PLEASE READ BEFORE PRINTING!

PRINTING AND VIEWING ELECTRONIC RESERVES

Printing tips:

- To reduce printing errors, check the "Print as Image" box, under the "Advanced" printing options.
- To print, select the "printer" button on the Acrobat Reader toolbar. DO NOT print using "File>Print…" in the browser menu.
- If an article has multiple parts, print out only one part at a time.
- If you experience difficulty printing, come to the Reserve desk at the Main or Science Library. Please provide the location, the course and document being accessed, the time, and a description of the problem or error message.
- For patrons off campus, please email or call with the information above:

Main Library: mainresv@uga.edu or 706-542-3256 Science Library: sciresv@uga.edu or 706-542-4535

Viewing tips:

- The image may take a moment to load. Please scroll down or use the page down arrow keys to begin viewing this document.
- Use the "zoom" function to increase the size and legibility of the document on the screen. The "zoom" function is accessed by selecting the "magnifying glass" button on the Acrobat Reader toolbar.

NOTICE CONCERNING COPYRIGHT

The copyright law of the United States (Title 17, United States Code) governs the making of photocopies or other reproduction of copyrighted material.

Section 107, the "Fair Use" clause of this law, states that under certain conditions one may reproduce copyrighted material for criticism, comment, teaching and classroom use, scholarship, or research without violating the copyright of this material. Such use must be non-commercial in nature and must not impact the market for or value of the copyrighted work.

Electronic Reserves materials are connected to an instructor's reserve list. By accessing this password protected document, you are verifying that you are enrolled in this course and are using this document for coursework.

The complete text of the U.S. copyright law is on Reserve at both the Main Library and Science Library Reserve Desks.

Alan Dershowitz

14

Tortured Reasoning

Although this is a book about the substantive issues surrounding the use of physical torture as a means to obtain information deemed necessary to prevent terrorism, I have decided to write my essay about the tortured reasoning and arguments that tend to typify much of the debate about this emotionally laden issue. I have already expressed my views with regard to controlling and limiting the use of torture by means of a warrant or some other mechanism of accountability, and these views are easily accessible to anyone who wishes to read and criticize them.[1] Here, in a nutshell, is my position.

Nonlethal torture is currently being used by the United States in an effort to secure information deemed necessary to prevent acts of terrorism. It is being done below the radar screen, without political accountability, and indeed with plausible deniability. All forms of torture are widespread among nations that have signed treaties prohibiting all torture. The current situation is unacceptable: it tolerates torture without accountability and encourages hypocritical posturing. I would like to see improvement in the current situation by reducing or eliminating torture, while increasing visibility and accountability. I am opposed to torture as a normative matter, but I know it is taking place today and believe that it would certainly be employed if we ever experienced an imminent threat of mass casualty biological, chemical, or nuclear terrorism. If I am correct, then it is important to ask the following question: if torture is being or will be practiced, is it worse to close our eyes to it and tolerate its use by low-level law enforcement officials without accountability, or instead to bring it to the surface by requiring that a warrant of some kind be required as a precondition to the infliction of any type of torture under any circumstances?

That is the important policy question about which I have tried to begin ı debate. It is about how a democracy should make difficult choice-of-evil lecisions in situations for which there is no good resolution.

This essay focuses on the way academics, judges, pundits, activists, re-ʼiewers, and even ordinary folk have chosen to distort, simplify, and cari-ːature my proposal for a torture warrant. In this respect, the essay is some-ẇhat autobiographic, but in a larger sense it is about the way provocative deas are sometimes distorted in the interest of promoting agendas.

First, a word about how I, a civil libertarian who has devoted much of ıis life to defending human rights against governmental overreaching, came o advocate this controversial proposal. It began well before September 11, ːoo1, and it was offered as a way of reducing or eliminating the use of tor-ure in a nation plagued with terrorism.

In the late 1980s I traveled to Israel to conduct research and teach a class ıt Hebrew University on civil liberties during times of crisis. In the course ɔf my research I learned that the Israeli Security Services (the GSS or Shin Bet) were employing what they euphemistically called "moderate physical ɔressure" on suspected terrorists to obtain information deemed necessary o prevent future terrorist attacks. The method employed by the security ːervices fell somewhere closer to what many would regard as very rough nterrogation (as practiced by the British in Northern Ireland and by the J.S. following September 11, 2001) than to outright torture (as practiced by he French in Algeria and by Egypt, the Philippines, and Jordan). In most ːases the suspect would be placed in a dark room with a smelly sack over ıis head. Loud, unpleasant music or other noise would blare from speakers. The suspect would be seated in an extremely uncomfortable position and hen shaken vigorously. Statements that were found to be made under his kind of nonlethal pressure could not—at least in theory—be intro-luced in any court of law, both because they were involuntarily secured and ɔe-cause they were deemed potentially untrustworthy, at least without cor-ːoboration.[2] But they were used as leads in the prevention of terrorist acts. Sometimes the leads proved false; other times they proved true. There is ittle doubt that some acts of terrorism—which might have killed many ːivilians—were prevented. There is also little doubt that the cost of saving hese lives—measured in terms of basic human rights—was extraordinar-ly high.

In my classes and public lectures in Israel, I strongly condemned these nethods as a violation of core civil liberties and human rights. The re-

sponse that people gave, across the political spectrum from civil libertarians to law-and-order advocates, was essentially the same: but what about the "ticking bomb" case?

The ticking bomb case refers to variations on a scenario that has been discussed by many philosophers, including Michael Walzer, Jean-Paul Sartre, and Jeremy Bentham. The current variation on the classic "ticking bomb case" involves a captured terrorist who refuses to divulge information about the imminent use of weapons of mass destruction, such as a nuclear, chemical or biological device, that are capable of killing and injuring thousands of civilians.

In Israel, the use of torture to prevent terrorism was not and is not hypothetical; it was and continues to be very real and recurring. I soon discovered that virtually no one in Israel was willing to take the "purist" position against any form of torture or rough interrogation in the ticking bomb case: namely, that the ticking bomb must be permitted to explode and kill dozens, perhaps hundreds, of civilians, even if this disaster could be prevented by subjecting the captured terrorist to nonlethal torture and forcing him to disclose its location. I realized that the extraordinarily rare situation of the hypothetical ticking bomb terrorist was serving as a moral, intellectual, and legal justification for the pervasive *system* of coercive interrogation, which, though not the paradigm of torture, certainly bordered on it. It was then that I decided to challenge this system by directly confronting the ticking bomb case. I presented the following challenge to my Israeli audience: If the reason you permit nonlethal torture is based on the ticking bomb case, why not limit it exclusively to that compelling but rare situation? Moreover, if you believe that nonlethal torture is justifiable in the ticking bomb case, why not require advanced judicial approval—a "torture warrant"? That was the origin of the controversial proposal that has received much attention, largely critical, from the media. Its goal was, and remains, to reduce the use of torture to the smallest amount and degree possible, while creating public accountability for its rare use. I saw it not as a compromise with civil liberties but rather as an effort to maximize civil liberties in the face of a realistic likelihood that torture would, in fact, take place below the radar screen of accountability.

The Israeli government and judiciary rejected my proposal. The response, especially of Israeli judges, was horror at the prospect that they—the robed embodiment of the rule of law—might have to dirty their hands by approving so barbaric a practice in advance and in specific cases.

The Landau Commission, established by the Israeli government in 1987 to explore these issues, also rejected my proposal. Instead it suggested that there are "three ways for solving this grave dilemma between the vital need to preserve the very existence of the state and its citizens, and to maintain its character as a law-abiding State." These are (1) to allow the security service to continue to fight its war against terrorism in "'a twilight zone' which is outside the realm of law"; (2) "the . . . way . . . of the hypocrites: they declare that they abide by the rule of law, but turn a blind eye to what goes on beneath the surface"; and (3) "the truthful road of the rule of law," namely, that the "law itself must ensure a proper framework for the activity of the GSS [the Israeli security agency responsible for counterterrorism] regarding Hostile Terrorist Activity."

It is not surprising that when the choices are put that way, the conclusion necessarily follows that "there is no alternative but to opt for the third way." The real question was whether a legal system could honestly incorporate the extraordinary actions of the GSS without becoming so elastic as to also invite other kinds of abuses.

The Commission's answer to this question was problematic. In seeking to rationalize the interrogation methods deemed necessary by the GSS, the Commission attached "great importance" to the legal defense of "necessity." The defense of necessity is essentially a "state of nature" plea. If one finds oneself in an impossible position requiring one to choose between violating the law and preventing a greater harm, such as the taking of innocent life—and one has no time to seek recourse from the proper authorities—society authorizes one to act as if there were no law. In other words, since society has broken its part of the social contract with you, namely, to protect you, it follows that you are not obligated to keep your part of the social contract, namely, to obey the law. Thus, it has been said that "necessity knows no law."

It is ironic, therefore, that in an effort to incorporate the interrogation methods of the GSS into "the law itself," the Commission selected the most lawless of legal doctrines—that of necessity—as the prime candidate for coverage.

The Israeli law of necessity is particularly elastic and open-ended. It provides:

> A person may be exempted from criminal responsibility for any act or omission if he can show that it was done or made in order to avoid consequences which could not otherwise be avoided and which would have inflicted grievous harm or injury on his person, honour or property or on the person or honour of others whom he was bound to protect or on property placed in his charge:
>
> Provided that he did no more than was reasonably necessary for that purpose and that the harm caused by him was not disproportionate to the harm avoided.

The commission acknowledged that this "full exemption from criminal responsibility" reflects the "clash of opposing values: on the one hand, values protected by means of the prohibitions of criminal law, and on the other hand, the duty, grounded in ethical precepts, to protect one's life or bodily integrity or that of others." In other instances of conflict, such as self-defense, the law established rules of action and inaction, refusing to leave the decision solely to the subjective perceptions and priorities of the person claiming the defense, but under the rubric of "necessity," the law "foregoes the attempt to solve the problem only by [means of formal law] . . . and appeals to the sense of legality innate in the conscience of every human being." The problem, of course, is that "every human being" has a different conscience and sense of legality in situations involving the tradeoff between law violations and the protection of other values. To make matters worse, "the course test [of necessity] is what the doer of the deed reasonably believed, and not what the situation actually was."[3]

What if Palestinian rock throwers raised the defense of necessity in defense of their "honor or property"? Would the courts be forced to choose—on an entirely political basis—between conflicting claims? Or what if a suspected terrorist decides to resist the "physical pressures" of his interrogators by physical countermeasures designed to protect his honor or person—that is, what if he fights back? Could he defend himself against assault charges by invoking "necessity"?

The point of the necessity defense is to provide a kind of "interstitial legislation" to fill "lacunae" left by legislative and judicial incompleteness. It is not a substitute legislative or judicial process for weighing policy options by state agencies faced with long-term systemic problems.

To demonstrate the inappropriateness and subjectivity of the application of the necessity defense to the problems faced by the GSS, it is interesting to ask why the Commission so quickly and forcefully rejected its application to the systematic lying engaged in by agents who denied un-

der oath that they had employed rough interrogation methods. This is what the commission says: "Here the investigator cannot rely on the defense of necessity . . . since perjury is a grave criminal offence and manifestly illegal, above which flies the black flag saying 'forbidden.'"

So held! *Ipse dixit!* But why? The GSS interrogators believed that lying was *as necessary* to their work as applying physical pressure. Both are grave criminal offenses and both are manifestly illegal. The difference surely cannot be that the immediate victims of the illegal physical pressure are suspected Arab terrorists, whereas the immediate victims of the perjury are the judges!

In fact, there are circumstances when a person who lies—or even commits perjury—should and would have the benefit of the necessity defense. For example: a person whose family is secretly being held hostage by escaped criminals is asked by the police for the whereabouts of the criminals; the criminals have threatened to kill his family unless he misdirects the police. He lies. Under these circumstances, his lie would fall within the defense of necessity. The same would be true if the person were called into court and gave the information under oath, while his family was being held under threat of imminent death by the criminals.

But systematic perjury committed over a long period of time should not be excused by necessity, because the systematic perjury is not an emergency response to a nonrecurring state-of-nature situation requiring the legislative and judiciary to delegate—in effect—their policy-making authority to the citizen, for an ad hoc weighing of choices. This is as true of the systematic long-term policy of physical pressure as it is of the systematic long-term policy of lying.

I am not necessarily suggesting by my criteria that the Commission's ultimate conclusion was wrong. I lack the information necessary to reach any definitive assessment of whether the GSS should have been allowed to employ physical pressure in the interrogation of some suspected terrorists under some circumstances. My criticism is limited solely to the dangers inherent in using—misusing, in my view—the open-ended "necessity" defense to justify, retroactively, the conduct of the GSS.[4]

The great virtue of the Landau Commission report is that it raised to the surface an important conundrum that few democracies ever openly confront. The vice of the report is that it purported to resolve that conundrum by reference to a legal doctrine that is essentially lawless and undemocratic.

In 1999 the Supreme Court of Israel confronted the issues raised in the Landau Commission report. The case, in essence, posed the following question. If an arrested terrorist knew the location of a ticking time bomb that was about to explode in a busy intersection but refused to disclose its location, would it be proper to torture the terrorist in order to prevent the bombing and save dozens of lives? The court answered no. As the president of the Supreme Court, Aharon Barak, put it: "Although a democracy must often fight with one hand tied behind its back, it nevertheless has the upper hand." It specifically outlawed many of the nonlethal techniques—"torture lite"—currently being employed by American authorities in their rough interrogations of captured terrorist suspects.

The Supreme Court of Israel left the security services a tiny window of opportunity in extreme cases. Borrowing from the Landau Commission, it cited the traditional common-law defense of necessity, and it left open the possibility that a member of the security service who honestly believed that rough interrogation was the only means available to save lives in imminent danger could raise this defense. This leaves each individual member of the security services in the position of having to guess how a court would ultimately resolve his case. That is unfair to such investigators. It would have been far better, in my view, had the court required any investigator who believed that torture was necessary in order to save lives to apply to a judge, when feasible. The judge would then be in a position either to authorize or refuse to authorize a "torture warrant." Such a procedure would require judges to dirty their hands by authorizing torture warrants or bear the responsibility for failing to do so. Individual interrogators should not have to place their liberty at risk by guessing how a court might ultimately decide a close case. They should be able to get an advance ruling based on the evidence available at the time.

In response to the decision of the Supreme Court of Israel, it was suggested that the Knesset—Israel's parliament—could create a procedure for advance judicial scrutiny, akin to the warrant requirement in the Fourth Amendment to the United States Constitution. It is a traditional role for judges to play, since it is the job of the judiciary to balance the needs for security against the imperatives of liberty. Interrogators from the security service are not trained to strike such a delicate balance. Their mission is single-minded: to prevent terrorism. Similarly, the mission of civil liberties lawyers who oppose torture is single-minded: to vindicate the individual

rights of suspected terrorists. It is the role of the court to strike the appropriate balance. The Supreme Court of Israel took a giant step in the direction of striking that balance. But it—or the legislature—should take the further step of requiring the judiciary to assume responsibility in individual cases. The essence of a democracy is placing responsibility for difficult choices in a visible and neutral institution like the judiciary.

Issues of this sort are likely to arise throughout the world, including in the United States, in the aftermath of the World Trade Center disaster. Had law enforcement officials arrested terrorists boarding one of the airplanes and learned that other planes, then airborne, were headed toward unknown occupied buildings, there would have been an understandable incentive to torture those terrorists in order to learn the identity of the buildings and evacuate them. It is easy to imagine similar future scenarios.

Following the terrible events of September 11 and the reported use of rough interrogation techniques—"torture lite"—by American military and civilian officials, I tried to start a debate about the concept of a torture warrant in this country. In proposing some kind of advanced approval for the use of limited force in extreme situations, I deliberately declined to take a position on the normative issue of whether I would personally approve of the use of nonlethal torture against a captured terrorist who refuses to divulge information deemed essential to prevent an avoidable act of mass terrorism, though I did set out the argument in favor of (and against) it. I sought a debate about a different, though related, issue: if torture would, *in fact* be employed by a democratic nation under the circumstances, would the rule of law and principles of accountability require that any use of torture be subject to some kind of judicial (or perhaps executive) oversight (or control)? On this normative issue, I have expressed my views loudly and clearly. My answer, unlike that of the Supreme Court of Israel, is yes. To elaborate, I have argued that unless a democratic nation is prepared to have a proposed action governed by the rule of law, it should not undertake, or authorize, that action. As a corollary, if it needs to take the proposed action, then it must subject it to the rule of law. Suggesting that an after-the-fact "necessity defense" might be available in extreme cases is not an adequate substitute for explicit advance approval.

The possible case of a ticking bomb terrorist or terrorist with weapons of mass destruction has provided a justification for a persuasive and unregulated use of torture (or other forms of rough interrogation) by American officials, just as it had in Israel. Few are prepared to give up use of that

option in really extreme cases. Instead of expressly limiting its use to such a case—and regulating it by procedural controls—many argue that is better to leave it to the "discretion" of law enforcement officials. A sort of "don't ask, don't tell" policy has emerged, enabling our president and attorney general to close their eyes to its use while being able to deny it categorically—the kind of willful blindness condemned by the courts in other contexts. With no limitations, standards, principles, or accountability, the use of such techniques will continue to expand.

These are the issues I addressed in my book *Why Terrorism Works.* These are the issues about which I have tried to begin a reasonable debate in the United States, as I had previously done in Israel. But unlike in Israel, where the debate did take place, in our country its terms were often distorted into a traditional discussion of the pros and cons of torture. Perhaps the most extreme example of this distortion took place at a conference held at John Jay College in New York, to which I was invited to deliver a keynote address about my proposal. The conference began with an emotional speech—replete with candles—delivered by a victim of torture who described how innocent people are tortured to death by brutal regimes around the world. The intended message of this introduction was that torture of the kind experienced by the speaker is bad—as if that were a controversial proposition. It was calculated to make it difficult, if not impossible, to conduct a rational discussion about ways of limiting and regulating the use of nonlethal torture in the context of terrorism prevention. Anyone who expressed any skepticism about simply reiterating a total ban on all torture was seen as the enemy of civilized human rights, even though the total "ban" now in effect has been a license for hypocrisy and pervasive torture with deniability.

Instead of engaging me in a nuanced debate about accountability and choice of evils, critics of my proposal have accused me of "circumventing constitutional prohibitions on torture,"[5] giving "thumbs up to torture," "proposing torture for captured terrorist leaders,"[6] according U.S. agencies "the right to torture those suspected of withholding information in a terrorist case,"[7] and "advocating . . . shoving a sterilized needle under the fingernails of those subjects being interrogated."[8] "Famed Lawyer Backs Use of Torture" read one headline, while another article reported that I urged governments to "put aside the moral issues."[9] One reviewer has even called me "Torquemada Dershowitz," a reference to the notorious torturer of the Inquisition. (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 prevent serious future crime.) Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit alleged that I "recommend . . . that suspected terrorists be tortured for information *by having needles stuck under their fingernails*"[10] (emphasis added)—a suggestion that he characterizes as "tinged with sadism."[11]

Anyone who reads my writings on torture—and especially the detailed chapter in my book *Why Terrorism Works*—will quickly see that each of the descriptions of my proposals is misleading.

Let me once again present my actual views on torture, so that no one can any longer feign confusion about where I stand, though I'm certain the "confusion" will persist among some who are determined to argue that I am a disciple of Torquemada.

I am against torture as a *normative* matter, and I would like to see its use minimized. I believe that at least moderate forms of nonlethal torture are *in fact* being used by the United States and some of its allies today. 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. Whenever I speak about this subject, I ask my audience for a show of hands on the empirical question "How many of you think that nonlethal torture *would* be used if we were ever confronted with a ticking bomb terrorist case?" Almost no one dissents from the view that torture *would in fact* be used, though there is widespread disagreement about whether it *should* be used. That is also 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.

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 terrorist case, would it be *normatively* better or worse to have such torture regulated by some kind of warrant, with accountability, recordkeeping, standards and limitations?[12] *This* is an important debate, and *a different one* from 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 about 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,"[13] and "prisoner rape warrants."[14] 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." 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 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 prisoner 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, then 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 for taking the high road—that is its job, because it is not responsible for making 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.

That is my position. I cannot say it any more clearly.

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:

> Dershowitz believes that the occasions for the use of torture should be regularized—by requiring a judicial warrant for the needle treat-

ment, 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.

The classic formulation of this argument was offered by Justice Robert Jackson in his dissenting opinion in one of the Japanese detention camp cases:

> 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 subtler 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 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.

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, Plessy v. Ferguson,* and *Buck v. Bell* in the High Court's Hall of Infamy. Though never formally overruled, and even occasionally cited, *Korematsu* serves as a negative precedent—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 would then lie about "like a loaded weapon" ready to be used by a dictator without fear of judicial review. That comes close to the current situation, in which the administration denies it is acting unlawfully, while aggressively resisting any judicial review of its actions with regard to terrorism.

The *New York Times,* on March 9, 2003, reported on the "pattern" being followed by American interrogators. It includes forcing detainees to stand "naked," with "their hands chained to the ceiling and their feet shackled." 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." The detainee is deprived of sleep, "fed very little," exposed to disorienting sounds and lights, and, according to some sources, "manhandled" and "beaten." In one case involving a high-ranking al-Qaeda operative, "pain killers were withheld from Mr. [Abu] Zubaydah, who was shot several times during his capture."[15]

A Western intelligence official described these tactics as "not quite torture, but about as close as you can get." At least two deaths and seventeen suicide attempts have been attributed to these interrogation tactics.[16]

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."[17] These countries include Egypt, Jordan, the Philippines, Saudi Arabia, and Morocco. 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 to which we are sending the captives, are signatories.[18]

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.

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 smacky-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.[19]

ıere is no doubt that these tactics would be prohibited by the Israeli ıpreme Court's decision described earlier, but the U.S. Court of Appeals r the District of Columbia recently ruled that American courts have no ıwer even to review the conditions imposed on detainees in Guantanamo other interrogation centers outside the United States.[20] That issue is now fore the U.S. Supreme Court, despite efforts by the administration to eclude review.

This, then, is the virtue of explicitness. The Supreme Court of Israel was le to confront the issue of torture precisely because it had been openly dressed by the Landau Commission in 1987. This open discussion led to ael being condemned—including by countries that were doing worse t without acknowledging it. It also led to a judicial decision outlawing practice. As I demonstrated in *Why Terrorism Works,* it is generally more ssible to end a questionable practice when it is done openly rather than ertly.[21]

My own belief is that a warrant requirement, if properly enforced, would bably reduce the frequency, severity, and duration of torture. I cannot how it could possibly increase it, since a warrant requirement simply ɔoses an additional level of prior review. As I discussed in *Why Terror- Works,* here are two examples to demonstrate why I think there would ess torture with a warrant requirement than without one. 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. 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. When Zaccarias Moussaui 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 would not have granted one. If Moussaui'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. 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."[22] 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 peoples' homes secure only in the discretion of police officers.[23]

Although torture is very different from a search, the policies underlying the warrant requirement are relevant to whether there is likely to be more torture or less 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, 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 legitimization 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 extralegal 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.

We know that Jordan, which denies that it ever uses torture, has, in fact, tortured the innocent relatives of suspect terrorists. We also know that when we captured Mohammed, we also took into custody his two elementary-school-age children—and let him know that we had them.

There is a difference in principle, as Bentham noted more than two hundred years ago, between torturing the guilty to save the lives of the innocent and torturing innocent people. A system that requires an articulated justification for the use of nonlethal torture and approval by a judge is more likely to honor that principle than a system that relegates these decisions to low-visibility 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. The first is the safety and security of a nation's citizens. Under the ticking bomb scenario, this value may argue for 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. 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 nonlethal 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. As Floyd Abrams put it: "In a democracy sometimes it is necessary to do things off the books and below the radar screen." The former presidential candidate Alan Keyes took the position that although torture might be *necessary* in a given situation, it could never be *right.* 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. 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. Professor Elshtain makes a similar point. Though she strongly favors the use of nonlethal torture in certain extreme

cases, she does not want "a law to cover such cases." Indeed, she characterizes my proposal for a torture warrant as "a stunningly bad idea." She prefers instead to have each individual "grapple with a terrible moral dilemma" rather than to have an open debate and then codify its results.[24] This understandable approach is in conflict with the 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. Citizens cannot 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. President Nixon's creation of a group of "plumbers" led to Watergate, and President Reagan's authorization of an "off-the-books" foreign policy in Central American led to the Iran-Contra scandal. 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. 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. "The best way to make a terrorist talk when he refused to say what he knew was to torture him," he boasted. 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.[25]

In a democracy governed by a rule of law, we should never want our soldiers or president to take any action that 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 particular action, then our government should not take that action.[26] Requiring that a controversial, even immoral, action

be made openly and with accountability is one way of minimizing resort to unjustifiable means.

I am especially pleased that Professor Elaine Scarry's essay is included in this collection, because it demonstrates how a very smart person, who has read my essay and my other writing on this issue,[27] persists on confusing my *empirical* descriptions and predictions (that torture *is* being practiced and *will be* practiced by democracies in extreme situations) with my *normative* preference (that torture *should* not be employed and that its use *should* be reduced or eliminated). Here is how Profesor Scarry erroneously characterizes my view: "He believes that in such a situation [the ticking bomb scenario] *it would be permissible* to torture if one first obtained a judicial or executive warrant." She contrasts my purported normative views with "our commitment to an unwavering prohibition on torture." But my point is precisely that we have no such commitment. In fact, our commitment instead is to "the way of the hypocrites: they declare that they abide by the rule of law, but turn a blind eye to what goes on beneath the surface." If we indeed had an unwavering commitment to prohibiting torture, I never would have begun this debate. It is because I believe that we are moving toward the worst of all possible worlds—a smug, self-satisfied willingness to condemn torture openly, while at the same time encouraging its secret use in extreme cases—that I decided to try to force this issue into the public consciousness.

What would Professor Scarry have us do instead? She would want torture to be used if it could save multiple lives, but she would leave the initial decision to the ex ante decision of "the torturers" and then leaves the post facto decision about whether the torturer did the right thing to "a jury of peers." This is extraordinarily naive, as anyone with any experience in criminal justice will quickly understand. No prosecutor would prosecute and no jury would convict if it *turned out* that the torturer was right, even if the basis on which he acted was weak or bigoted. But some juries might well convict if the torturer turned out to be wrong, even if he or she had a very strong basis on which to act. Our legal (and moral) systems should make accountability turn on a defendant's mens rea (state of mind) at the time he or she acted, not on fortuities beyond his or her control.

An analogy may prove helpful. The former head of counterterrorism, Richard A. Clark, reports that on the morning of September 11, 2001, while several planes that were believed to have been hijacked remained in the air, an excruciatingly difficult decision had to be made: whether "we need to

authorize the Air Force to shoot down any aircraft—including a hijacked passenger flight—that looks like it is threatening to attack and cause large-scale death on the ground." Had a passenger jet been shot down, it is certainly possible that a terrible mistake could have been made. Perhaps that plane was not, in fact, being hijacked; or maybe the passengers were in the process of gaining control; or possibly the plane was being hijacked as leverage in negotiations and not to be crashed into a building. It would always be tragic to choose to kill innocent passengers, but it might be necessary in order to prevent even more deaths. Who should make a decision—a tragic choice—of this type and magnitude?

Surely the answer must be: the highest-ranking public official capable of doing so—someone with accountability and responsibility. No one would want to leave it to a low-ranking, anonymous Air Force pilot, without guidance or criteria (unless, of course, there was no time to pass it up to higher authorities). And certainly no one would want the fate of that pilot to be determined by "a jury of peers" after the fact. Tragic choices should be made at the top whenever feasible. And the decision whether to threaten or inflict nonlethal torture in order to prevent a mass terrorist attack is a tragic choice of evils, as is the decision to shoot down a passenger jet and kill hundreds of innocent people.

Professor Scarry also seems willing to rely on the willingness of the torturer to break the law and violate morality in an extreme case: "It is unlikely that any savior of the city would actually be inhibited by the lack of preexisting moral and legal assurances of immunity." But that is precisely the problem: we don't want individual "saviors" to be taking ad hoc, secret, unaccountable decisions whether to inflict torture. An ex ante process would offer some protection against the evils of the current ad hoc system of deniability and unaccountability—admittedly at a cost. The real question, and one Professor Scarry avoids, is whether the cost is worth the benefits. That is the debate I have tried to begin.

Professor Scarry correctly raises the question of whether "a judge or executive branch officer, acting under the pressure of a ticking bomb, will be able to discriminate between acceptable risks." But the alternative that she apparently prefers is to leave such difficult discriminating choices to each low-ranking "savior" who believes there may be a need to torture—and to a jury of peers to decide, on an ad hoc basis, whether he struck the appropriate balance.[28]

At bottom, my argument is not in favor of torture of any sort. It is

against all forms of torture without accountability. Let us continue to reaffirm not only our opposition to torture but our opposition to the kind of hypocrisy that loudly denounces torture while discreetly closing our eyes to its increasing use.

The recent disclosure of significant abuses by military intelligence and military police officers in the Abu Ghraib prison outside of Baghdad demonstrates what happens when high-ranking officials have a "don't ask, don't tell policy" toward the use of extraordinary pressures in interrogation. While our leaders in Washington and our commanders in the field adamantly denied the use of any form of torture—light or otherwise—a subtle message was being conveyed down the chain of command that intelligence and police officials on the ground could do what they had to do to obtain important information. If this had not been perceived by the soldiers as the message from above, there is no way the photographs they took would have been so openly distributed.

When the message is sent in this way—by a wink and nod—no lines are drawn, no guidelines issued, and no accountability accepted. The result was massive abuses by those on the ground, coupled with deniability by those at the top.

How much better it would have been if we required that any resort to extraordinary means—means other than routine interrogation—be authorized in advance by someone in authority and with accountability. If a warrant requirement of some kind had been in place, the low-ranking officers on the ground could not plausibly claim that they had been subtly (or secretly) authorized to do what they did, since the only acceptable form of authorization would be in writing. Nor could the high-ranking officials hide behind plausible deniability, since they would have been required to give the explicit authorization. Moreover, since authorization would have to go through the chain of command, limitations would have been imposed on allowable methods. These would not have included the kind of gratuitous humiliation apparently inflicted on these prisoners.

There are of course no guarantees that individual officers would not engage in abuses on their own, even with a warrant requirement. But the current excuse being offered—we had to do what we did to get information—would no longer be available, since there would be an authorized method of securing information in extraordinary cases by the use of extraordinary means. Finally, the requirement of securing advanced written approval would reduce the incidence of abuses, since it would be a rare case in which

a high-ranking official, knowing that the record will eventually be made public, would authorize extraordinary methods—and never methods of the kind shown in the Abu Ghraib photographs.

Notes

1. Dershowitz, Alan M. *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven, Conn.: Yale University Press, 2002).

2. Interrogators routinely lied about the use of rough interrogation methods in particular cases, and thus the fruits of such interrogations were sometimes improperly introduced in criminal trials.

3. Even if the mere *public* disclosure of the problem would be dangerous to the security of the state—always a matter of degree, especially in an open democracy like Israel, where the problem will inevitably surface, as it did here—there are *secret* options (at least temporarily secret) that are far more democratic than the ones employed here. Among these are special cabinet committees or judicial panels authorized to approve special measures under extraordinary circumstances.

Perhaps I am especially skeptical of the claims of "necessity" as an American. If that defense were available in the United States, it would have been employed by Colonel Oliver North to justify his lying to Congress, and by President Richard Nixon to justify the break-in at the Democratic National Committee and its subsequent coverup. Indeed, in the United States, the defense of necessity has been used—abused—by all manner of illegal protesters, ranging from Abbie Hoffman to Amy Carter to antiabortion protesters.

4. At the very most, its unlawful conduct might have been "excused" rather than "justified." Though this distinction may sound somewhat technical, the entire enterprise of finding a conceptual hook on which to hang the Commission's policy judgments is an exercise in technicality. Indeed, the very rule of law relies on technical compliance with established norms. If such technical efforts are to be useful, they should, at least, be technically correct. And finding the conduct of the GSS to be justified, which means desirable, rather than excusable, which means merely understandable, is wrong. Perhaps the commission adopted this tactic to send a prospective message: until legislation is enacted, the GSS should *continue* to engage in the necessary and justifiable activities in which they engaged prior to the report. If this is the message the commission intended to send, it should have done so more candidly. If not, it should have avoided reliance on a legal defense that invites misunderstanding over whether the continued use of "physical pressure" is necessary and thus justified.

5. Brendon O'Leary, *Times Higher Education,* October 4, 2002.

6. *Washington Times,* March 21, 2002.

7. *Globe and Mail,* September 2002.

8. Jane Genova, October 9, 2002.

9. *National Post* (Canada), December 9, 2003, A6; *Gazette,* December 9, 2003, A7.

10. *New Republic,* October 14, 2002.

11. *New Republic,* September 2, 2002. Posner also faulted me for not considering the option of truth serum. In *Why Terrorism Works,* I do consider that option: I say "Let's start with truth serum," and then I proceed to ask "What if truth serum" doesn't work? (248) It is in answer to that question that I propose the torture warrant.

12. 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 (see the Fourth Amendment). A legislative warrant for specific cases would be both 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.

13. "Testilying" is a term coined by New York City police to describe systematic perjury regarding the circumstances that led to a search, seizure, or interrogation.

14. William F. Schulz, "The Torturer's Apprentice: Civil Liberties in a Turbulent Age," *Nation,* May 13, 2002.

15. Raymond Bonner, "Questioning Terror Suspects in a Dark and Surreal World," *New York Times,* March 9, 2003.

16. When Israel has employed similar (though somewhat less extreme) tactics, they were universally characterized as torture, without even noting that they were nonlethal 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 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.

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.

17. *New York Times,* March 9, 2003, A1.

18. 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.

19. Jess Bravin and Gary Fields, "How Do Interrogators Make Terrorists Talk?" *Wall Street Journal,* March 3, 2003.

20. *Al Odah v. United States,* 321 F.3d 1134 (2003).

21. *Why Terrorism Works,* 155–160.

22. *U.S. v. Lefkowitz,* 285 U.S. 452, 464 (1932).

23. *Johnson v. U.S.,* 333 U.S. 10, 13–14 (1948).

24. For many, capital punishment is a moral evil that should not be, but is, employed by society. For some it is worse than nonlethal torture. The strongest argument made for it often uses extreme examples: the mass-murdering recidivist who kills while in prison and has the capacity to escape. If killing that individual were somehow deemed necessary, would Elshtein prefer that it be done by an individual state actor, after grappling with his conscience, or as a result of a codification, after democratic processes have been followed?

25. Suzanne Daley, "France Is Seeking a Fine in Trial of Algerian War General," *New York Times,* November, 2001.

26. Indeed, there is already one case in our jurisprudence in which this has already occurred and the courts have considered it. In the 1984 case of *Leon v. Wainwright,* Jean Leon and an accomplice kidnapped a taxi cab driver and held him for ransom.