*

24. Posner, *supra* note 9, at 28.

to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as 'the tendency of a principle to expand itself to the limit of its logic.' A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image.²⁵

Experience has not necessarily proved Jackson's fear or Posner's prediction to be well founded. The very fact that the Supreme Court expressly validated the detentions contributed to its condemnation by the verdict of history. Today, the Supreme Court's decision in *Korematsu* stands alongside decisions such as *Dred Scott*,²⁶ *Plessy v. Ferguson*,²⁷ and *Buck v. Bell*²⁸ in the High Court's Hall of Infamy.²⁹ Though never formally overruled, and even occasionally cited,³⁰ *Korematsu* serves as a negative precedent

25. *Korematsu v. United States*, 323 U.S. 214, 245-46 (1944) (Jackson, J., dissenting).

26. *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

27. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

28. *Buck v. Bell*, 274 U.S. 200 (1927).

29. See generally William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2152, n.458 (2002); KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 631 n.4 (2001); Patrick O. Gudridge, *Remember Endo*, 116 HARV. L. REV. 1933 (2003); Roberta M. Berry, *From Involuntary Sterilization to Genetic Enhancement: The Unsettled Legacy of Buck v. Bell*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 401 (1998); Suzanne Sangree, *Control of Childbearing By HIV-Positive Women: Some Responses to Emerging Legal Policies*, 41 BUFF. L. REV. 309, 321-22 (1993); Robert Rubinson, *The Polyphonic Courtroom: Expanding The Possibilities of Judicial Discourse*, 101 DICK. L. REV. 3, 21 (1993).

30. See, e.g., *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 287, 291, 292, 297, 299 (1978).

— a mistaken ruling not ever to be repeated in future cases. Had the Supreme Court merely allowed the executive decision to stand without judicial review, a far more dangerous precedent might have been established: namely, that executive decisions during times of emergency will escape review by the Supreme Court. That far broader and more dangerous precedent, espoused by Posner, would then lie about “like a loaded weapon” ready to be used by a dictator without fear of judicial review.

A second argument against my position is Strauss’s assertion — with no supporting evidence — that “a warrant procedure likely would be an invitation to increasing use of torture.”³¹ This, of course, is an empirical claim, which, if true, would cause me to reconsider my proposal, since my goal is to cabin the use of torture. Other critics of a warrant requirement have exactly the opposite concern: they fear that requiring judicial approval will deter agents from employing effective preventative means in situations where they may be warranted. These critics point to the FBI’s refusal to seek a national security warrant in the Moussai case prior to September 11, 2001.³²

My own belief is that a warrant requirement, if properly enforced, would probably reduce the frequency, severity, and duration of torture. I cannot see how it could possibly increase it, since a warrant requirement simply imposes an additional level of prior review. As I argued in *Why Terrorism Works*, two examples demonstrate why I think there would be less torture with a warrant requirement than without one. First, recall the case of the alleged national security wiretap being placed on the phones of Martin Luther King by the Kennedy administration in the early 1960s.³³ This was in the days when the attorney general could authorize a national security wiretap without a warrant. Today, no judge would issue a warrant in a case as flimsy as that one. Indeed, no law enforcement agent would even request one. Second, when Zaccarias Moussai was detained after trying to learn how to fly an airplane, without wanting to know much about landing it, the government did not even seek a national security wiretap because its lawyers believed that a judge

31. Strauss, *supra* note 1, at 275.

32. This is a complicated matter. See DERSHOWITZ, *supra* note 12, at 244.

33. DERSHOWITZ, *supra* note 12, at 159-60.

would not have granted one.³⁴ If Moussau's computer could have been searched without a warrant, it almost certainly would have been.

It should be recalled that in the context of searches, the framers of our Fourth Amendment opted for a judicial check on the discretion of the police, by requiring a search warrant in most cases.³⁵ The Court has explained the reason for the warrant requirement as follows: "The informed and deliberate determinations of magistrates . . . are to be preferred over the hurried actions of officers."³⁶ Justice Jackson elaborated:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences, which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often-competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to nullify and leave the people's homes secure only in the discretion of police officers.³⁷

Although torture is very different from a search, the policies underlying the warrant requirement are relevant to whether there is likely to be more or less torture if the decision were left entirely to field officers, or if a judicial officer had to approve a request for a torture warrant. As Mark Twain once observed: "To a man with a hammer,

34. DERSHOWITZ, *supra* note 12, at 159-60. The argument that judges today hand out national security warrants in every instance in which one is sought ignores the fact that the warrant requirement may reduce the number of instances in which agents seek a warrant.

35. *United States v. Lefkowitz*, 285 U.S. 452 (1932). The Fourth Amendment provides that "[t]he right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." U.S. Const. amend. IV.

36. *Lefkowitz*, 285 U.S. at 464.

37. *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

everything looks like a nail.” If the man with the hammer must get judicial approval before he can use it, he will probably use it less often and more carefully.

The major downside of any warrant procedure would be its legitimation of a horrible practice, but in my view it is better to legitimate and control a *specific* practice that will occur, than to legitimate a *general* practice of tolerating extra-legal actions, so long as they operate under the table of scrutiny and beneath the radar screen of accountability. Judge Posner’s “pragmatic” approach would be an invitation to widespread (and officially — if surreptitiously — approved) lawlessness in “extreme circumstances.” Moreover, the very concept of “extreme circumstances” is subjective and infinitely expandable.³⁸

The Supreme Court of Israel has confronted a similar choice in that nation’s war against terrorism.³⁹ It has chosen — to an even greater degree than our courts have in recent years — to review virtually every emergency decision even during on-going military operations.⁴⁰ The result was a remarkable and courageous decision rendered by its Supreme Court on September 6, 1999, in which it prohibited the use of physical pressure even to obtain information deemed necessary to prevent future terrorist attacks against civilians.⁴¹ The Court’s opinion, written by its President, Professor Aharon Barak, warrants extensive quotation:

The facts presented before this Court reveal that one hundred and twenty one people died in terrorist attacks between 1.1.96 to 14.5.98. Seven hundred and seven people were injured. A large number of those killed and injured were victims of harrowing suicide bombings in the heart of Israel’s cities. Many attacks - including suicide bombings, attempts to detonate car bombs, kidnappings

38. Posner has included as “extreme circumstances” the election dispute in 2000 and has justified the Supreme Court’s unprincipled and lawless resolution of it. See Richard A. Posner, *Bush v. Gore: Prolegomenon to an Assessment*, 68 U. CHI. L. REV. 719, 736 (2001); Compare, ALAN M. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000* (Oxford Press 2002).

39. H.C. 5100/94, Public Comm. Against Torture v. Israel (1999) reprinted in 38 INT’L. LEGAL MATERIALS 1471-90.

40. See, e.g., *id.*; see also H.C. 5591/02, Yassin v. Commander of Kziot Military Camp (2002); H.C. 785/87, Abd al Nasser al Aziz v. Commander of IDF Forces (1988).

41. *Public Comm. Against Torture v. Israel*, 38 INT’L. LEGAL MATERIALS at 1471-73.

of citizens and soldiers, attempts to hijack buses, murders, the placing of explosives, etc.- were prevented due to the measures taken by the authorities responsible for fighting the above described hostile terrorist activities on a daily basis.⁴²

The decision proceeds to prohibit all forms of physical pressure including the following:

1. Making the suspect "crouch . . . on the tip of his toes for five minute intervals"
2. Making the suspect sit, handcuffed to a low chair in the uncomfortable "Shabach position" ("the suspect is cuffed with [one hand] placed inside the gap between the chair's seat and back support, while the other is tied behind him, against the chair's back support)
3. Covering the suspect's head with a "ventilated sack"
4. Playing "powerfully loud music"⁴³

The court then summarized its holding as follows:

This decision opens with a description of the difficult reality in which Israel finds herself security wise. We shall conclude this judgment be readdressing that harsh reality. We are aware that this decision does not ease dealing with that reality. This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties. . .

Consequently, it is decided that the order nisi be made absolute, as we declare that the GSS does not have the authority to "shake" a man, hold him in the "Shabach" position. . . force him into a "frog crouch" position and deprive him of sleep in a manner other than that which is

42. *Public Comm. Against Torture v. Israel*, 38 INT'L. LEGAL MATERIALS at 1471-73.

43. *Id.* at 1488.

inherently required by interrogation. Likewise, we declare that the “necessity” defense, found in the Penal Law, cannot serve as a basis of authority for the use of these interrogation practices, or for the existence of directives pertaining to GSS investigators, allowing them to employ interrogation practices of this kind.⁴⁴

I know of no other Supreme Court decision acknowledging that the restrictions it imposes on interrogation will almost certainly cost the lives of its civilians, yet nonetheless prohibiting the use of effective, but inhumane tactics.⁴⁵

Contrast the Israel Supreme Court decision with a decision of the United States Court of Appeals for the Eleventh Circuit in a case involving two kidnappers who were holding an adult victim for ransom.⁴⁶ One of the kidnappers met the victim’s brother to collect the ransom, and the police arrested him and demanded that he tell them the whereabouts of his confederate and the victim.⁴⁷ When he refused, the police “choked” the suspect and twisted his arm “until he revealed where [the victim] was being held.”⁴⁸ One judge characterized the police action as “rack and pinion techniques.”⁴⁹ Nonetheless, the court of appeals approved the actions as necessary for “a group of concerned officers acting in a reasonable manner to obtain information they needed in order to protect another individual from bodily harm or death.”⁵⁰ The Supreme

44. *Public Comm. Against Torture v. Israel*, 38 INT’L. LEGAL MATERIALS at 1489.

45. In light of this courageous decision, it is ironic that in May 1999 the Dutch sections of Amnesty International publicly opposed the awarding of a human rights prize to the author of that, and many other human rights rulings supporting Palestinian claims on the ground that “the Israel Supreme Court’s decisions with regard to human rights . . . have been devastating.” Amnesty International specifically claimed that “Israel is the only country in the world to have effectively legalized torture.” ALAN DERSHOWITZ, *THE CASE FOR ISRAEL* 137 (2003). It should not be surprising that so many human rights advocates have lost faith in Amnesty International’s objectivity when it comes to reporting on Israel. The real point is that “Israel is the only country in the world” to have explicitly and directly confronted the difficult choice of evils in the ticking-bomb terrorist case. It should be praised, rather than condemned for surfacing this problem and subjecting it to open and democratic processes of review.

46. *Leon v. Wainwright*, 734 F.2d 770 (11th Cir. 1984).

47. *Id.* at 771.

48. *Leon v. State*, 410 So. 2d 201 (Fla. Dist. Ct. App. 1982).

49. *Id.* at 206 (Ferguson, dissenting).

50. *Leon*, 734 F.2d at 772-73; *See also* DERSHOWITZ, *supra* note 12, at 124.

Court of Israel would not have approved this police action either in an ordinary criminal case or in a terrorist prevention situation.

The practice outlawed by the Israeli Supreme Court was similar, both in kind and degree, to that being surreptitiously employed by the United States following September 11, 2001. The *New York Times*, on March 9, 2003, reported on the "pattern" being followed by American interrogators.⁵¹ It includes forcing detainees to stand "naked," with "their hands chained to the ceiling and their feet shackled."⁵² Their heads are covered with "black hoods;" they are forced "to stand or kneel in uncomfortable positions in extreme cold or heat," which can quickly vary from "100 to 10 degrees."⁵³ The detainee is deprived of sleep, "fed very little," exposed to disorienting sounds and lights, and according to some sources, "man-handled" and "beaten."⁵⁴ In one case involving a high-ranking al Qaeda operative, "painkillers were withheld from Mr. [Abu] Zubaydah, who was shot several times during his capture."⁵⁵

A Western intelligence official described these tactics as "not quite torture, but about as close as you can get."⁵⁶ There have been at least two deaths and twenty suicide attempts attributed to these interrogation tactics.⁵⁷

51. Don Van Natta Jr., et al., *Threats and Responses: Interrogations; Questioning Terror Suspects in a Dark and Surreal World*, N.Y. TIMES, Mar. 9, 2003, at A1.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* When Israel has employed similar (though somewhat less extreme) tactics, they were universally characterized as torture, without even noting that they were non-lethal and did not involve the infliction of sustained pain. This is what the U.N. committee Against Torture concluded in 1997:

The Committee Against Torture today completed its eighteenth session – a two-week series of meetings marked, among other things, by a spirited debate with Israel over Government-approved use during interrogations of what it termed "moderate physical pressure" in efforts to elicit information that could foil pending terrorist attacks. This morning the Committee said in official conclusion that such interrogation methods apparently included restraining in very painful conditions; holding under special conditions; sounding of loud music for prolonged periods; sleep deprivation for long periods; threats, including death threats; violent shaking; and use of cold air to chill – and that in the Committee's view, such methods constitute torture as defined by Article 1 of the Convention

Intelligence officials “have also acknowledged that some suspects have been turned over [by the United States] to security services in countries known to [engage in] torture.”⁵⁸ These countries include Egypt, Jordan, the Philippines, Saudi Arabia, and Morocco.⁵⁹ Turning captives over to countries for the purpose of having them tortured is in plain violation of the 1984 International Convention Against Torture, to which we, and the countries where we are sending the captives, are signatories.⁶⁰

The *Wall Street Journal* reported that “a U.S. intelligence official” told them that detainees with important information could be treated roughly:

Among the techniques: making captives wear black hoods, forcing them to stand in painful “stress positions” for a long time and subjecting them to interrogation sessions lasting as long as 20 hours.

against Torture, especially when were used in combination, which it said appeared to be the standard case.

It called, among other things, for Israel to “cease immediately” the use of those and any other interrogation procedures that violated the Convention, and emphasized that no circumstances – even ‘the terrible dilemma of terrorism’ that it acknowledged was faced by Israel – could justify torture

.....

Members of a Government delegation appearing before the Committee contend that such methods had helped to prevent some 90 planned terrorist attacks over the last two years and had saved many civilian lives, in one recent case enabling members of the country’s General Security Service to locate a bomb. The delegation repeatedly denied that the procedures amounted to torture.

Press Release, UN Committee Against Torture, UN Committee Against Torture Concludes Eighteenth Session Geneva (May 13, 1997) (on file with author).

Whether the procedures previously used by Israel and currently used by the United States did or did not constitute torture, the Supreme Court of Israel has now outlawed them.

58. Van Natta, et al., *supra* note 51, at A1.

59. Van Natta, et al., *supra* note 51, at A1.

60. Van Natta, et al., *supra* note 51, at A1. An Egyptian government spokesman “blamed rogue officers” for any abuse in his country and said “there was no systematic policy of torture.” He went on to argue, “any terrorist will claim torture—that’s the easiest thing. Claims of torture are universal. Human rights organizations make their living on these claims.” The spokesman went on to brag that Egypt had “set the model” for antiterrorism initiatives and the United States is seemingly “imitat[ing] the Egyptian model.” When Israel too has claimed that allegations of torture made by detainees who have provided information may be self-serving and exaggerated, Egyptian and other authorities have insisted that the detainees must be believed. *Id.*

U.S. officials overseeing interrogations of captured al-Qaeda forces at Bagram and Guantanamo Bay Naval Base in Cuba can even authorize “a little bit of smack-face,” a U.S. intelligence official says. “Some al-Qaeda just need some extra encouragement,” the official says.

“There’s a reason why [Mr. Mohammed] isn’t going to be near a place where he has Miranda rights or the equivalent of them,” the senior federal law-enforcer says. “He won’t be someplace like Spain or Germany or France. We’re not using this to prosecute him. This is for intelligence. God only knows what they’re going to do with him. You go to some other country that’ll let us pistol whip this guy. . . .”

U.S. authorities have an additional inducement to make Mr. Mohammed talk, even if he shares the suicidal commitment of the Sept. 11 hijackers: The Americans have access to two of his elementary-school-age children, the top law-enforcement official says. The children were captured in a September raid that netted one of Mr. Mohammed’s top comrades, Ramzi Binalshibh.⁶¹

There is no doubt that these tactics would be prohibited by the Israeli Supreme Court, but the United States Court of Appeals for the District of Columbia recently ruled that American courts have no power even to review the conditions imposed on detainees in Guantanamo or other interrogation centers outside the U.S.⁶²

This, then, is the virtue of explicitness. The Supreme Court of Israel was able to confront the issue of torture precisely because it had been openly addressed by the Landau Commission in 1987.⁶³ This open discussion led to Israel being condemned—including by countries that were doing worse but without acknowledging it. It

61. Jess Bravin & Gary Fields, *How Do U.S. Interrogators Make a Captured Terrorist Talk?*, WALL ST. J., Mar. 3, 2003, at B1.

62. *Al Odah v. United States*, 321 F.3d 1134, 1142-45 (D.C. Cir. 2003). The United States Supreme Court has granted *certiorari* to hear the issue. *Rasul v. Bush*, 124 S.Ct. 534 (2003).

63. Symposium, *The Report of the Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity*, 23 ISREAL L. REV. 141, 141-46 (1989), available at http://unixware.mscc.huji.ac.il/~law1/ilr/ilr23_2.htm#text1.

also led to a judicial decision outlawing the practice.⁶⁴ As I demonstrated in *Why Terrorism Works*, it is generally more feasible to end a questionable practice when it is done openly rather than covertly.⁶⁵

Professor Strauss, like many of my students, tries to evade the classic hypothetical case of the “ticking bomb” terrorist by asserting “that this hypothetical, almost certainly, will never happen.”⁶⁶ But what if it does? What would she have those responsible for our safety do in the event of what she characterizes as the hypothetical that gives [her] nightmares:

The police in New York have, in custody, a suspect known to be a terrorist. He is adjudged perfectly lucid and rational. He admits to planting a nuclear weapon in the heart of the city and informs the police that the bomb will go off within five hours. Other evidence obtained by the police make the threat totally credible. There is no possibility of evacuation and no possibility of finding the bomb, except by the most amazing stroke of luck, during this time. Would I really argue that the state must refrain from torture in this case?⁶⁷

What does she think the police would in fact do in such a situation? All she is willing to tell us is that her decision whether to employ torture “may turn on the definition of torture.”⁶⁸ She would have “no problem” with truth serum “administered under medical supervision.”⁶⁹ Judge Posner apparently agrees.⁷⁰ My civil liberties colleague Harvey Silverglate, on the other hand, regards truth serum as worse than non-lethal torture, since the former—if successful—totally deprives the subject of all autonomy. Reasonable people have different views regarding these horrible choices of evil. My point is to institutionalize these preferences and debate and decide them openly and with accountability, rather than by often emotional personal biases.

64. H.C. 5100/94, *Public Comm. Against Torture v. Israel* (1999), reprinted in 38 INT'L. LEGAL MATERIALS 1471-73.

65. DERSHOWITZ, *supra* note 12, at 155-160.

66. Strauss, *supra* note 1, at 272.

67. Strauss, *supra* note 1, at 272.

68. Strauss, *supra* note 1, at 272.

69. Strauss, *supra* note 1, at 272.

70. Posner, *supra* note 9, at 28.

A second answer to Strauss is that variations on the "hypothetical" she assures us "will never happen" have, in fact, happened in the Philippines, in Israel, in Germany, and in the United States.⁷¹ The responses to these actual cases have generally been ad hoc and not subject to democratic review and accountability.⁷² The ad hoc resolution almost always results in torture being used, even in marginal cases.

Strauss also argues that:

No rule can cover every situation. What number of anticipated casualties must be countenanced before indulging in torture? How certain must the evidence against the suspect be? How much time does the officer have before the public is jeopardized? What method of torture should be used? What amount of pain inflicted? No rule can take into account all the possible variations in these factors.⁷³

She is right. These questions are important ones, but they will need to be asked whether a society opts for a "torture warrant" or an "ad hoc discretionary" approach. The difference is whether these questions are asked by judges, openly and with accountability, or by low-level functionaries, in secret and based on personal opinions.

Finally, Strauss proposes a counter-hypothetical designed to trump the classic ticking bomb hypothetical:

The police in New York have in custody a suspect that is a known terrorist. He is adjudged perfectly lucid and rational. He admits to planting a nuclear weapon in the heart of the city and that the bomb will go off within five hours. Other evidence obtained by the police make the threat totally credible. There is no possibility of evacuation, no possibility of finding the bomb except by the most amazing stroke of luck during this time. The state tortures this suspect—physically mutilating him until he is near death, all to no avail. He is a fanatic and no amount of pain inflicted upon him will cause him to thwart his

71. DERSHOWITZ, *supra* note 12, at 137.

72. Israel has been the exception. See *supra* note 39; Mordechai Kremnitzer, *The Landau Commission Report: Was the Security Service Subordinated to the Law, or the Needs of the Secret Service*, 23 ISRAEL L. REV. 216 (1989).

73. Strauss, *supra* note 1, at 273.

mission. So, the police turn to the only option they have available. They bring into the interrogation room the suspect's beloved four-year-old son. And they start to torture the child. As they strip the child naked, the suspect says nothing. They strike the child. The suspect reacts; he is obviously tormented by the treatment of his child. The police apply electrodes to the child's genitals. After the child is shocked several times, the suspect caves in and tells the police the location of the bomb.⁷⁴

This scenario would clearly fit the "ticking bomb" exception. Arguments that the "ends justify the means," or defense of others could easily justify such an action. Yet a nation that intentionally and brutally harms an innocent child has clearly lost its moral bearings. The United States should not become such a nation.⁷⁵

I agree. But I believe we are more likely to become such a nation if we leave decisions of this kind to the uncontrolled discretion of those whose only job is to protect us from terrorism and who are paid to believe that the ends always justify the means. There is some evidence to suggest that I am right. We know that Jordan, which denies that it ever uses torture, has, in fact, tortured the innocent relatives of suspected terrorists.⁷⁶ We also know that when we captured Mohammed, we also took into custody his two elementary school old children—and let him know that we had them.⁷⁷

There is a difference in principle, as Bentham noted more than 200 years ago, between torturing the guilty to save the lives of the innocent, and torturing innocent people.⁷⁸ A system which requires an articulated justification for the use of non-lethal torture and approval by a judge is more likely to honor that principle than a system that discreetly and without open accountability relegates

74. Strauss, *supra* note 1, at 275-6.

75. Strauss, *supra* note 1, at 276.

76. DERSHOWITZ, *supra* note 45, at 234. Steve Chapman, *No Tortured Dilemma*, WASH. TIMES, Nov. 5, 2001, at A18.

77. Press Release, Amnesty International U.S.A., Amnesty International: Alarm at Reports of US Interrogation Techniques, (Mar. 5, 2003), available at <http://www.amnestyusa.org/news/2003/usa03052003.html>.

78. See DERSHOWITZ, *supra* note 12, at 250 (citing W.L. Twining & P.E. Twining, *Bentham on Torture*, NORTHERN IRELAND LEGAL QUARTERLY (1973)).

these decisions to law enforcement agents whose only job is to protect the public from terrorism.

As I pointed out in *Why Terrorism Works*, several important values are pitted against each other in this conflict.⁷⁹ The first is the safety and security of a nation's citizens.⁸⁰ Under the ticking bomb scenario this value may be thought to require the use of torture, if that were the only way to prevent the ticking bomb from exploding and killing large numbers of civilians. The second value is the preservation of civil liberties and human rights.⁸¹ This value requires that we not accept torture as a legitimate part of our legal system. In my debates with two prominent civil libertarians, Floyd Abrams and Harvey Silverglate, both acknowledged that they would want non-lethal torture to be used if it could prevent thousands of deaths, but they did not want torture to be officially recognized by our legal system.⁸² As Floyd Abrams put it: "In a democracy sometimes it is necessary to do things off the books and below the radar screen."⁸³ Former presidential candidate Alan Keyes took the position that although torture might be *necessary* in a given situation, it could never be *right*.⁸⁴ He suggested that a president *should* authorize the torturing of a ticking bomb terrorist, but that this act should not be legitimated by the courts or incorporated into our legal system.⁸⁵ He argued that wrongful and indeed unlawful acts might sometimes be necessary to preserve the nation, but that no aura of legitimacy should be placed on these actions by judicial imprimatur.⁸⁶ This understandable approach is in conflict with a third important value: namely, open accountability and visibility in a democracy. "Off-the-book actions below the radar screen" are antithetical to the theory and practice of democracy.⁸⁷ Citizens cannot

79. DERSHOWITZ, *supra* note 12, at 151.

80. DERSHOWITZ, *supra* note 12, at 151.

81. DERSHOWITZ, *supra* note 12, at 151.

82. DERSHOWITZ, *supra* note 12, at 151. Silverglate believes that even in such a situation the torturer should be prosecuted and the jury would almost certainly acquit.

83. DERSHOWITZ, *supra* note 12, at 151.

84. DERSHOWITZ, *supra* note 12, at 151-52. See also debate between Alan Keyes & Alan Dershowitz on "torture," available at http://www.renewamerica.us/show/transcripts/02_02_04akims.htm (last visited Oct. 15, 2003).

85. DERSHOWITZ, *supra* note 12, at 151-52.

86. DERSHOWITZ, *supra* note 12, at 152.

87. DERSHOWITZ, *supra* note 12, at 152.

approve or disapprove of governmental actions of which they are unaware. We have learned the lesson of history that off-the-book actions can produce terrible consequences. Former President Richard Nixon's creation of a group of "plumbers" led to Watergate, and former President Ronald Reagan's authorization of an "off-the-books" foreign policy in Central American led to the Iran-Contra scandal.⁸⁸ And these are only the ones we know about!

Perhaps the most extreme example of this hypocritical approach to torture comes—not surprisingly—from the French experience in Algeria. The French army used torture extensively in seeking to prevent terrorism during France's brutal war between 1955 and 1957.⁸⁹ An officer who supervised this torture, General Paul Aussaresses, wrote an account of what he had done and seen, including the torture of dozens of Algerians.⁹⁰ "The best way to make a terrorist talk when he refused to say what he knew was to torture him," he boasted.⁹¹ Although the book was published decades after the war was over, the general was prosecuted—but not for what he had *done* to the Algerians. Instead, he was prosecuted for *revealing* what he had done, and seeking to justify it.⁹²

In a democracy governed by a rule of law, we should never want our soldiers or president to take any action, which we deem wrong or illegal. A good test of whether an action should or should not be done is whether we are prepared to have it disclosed—perhaps not immediately, but certainly after some time has passed. No legal system operating under the rule of law should ever tolerate an "off-the-books" approach to necessity. Even the defense of necessity must be justified lawfully. The road to tyranny has always been paved with claims of necessity made by those responsible for the security of a nation. Our system of checks and balances requires that all presidential actions, like all legislative or military actions, be consistent with governing law. If it is necessary to torture in the ticking bomb case, then our governing laws must accommodate this practice. If we refuse to change our law to accommodate any par-

88. DERSHOWITZ, *supra* note 12, at 152.

89. PAUL AUSSARESSES, *SERVICES SPECIAUX, ALGERIE 1955-1957* (2001).

90. *Id.*

91. *Id.*

92. Suzanne Daley, *France is Seeking a Fine in Trial of Algerian War General*, N.Y. TIMES, Nov. 29, 2001, at 6.

particular action then our government should not take that action.⁹³ Requiring that a controversial action be made openly and with accountability is one way of minimizing resort to unjustifiable means.

93. The necessity defense is designed to allow interstitial action to be made in the absence of any governing law and in the absence of time to change the law. It is for the non-recurring situation that was never anticipated by the law. The use of torture in the ticking bomb case has been debated for decades. It can surely be anticipated. ALAN M. DERSHOWITZ, *SHOUTING FIRE* 474-76 (Little Brown 2002).

In the 1984 case of *Leon v. Wainwright*, the court did not find it necessary to invoke the "necessity defense," since no charges were brought against the policemen who tortured the kidnapper, but it described the torture as having been "motivated by the immediate *necessity* to find the victim and save his life." 734 F.2d at 770 (emphasis added). If an appellate court would so regard the use of police brutality – torture – in a case involving one kidnap victim, it is not difficult to extrapolate to a situation in which hundreds or thousands of lives might hang in the balance.