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**Warrant to Torture?: A Critique of Dershowitz and
Levinson**

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CONTENTS

<i>About the Author</i>	v
Introduction	1
Part One	
The Evil of Torture	3
Part Two	
Torture-Warrants: The Case for Legalization	7
Conclusion	
Responding to Excusable Torture	13

ABOUT THE AUTHOR

Jonathan Allen is an Assistant Professor in the Department of Political Science at the University of Illinois at Urbana-Champaign. He is currently completing a book on theories of social criticism, and has published several articles on this topic. He is also researching a book project on transitional justice, provisionally entitled *Liberal Memory*, and has published articles on normative issues relating to South Africa's Truth and Reconciliation Commission. In addition, he has a general interest in moral and political evils (including torture), and has published an article on this subject in the 2001 issue of *Political Theory*, entitled "The Place of Negative Morality in Political Theory."

INTRODUCTION

The view that torture is morally impermissible has been virtually unchallenged in the West for the past two centuries. Although there are scattered exceptions to this claim, the judgment that torture is simply intolerable has served as a basic article of faith—like slavery, an issue that required no discussion.¹ Indeed, one of the few normative discussions of torture published in the post-World War II era begins by addressing the claim that this is an issue that *should not even be discussed*, because to do so risks conveying the impression that a legitimate case for torture could be made.²

In the aftermath of the attacks on the World Trade Center, it is clear that this taboo has been significantly eroded. A growing number of reports have suggested that U.S. security agencies have either been involved in torturing suspected terrorists in areas outside the United States, such as the island of Diego Garcia, or have “rendered” (to use the preferred term) suspects to countries such as Syria, Jordan, Egypt, and Morocco, which are willing to do the work of torture for them.³ Disturbing reports about the treatment of prisoners at Guantanamo Bay continue to surface, and the scandal over cases of abuse in the prison of Abu Ghraib, possibly encouraged by intelligence agents, has brought this issue into full public view. At the time of writing, it seems increasingly plausible that these abuses were at least in part the result of policy decisions taken two years ago, though this has not yet been definitively proved.

The taboo against torture has not prevented it from being widely practiced—by signatories to anti-torture conventions as well as by countries that have refused to ratify such agreements.⁴ While the attacks of September 11, 2001, may have affected the frequency with which torture is practiced, particularly by agents of constitutional democracies, their clearest consequence has been to increase people’s willingness to defend the practice explicitly on moral grounds. If the anti-torture conventions of the past were the homage rendered by vice to virtue, a growing number of people seem to think that frankness about torture, and about the need to practice it, is preferable. This new frankness is visible across the political spectrum—indeed, one of the most prominent defenders of the justifiability of legalizing certain forms of state torture is Alan Dershowitz, a noted civil rights lawyer and professor of law at Harvard University. Sanford Levinson, too, has defended a view very close to that of Dershowitz in a recent *Dissent* forum on the topic.⁵

Both Dershowitz and Levinson advance nuanced arguments, and indicate that they are motivated by a desire to reduce actual instances of torture. I cannot deny that the current threat of terrorism makes it necessary for constitutional democracies to consider seriously the need to commit a range of evils in order to prevent or minimize great calamities. While it may be true in general that hard cases make bad law, the present context requires morally serious people to discuss explicitly a range of hard choices that may have to be made. We are unfortunately well beyond the point where discussion of state torture can simply be rejected as inadmissible. Rather, as Michael Ignatieff notes in his recent book, *The Lesser Evil*, we now have to consider a series of

¹ Abhorrence of torture is cited as a plausible candidate for a universal value by several moral philosophers. See Jeremy Waldron, “How to Argue for a Universal Claim,” *Columbia Human Rights Law Review* 30 (1999): 305; Stuart Hampshire, *Innocence and Experience* (Cambridge, MA: Harvard University Press, 1989), 90; Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (Notre Dame, IN: University of Notre Dame Press, 1994), 10.

² See Henry Shue, “Torture,” *Philosophy and Public Affairs* 7 (1978): 125.

³ This practice is a contravention of Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which explicitly prohibits it.

⁴ See Oona Hathaway, “Do Human Rights Treaties Make a Difference?,” *Yale Law Journal* 111 (2002). Hathaway’s study seeks to show that human rights treaty ratification *alone* makes very little difference to human rights practice. She does not claim that liberal democracies’ records concerning torture are equivalent to those of authoritarian states.

⁵ Dershowitz’s arguments appear in “Is There a Torturous Road to Justice,” *Los Angeles Times*, Apr. 17, 2003, B15 and in more sustained form in Dershowitz, *Why Terrorism Works* (New Haven and London: Yale University Press, 2002), 131-163. He has also made the argument on various television talk shows, and in interviews and public debates. For Levinson’s views, see “The Debate on Torture: War Against Virtual States,” and “Sanford Levinson Replies,” *Dissent* (summer 2003).

conflicts between security and liberty—conflicts where the only available choices lie between evils and lesser evils.⁶

Like Ignatieff, however, I remain unpersuaded by the arguments offered by Dershowitz, Levinson, and others for legalizing torture. These arguments are flawed at both general and specific levels, and I want to identify those flaws as clearly as I can here, in order to reject the case for legalized torture that they present.⁷ Before doing so, however, I offer a brief account of what torture is and why it should be regarded as a very great evil. If it is not a very serious evil after all, then neither is the choice between legalizing and outlawing torture a very serious dilemma.

⁶ See Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton, NJ: Princeton University Press, 2004), 1-24.

⁷ In doing so, I concentrate on the moral issues raised by Dershowitz's proposal. For a good discussion of the extent to which it violates basic constitutional principles, see Seth F. Kreimer, "Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War On Terror," *University of Pennsylvania Journal of Constitutional Law* 6 (2003): 294-299.

PART ONE

The Evil of Torture

In what respects does state-authorized torture constitute an extreme evil? Though the question may seem almost not worth asking, it is important to remember that the prohibition against torture is relatively recent in Western history. For three thousand years, torture was not only legal, but also part of most legal codes.¹ For example, although most Greek city-states did not permit the torture of citizens, there was no such prohibition in the cases of slaves and foreigners. In imperial Rome, judicial torture, aimed at extracting information and confessions from those suspected of crimes, was an accepted practice, and, although initially confined to slaves, expanded within a few centuries to include freemen. St. Augustine, who movingly sketches the irreversible failures of judicial torture in this context as an example of the flaws of all systems of earthly justice, never suggests that the practice should be abolished.² The early Christian Church in general shifted back and forth over the issue of torture, initially taking a stand against judicial torture, but later allowing it back in the form of trial by ordeal. By the twelfth century, ordeal and torture were often equated, and judicial torture was practiced, both in the context of criminal proceedings and in cases of heresy. From the thirteenth to the sixteenth century, the use of torture by the Spanish (and later the Roman) Inquisition grew, directed against heretics, Jews, and later Protestants, Hindus, etc., and resulted in elaborate legal regimes and detailed handbooks of official techniques of torture. The Spanish Inquisition was eventually suppressed in 1834, after unsuccessful earlier attempts to do so. The number of victims of the Inquisition remains disputed, ranging from several thousand to over three hundred thousand.³

The presence of torture in most European legal systems continued until the rise of trial by jury, the appearance of less sanguinary forms of punishment, and the powerful critiques launched by Enlightenment reformers such as Voltaire and Cesare Beccaria, which took effect in the second half of the eighteenth century.⁴ What this means is that the official moral prohibition against torture is historically exceptional and perhaps more fragile than people have wanted to admit. In the current context, therefore, we cannot afford to assume that the seriousness of torture is self-evident.

In order to explain the seriousness of torture, let me take as a starting point the broad definition adopted by the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. According to this definition, torture is:

...any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation

¹ For general histories, see Edward Peters, *Torture* (Oxford: Blackwell, 1985) and the more popular discussions in Brian Innes, *The History of Torture* (New York: St. Martin's, 1998) and John Conroy, *Unspeakable Acts, Ordinary People: The Dynamics of Torture* (New York: Knopf, 2000), 27-38.

² See St. Augustine, *City of God*, Bk. XIX, Ch. 6.

³ For a discussion of some of these contrasting estimates, see Innes, 76-77. Innes provides general accounts of the rise of the Roman and Spanish Inquisitions on pp. 32-51, 67-83.

⁴ This period of the history of torture is complex. Its premier historian, John Langbein, argues that torture was increasingly relied on in Europe as a result of very strict evidentiary standards concerning testimony and confession. Once the harshness of punishments declined, however, judges felt justified in convicting and sentencing defendants to milder punishments, even when they had not confessed to their crimes under torture. At this point, Langbein argues, torture became increasingly irrelevant as a way of gathering evidence. See Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Regime* (Chicago and London: University of Chicago Press, 1977), 43-67. Langbein is thus skeptical of the standard view that the abandonment of torture was the result of Enlightenment critiques. For the most important example of these critiques, see Cesare Beccaria, *On Crimes and Punishment*, tr. Henry Paolucci (Indianapolis: Bobbs-Merrill, 1963), Ch. XII, pp. 30-36.

of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising from, inherent in or incidental to lawful sanctions.⁵

I want to suggest that the evil of state-sponsored torture, as defined above, consists in four aspects: the infliction of pain, the promotion of absolute domination, the imposition of humiliation, and the promotion of rule by fear. Although this distinction is far from watertight, we could say that the first two of these aspects are chiefly restricted to the relation between torturer and tortured, while the second two indicate also the role played by torture in the broader political system.

Histories of torture tend to dwell, sometimes almost pornographically, on the enumeration of techniques and tools of torture—from racks, thumbscrews, water torture, to quirts, electric prods, mind altering substances, and other forms of psychological torture. I want only to note that most of these techniques involve the infliction of pain, usually physical pain, which nevertheless stops short of actual killing. Of course, torture may go too far, and result in the death of the victim. However, in general, the prolonged infliction of pain is the hallmark of the process of torture. This has the effect of reducing the victim's sense of agency, complex thought, the linguistically articulated world, and even the world of perceived objects, to the awareness of overwhelming pain.⁶ In his disturbing reflections on his own experience of torture, Jean Améry comments, "Only in torture does the transformation of the person into flesh become complete. Frail in the face of violence, yelling out in pain, awaiting no help, capable of no resistance, the tortured person is only a body, and nothing else besides that."⁷ Although people's physical sensitivity to pain may differ, in general the infliction of pain also has an isolating effect; the intensity of pain focuses the victim on it. Afterwards, the nature of the experience cannot be communicated to others. In this respect, much the same can be said of the physically and mentally disorienting effects of sleep deprivation.⁸

Améry speculates that the experience of torture *is* death—in the sense that it gives the victim a premonition of death and of the physical vulnerability present at death.⁹ But the fact that this is not literally true has led some, according to Henry Shue, to argue that as killing someone in combat involves the total destruction of a person, while torture usually only partially destroys or incapacitates, torture is therefore a lesser harm than killing in combat. If killing in combat may be justified, then it follows that inflicting harm that stops short of total physical destruction is also justifiable. Shue's response to this line of reasoning is to point out that the *defenselessness* of victims of torture introduces a distinct set of moral issues, which makes it improper simply to compare killing someone in combat with torturing someone in terms of the amount of pain or destruction inflicted.¹⁰ It is worth adding that one of the effects of torture, accomplished through the infliction of pain, is to *demonstrate* the defenselessness of the victim to her, and to bystanders. This is particularly true in modern or technologically sophisticated societies, where we do not simply accept pain as an inevitable natural calamity, but are aware that our power as a society to prevent or diminish pain has been greatly enhanced.¹¹ To subject someone to prolonged pain or unusual physical and mental hardship is thus to underline the exclusion of that person from normal social protection.

This brings me to the second aspect of torture: the way in which it promotes the absolute domination of the torturer, and the subjection of the victim. Améry's account of his own torture is especially revealing on this point. His torturers were not sadists in a sexual sense, he says. They were, however, committed to a project of

⁵ United Nations, Office of the United Nations High Commissioner for Human Rights, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, December 10, 1984, <http://www.ohchr.org/english/law/cat.htm>.

⁶ See Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* (Oxford: Oxford University Press, 1985), 52-56. Scarry identifies eight aspects of pain. I do not discuss all of these in detail here.

⁷ Jean Améry, *At the Mind's Limit*, reissue, tr. Sidney and Stella P. Rosenfeld (Bloomington: Indiana University Press, 1980), 33. See also p. 35.

⁸ Arthur Koestler's novel, *Darkness at Noon* (Harmondsworth: Penguin, 1947) describes the effects of sleep deprivation on the main character, Rubashov.

⁹ Améry, 33-34.

¹⁰ See Shue, 126, 130. I will briefly reconsider the claim that torture victims are defenseless at a later stage.

¹¹ I am adapting this point from Jeffrey Reiman, "Justice, Civilization, and the Death Penalty," in A. John Simmons, ed., *Punishment* (Princeton, NJ: Princeton University Press, 1995), 293-295.

domination over another human being, and to the denial of his equal dignity. Améry suggests that whereas human society requires conduct bridled by a moral recognition of the equal dignity of others, torture not only withholds that recognition but also actively promotes the domination and ruination of others.¹² In the course of this process, the torturer reserves agency to himself alone, by “expanding into” the body of the victim and manipulating his spirit, which he can then vacate as he pleases, in order to pursue whatever ordinary activities he pleases, leaving a suffering shell behind him. What is more, Améry notes that in the course of his suffering, he found himself admiring the almost god-like power of his torturers. Clearly, this process constitutes a deliberate reversal or violation of the kinds of recognition afforded by relations of love and intimacy, or by legally regulated interactions, which, in modern societies, are justified on the premise of equal dignity.¹³

It seems to be some combination of the experience of domination and the third aspect of torture—humiliation—that leads Améry to comment that torture is never over for the victim. What remains is not necessarily the pain or its effects—which may sometimes be relatively minor—but rather the sense of vulnerability and of the humiliation involved in being bent to someone else’s will, made to reveal intimate secrets about oneself, or to act in ways that injure one’s sense of self-respect. A feature of torture that is repeatedly evident is the humiliation of the tortured. The forms of humiliation vary depending on the culture of both perpetrators and victims, but all are aimed at conveying the lesson that those being tortured are lesser human beings, are subhuman, are animals, or deserve the treatment they are experiencing.¹⁴ Why is this the case? Many observers of torture insist that the main purpose of torture is not so much to gather information (though that may be one of its goals) but to break the person being tortured as well as to intimidate anyone who subsequently comes into contact with him. Practices of humiliation, however, suggest that an additional dynamic is at work. As Avishai Margalit and Gabriel Motzkin note, commenting on the element of torture evident in the Holocaust, torture involves a strange kind of collusion between torturer and victims.¹⁵ To the extent that the torturer cannot quite rid himself of the feeling that he is dealing with human beings, he must force the victims to act in ways that suggest their subhuman status. If he is to feel justified or “innocent” in his actions, victims must demonstrate or affirm the appropriateness of his treatment of them.¹⁶ This disturbing dynamic is closely related to the experience of grudging admiration of his torturer’s “god-like” status recounted by Améry, and it presents a distorted reflection of processes of recognition based on mutuality and an acknowledgment of equal moral status.

The purpose of such processes, though it may only be dimly understood by those engaged in them, is twofold. On the one hand, the successful humiliation of victims affirms the perpetrator’s sense of the rightness of his actions. On the other hand, it does so by inducing in the victims a sense that they deserve their treatment or that they are subhuman. Just as many rape victims feel guilty as a result of the rape, many victims of torture come to feel that they deserved what they got. This is reinforced in cases in which they are made to betray comrades or perform other acts they experience as shameful.¹⁷ This feature of torture indicates another reason why it cannot simply be considered a lesser form of harm than death in combat. Whatever the degree of harm that is inflicted, the humiliations of torture also involve a kind of moral injury—an attempt to damage the standing of the victim as a moral being, with a set of minimal claims on our consideration.¹⁸

¹² Améry, 3. At times, Améry writes as if he believes that torturers are motivated by “existential” fantasies of domination and hatred for the restraints of society. It seems more generally valid to say that the logic of the *practice* of torture entails the domination of others (whether the torturer is realizing a personal fantasy or not).

¹³ Axel Honneth, who distinguishes between three forms of recognition, describes abuse and assault as forms of “misrecognition,” though the term seems too anemic to adequately describe the process of torture. See Honneth, *The Struggle for Recognition* (Cambridge, MA: MIT Press, 1995).

¹⁴ For a discussion of types of humiliation, see Avishai Margalit, *The Decent Society* (Cambridge, MA: Harvard University Press, 1996), 89-90.

¹⁵ See Avishai Margalit and Gabriel Motzkin, “The Uniqueness of the Holocaust,” *Philosophy and Public Affairs* (1996): 65-83.

¹⁶ See Margalit and Motzkin, 74.

¹⁷ See George Orwell, *1984*. It is Winston’s betrayal of Julia under pressure of torture that finally destroys his willingness to explore his interiority—his beliefs and feelings—and leaves him a mere shell, not willing to delve beyond his outward conformity.

¹⁸ Jean Hampton develops the distinction between harm and moral injury in “Correcting Harms Versus Righting Wrongs: the Goal of Retribution,” *UCLA Law Review* 39 (1992): 1659-1702.

The fourth aspect of torture is the promotion of rule by fear. This is obviously evident in regimes such as the Soviet Union, Nazi Germany, apartheid South Africa, or Augusto Pinochet's Chile, in which the populace is aware that practices of torture are widespread. In such regimes, knowledge of the practice of torture has the effect of heightening people's insecurity, and torture thus functions as a general means of social control.¹⁹ In constitutional democracies, or in cases where torture is being used against external enemies or ethnic outsiders, the political effects of torture do not include the promotion of general passivity to the same extent. In these cases, however, the lesson that is conveyed is that considerations of survival or security make it necessary to accept that some set of people lies outside of the normal protections of law. Sometimes the enforcement of this lesson requires that citizens' basic freedoms be curtailed. Even when the practice of torture in constitutional democracies is limited and does not threaten a broad range of rights and freedoms, however, it destabilizes the assumption of basic moral equality on which such societies are based.²⁰

State-sponsored torture has been performed for a range of explicit purposes—punishment, religious conversion, social control and intimidation, and the extraction of information. However, the moral significance of torture seems always to involve the four aspects enumerated here. Wherever state-sponsored torture has been widespread, it has involved the infliction of pain, the reduction of victims to manipulable objects and the elevation of perpetrators to the status of impressively powerful agents, the moral injury of people through humiliation, and the promotion of fear and insecurity within society. The degree to which these aspects are present varies, but all are always present in some measure.

That this is so, however, only indicates the moral and political stakes involved in considering moral justifications for torture or for the legalization of torture. Reflecting on the moral significance of torture as an evil does not settle debates about whether the practice and legalization of torture may or may not be justifiable in extreme circumstances. One could concede all the points made about torture here, and still believe that, evil though it is, the consequences of not using it may sometimes be even worse. To be sure, some might say, we get our hands very dirty indeed when we endorse the use of torture. But if this is the only means of averting harms such as potentially very destructive terrorist attacks, so be it. In such cases, we do not confront morally good choices, merely choices between greater and lesser evils, and the legalization of torture constitutes the lesser evil. What are we to think of such claims?

¹⁹ See Judith Shklar, "The Liberalism of Fear," in *Political Thought and Political Thinkers* (Chicago and London: University of Chicago Press, 1998), 9, 11-13.

²⁰ Hannah Arendt argues that the experience in coercion acquired by imperial and colonial administrators found its way back to Europe, and bore tragic fruit there in the twentieth century. See Arendt, *The Origins of Totalitarianism* (New York: Harcourt Brace Jovanovich, 1973), 185, 327-333.

PART TWO

Torture-Warrants: The Case for Legalization

Although these kinds of claims have been quite widespread since the September 11 attacks, Alan Dershowitz and Sanford Levinson have presented the most sustained moral argument for the legalization of torture, and I want to turn to this now. For the most part, I shall concentrate on Dershowitz's views, referring to Levinson where his arguments supplement Dershowitz's case.¹

There are two parts to Dershowitz's argument: a general defense of the moral permissibility of torture, and a more specific justification of the legalization of torture for a range of cases. Both aspects of the argument are framed as "dirty hands dilemmas"—as situations in which no wholly right choice is possible. Whatever course of action one judges to be right will nevertheless involve the infliction of an undeserved harm on some set of people, and the value of the end promoted as a result of this will not cancel out the harm done. Michael Walzer, the author of the most influential formulation of the idea of dirty hands dilemmas, argues that although the choices we make in responding to such dilemmas may be *excusable*, we are still guilty of wrong.² This last point is worth noting; as we shall see, despite presenting the issue of the moral justification of torture as a dirty hands dilemma, Dershowitz actually veers rapidly towards the view that the good secured by torture—security—cancels out the evil involved.

Dershowitz begins by adapting a hypothetical scenario presented by Walzer in order to illustrate the nature of dirty hands dilemmas—the "ticking bomb terrorist" case. We are asked to imagine a situation in which a political leader of a country plagued by terrorism has to decide whether to authorize the torture of a captured rebel leader who knows or probably knows the location of a number of bombs, which are set to go off within twenty-four hours, and which will kill a large number of people if they do detonate.³ Walzer claims that a responsible political official who personally abhorred torture might nevertheless decide to permit the torture of the rebel leader in order to extract the information necessary to prevent civilian deaths, though he insists that the official incurs a "moral burden" of guilt as a result. Dershowitz, on the other hand, concludes that torture would be clearly justified in such a case. He cites a related hypothetical scenario proposed by Jeremy Bentham. Bentham asks us to imagine that by torturing a criminal who knows the whereabouts of one hundred innocent people who are themselves being subjected to torture, we can rescue them from their suffering. For Bentham, torturing the criminal is obviously the right choice to make.⁴

Dershowitz's response to this case is interesting. On the one hand, he is critical of the failure of Bentham's act-utilitarianism to specify limits to the use of torture for important ends. In his judgment, Bentham's type of cost-benefit analysis does not give us enough principled safeguards against decisions to sacrifice innocent individuals for the good of a collectivity and thus risks establishing a precedent that would inevitably be extended beyond the original case. We would end up on a slippery slope, justifying the use of evil means to avert less and less serious harms. We can, however, prevent this slide down the slippery slope, according to Dershowitz, by stipulating a series of limits on consequentialist calculations concerning torture: only

¹ Levinson's argument is generally dependent on Dershowitz's, but is also more ambivalent. He worries, for example, about the "contagion effect" of legalizing torture, and insists that he wants torture authorized only when real "catastrophes" loom. In other cases, he says, the United States must be "willing to bear significant costs...before it accepts the possibility of torture." See Sanford Levinson, "The Debate on Torture: War against Virtual States," *Dissent* (summer 2003).

² See Michael Walzer, "Political Action: the Problem of Dirty Hands," in Marshall Cohen et al., eds., *War and Moral Responsibility* (Princeton, NJ: Princeton University Press, 1974), 63, 76. Sanford Levinson also frames his discussion of torture as a dirty hands dilemma. See Levinson, 4.

³ See Walzer, "Political Action," 68-69.

⁴ Cited in Dershowitz, 142-143.

“nonlethal” torture should be used, and those subjected to it should receive immunity for any acts in which they are implicated as a result of the information extracted from them by means of torture.⁵

On the other hand, Dershowitz seems to accept the idea that torture in “ticking bomb terrorist” cases is justified on consequentialist grounds. Both he and Levinson argue that this type of case demonstrates the indefensibility of maintaining an absolute prohibition against torture. Though one could insist on doing justice even if the heavens were very likely to fall as a result, this would be small comfort to those he could have saved, but did not. Levinson claims that there are situations so potentially catastrophic that they would justify even killing an innocent in order to save thousands.⁶

However, while Dershowitz begins by conceding the moral enormity of any choice for torture, by degrees he slips into the contention that torture may be justified by a relatively straightforward cost-benefit analysis. For example, he denies the claim that torture is the infliction of pain on a defenseless person. If the person being tortured has information necessary to avert a disaster, then he is not really defenseless but constitutes a threat.⁷ Moreover, the torture that would be applied to such a person would be “nonlethal” and would not result in permanent physical injury. Indeed, towards the end of his discussion of the “ticking bomb terrorist” scenario, Dershowitz claims, “absolute opposition to torture—even nonlethal torture in the ticking bomb case—may rest more on historical and aesthetic considerations than on moral or logical ones.”⁸

On this view, nonlethal torture is not a very significant harm after all—probably not as serious as the death penalty or the harms associated with incarceration. This puts the “ticking bomb scenario” to a use completely alien from Walzer’s purposes. For Walzer, the goal of saving civilian lives excuses the authorization of torture, but does not cancel the evil manifestly involved in this act. For Dershowitz, by contrast, the authorization of torture is justified by a sufficiently important goal, and, provided we limit the use of torture appropriately, the goal of averting an imminent and large-scale threat to civilian lives clearly outweighs the relatively insignificant harm of torture. Whereas a recognition of the wrongness of torture—even in those cases where we believe that the goal of averting imminent disaster excuses it—focuses the chooser on the “dirty hands” he incurs, and upholds moral scruples, Dershowitz’s argument minimizes the wrong, and thus promotes morally insensitive strategies of self-justification and self-exculpation.⁹

The second part of Dershowitz’s argument—the case for legalizing torture—is supposedly related to the first, though in fact I think that there is little or no connection between the two. If we are persuaded by the ticking-bomb terrorist scenario that an absolutist prohibition against all instances of torture is unsustainable, and that torture is sometimes justified in order to prevent grave harms, then we should also be willing to legalize torture by requiring law enforcement agents who wish to torture a convicted terrorist or a terrorist suspect to present a case to that effect in court, and by giving judges (or some group of specially qualified judges) the authority to issue or withhold “torture warrants.”¹⁰ In Dershowitz’s view, torture will take place in any case whenever people believe that they are confronted by an imminent threat, so legalization would allow us to avoid the hypocrisy of pretending that we are keeping our hands clean. It would also have the effect of reducing the actual instances of torture, would impose appropriate constraints on the mode of torture, and in general, would subject the process to legal scrutiny and control.

This argument is seriously flawed, both at the general and the specific level. There are two main flaws at the general level. First, as I have been suggesting, the way in which Dershowitz presents his version of the

⁵ What is the moral basis of these constraints? The first constraint seems to issue from a “quantitative” concern to limit harms, while the second introduces deontological concerns about violations of basic rights and freedoms, though Dershowitz does not spell out the source and status of these concerns.

⁶ Levinson, 4.

⁷ This is both true and misleading. It is true that the terrorist’s secret knowledge poses a threat to society if it is not revealed. In that sense, he is unlike a conventional prisoner-of-war. On the other hand, the terrorist has no real defenses against his torturers (unless his knowledge enables him to cut a deal with them).

⁸ Dershowitz, 148.

⁹ For a general argument about the importance of acknowledging the fault of a tragic decision, see Martha Nussbaum, “The Costs of Tragedy: Some Moral Limits on Cost-Benefit Analysis,” *Journal of Legal Studies* 29 (2000): 1009.

¹⁰ As we shall see later, Dershowitz is disturbingly ambiguous over whether only convicted terrorists or suspected terrorists could be tortured.

“ticking bomb terrorist” scenario minimizes the evil of authorizing torture by depicting it as more like the straightforward kind of trade-off required by cost-benefit analysis than as an unavoidably tragic choice. He does this by focusing on the physical harm involved in torture to the almost total neglect of the three additional aspects of torture—the promotion of domination, the infliction of humiliation, and the encouragement of social fear—discussed above. This allows him to claim that anyone who supports the death penalty, killing in war and in self-defense, or the use of force against fleeing felons is inconsistent in remaining opposed to torture. “Death,” says Dershowitz, “is forever, while nonlethal pain is temporary. In our modern age death is underrated, while pain is overrated.”¹¹ Even if one were to concede the dubious claim that physical pain is never as great a harm as death, Dershowitz seems completely oblivious to concerns about the moral and psychological injuries inflicted by torture.¹² Yet many torture victims identify the humiliations of torture and the sense of being totally at the mercy of another human being as worse—and longer-lasting—experiences than subjection to physical pain. While humiliation and domination may be somewhat reduced in the controlled circumstances Dershowitz envisages, they are intrinsic features of torture, and cannot be completely eliminated. Thus, while killing *sometimes* involves humiliation, torture *always* does. My general claim here is not that we should reverse Dershowitz’s claim and consider torture always worse than killing or execution, but simply that these evils cannot be as straightforwardly compared and ranked as he supposes. We are therefore not entitled to consider torture as obviously less evil than killing.

The second difficulty with Dershowitz’s hypothetical “ticking bomb” scenario is that one’s response to it is largely irrelevant to the question of the legalization of torture. What the hypothetical case persuasively demonstrates is the limits of an absolutist deontological morality in which consequences never matter. However, its persuasiveness depends on stipulating a set of conditions that are unlikely to occur frequently in reality. For example, for the “ticking bomb” scenario to constitute a truly compelling case for torture, we would have to know: (a) that we are holding the right person; (b) that the person being tortured really does possess the information we need; (c) that acquiring the information the captured terrorist possesses would be very likely to put us in a position to avert a disaster, and that his accomplices haven’t already adopted a contingency plan he knows nothing about; (d) that the information we obtain through torture is reliable.

We can of course *stipulate* that we know these things—and if we do, we really are presented with an important test of the validity of moral absolutism. However, in reality, we will be operating to a greater or lesser degree on the basis of supposition, not certainty. This is well illustrated by an incident that took place in Algiers during the Algerian War, in which the secretary-general of the Algiers prefecture, Paul Teitgen, resisted pressure to authorize the torture of a terrorist suspect, who had been caught while placing a bomb near the gasworks. Although it was feared that there was a second bomb, which would have threatened the population of the entire city, in fact no second bomb exploded.¹³ Teitgen could have been mistaken—in which case the consequences of his refusal would have been terrible—but although the case for authorizing torture was surely compelling in this case, in fact, his decision seems to have been correct. The lesson to draw from this is simply that real cases, even those that approximate the “ticking bomb” scenario, involve much more uncertainty, and therefore require complex judgements.

The effects of uncertainty on our judgment do not destroy the consequentialist case for torture—but they do considerably weaken its general persuasiveness and its applicability to real cases. In real cases, we must not only balance the harm of torture against the good of saving lives, but must also factor into our calculation the moral risks of torturing the wrong person, or of torturing the right person to no avail. Sometimes we may decide that these risks have to be run—but the justification for torture in these cases is far from obvious.

Thus, even if we concede that torture is permissible in the ticking-bomb terrorist scenario or relevantly similar real situations, that judgment does not produce a clear and decisive general justification of torture. We have to make a complex, case-by case calculation—and this becomes even more complicated when we turn to the issue of legalization. Here not only do we confront all the concerns about the reliability of our judgments

¹¹ Dershowitz, 149.

¹² To suppose that physical pain is *always* worse than death implies that assisted suicide and euthanasia are necessarily unjustifiable. This is a defensible, though to my mind implausible, view, but it requires a much more compelling justification than Dershowitz’s throw-away assertion that death is always a greater evil than pain.

¹³ This case is cited in Kreimer, “Too Close to the Rack and Screw,” p. 319, n. 144.

that arise in real cases, but also the risks of corrupting the legal system, providing a dangerous example to others, placing agents of the state who might themselves be captured and subjected to torture at greater risk, etc.

It will be recalled that Dershowitz and Levinson contend that the legalization of a narrow range of permissible instances of torture may actually turn out to be a more effective means of minimizing and constraining the practice than the actual legal prohibitions currently in place. At present, they claim, there is a “don’t ask, don’t tell” public attitude towards torture, while in fact torture is practiced quite widely in the absence of any kind of scrutiny. This state of affairs would be changed for the better if the courts made decisions concerning whether or not to permit torture in a “formal, visible, accountable, and centralized system.”¹⁴ Dershowitz claims that this would amount to a “double check,” which would restrain law enforcement officers who have already decided that torture is justified in a particular case. Officials would be more likely to apply for a torture warrant only after finding compelling evidence against their suspect, and records of the trial and of every warrant issued would have to be kept. Moreover, suspects’ rights would be better protected—they would be given the option of providing the information, and then, if they refused to do so, would be granted immunity from subsequent prosecution arising out of the information extracted through torture. Essentially, Dershowitz’s argument boils down to the claim that it is better to have torture occurring within the legal system, under legal oversight, than outside of it, subject to no public control of any kind.

Is this correct? Even if we accept the doubtful claim that these are our only available alternatives, in fact, Dershowitz’s argument is fatally flawed at the level of logic, and empirically implausible. At the logical level, Dershowitz’s case for legalization seems internally inconsistent. His argument depends on the plausibility and coexistence of two sets of considerations. On the one hand, the case for legalizing torture is based on the contention that sometimes, in order to prevent disasters, the only effective and rapid way of acquiring the relevant information is through torture. On the other hand, he argues that making torture part of the legal process places greater constraints on torture, by requiring the compilation of evidence supporting any application for a torture warrant, and by requiring judges to examine this evidence closely. It is unclear, however, that these two motivations for legalizing torture can coexist. If a crisis appeared imminent, and required urgent action, it seems all too likely that a genuinely stringent process of scrutiny would slow the process down to the point of ineffectiveness. For example, it would take time to compile evidence, and time for judges to sift through it. If authority to issue warrants was reserved to a small set of highly qualified judges, it might well be difficult to obtain rapid access to these judges in moments of crisis. Thus, for the process to move rapidly to completion, it would almost certainly be necessary to relax the constraints significantly—by reducing the volume and quality of information required, the amount of time needed for a judge’s deliberations, the level of competency and training of the judges, and the general procedural stringency of the proceedings. In either case, one of the two motivations for legalizing torture—effectiveness and regulation—would have been fatally undermined.

Perhaps the argument can be redeemed from logical inconsistency on empirical grounds. It might, in other words, be the case that while legalized torture entails some costs in effectiveness and in stringency of procedure, the resulting balance is acceptable. Is this in fact the case? In answering, I want to concentrate on the issue of whether procedural safeguards can be maintained, as the issue of the effectiveness of legal torture is hard to determine, given the paucity of clear cases available.

Dershowitz cites the English experience of legalized torture by the Privy Council in the sixteenth and seventeenth centuries as an example of a system in which “torture was used to save life, rather than to take it, and when the limited administration of nonlethal torture was supervised by judges.”¹⁵ In making this claim, he is paraphrasing (a little inaccurately) the legal historian John Langbein’s claim that the brief English experience of legalized torture in the early modern era constituted an exception to its more entrenched presence on the European continent. It is not clear, however, why Dershowitz considers this reference significant. It is true that torture was generally used by the Privy Council to “discover” facts about treasonable plots and to force prisoners to submit to the jurisdiction of the court by entering a plea, rather than to produce evidence against them. However, the experience was very brief, ending in the early seventeenth century, and, as Langbein points

¹⁴ Dershowitz, 158.

¹⁵ *Ibid.*, 155-156.

out, was never successfully bureaucratized, unlike torture in France in the same period, which was wholly public and bureaucratized, and lasted much longer.¹⁶ If anything, this historical episode suggests that the formalization and bureaucratization of torture within a legal system have the effect of prolonging its presence and expanding its effects. While Dershowitz wants to claim that formalizing and making public a legal system of torture is likely to restrict its use, the evidence from this period, though open to some debate, suggests the opposite conclusion. Moreover, in general, most students of the history of torture note that, once introduced into a legal system in a limited form, the “torturable class” gradually expands, and procedural constraints on torture are relaxed.

The contemporary Israeli experience with torture is also instructive. Israel, as a signatory to a number of anti-torture conventions, denied that it used torture until the investigations of the Landau Commission in 1987 proved otherwise. While the Commission and subsequent court decisions were highly critical of the indiscriminate use of extreme methods of interrogation, they also recognized that security forces could use “psychological pressure” and a “moderate amount of physical pressure” when “necessity” required this.¹⁷ Anat Biletzki comments that far from reducing torture, these official reports and court decisions may have had the effect of legitimizing it. She points to compelling testimony and anecdotal evidence that the torture of Palestinians by Israeli forces is widespread. This eventually resulted in a 1999 High Court decision to explicitly ban torture as a method of interrogation, though the Court also recognized the right of the Knesset to pass legislation allowing for the use of extreme means of interrogation in “special circumstances.”¹⁸

What lessons can be drawn from this case? Since the Israeli legal system has never explicitly institutionalized torture, we cannot conclude with finality that Dershowitz is mistaken to think that legalization is likely to result in more effective oversight of torture and in a reduction of its incidence. What can be concluded is, first, that there are usually definitional loopholes that weaken legal oversight of torture. What constitutes severe pain or humiliation is subject to dispute—and it is hard to see that this would not also be true of Dershowitz’s proposals for “nonlethal” torture, including “vigorous shaking.”¹⁹

Second, we may infer that courts and other legal bodies, operating in a context of crisis, are likely to be wary of appearing to go out on a limb to uphold principled constraints on torture. While the Israeli High Court decision of 1999 explicitly banned a range of methods of interrogation including sleep deprivation, “shaking,” etc., and criticized the view that “necessity” could not function as a before-the-fact justification of torture, it allowed the “necessity” defense to re-enter via the legislative back door. Courts sometimes laudably resist popular pressures, but they are certainly not insulated from them, and ensuring the publicity of legalized torture does not guarantee that procedural safeguards will be maintained.

There are more speculative but highly plausible reasons for thinking that, in practice, legalized torture would not promote effective constraints on the process. As Seth Kreimer points out, Dershowitz himself is ambiguous as to whether only convicted or also suspected terrorists could be subjected to legal torture. Moreover, he is distressingly vague about how much evidence would be required to torture a suspect—shifting from “compelling evidence” to “probable cause.”²⁰ It is reasonable to assume that this kind of vagueness would be magnified in practice, and it casts doubt on how effectively principled barriers can be built into the practice of legal torture.

Kreimer also astutely observes that the legalization of torture would provide security agents with a powerful incentive to apply for warrants virtually indiscriminately—so as to shift responsibility to the judges and avoid the prospect of being held liable for not applying. This would reduce whatever “psychic costs” one

¹⁶ This also noted in Kreimer, p. 311, n. 117.

¹⁷ The Landau Commission’s report details permissible methods and circumstances of interrogation—but this part of the report has never been declassified. I am relying here on Anat Biletzki’s interesting discussion of the Commission and the 1999 High Court decision. See Biletzki, “The Judicial Rhetoric of Morality: Israel’s High Court of Justice on the Legality of Torture,” working paper # 9, Center for Advanced Study, Princeton, NJ, January 2001. See also Conroy, 212-215.

¹⁸ See Biletzki, 13.

¹⁹ Levinson calls attention to the ambiguities of the definitions of torture presented in anti-torture conventions, and the way in which the United States and other countries have exploited these ambiguities. But it is hard to see how legalizing torture would remove this problem.

²⁰ See Dershowitz, 151-153, and Kreimer, 321.

might hope are involved in applying to have someone tortured. In addition, if we assume that many of those applying will be professionals, well versed in presenting a plausible case (torture's institutionalized equivalent of state prosecutors), we could expect a reasonably significant error rate on the part of judges. This suggests that Dershowitz is mistaken to claim that torture would be reduced, "even if the judge rarely turns down a request."²¹ Rather than reducing instances of torture, it is more likely that legalization would have the effect of multiplying them.

What about the claim that if the process of torture is public throughout—including the application, the judgment, and the actual implementation—instances of torture would be reduced and abuses controlled? Replying to the objection that "supine judges would grant the requests of overly aggressive security agencies," Sanford Levinson counters by noting that those found guilty of torture now are rarely severely punished.²² His point seems to be that prospective consent to a public process may allow for greater control over torture than retrospective review. However, it is not clear that this is true. While the public may indeed refuse to punish abuses after the fact if they believe them to have been well intentioned, it is equally likely that they will prospectively legitimize torture on the basis of their fears. In this respect, neither prospective nor retrospective publicity may help.²³

Nor is it clear that the publicity of the process would inhibit the corruption of the moral sensibilities of those administering it. Levinson makes the curious claim that requiring the person who is to be tortured to be present when the decision is made would prevent judges from "taking refuge in abstraction."²⁴ I find this mystifying. If hanging judges have not been deterred by the presence of those they sentence to death, why should we think that a judge who authorizes nonlethal torture would be?

More seriously, regularizing the process of torture would surely erode moral inhibitions. Students of the Holocaust such as Zygmunt Bauman argue that once practices have been placed in a bureaucratic or official context, in which goals are no longer open to question and personal responsibility is divided and diffused, moral resistance to abuses is much less likely to occur.²⁵ Do we have any reason to suppose that a similar lowering of people's resistance to torture would not occur if the practice were to be legalized? At the least, such a reduction of moral sensibilities would be a significant risk.

For all of these reasons, I believe that the arguments presented by Dershowitz and Levinson in justification of the legalization of torture are at best unpersuasive and at worst subject to serious internal inconsistencies. In principle, I am willing to concede that in a genuine "ticking bomb terrorist" case, torture could be excusable, though for the reasons outlined in the first part of the paper, it would still involve a grave wrong. But this concession has no bearing on the question of legalization. Here we need to consider the plausibility of claims that the evil of torture could be effectively contained and insulated within a legal system generally committed to respecting the basic rights and freedoms of those accused of crimes. Particularly if we bear in mind that torture is not simply a matter of temporarily injuring bodies, but also promotes relations of domination, humiliation, and fear, we should be very wary of allowing it a foothold within legal and political systems that are supposedly based on a recognition of the morally equal status of all citizens. We also need to consider seriously the symbolic message that legalization would send to the world.²⁶ To the extent that we aim to promote respect for human rights on the international level, to reduce the taboo against torture and to legalize it in any form is to allow a dark shadow of doubt to fall over our claim to be committed to such rights.

²¹ Dershowitz, 158.

²² Levinson "Reply," 1.

²³ Here I disagree with Kreimer, who has more confidence in the fairness of retrospective review than I do.

²⁴ Levinson, 9.

²⁵ See Bauman, *Modernity and the Holocaust* (Ithaca, NY: Cornell University Press, 1989), 98-106.

²⁶ In this regard, Henry Shue remarks that while there is no guarantee that upholding the taboo against torture will be respected by others, it is quite certain that conspicuous failures to do so will furnish them with reasons for dismissing the prohibitions in their own case. See Henry Shue, "Response to Sanford Levinson," *Dissent* (summer 2003): 1.

CONCLUSION

Responding to Excusable Torture

Legalization of torture would render dubious any claimed commitment to defending basic rights on the part of the torturing nation. The persistently uncomfortable challenge that Dershowitz and Levinson present, however, is that a dark shadow of doubt has in fact fallen over such commitments. Constitutional democracies already practice torture covertly, and outsiders are well aware of this. So why fret about upholding a moral taboo to which we really only pay lip service and which we agree is likely to be overridden in an emergency? If we really do accept that it is sometimes necessary to torture, then we should openly acknowledge this and should not pretend to outlaw conduct that we secretly approve. Dershowitz states, “In a democracy governed by the rule of law, we should never want our soldiers or our president to take any action that we deem wrong or illegal.”¹ To do so destabilizes the rule of law and responds unfairly to officials who act for the public good.

My own position on torture is certainly vulnerable to this objection. In my view, torture may be an excusable tragic choice in very extreme circumstances. These circumstances are likely to be so rare that they do not justify taking the risks involved in incorporating torture within the legal system. Rather, officials who do torture in order to avert serious harms must face public scrutiny and penalties—even when we have good reason to think that they acted out of concern for public security. In some (but certainly not all) cases, those penalties would presumably be suspended, or would be minimal, or pardons would be granted. But the general prohibition against torture would be upheld.

Why does this matter? It could certainly be argued that imposing lighter penalties on guilty officials, or waiving penalties altogether, makes a morally troubling statement and would be regarded as evidence of hypocrisy by the outside world. No doubt such responses, if they were widespread, would also have a corrupting effect on the legal system in the long run, by allowing a gap between crime and punishment to appear. The main hope here has to be that such cases would be relatively infrequent and that official abuses would in fact be punished. If so, the degree and directness of the corruption of justice would be minimized. By contrast, if torture were legalized, its institutionalization would have the effect of openly and directly promoting its practice and undermining the commitment to justice.

Is it unfair to hold public officials accountable, and even to punish them in some cases, for acts they clearly committed out of concern for the public good? Difficult though it may be to accept, if it is true that torture is always a serious evil, and always has the potential to corrupt our commitment to ordered liberty and our respect for equal dignity, then we cannot simply ignore the evils committed for our sake by public servants. At the very least, holding hearings, and issuing penalties—even if we reduce them or remove them subsequently—reminds us of the moral risks we are running. Paying lip service to moral principles is not merely hypocrisy; it keeps the moral stakes of our action in full view of both citizens and officials. In his discussion of dirty hands dilemmas, Michael Walzer argues that we need people who will sometimes override their scruples for us—but that we should still want our political officials to *have* scruples. We should also want to retain moral scruples ourselves—and being forced, from time to time, to examine the nature of the crimes committed for our sake may help us to hang on to them.² Again, this is a hope, not a guarantee.

There is a more central concern here, however. To accord torture a place within the legal system is a radical departure from the attempts of the last three centuries in the West to base law on equal respect for individual dignity, and to outlaw forms of institutionalized cruelty, humiliation, and domination. A direct official acceptance of torture symbolically counters these efforts, and signals a break with the core commitment to equal concern. As Michael Ignatieff cautions, it “expresses the state’s ultimate view that human beings are

¹ Dershowitz, 152.

² See Walzer, “Political Action,” 81.

expendable.”³ It is conceivable that we may reach a point at which we embrace such a view. But if we do reach it, in the name of our bare survival, we may discover that even that has already been fatally jeopardized.

³ Ignatieff, 143.