

The Torture Debate: What the scholars and the intellectuals are saying

Dieudonné Balla

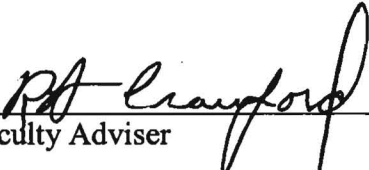
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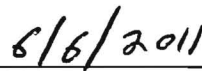
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Approved:

  
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Faculty Adviser

  
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Date

  
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Director, Global Honors

  
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### **The Torture Debate: What the scholars and the intellectuals are saying**

“The United States does not torture. It’s against our laws, and it’s against our values. I have not authorized it—and I will not authorize it” (Danner 2009, p.6). That sentence is extracted from the speech that the former President of the United States, George W. Bush, gave on September 6<sup>th</sup> 2006 while addressing the nation from the East Room of the White House. That sentence perfectly fits the image of the United States that has always been put forward in public when it comes to defining our leading position in defense of human rights. However, we now know that the Bush Administration adopted a set of practices that qualify as torture in the interrogation of several prisoners. The Committee on Armed Services of the United States Senate (CASUSS) (2009) reported that after 9/11, several detainees in U.S custody were interrogated using methods that fit the definition of torture in the Third Geneva Convention and in the United Nation Convention Against Torture. More importantly, the report tracks the evolution of those interrogation practices and concludes that they were approved by high officials such as Secretary Rumsfeld who—when he was asked to approve interrogation techniques such as stress positions, use of dogs, deprivation of light, and more—famously said “I stand for 8-10 hours a day. Why is standing [of detainees] limited to 4 hours?” (CASUSS 2009, p.xix).

Though they had been happening for some time, such interrogation practices were kept secret from the public until February 2004, when the photographs from Abu Ghraib surfaced in the media. Out of the alleged sixteen thousand photographs that were taken, only two became iconic due to their constant presence in the media: “one of an Iraqi prisoner standing on a box with electric wires attached to his genitals, toes, and fingers, and one of prison guard Lynndie England holding a wounded Iraqi prisoner on a tie-down strap” (McClintock 2009.p59). After such atrocious images were made public, several people denounced the use of torture by

American authorities, but the authorities blamed those pictures on a few *bad apples*. However, we know from the CASUSS (2009) report that “the abused detainees of Abu Ghraib in the late 2003 were not simply the result of a few soldiers acting on their own” (p.xxix). From the circulation of those pictures, the question of torture emerged in political debates. Those debates were more conspicuous in the later years of the Bush Administration, but even after President Obama took office, the debates continued, and even increased, as exemplified in Crawford’s (2010) article “Torture and the Ideology of National Security.” In his article, Crawford critiques President Obama for wanting to move forward without holding accountable the officials who authorized torture during the Bush Administration. Along with Crawford, several intellectuals and scholars have continued the debate over torture outside of popular media. Some have argued that it has become necessary to use torture; others have argued that torture should never be sanctioned by liberal democracies; and other groups have developed arguments that fall somewhere between those two extreme positions.

Americ In this paper, I will explore several arguments that directly or indirectly sanction torture in certain instances. I will specifically focus on three authors, namely Alan Dershowitz, Michael Walzer, and Richard Posner. Dershowitz is an American lawyer who is also a professor at Harvard Law School. He is well known in the torture debate because he has argued that torture is inclusive in our political lives, so we should either institutionalize and regulate it through “torture warrants,” or we should let it happen in secret with no accountability and suffer the consequences. Michael Walzer is a prominent American philosopher who is also a professor at the Institute for Advanced Studies in Princeton, New Jersey. He has published in a vast array of topics, and he is perhaps most famously known for his “problem of dirty hands.” Walzer argues that political leaders must often do the legally wrong thing in order to achieve the morally right

thing. In the case of torture, a political leader would “dirty his hands” by allowing torture in order to do the *morally right* thing, prevent a nuclear attack, for example. Richard Posner is an American legal theorist who is currently a judge on the United States Court of Appeals for the Seventh Circuit in Chicago. He is known in the torture debate because he argues that in times of emergency, the executive should bend the constitution and allow the torture of a terrorist who could reveal lifesaving information. After exploring the proposals of those three authors in details, I will develop other arguments that directly or indirectly respond to their positions. Then, I will conclude each section by giving my own assessment of the proposals of each of the three authors. I will conclude by explaining why this debate is important for an American and a global audience, and I will argue that in order to further the torture debate and decide whether we, as individuals, believe torture should be permissible or not, we need to establish a connection between the atrocities of torture and the atrocities of more *acceptable* practices such as war.

It is important to notice, though, that while this paper is based on torture in post 9/11 America, torture was certainly a United States government practice long before 2001. Also, the practice of torture is not exclusive to the United States, and it was recorded in other countries. This is evidenced by McCoy (2006) as he explores instances of torture as early as during the Cold War in Asia, Latin America, and Central America (61). Specifically, “Amnesty International documented widespread torture. . . in twenty-four. . . nations” which include South Vietnam, Brazil, Uruguay, Iran, and the Philippines (McCoy, 2006, p.60-61). In addition to those countries, several instances of torture were recorded in different European countries in the 1940’s. Those countries include France and Belgium in 1941, Czechoslovakia in 1942, Denmark in 1943, Germany in 1944, and Austria in 1945 (Relaji 2007, p.496-497). Also, Israel is one of the most conspicuous countries in the debate of torture because though it is not the only one in

which torture has been practiced, Israel is the only country that has ever used torture within the law (Dershowitz, 2002).

### **Dershowitz and the Torture Warrants**

One of the most prominent authors who argue for the occasional sanction of torture is Alan Dershowitz (2002). In the chapter four of his book *Why Terrorism Works*, Dershowitz explores the question of whether or not we should torture a terrorist in a ticking bomb scenario, which is a scenario in which a bomb, preferably a nuclear bomb, is planted somewhere and will go off in a short time and kill hundreds of innocents; the authorities capture a terrorist who knows where the bomb is located, but he refuses to talk—do they torture him? He starts by arguing that liberal democracies are, for the most part, very attached to the prohibition of torture. He illustrates this with the case of a former prime minister of Italy who was kidnapped by terrorists in 1978. An officer suggested to the leader of the investigation that they could torture a detainee who possibly had information on where to find the former prime minister; the leader of the investigation declined and claimed that losing the life of the former prime minister would not be as tragic as introducing torture in Italy—ultimately, the prime minister was killed, and that shows the price Italian authorities were willing to pay to keep torture out of their nation.

Dershowitz (2002) continues the development of his argument by addressing those who believe that torture should not be used because it does not work and only produces useless misinformation. Dershowitz responds by saying that though many people wish torture did not work, the tragic reality is that it does work. As an illustration, he uses a case in 1995 where the Philippino authorities tortured a terrorist until he gave up information that was used to prevent an attempt to assassinate the Pope and the crash of several commercial planes carrying thousands of

passengers into the Pacific Ocean. From that case, Dershowitz concludes that pretending that torture never works is not advancing the debate on whether to torture a ticking bomb terrorist or not. He also makes the point that torture doesn't always work, the same way all other techniques of crime prevention don't always work. The fact that torture sometimes works in producing valuable intelligence is the very reason why, despite all the anti-torture movements, torture has not completely been eradicated from any nation. In the current age of biological, chemical, and nuclear terrorism, we have to bring up torture as an alternative, he argues, because we are doomed to face tragic choices that would require the use of torture.

In his essay, "Want to torture? Get a warrant," Dershowitz (2002) furthers his arguments by explaining that if American authorities had captured a terrorist with information regarding an imminent attack on Americans, and the terrorist refused to give up this vital information, there is no doubt in his mind that the authorities would torture the terrorist. In fact, Dershowitz argues that the majority of Americans would expect the authorities to torture a terrorist in such a case regardless of our anti-torture laws. Also, most Americans would expect their government to break any anti-torture law or treaty possible in order to save American lives. Therefore, Dershowitz does not believe the debate should be about whether to use torture or not since he believes it would certainly be used in the case described above. Instead, the debate should be on whether torture should be used within the law or outside the law.

Dershowitz (2002) is certain that American authorities would use torture in a case as extreme as the one described above because all democracies, including the United States, have used torture outside the law at some point. He explains that only Israel has used torture within the law because of the specific challenges they face with terrorism. Israel arguably faces terrorist attacks involving bombs on a more regular basis than any other country in the world, and

Dershowitz argues that while the ticking bomb scenario has been a hypothesis in most cases in which it is discussed, Israel is the one country where the ticking bomb scenario is real.

In order to put the Israeli situation in perspective, it is worth mentioning that terror attacks involving bombs are daily occurrences in Israel. This explains why Israeli authorities have at times believed that sanctioning harsh interrogation methods (torture) was the right thing to do in their situation. A famous example in which Israeli authorities have publicly defended their use of harsh interrogation techniques is that of Nachshon Waxman, a 19 year old army corporal who was kidnapped by Palestinian terrorists on October 9<sup>th</sup> 1994. The Israelis captured the driver of the car in which Waxman had been taken away, and they severely tortured him until he told them where Waxman was being held. Waxman was killed during the attempt of his rescue, but the prime minister of the time, Yitzhak Rabin, stood by his decision to allow the torture of the car driver, and he argued that torture was the reason they were able to locate Waxman and at least have a chance to attempt his rescue. Authors such as Krauthammer (2004) have argued that the prime minister's position, especially given that he was a Nobel Prize laureate, proves that torture should be an option in certain situations. Even individuals who are known for their pacifism recognize that the Israeli situation is special, and that's why the use of torture is a very important topic in Israel.

Dershowitz (2002) continues by arguing that Israel has used harsh techniques on prisoners, including locking them in smelly rooms, putting a sack on their heads, and shaking them until they gave the information the interrogators needed. In cases where such interrogation techniques provided fruitful answers, the Israeli government never allowed the information obtained to be used in a court room, but they used it to prevent several terrorist acts. According to Dershowitz, several terrorist attacks were prevented in Israel because of information obtained

through torture. Dershowitz does not refer to specific evidence for this claim, but cases such as Waxman's come to mind as despite the fact that he was killed, it is thanks to torture that Israeli authorities were able to locate him.

However, despite the fact that those rough interrogation techniques allegedly prevented several terrorist attacks, they brought so much controversy that the president of the Israeli Supreme Court banned the use of those rough interrogation tactics on suspected terrorists. Nonetheless, the Supreme Court left a provision that would allow interrogators to use those tactics on a terrorist in a case of a ticking bomb scenario, a case in which the suspected terrorist refused to give up information that could save hundreds of innocent lives. In such a case, the interrogator would be protected from criminal charges by the "Law of Necessity," which implies that the interrogator did what was necessary in that specific situation.

Although such a ticking bomb scenario has never happened in the United States, Dershowitz believes that it will happen in America sooner or later. Therefore, in order to prepare for such a scenario, we should design special torture warrants that could only be issued by a judge and would allow some specific agents to use torture to save innocent lives.

In his book *Shouting Fire: Civil Liberties in a Turbulent Age*, Dershowitz (2002) explains how such torture warrants would operate. They would only be issued in a case where innocent lives were at stake and if there was probable evidence that the suspected terrorist had information that could save those innocent lives, but he refused to give up the information. Also, Dershowitz insists that the tortured victim be given immunity if the information he provided helps to foil an attack. Specifically, the torture victim could receive immunity from prosecution and receive a large amount of cash and a new identity as reward. He also emphasizes that the means used to

torture the suspect be nonlethal. He gives the example of tactics such as inserting sterile needles under the nails of the suspect to provoke agonizing pain without endangering his life.

Dershowitz (2002) admits that it might sound awful that a judge could issue a warrant to allow a practice as horrible as torture, but he reminds his readers that the other alternative would be to have several police officers illegally use torture and escape all accountability. Also, he recognizes that some people might be concerned that a torture warrant designed for ticking bomb scenarios would undoubtedly engage on a slippery slope that would lead to such warrants being issued for cases without ticking bombs. However, Dershowitz believes that is unlikely; in fact, he believes the opposite is more likely because with the existence of torture warrants, it would be harder to justify torture without warrants. Therefore, torture warrants would actually decrease the frequency at which torture is used. Dershowitz believes such warrants would not be vulnerable to a slippery slope because there would be accountability. Nobody would be allowed to torture without warrant, and anybody who would torture without warrant would be held accountable. Dershowitz believes fewer people would engage in unlawful torture, and the lawful tortures would also be significantly fewer because of all the conditions that would have to be met for the issuance of a torture warrant.

### **In response to Dershowitz' Torture Warrants**

Not surprisingly, Dershowitz's (2002) proposal of torture warrants has outraged many intellectuals and scholars, and as a result, several of them have criticized his proposal. For instance, Gross (2004) argues that instead of the circumstantial sanction of torture proposed by Dershowitz, we should legally have a total ban of torture in all circumstances from a pragmatist and moral perspective. However, Gross admits that there might be extreme situations that require

our elected officials to go beyond the law, and one of such extreme situation could require that the law that prohibits torture be violated. Thus, he argues that we should have a law that forbids torture in all circumstances, but he believes that law can be violated in certain situations. In order to deal with those extreme situations, Gross argues that Dershowitz's proposal of torture warrants is not a good idea because it essentially uses an extreme and unusual situation as the basis for a general policy. Gross believes instead that truly extreme situations may give rise to official disobedience. He argues that officials might act extra legally in such extreme situations, but they should be ready to accept the legal ramifications of their actions. So, while Dershowitz argues that torture can be morally and legally permissible, Gross argues that even if there are situations in which torture can be morally permissible, it does not mean that we should turn those exceptions into laws. When an official acts outside the law in an extreme situation, Gross argues, it is up to the public as a whole to implement Ex Post ratifications. Thus, the role played by the public after the facts is essential in Gross' proposal.

Gross (2004) elaborates his proposal of Ex Post ratifications by arguing that acknowledging that extra legal actions might sometimes be necessary is not a way of saying officials should break the laws whenever they want. In fact, Gross specifically emphasizes that our officials should feel uneasy about acting outside the law; he believes when they feel uneasy about breaking the law, officials will only break it when it is indeed necessary. That is one of the reasons he does not support Dershowitz's torture warrants. If those warrants were a lawful option, the officials would not necessary feel uneasy about issuing them, and that makes it more likely that they could be issued for the wrong reasons. He also argues that the fact that torture has been banned by many liberal democracies, including the United States, will make it even harder for any official to allow it, and because of such reticence to allow torture, no official would allow

it if it was not absolutely necessary. Gross concludes his argument with three reasons why his proposal is a better one than Dershowitz's: first, the need for officials to give reasons why they want to break the law will be a restraining factor in itself; second, the open acknowledgment of the officials that they are breaking the law by allowing torture will allow an opened dialogue between the government, its domestic constituency, and the global community; and thirdly, the fact that the officials who allowed torture would have to explain themselves before the public and accept the consequences will make it even more difficult for those officials to allow torture in less than extreme situations. That's how Gross believes torture should be handled—not with torture warrants.

Another author who disagrees with Dershowitz's (2002) proposal is Scarry (2004). She starts her critique of Dershowitz by arguing that the fact that his argument is based on the imaginary ticking bomb scenario instead of the numerous real scenarios in which torture could be and/or has been used is highly problematic; therefore, we should not change our laws based on an imaginary scenario. She continues her critique by arguing that there are five significant problems with Dershowitz's proposal of torture warrants. The first problem of Dershowitz's proposal is that he assumes that indeed, anybody in a ticking bomb scenario would opt for torturing the suspect. That is the whole premise of Dershowitz's writings in support of his torture warrants. He assumes that we would all think like him, but Scarry argues that it would very much be possible that someone had enough conviction in their moral principles that they would not want to compromise them. Just as Dershowitz argues that most people would not want to compromise the lives of the potential victims, it is possible that many people would not want to compromise their anti-torture beliefs.

The second problem Scarry (2004) finds in Dershowitz's (2002) proposal is that it does not mention the confidence of the potential torturer who presumably finds himself in the ticking bomb scenario. Scarry believes it is very important that the torturer be confident about the outcome of his acts. So, he should ask himself how sure he is that when he tortures the victim, innocent lives will indeed be saved. Scarry suggests the potential torturer asks the following question: am I confident enough that he holds this lifesaving knowledge to the point that I would give up my liberty and even my life to torture him? Scarry believes that if the potential torturer then finds himself thinking, "I am not quite sure enough that I can give my liberty [or my life] to it"(3), then it is a clear signal that he is not confident enough that the victim actually holds the potentially lifesaving information. As a result, he should not torture. Scarry argues that this test would certainly be better and faster than trying to obtain a torture warrant from a judge.

Scarry's (2004) third problem with Dershowitz's proposal is the ticking bomb scenario's improbability. She admits that it is indeed possible that terrorists could get hold of weapons of mass destruction and threaten innocent lives. However, she still believes a ticking bomb scenario would be improbable because that scenario implies that we have absolute certitude that the person we want to torture knows where the bomb is located. From real life, though, we know how imperfect knowledge can be, and we know that absolute certitude is almost impossible. If we have a way to absolutely know that the terrorist holds the information, we should also have a way to absolutely know where the bomb is located. Both instances are very unlikely, so relying on such premises makes the ticking bomb scenario highly improbable.

Dershowitz's (2002) proposal's fourth problem, Scarry (2004) argues, is the idea that a torture warrant would decrease the instances in which torture is used because the judge who issues the warrants would only issue them in appropriate circumstances. Scarry explains that it

would be hard to choose which case would qualify as a ticking bomb scenario and which one would not. It is very likely that more warrants than Dershowitz thinks would be issued. To support her argument, Scarry elaborates that “the court set up to issue warrants under the Foreign Intelligence Surveillance Act (FISA) has declined only one requested warrant in twenty-five years: the estimated number of warrants requested is twenty-five thousand” (5). This shows that it is very possible that torture warrants would not decrease the instances in which torture is used. The presence of a warrant would simply provide people with a guide on how to torture within the law.

Scarry’s (2004) fifth and final critique of Dershowitz’s (2002) proposal is in his argument that torture warrants would provide more accountability because instances of torture would be documented and then reviewed later on to see if indeed all the conditions for a ticking bomb scenario were met. Scarry argues that this logic does not hold because if the person who tortured was issued a warrant before they did it, it means that they acted within the law. Therefore, trying to hold them accountable after the facts would imply that they can still be punished for using torture. But since they would have tortured in respect of the law, it would not make sense to prosecute them after the facts. If we prosecuted them, it would mean that we are prosecuting them for respecting the law. That is why Scarry thinks that torture warrants would not permit accountability. In fact, she believes the current system works better in holding people who use torture accountable because since all torture is illegal, anybody who is found out to have allowed torture or to have tortured can be brought to justice because they broke the law. Thus, maintaining an absolute prohibition of torture is better than having torture warrants.

Along with Gross (2004) and Scarry (2004), a third author who critiques Dershowitz’s (2002) proposal of torture warrants is Wisniewski (2008). Wisniewski’s critique focuses on the

fact that Dershowitz sets up a premise that only allow us two choices: either allow torture with torture warrants so that the actors can be held accountable and instances of torture can be reduced, or accept the status quo, which Dershowitz describes as a situation where torture happens with no consideration of the law and without any form of accountability. In Dershowitz's view, torture is an inclusive part of our political life, and he does not believe we can ever get rid of it. That's why he only gives those two options when he makes his argument for torture warrants. However, Wisnewski believes those are not the only two options.

Wisnewski (2008) argues that Dershowitz's (2002) proposal is heavily influenced by his, Dershowitz's, hatred of hypocrisy. Dershowitz believes it is highly hypocritical to have anti-torture laws while torture is obviously happening in our country. Therefore, Dershowitz's torture warrants represent a way to reconcile our laws and our actions. But Wisnewski argues that hypocrisy, though a horrible trait, should not be a reason for allowing something that is even worse than hypocrisy—torture in this case. To support his point, Wisnewski gives the example of a secret killer who advocates for the suppression of killing in public. Maybe this killer is even a member of a human right organization that fights against killing, but at night, he is a secret killer. Though he is being hypocrite, it is certainly better than trying to institutionalize killing. The same goes with smoking: It is okay for someone who smokes in secret to discourage other people to smoke. His undeniable hypocrisy should not force him to endorse smoking. So Wisnewski agrees with Dershowitz that it is anti-democratic to have anti-torture laws while we have instances of torture in our country, but Wisnewski does not think that that would justify issuing torture warrants, since torture warrants themselves would be anti-democratic, and even arguably more anti-democratic than the hypocrisy of having anti-torture laws while being aware that torture is indeed practiced in the country.

Wisnewski (2008) concludes by coming back to his opening point that Dershowitz (2002) only brings two options to the table: whether to use torture legally or to use it illegally. However, one option that Dershowitz does not mention is the one written in the United Nation's anti-torture convention that states that torture should never be permissible under any circumstance, and we should do everything in our power to make sure this position is enforced. The fact that Dershowitz ignores this third position makes his argument appear as one that is not trying to advance the debate about torture but one that is trying to end it. Unfortunately, by only giving two options and ignoring an important one, Dershowitz' proposal cannot be the right solution.

My own assessment of Dershowitz's (2002) proposal for torture warrants is multi-oriented, but I am only focusing on one aspect here—torture is impossible to control and in addition to the harm done to the torture victim, the torturer suffers significant damages that arguably lead him to lose his very humanity. Even if torture warrants are designed to be controlled, I believe that once an individual starts torturing because he was ordered to do it in a supposedly ticking bomb scenario, it is very likely that he will normalize the practice of torture and he will eventually be perverted by that practice. Thus, the torturer who started by simply respecting orders from a judge will possibly end up torturing for other reasons such as regular interrogation, punishment, entertainment, and even possibly out of pure enjoyment. The photos of Abu-Ghraib are the best evidence to this. The look in the eyes of those guards makes me think of a human being who has lost his soul, the very essence of his humanity. If torture is institutionalized, in addition to all the problems pointed by the authors above, we are likely to have more perpetrators lose their very essence as humans. Thus, there will be a lot more instances of torture because these perpetrators will become immune to the atrocities of the practice. So, I don't think torture warrants would be the appropriate solution to our current

problem with torture. However, I agree with Dershowitz that the status quo is unacceptable. It is inadmissible that we ban torture on paper even though we practice it in actuality. Therefore, Dershowitz accomplishes a lot by exposing the failures of the current laws against torture, and I commend him for proposing possible laws as replacements.

#### **Walzer and The problem of dirty hands**

Walzer (1973) also argues that in certain situations, torture should be sanctioned. Specifically, he argues that a political leader might know torture to be wrong, but at the same time, he might believe its sanction is the right thing to do in a specific situation. In such a case, Walzer argues, the political leader is facing a problem of dirty hands and must sanction the torture. In *Political action: The problem of dirty hands*, Walzer argues that it is impossible to govern innocently; it is easy to get one's hands dirty in politics, and it is often right to do so. He argues that it is permissible for a good man to do bad things when he faces certain situations as long as he realizes that he is doing something wrong, and he is ready to deal with whatever consequences ensue. In a case of torture, for example, this would mean that an official who allowed torture, knowing that torture is illegal, can be justified because of the specific circumstances (ticking bomb), but he should be ready to pay for it. He should turn himself in to justice and accept his sentence. Walzer then asserts that we should not judge such a man for he is a good man, but that does not make his actions right. That's why he should be ready to assume the punishment.

#### **In response to Walzer's problem of dirty hands**

Miesels (2008) is an author who partially agrees with Walzer's (1973) problem of dirty hands. In his article, "Torture and the problem of dirty hand," Meisels argues that it is generally agreed that liberal democracies believe torture is morally wrong. He explains that because of that

general belief, it had been clear for a long time that no liberal democracy would allow the use of torture in any circumstance. However, with the rise of international terrorism, it seems torture has become an option in liberal democracies when it is believed that torture of a captured terrorist could divulge lifesaving information. With that premise, Meisels elaborates on instances in which torture might be acceptable even though it is wrong.

He starts by presenting Walzer's (1973) "dilemma of dirty hands" in which a leader knows that torture is wrong in all circumstances, but when he faces a situation when he believes torture would be the right thing to do, he allows it. Meisels (2008) supports this point by saying that torture might be morally unjustifiable, but in certain circumstances, it might be the required course of political action. In a sense, the leader who knows torture to be morally wrong but still authorizes it because it is the best thing to do is dirtying his hands with the blood of the tortured prisoner. His hands are dirty because torture is wrong and he knows it, but at the same time, he should not be blamed because he recognized that a wrong action had to be allowed for a good reason. So this leader is paradoxically doing a wrong that is right.

In the case of a dirty hands problem, Walzer (1973) believes that the leader who allowed torture in the circumstances discussed above should be held accountable for his acts and accept any punishment that the law provides for his offense. The fact that his permission of torture might have produced successful consequences or the fact that he recognized that he did something wrong are not sufficient. Some sort of punishment should still be applied to him by the state, the public, or any qualified authority. Thus, Walzer believes that the leader should be punished for doing what he ought to have done.

However, while Meisels (2008) supports the theory of the dirty hands, he disagrees with the idea that the leader who did what he ought to have done should be punished. For Meisels, the fact that the leader acted in good faith and did what he should have done for his people means he should not be punished. In fact, Meisels argues that punishing such a leader would be counter-intuitive. If the leader had done something that we would not have expected him to do, then it would be okay to punish him, but if we recognize that he took a risk, knowing that torture is wrong, but he still allowed it because he believed in good faith that was the best solution and the solution his people would favor, then punishing him is simply wrong. Thus, Meisels only partially agrees with Walzer's (1973) dirty hands theory—he argues that the leader who dirtied his hands should not be held accountable.

Similarly to Meisels (2008), Nielsen (2000) partially agrees with Walzer's (1973) problem of dirty hands. In his article "There is no dilemma of dirty hands," Nielsen argues that Walzer is only right in parts of his argument about the problem of the dirty hands. Nielsen agrees with Walzer that in order to succeed in politics, even when we have the best intentions possible, we might have to commit acts that would be considered evil and/or unlawful; that is, in politics, we are very likely to dirty our hands in order to prevent an even worse evil from happening. Though Nielsen agrees with Walzer thus far, he does not agree with Walzer's idea that the political leader dirties his hands because he does what is wrong in order to achieve what is right. Nielsen believes it is a contradiction or at least a paradox to claim that one must do wrong to do right. He argues that when we do what leads to the avoidance of the greater evil, we can't be doing what's wrong. In fact, by doing the lesser evil, we are doing what we ought to do, so we are doing what is right. Even though what the political leader does might be perceived as wrong in normal circumstances, the fact that he does it in order to prevent a greater evil makes it right.

Thus Nielsen believes that Walzer is wrong in his formulation of the problem of the dirty hands. In fact, Nielsen believes that there is no dilemma of dirty hands.

To tie this back to the issue of torture, Nielsen (2000) understands and agrees that a political leader might find himself in a position where he must allow the torture of a terrorist in order to prevent an atomic bomb from detonating in a major city and killing thousands of innocents. However, unlike Walzer (1973), Nielsen does not think that the political leader who sanctions the torture of the terrorist is doing anything wrong. He does not even think there should be a moral dilemma in this situation, considering the greater evil that would have been prevented. Nielsen concludes by arguing that for a leader who dirtied his hands, by sanctioning torture for example, "it is difficult enough in such situations to ascertain what the lesser evil is and to steel ourselves to do it, without adding insult to injury by making, artificially and confusedly, a conceptual and moral dilemma out of it as well" (141). Nielsen believes that a political leader who has sanctioned torture went through very difficult times while making that decision, so he should certainly not be accused of being immoral for doing what's right.

Another author who critiques Walzer's (1973) problem of dirty hands is Yeo (2000). In his essay "Dirty hands in politics: On the one hand, and on the other," Yeo argues that the politician who dirties his hands is more likely deceiving the public than actually facing a dilemma. To illustrate his point, Yeo analyzes Walzer's example of a political leader who sanctions torture in a ticking bomb scenario because he believes it to be the right thing to do in order to save innocent lives. Walzer insists that this specific political leader believes it is wrong to torture not only in certain circumstances, but always. In fact, during his campaign, this political leader has angrily expressed his belief in the absolute evil of torture. This political

leader expresses two contradictory views: one that says it is right to torture the ticking bomb terrorist and another that says it is never right to torture.

Yeo (2000) argues that such contradiction needs to be reconciled. The mere fact that the political leader feels guilty, as Walzer (1973) argues, is not enough to reconcile the contradiction. So in an attempt to reconcile it, Yeo proposes that maybe this political leader changed his mind on the topic of torture. Maybe he used to think torture was absolutely non-permissible, but he has now changed his mind and believes torture can sometimes be permissible or vice versa. However, Yeo argues that it is unlikely that such change happened in the views of the political leader. But it remains impossible that this leader actually believes both views as they are opposite. Instead, Yeo argues, it is more likely that for political reasons, he does not want us, the public, to know that he would ever sanction torture, especially because he knows torture to be legally and morally wrong. However, Yeo believes there is an even stronger proof that this political leader is probably lying, and he is probably very likely to lie in the future. If this leader knows it is wrong to torture, but he allows it because he believes it is better for the public, then he could certainly do the same thing about lying. He might strongly believe that lying is wrong in itself, but if he also believes that lying would be the better thing to do in order to preserve the moral order or to ensure the credibility of the press release, for example, he will certainly lie. More specifically, "since the dirty-hands deed cannot publicly be reconciled with official morality, it may be necessary that it be covered up, suppressed, or otherwise concealed" (162). *Thus Yeo concludes that the dirty hand politician who allowed torture, far from facing a dilemma, is actually a liar who should not be trusted.*

My assessment of Walzer's (1973) problem of the dirty hand is virtually a combination of the positions advanced by the three authors above. I agree with Walzer's proposal that political

leaders find themselves in situations in which they must make decisions that would not be appropriate in regular times. I also agree that if they judge they should authorize unlawful actions, they should do it. However, the fact that a political leader who dirtied his hands feels guilty about his acts is irrelevant to me. What matters is that he broke the law, and in order to determine how to respond to his temporary suspension of the rule of law, the public and other government officials should look at the results of his actions after the facts. If indeed it is unanimously, or at least in majority, determined that he did what was best and the future supports his decision, then he should be forgiven. But if his acts are proven unnecessary and useless, he should be punished for it. In order to address Yeo's (2000) valid concern about the honesty of political leaders, it is important that how they feel be irrelevant, especially because we have no certain way of knowing how a person feels about an issue such as torture beyond what they communicate to us. Therefore I agree with Walzer that political leaders face a problem of dirty hands, but I don't think their moral position on the matter should be considered—only their actions and their results should be considered.

#### **Posner and the presidential powers during emergency times**

While Dershowitz (2002) focused his argument on the regulation of torture and Walzer (1973) focused his on the ethics of a leader who has dirtied his hands by allowing torture, Posner (2006) addresses issues related to torture by using the constitution and the presidential powers as basis. In his book, *Not a Suicide Pact*, Posner argues that the constitution is not supposed to be a document that never changes. He believes it should be bent to fit specific circumstances because a constitution that does not bend will eventually break, thus leading to losses that could have been prevented if the constitution had been bent. In fact, he argues that the constitution is meant to be loosened in order to let the democratic forces play in extreme circumstances. That's why in

times of danger, civil liberties are narrowed. Posner argues that according to the constitution, the president is responsible for the security of the nation, so in such times of danger, he is the one to decide how narrow the civil liberties should be. In a case of a terrorist threat or attack, for example, we should agree to have our liberties narrowed until the threat is averted, no matter how long it takes.

While we are all supposed to have our civil liberties narrowed in times of danger such as terrorist threats, the terrorist suspects, according to Posner, should be given even less constitutional right than ordinary criminals. In fact, in an attempt to protect the nation during a terrorist threat, it can be justified to torture terrorist suspects if it is believed they can help prevent attacks against the nation. Posner refers to the “law of necessity” as a moral justification for acting against the constitution by allowing torture of terrorist suspects. He even goes further by arguing that the law of necessity can trump constitutional rights in extreme circumstances. All those decisions of what is necessary in times of emergency should be made by the government, and Posner argues that we should acknowledge that the government should have the power and even the duty to violate certain rights, including constitutional rights, when they judge it to be the right thing to do to prevent catastrophic harm to the nation.

In the chapter four of his book, *Not a Suicide Pact*, Posner (2006) argues that the greater the information kept by a terrorist is believed to be, the greater coerced methods his interrogators should use to make him speak, and the greater such coerced interrogation is allowed by the constitution. Posner believes the degree of coercion used on a suspect who refuses to speak should be proportional to the value of the information the suspect holds. If for example the suspect refuses to give up information about the location of a ticking bomb, the location of weapons of mass destruction, the name of a key terrorist leader, etc., then the coercion should be

as great as possible to make him talk. Then in an argument reminiscent of Dershowitz's (2002), Posner even claims that in such a situation, most people would support the torture of that terrorist.

He then continues by explaining that as long as the criminal defendant is not sentenced and the information gathered through coerced interrogation is not used to convict him of a crime, the Eighth Amendment's prohibition of cruel and unusual punishment and the Fifth Amendment's prohibition against self-incrimination are not applicable. Thus, a terrorist being tortured in an attempt to prevent imminent or future attacks against the nation is not protected by the constitution.

Addressing possible critics, Posner (2006) recognizes that certain people, diehard libertarians, as he calls them, would probably not support torture even in extreme situations on the grounds that torture never works anyway. But he argues that such beliefs are incorrect because despite the fact that some people will withhold information even when they are tortured and some others will make up information to stop the torture, torture remains an effective method to gather true information. The numerous cases of false positives do not mean that torture never works.

In order to address the concerns of those who would still oppose torture of a terrorist in extreme circumstances, Posner (2006) invites his readers to consider the fact that we still execute people, and when soldiers kill enemies on the battle field, no one, including themselves, seems to believe they are doing anything wrong. He then goes on to explain that the torture he advocates has nothing to do with the type of torture used by dictators in order to scare or intimidate people. In addition, given the wide opposition of torture in America and the numerous leaks about

instances of torture in America, it is clear, in Posner's perspective, that the American government would never allow torture of a suspect unless it believed torture to be necessary for the specific circumstance.

Posner (2006) believes we should trust the authorities to recognize and act on moral duties that might be higher than their legal duties. That's why he argues that President Lincoln was right when he acted on a moral duty higher than his legal duty by suspending habeas corpus for Confederate sympathizers during the civil war. Posner believes Lincoln was as right in his breaking of the law as Gandhi and Martin Luther King were right in their breaking of the law. Martin Luther King and Gandhi broke the law and revolted to solve the specific problems they faced in their time. So today, with the existence of weapons of mass destruction that could possibly kill thousands or even millions of innocent Americans, the president's moral and political duty should be to authorize torture if it can save those innocent lives—it would be *necessary* for the president to allow torture in such extreme circumstances.

Posner (2006) concludes chapter four of his book by arguing that the president is the ultimate decision maker in cases of emergency. Whether or not the country is at war, the president, as the commander in chief, is always expected to defend the nation. That is a right that is given to him by the constitution, so he should be expected to act on it.

#### **In response to Posner and the presidential powers during emergency times**

Cole (2007) disagrees with Posner's argument, and he argues that Posner's (2006) interpretation of the constitution is very ill-suited because it goes against the very idea of precommitment that is the basis of constitutionalism. By arguing that a constitution that does not bend will eventually break, Posner treats the constitution as a document that invites utilitarian

judgments that would allow the law to be broken depending on the specific case. By doing so and arguing that all the power to decide what the constitution means should be left to a government judge, Posner, according to Cole, fails to recognize the constitution as based on precommitment, and instead, he gives all the power to define what the constitution means to judges who use their own subjective judgments to impose their will on others.

Cole (2007) argues that precommitments are so important in the constitution because the constitution is designed to guide us in times when we would be tempted to act irrationally. He argues that history tells us that in times of great fear and danger in liberal democracies, we tend to act just in such irrational manners with actions that target vulnerable groups and sacrifice them for the gains of the majority. Therefore, the constitution is there to remind us that we should avoid such behaviors. We should look at the constitution as a document that gears us in the right direction regardless of the specific situation and especially in situations where we would be tempted to target the vulnerable—the torture victim in the context of this paper.

To respond to Posner's position on coercive interrogation, Cole (2007) restates Posner's position that the Fifth Amendment would only protect a torture victim if the confession was used in court; therefore, if the victim was tortured solely for intelligence purpose, he is not protected by the Fifth Amendment. But Cole observes that in his argument, Posner only focuses on one case that serves his purpose, *Miranda vs. Arizona*, and he ignores several other Supreme Court decisions that banned involuntary confession for the simple reason that the interrogation methods violated the due process of law. This shows that when an individual is coerced to confess against his will, especially through physically harmful acts, this individual can still be protected by the due process law even if his confession is not brought up in court against him.

Cole (2007) concludes that the constitution should not be left to some officials to determine whether or not they should bend it depending on how much information they expect to uncover through torturing someone. Due process highlights certain basic rights that are applicable to all human beings in all circumstances, and all human beings are protected against torture and all inhuman and degrading treatments. Not only the constitution protects potential torture suspects against such treatments, but the international convention against torture does the same, and virtually all nations in the world, including the United States, have ratified it, so torture should never be allowed on the grounds that the constitution does not prohibit it.

In addition to Cole (2007) Kremnitzer and Levanon (2009) critique Posner's argument that in time of national security, the law should be changed to fit the specific situation. Posner (2006) believes constitutional standards should be shaped to handle the specific situation of emergency. In the context of this paper, that would be imminent nuclear attack from terrorists. Kremnitzer and Levanon stand against this proposition and argue that balancing principles such as the ones in the constitution are not designed for specific circumstances. Instead, they are designed to be flexible enough to cover a very wide variety of cases based on "overall assessment of the importance of liberty vis-A-vis safety or according to the level of harm to which each value can reasonably be subjected. They are shaped with the prospect of being applied under all circumstances and take changing circumstances into account" (250). Therefore, Kremnitzer and Levanon argue, Posner's implication that the constitution cannot sufficiently direct us on how to handle emergencies, even ones as extreme as a nuclear attack from terrorist, is erroneous. Kremnitzer and Levanon continue by arguing that there is no reason to believe that the designers of the constitution did not think about how it would work in times of emergency. Even if the constitution was designed in times of peace, it should still be applicable in times of

emergency. This should especially be the case, Kremnitzer and Levanon argue, because in times of emergency, specifically when the country is in great danger, even the greatest judges can be influenced by fear, patriotism, public pressure, etc. to the point that they could exaggerate a situation of emergency.

Kremnitzer and Levanon (2009) expand that if, as Posner (2006) suggests, the constitution is bent during emergencies, and civil liberties of certain individuals are taken away, it is important to realize that such liberties will be taken away for a very long time, if not forever. This is the case because terrorist threats, Kremnitzer and Levanon argue, are not likely to disappear soon.

Also, when Posner (2006) specifically argues that torture should be allowed as a preventive measure during emergencies, he argues that the power to allow torture should be given to the executive. He argues that it is the constitutional right of the executive to decide when to allow torture, and we must all accept it. However, Kremnitzer and Levanon (2009) argue that Posner does not provide a solution to the inherent lack of trust we have towards the government. In explaining some of the reasons why we are suspicious of the government, especially during emergencies, Kremnitzer and Levanon state that decision makers are usually more prone to act on what will solve a problem in the immediate, and they often ignore the moral aspects of problem; also, decision makers tend to see solutions to problems as black or white, so they are likely to consider only two options instead of several others; and finally, decision makers tend to focus on short term results instead of long term. In the case of torturing a terrorist, for example, decision makers could allow torture and be satisfied because the torture provided short term results, but they would not necessarily consider the long term effects that the sanction of torture could have in a society in which terrorism still exists. For those different reasons,

Kremnitzer and Levanon believe torture should never be allowed. In fact, they conclude that commitment to the rule of law is essential to liberal democracies, so we should not allow any practice that would move us away from our laws. This, the authors argue, is exactly what Posner's proposal of bending the constitution during emergencies would do.

In his critique of Posner's (2006) proposal, Margulies (2006) focuses on Posner's "law of necessity." Margulies argues that it is problematic to give broad powers to the executive during emergencies with the justification that those powers are a necessity to avoid long term damages that may result from trying to force the president to respect the current laws. Margulies believes this is problematic because any regime that allows exceptions to the law will inevitably expand and attempt to use those exceptions even in situations when they are not necessary. To illustrate this, Margulies uses the very example of President Lincoln, which was also used by Posner in his writings. Margulies explains that after the civil war, President Lincoln tried to try non-belligerent before military commissions although the Federal Courts were again operational. The Supreme Court did not allow this to happen, but it can be argued that since President Lincoln had used the "law of necessity" once before and had made exception of his breaking of the rule, he was encouraged to try it again despite the fact that it was not at all necessary. In this case, the presence of the federal courts made it totally unnecessary to try civilians before military commissions, but President Lincoln still tried to do it. In addition, President Lincoln's suspension of Habeas Corpus during the civil war, Margulies argues, set the precedent for future instances of presidents making an exception of themselves in less justifiable circumstances. This was the case of "Wilson's suppression of civil liberties and the World War II internment of Japanese-Americans" (322). Instead of representing a special instance of extralegal action, the exception generates its own common law. Thus future presidents who found themselves in

situations they believed to be similar to the one President Lincoln faced used his experience as a model to justify their breaking of the law.

This would be similar in a case where the Constitution is bent in order to allow torture of certain individuals in times of national emergency. The sanction of torture would start as an exception, but with time, future actors would try to repeat that exception to the point that it would risk being normalized. That is the reason the executive should not be allowed to bend the constitution and allow torture under the justification that it was necessary in that specific situation.

Digging deeper into the example of President Lincoln, Margulies (2006) agrees that President Lincoln was right in ignoring the ruling of Chief Justice Taney that suspending Habeas Corpus was unconstitutional. However, Margulies emphasizes the fact that we could only know that President Lincoln was right a long time after the facts. We had to wait and observe the policies he put in place in order to see that their effects were positives. Therefore Margulies argues that courts should not allow the bending of the constitution in advance before they see the results produced by the bending. In that sense, it is a good thing that Chief Justice Taney ruled President Lincoln's order unconstitutional because the results could have been different. In the case of the sanction of torture by the executive when we face a ticking bomb scenario, Margulies would therefore argue that we can't allow torture without knowing the specific results that will result from torturing the ticking bomb scenario. Thus, he is in complete disagreement with Posner.

My own response to Posner's (2006) proposal that we give total and super powers to the government in times of emergency is that such a situation appears very dangerous. If we are ready to give up some or many of our rights during emergency and accept that the government

violates our liberties during times of crisis, I believe we should be ready to do the same forever. It is often very difficult to know what constitutes a time of emergency, and similarly, it is often very difficult to go back to normal once a state of emergency has been declared. As soon as he took power, Hitler declared a state of emergency that lasted more than five years (Friedlander 1997). The results of Hitler's state of emergency and the powers he attributed to himself during those years cannot be discussed here, but it is important to keep Germany in mind while considering giving endless super powers to our government during times of crisis. Posner's proposal that the constitution be bent during times of emergency would open the door to all sorts of ridiculous interpretations, and depending on who happens to be in the government, the constitution would change meanings and support selfish agendas. Therefore, it is important that the constitution remains solid in times of peace as in times of crisis. If torture is prohibited by the constitution, it should remain that way at all times, and anybody who violates that provision of the constitution, including the president, should be held accountable.

### **Concluding thoughts**

#### **Why this matters**

The torture debate in the United States is relevant to several audiences. This debate should be important to all American citizens because what the American government does shapes the perception of the United States and of all Americans around the world. If the United States allows torture, for example, it would be hard for the United States to point at the Libyan or the Iranian government and accuse them of allowing torture in their countries. At least, the credibility of the United States would be undermined because the Libyan or Iranian government could invite the United States to consider the cases of torture in the United States. When an

American travels abroad, he is identified by what his government does, so it is important that all Americans get involved in this debate and do their parts.

In addition, all global students of politics around the world should be interested in this debate because torture is prohibited by the Geneva Convention, to which virtually all nations in the world are signatory. If the United States' government sanctions torture while being signatory to the Geneva Convention, it is important that citizens in other countries ask themselves whether the same thing is happening in their countries. If a country formally agrees to respect the Geneva Convention but disregards its rules in actuality, the citizens of that country should confront the hypocrisy of their government and join the global torture debate—torture is an issue that affects all global citizens.

Also, this debate is relevant to all university students around the world. The debate has been around in political circles for some time, but it seems no final solution has been found. Thus it is important that students join the debate. Universities are often the avenues where important ideas circulate before they become available to the public, so all students should participate in this debate. Moreover, given that the students of the present will be the decision makers of the future, it is important that they be prepared to make the right decisions for their countries when the time comes. The way to work in that direction is by learning everything that is being said about torture and become involved in the debate. And in addition to schools, most public institutions should seek to learn more about this topic because, as Crawford (2010) argues, "Unless the moral, legal and political consequences of an acceptance of torture by the American people[or citizens of any other country] are taken up in classrooms, congregations, the media and other public arenas around the country, the ideology of 'national security' will continue to define

the 'debate' over torture, dictate the silences, and shape the public's response to the insecurities of our time" (n.p).

### **Torture and Violence**

While considering the different positions on the torture debate, it is easy to divorce torture from our everyday lives and treat it as something that we, modern human beings, don't do naturally. But if the atrocity of torture is ingrained in its cruelty and violence, one has to wonder why we are not as appalled by other acts of violence that have been *normalized* by our society. Paul Kahn (2008), in his book *Sacred Violence: Torture, Terror, and Sovereignty*, explores that question quite skillfully. He argues that most Westerners will believe an individual who is punished under the Sharia is being tortured, and they would be offended by such punishment. However, those same Westerners would not think it is torture when we place criminal offenders in prison cells for decades. Similarly, when Europeans accuse Americans of torturing the people we condemn to several years on death row, we are offended. I believe such behaviors show that we have a clear idea of what defines the torture that we denounce, but there are aspects of our daily lives that we have become immune to, even though others might see those aspects of our lives as torture.

I argue that combat is an even better aspect of our lives that is comparable to torture. While the duels that used to define combat in the old times were fair as they opposed two individuals with the same weapon, the modern form of combat is anything but fair. As Khan (2008) argues, "the logic of combat seeks as its ideal a total asymmetry in the application of force. Its end is to obtain a position from which no harm can result to one's own side while all the injury is suffered by the enemy" (46). I believe that logic is perfectly applicable to torture.

The torturer shows his dominance and extremely abuses the tortured while he, the torturer, makes sure not to suffer at all. One could argue that at least in combat one can surrender and stop the conflict. But once again, I believe the idea of the conflict that stops because a white handkerchief is waved in the air belongs to our forefathers' time. In today's warfare, conflicts don't stop just because one side decides to surrender. In the 1999 movie *Three Kings*, realized by David O. Russel, we follow four American soldiers in the aftermath of the Persian Gulf War as they decide to steal gold that was stolen from Kuwait. In the opening scene, Sergeant Barlow is pointing his gun at an Iraqi soldier who is waiving his white handkerchief. Barlow appears confused as to what to do, but he eventually shoots and kills the Iraqi soldier. As he runs towards the body of the dead man, fellow American soldiers follow him and take pictures of themselves with the body. While that account is the product of fiction, it is important to notice that in the real first Gulf War, the Iraqi army was massacred as they fled Kuwait city (Khan, 2008, p.46-47). This is very similar to a tortured victim that begs for mercy while the torturer ignores and continues the torture.

I conclude by arguing that torture is an absolutely atrocious practice that should be eradicated from the surface of the earth if that is possible. However, I don't see any indication that such eradication is plausible in the near future, so we should realize that torture is present in our society because of our tendency to use violence as human beings. If we are ready to allow war, in essence the mass killing of other human beings in our name, for *any* reason at all, including self-defense, then we must be ready to do the same with torture.

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