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# *Liberal Democratic Torture*

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Liberal democracies have long practised torture, but should they ever permit their officials to torture (and, if so, when?), how should their citizens think and talk about it, and how should the law treat it? Is it just another instance of 'dirty hands' in politics? If it averts some terrible harm, can resorting to it be seen as choosing the 'lesser evil'? What, then, is torture? The 'torture memos' of the Bush administration's legal advisers are reviewed and their attempt to narrow its definition criticized, as is Judge Posner's attempt to confine it to physical coercion. Attempts to evade the questions above (on the grounds that torture is never effective in averting disaster) are rejected. It is suggested that torture, unlike other cases of dirty hands considered, cannot be rendered liberal-democratically accountable, in the sense that it will sometimes be legitimate and, when not, punished, because its practice cannot be publicly recognized without undermining both the democratic and liberal components of liberal democracy. This suggestion is supported by adducing a 'Durkheimian argument' to the effect that our institutions and customs have been so penetrated by core elements of an egalitarian 'religion of individualism' that violating them threatens a kind of 'moral disintegration'. This, it is argued, requires liberal democracies to reject the very idea of a scale that can allow comparison of the benefits against the costs of torturing. The absolute prohibition serves to maintain inhibitions, though these are currently being eroded by the fear of terrorism.

## THE PROBLEM OF TORTURE

In this article I propose to examine what I shall call the problem of torture. Doing so, I see, needs some defence. For Slavoj Žižek has argued that 'essays … which do not advocate torture outright, [but] simply introduce it as a legitimate topic of debate, are even more dangerous than an explicit endorsement of torture', for we thereby legitimze torture and this 'changes the background of ideological presuppositions and opinions much more radically than its outright advocacy.' The 'mere introduction of torture as a legitimate topic', Žižek writes, 'allows us to entertain the idea while retaining a pure conscience.'[1] But who says that we are entitled to a pure conscience and why should we think the protection of the purity of our consciences to be more important than facing up to hard questions?

So I want to address the key hard question in this area: namely, what attitude should liberal democracies take towards the practice of torture? We know, of course, that they have long engaged in it and encouraged it in other places under their sway.[2] It is enough to cite the French in Algeria, the Israelis, the British in Kenya and in Northern Ireland and the United States in Latin America and currently in various places: as Mark Danner writes, although it is not publicly admitted, we know that 'since the attacks of September 11 2001, officials of the United States at various locations around the world, from Bagram in

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[1] S. Žižek, *Welcome to the Desert of the Real* (London: Verso, 2002), pp. 103–4.

[2] See the brilliant, Swiftianly satirical essay on this theme by John Gray reprinted in his book *Heresies: Against Progress and Other Illusions* (Cambridge: Granta, 2005), chap. 15: 'Torture: A Modest Proposal'.

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Afghanistan to Guantanamo in Cuba to Abu Ghraib in Iraq, have been torturing prisoners.'[3] In addition, as Seymour Hersh reports, the United States has 'carried out instant interrogations, often with the help of foreign intelligence services – using force if necessary – at secret C.I.A. detention centers scattered around the world.'[4] According to Anthony Lewis, it became clear that:

> the American military and Central Intelligence Agency were holding terrorist suspects at places other than Abu Ghraib and Guantanamo. Some were not listed with the Red Cross, which complained that it was unable to check on the condition of all American prisoners. And some died while under investigation. One, an Iraqi general, Abed Hamed Mowhoush, was found in an autopsy to have died from 'asphyxia due to smothering and chest compression'.[5]

The questions I want to raise are: what should we expect of liberal democracies? Should they *ever* permit their officials to engage in torture (the definition of which will need attention)? If so, to what purpose and under what conditions? How should their citizens think and talk about torture practised in their name? What is the appropriate vocabulary for discussing this topic? And how should the law stand in relation to the practice of torture?

The problem of torture arises where it appears to be the only available means of averting some terrible outcome. One could say that the problem of torture is just a particular case of what is sometimes called the problem of dirty hands: that is, a species of moral dilemma, where, in doing what appears to be the right or best thing in the circumstances, we cannot avoid doing wrong. Closely related but distinct from cases of this kind are what are often labelled 'tragic choices', where there is a conflict between a general good (such as protection of the public) and a particular wrong, and no apparently right or best alternative: where, that is, there is no prospect of consolation with the thought that one did the right or best thing overall. Tragic choices involve the clash of conflicting duties or, as Hegel put it, of right with right. In such a case, whatever the agent does is wrong. As Bernard Williams wrote:

> though it can actually emerge from deliberation that one of the courses of action is the one that, all things considered, one had better take, it is, and it remains, true that each of the courses of action is morally required, and at a level which means that, whatever he does, the agent will have reason to feel regret at the deepest level.[6]

Examples of such moral dilemmas, both non-tragic and tragic, abound. The classic and classical tragic case is that of Antigone, but there are countless more mundane instances in all spheres of life. Tragic choices are typical, for example, of the policy and decision making of medical administrators, charged with the task of rationing scarce medical resources, and of other areas of public policy, where risks of injury and death are involved,

[3] M. Danner, ed., *Torture and Truth: America, Abu Ghraib and the War on Terror* (New York: New York Review Books, 2004), p. 10.

[4] S. Hersh, *Chain of Command: The Road from 9/11 to Abu Ghraib* (New York: Harper Collins, 2004), p. 50.

[5] A. Lewis, 'Introduction', to K. J. Greenberg and J. L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (New York: Cambridge University Press, 2005), p. xv. Since then there have been numerous reliably reported cases of interrogators employing standard techniques of torture. For example, Khalid Sheikh Mohammed, a top al-Qaeda operative apprehended in Pakistan in 2003, was reportedly subjected to 'water-boarding', which simulates drowning and asphyxiation (Jane Mayer, 'The Experiment: Is the Military Devising New Methods of Interrogation at Guantanamo?' *New Yorker,* 11 and 18 July 2005), 60–71, p. 65.)

[6] Bernard Williams, 'Conflicts of Values', in *Moral Luck: Philosophical Papers 1973–1980* (Cambridge: Cambridge University Press, 1981), pp. 71–82, at p. 74.

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and where, it seems, one cannot avoid doing an injustice to some group or category of persons whatever one does.[7]

## DIRTY HANDS

Here I want to focus on dirty hands, which are widely thought to be especially characteristic of political life. Non-extreme examples are cited by Williams: a politician, he wrote:

> might find himself involved in, or invited to, such things as lying, or at least concealment and the making of misleading statements; breaking promises; special pleading; temporary coalition with the distasteful; sacrifice of the interests of worthy persons to those of unworthy persons; and (at least if in a sufficiently important position) coercion up to blackmail.'[8]

None of these things are unique to politics, but perhaps we tend to associate dirty hands and politics because in political life the good to be attained tends to be framed in general terms and the wrongs committed highly specific. Spreading freedom around the world, social justice, the Defence of the Realm, the Cause of the Revolution, the Glory of the Republic may have been furthered, but particular people have been betrayed, lied to, or done in.

In a classic paper, Michael Walzer has discussed this issue. On Walzer's account, when

> rules are overridden, we do not talk or act as if they had been set aside, cancelled, or annulled. They still stand and have this much effect at least: that we know we have done something wrong even if what we have done was also the best thing to do on the whole in the circumstances.'[9]

He cites Machiavelli's dictum that 'when the act accuses, the result excuses' and his point is that the accusation stands. Machiavelli's 'political judgments', he writes, are 'consequentialist in character, but not his moral judgments.'[10] Walzer also cites Max Weber, who took a much more tragic view of the matter than Machiavelli. For Weber there was no consolation to be had in the thought that one is pursuing what is right or best overall. According to Weber, anyone who chooses to engage in politics 'lets himself in for the diabolic forces lurking in all violence'.[11] For:

> the world is governed by demons and he who lets himself in for politics, that is for power and force as means, contracts with diabolical powers and for his action it is *not* true that good can follow only from good and evil only from evil, but that often the opposite is true. Anyone who fails to see this is, indeed, a political infant.[12]

'No ethics in the world', Weber wrote,

> can dodge the fact that in numerous instances the attainment of 'good' ends is bound to the fact that one must be willing to pay the price of using morally dubious means or at least dangerous ones – and facing the possibility or even the probability of evil ramifications. From

[7] See G. Calabresi and P. Bobbitt, *Tragic Choices* (New York: Norton, 1978).

[8] Williams, 'Politics and Moral Character' in *Moral Luck*, p. 58.

[9] M. Walzer, 'Political Action: The Problem of Dirty Hands', *Philosophy and Public Affairs,* 2 (1973), 160–80, reproduced in part in S. Levinson, ed., *Torture: A Collection* (New York: Oxford Univesity Press, 2004), chap. 3, p. 68.

[10] Walzer, 'Political Action', p. 69.

[11] M. Weber, 'Politics as a Vocation', in H. H. Gerth and C. Wright Mills, eds., *From Max Weber: Essays in Sociology* (London: Routledge and Kegan Paul, 1948), pp. 125–6.

[12] Weber, 'Politics as a Vocation', p. 123.

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no ethics in the world can it be concluded when and to what extent the ethically good purpose 'justifies' the ethically dangerous means and ramifications.[13]

In what follows I want to explore this phenomenon of dirty hands in politics and ask, in particular, whether what we call 'torture' raises any distinctive questions in the present-day context of liberal democracies engaged in a war against terror. One contemporary writer about these issues, Michael Ignatieff, shares the view of Williams and Walzer that dirty hands in politics is a reality we must face up to. Unlike them, however, he writes as though we can rank or weigh or balance evils, according to some overall scale of value. He argues for what he calls a 'lesser evil morality' according to which 'necessity may require us to take actions in defence of democracy which will stray from democracy's own foundational commitments to dignity'.[14] Such an ethics is, Ignatieff writes, 'a balancing act: seeking to adjudicate among the claims of risk, dignity and security in a way that actually addresses particular cases of threat'.[15] In justifying an act as a lesser of two evils, he argues, we should not 'try to pretend that the necessary character of an evil act excuses its morally dubious character. Thus killing an innocent person to save the lives of hundreds of others might be a lesser evil but the act would still be wrong.' Values conflict and in times of danger the conflict becomes intense. So,

> [the] suppression of civil liberties, surveillance of individuals, targeted assassination, *torture* [*sic*], and pre-emptive war put liberal commitments to dignity under such obvious strain, and the harms they entail are so serious, that, even if mandated by peremptory majority interest, they should be spoken of only in the language of evil.[16]

On the other hand, Ignatieff writes that

> torture should remain anathema to a liberal democracy and should never be regulated, countenanced, or covertly accepted in a war on terror. For torture, when committed by a state, expresses the state's ultimate view that human beings are expendable. This view is antithetical to the spirit of any constitutional society whose raison d'être is the control of violence and coercion in the name of human dignity and freedom.'[17]

But to this one can imagine Max Weber retorting that Michael Ignatieff really should grow up. So my question is: is there a good argument for making an exception of torture? If necessary for the greater good, is it not then, though evil, just another example of the need to dirty our hands?

But, before turning to that question, let us return for a moment to the matter of dirty hands, for there are those who think there is no such thing at all. Thus, in criticism of the Walzer–Ignatieff view, Irfan Khawaja has written that the 'idea that politics requires "lesser evils" and "dirty hands" is an unargued dogma, characteristically asserted with vigor, but essentially undefended now for decades': for 'what is genuinely "necessary" in preserving rights is not a necessary or lesser evil: it is not an *evil* at all. It is simply what

[13] Weber, 'Politics as a Vocation', p. 121.

[14] M. Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton, N.J.: Princeton University Press, 2004), pp. 8–9.

[15] Ignatieff, *The Lesser Evil*, pp. 12–13.

[16] Ignatieff, *The Lesser Evil*, p. 18 (italics added to the original).

[17] Ignatieff, *The Lesser Evil*, p. 143.

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has to be done. In this respect, Barry Goldwater was precisely correct to say that "extremism in the defence of liberty is no vice." It isn't.'[18]

There are, in fact, two ruthless ways of dissolving the problem of dirty hands: that is, of denying that there is any such dilemma. One is to be ruthlessly consequentialist. The consequentialist (for example a utilitarian, or a Marxist perfectionist – remember Lenin on omelettes and eggs and Trotsky on 'Their Morals and Ours')[19] simply asserts that what is morally required is that one always does 'simply what has to be done' in order to bring about the best outcome, all things considered. On such a view the ideas of an uncancelled wrong and regret at committing it have no place and no justification. (Of course, the rule utilitarian can plead for a rigid rule against torturing, but his pleas will carry no weight in the face of the dire necessity to avoid some catastrophic disutility.) There is, we might add, an Orwellian version of this consequentialist view, which consists in redescribing the acts that simply have to be done in ways that obscure their otherwise troubling features. You do not suppress free speech; you eliminate harmful opinions, obscenity and corruption. You do not bomb villages; you pacify the countryside. You do not invade and occupy a country; you liberate it. And, in the case of torture, according to the Ryder report into military prisons, the military police at Abu Ghraib were to 'actively set favorable conditions for subsequent interviews'.[20] The other way of washing dirty hands clean is to be ruthlessly moralistic. This is the deontological way, which says 'never do wrong' – even if it means, as Kant thought, turning over a friend hidden in your house to a murderer inquiring about his whereabouts.[21]

Along with Williams, Walzer, Ignatieff and others, I am going to take the non-ruthless path of assuming that there is a real dilemma of which 'dirty hands' is the name, in the spirit of *Ecclesiasticus* 13: 1: 'He that touches pitch shall be defiled therewith'. Williams and Walzer doubt and Ignatieff embraces the thought that one can rank or weigh the wrongs committed against the good pursued, but all agree that the former remains an evil, or uncancelled wrong. So I now want to ask whether the problem of torture is not just another instance of dirty hands. So we need first to ask what exactly we are talking about. What are we to mean by 'torture'?

## THE TORTURE MEMOS

Much, of course, has been written about this, especially very recently, most notably by the authors of a series of secret memoranda for the Bush administration, published as appendices in Mark Danner's book *Torture and Truth* and, most recently and extensively, *The Torture Papers: The Road to Abu Ghraib* (of which a second volume is to appear) edited by Karen Greenberg and Joshua Dratel. These memoranda record the intense debate over methods of interrogation among government attorneys in the Office of Legal Counsel of the Department of Justice working closely with the White House, from 2002 onwards. In this context, Judge Richard Posner is, of course, right when he says that the word lacks a stable definition and that what is involved in its use is 'picking out a point along a

[18] I. Khawaja, 'Do We Have to Get Our Hands Dirty to Win the War on Terrorism? And What Does That Mean, Exactly?' *History News Network,* George Mason University, 3 February 2005, hnn.us/articles/4997.html.

[19] See Steven Lukes, *Marxism and Morality* (Oxford: Clarendon Press, 1985), chap. 6.

[20] Hersh, *Chain of Command,* p. 28.

[21] Kant's position is referred to in Jean Behtke Elshtain's chapter, 'Reflections on the Problem of "Dirty Hands" ', in Levinson, ed., *Torture,* chap. 4, p. 291.

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continuum at which the observer's queasiness turns to revulsion.'[22] The Bush advisers and officials were seeking a legally-based definition that would, as Kenneth Roth, executive director of Human Rights Watch put it in late 2004, establish that 'there is a realm of coercion that does not violate the international prohibition against torture.'[23]

The stage for the debate was set by the statement in January 2002 by Alberto Gonzales, now attorney general of the United States and then the president's legal counsel, that the war against terror is 'a new kind of war' in which the 'new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions.'[24] This view disturbed Colin Powell at the State Department, who in a memo observed that such a position would 'reverse over a century of US policy and practice in supporting the Geneva conventions and undermine the protections of the law of war for our troops, both in this specific conflict and in general,' warning, with considerable prescience, that there would be 'negative international reaction' that would 'undermine support among critical allies'.[25] A memo to Gonzales from John Yoo, deputy assistant attorney general, confirmed the president's determination that al-Qaeda members are not prisoners of war (POWs) but rather illegal combatants and thus 'not entitled to any of the protections of the Geneva conventions'[26] – and so these were not strictly enforceable in Guantanamo. The debate over how far US military and intelligence personnel are permitted to go in interrogating prisoners then commenced with the so-called 'Bybee Report' of August 2002, a memo to Gonzales, which sought to restrict the definition of torture in two distinct ways. First, it stressed that interrogation must involve acts 'inflicting, *and that are specifically intended to inflict,* severe pain or suffering, whether mental of physical'. Secondly, that suffering had to meet strict requirements:

> torture is not the mere infliction of pain and suffering on another but is instead a step well removed. The victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result. If that pain or suffering is psychological, that suffering must result from one of the acts set forth in the statute. In addition, these acts must cause long-term mental harm … Torture is generally understood to involve 'intense pain' or 'excruciating pain' or put another way, 'extreme anguish of body or mind.'[27]

Diane Beaver, staff judge advocate of the Defence Department, in October 2002 stressed once again that the severe mental pain or suffering had to be 'specifically intended', and indeed the mental pain had to be 'prolonged mental harm caused by or resulting from the intentional infliction or threatened infliction of severe physical pain or suffering.' Moreover, she added that it was permissible to use 'scenarios designed to convince the detainee that death or severely painful consequences are imminent' if there was 'a

[22] Richard Posner, 'Torture, Terrorism and Interrogation', in Levinson, ed., *Torture,* chap. 16.

[23] Hersh, *Chain of Command*, p. 71. Since these documents were written, the Office of Legal Counsel has issued a new memorandum with a less restrictive definition of torture, but this new memorandum contains a footnote stating that the office does not believe that the conclusions of the earlier memoranda 'would be different under standards set forth in this memorandum.' As Noah Feldman suggests, the purpose of this seems to be to give legal protection to any who have already acted on the basis of the early memos (Noah Feldman, 'Ugly Americans', *The New Republic,* 30 May 2005, pp. 23–9).

[24] Danner, *Torture and Truth*, p. 84.

[25] Danner, *Torture and Truth*, p. 89.

[26] Danner, *Torture and Truth*, p. 113.

[27] Danner, *Torture and Truth*, p. 126.

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compelling governmental interest and it is not done intentionally to cause prolonged harm.'[28] She then commented: 'However, caution should be utilized with this technique because the torture statute specifically mentions making death threats as an example of inflicting mental pain and suffering.' In particular, caution should be exercised in using a wet towel, since 'foreign courts have already advised about the potential mental harm that this method may cause'[29] (though she qualified this by suggesting that there should be scientific vetting of these procedures). This memo evoked anxiety in General James T. Hill, who wrote: 'I am particularly troubled by the use of implied or expressed threats of death of the detainee or his family.'[30] Then in April 2003 a Working Group on Detainee Interrogations reiterated the requirement of intentionality for an act to count as torture, making it even tighter. Torture, they wrote, is to be defined as:

> an act specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the adminstration or application, or threatened application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.[31]

Furthermore, the Geneva Torture Convention proscribes torture-like acts that constitute cruel, inhuman or degrading treatment, and this in the United States should be understood to mean:

> to inflict pain or harm without a legitimate purpose; to inflict pain or injury for malicious or sadistic reasons; to deny the minimal civilized measures of life's necessities and such denial reflects a deliberate indifference to health and safety; and to apply force and cause injury so severe and so disproportionate to the legitimate government interest being served that it amounts to a brutal and inhumane abuse of official power literally shocking the conscience.[32]

Accepting the recommendations of this report, Donald Rumsfeld issued a document which, among other things, permitted (as excluded from torture) 'attacking or insulting the ego of a detainee, not beyond the limits that would apply to a POW' (but then adding that, since unlawful combatants were not entitled to such protections, consideration should be given to the views of other nations that they should be so entitled, *prior to the application of the technique*); and that interrogators be given 'reasonable latitude to vary techniques depending on the detainee's culture, strengths, weaknesses, environment, extent of training in resistance techniques as well as the urgency of obtaining information that the detainee is known to have.'[33] Lieutenant General Riccardo Sanchez, then overall commander in Iraq, issued a memo in October 2003 specifying that the need for actionable intelligence meant that interrogators could (presumably without engaging in torture) 'manipulate an internee's emotions and weaknesses' and assume control over the 'lighting, heating … food, clothing and shelter' of those they were questioning.[34] Finally, there is a report

[28] Danner, *Torture and Truth*, p. 174.
[29] Danner, *Torture and Truth*, p. 176.
[30] Danner, *Torture and Truth*, p. 179.
[31] Danner, *Torture and Truth*, p. 194.
[32] Danner, *Torture and Truth*, p. 194.
[33] Danner, *Torture and Truth*, pp. 202–4.
[34] Danner, *Torture and Truth*, p. 12.

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from Major General Geoffrey Miller, formerly commander of Guantanamo and subsequently commander of Abu Ghraib, who, after traveling to Abu Ghraib in August 2003, recommended that those in charge there should 'dedicate and train a detention guard force … that sets conditions for the successful interrogation and exploitation of internees/detainees.'[35] At this point, Mark Danner comments, 'interrogation methods officially intended for use only on prisoners not protected by the Geneva Convention, like those in Guantanamo, "migrate" (in the words of James R. Schlesinger in his report) and are employed on prisoners in Iraq who are entitled to such protection.'[36]

What this fascinating debate amounts to is well summarized by Karen Greenberg as 'a carefully constructed anticipation of objections at the domestic and international levels and a legal justification based on considerations of failed states, non-state actors, and the national security agenda of the United States'.[37] It shows a continuing, collective effort to secure a minimalist definition of torture, by shifting the point where torture can be said to begin along Posner's continuum to allow for a range of practices believed necessary to secure actionable intelligence, provided that there is 'urgency of obtaining information' and a 'legitimate government interest' is served – practices such as the following, recorded by the Red Cross as having been 'used by [US] military intelligence in a systematic way to gain confessions and extract information':

*Hooding, used to prevent people from seeing and to disorient them, and also to prevent them from breathing freely … [which] could last for … up to two to four days;
*Handcuffing with flexi-cuffs, which were sometimes made so tight and used for such extended periods that they caused skin lesions and long-term after-effects on the hands (nerve damage), as observed by the ICED;
*Beatings with hard objects (including pistols and rifles), slapping, punching, kicking with knees or feet on various parts of the body (legs, sides, lower back, groin) …;
*Being paraded naked outside cells in front of other persons deprived of their liberty, and guards, sometimes hooded, or with women's underwear over the head …;
*Being attached repeatedly over several days … with handcuffs to the bars of their cell door in humiliating (i.e. naked or in underwear) and/or uncomfortable positions causing physical pain …;
*Exposure while hooded to loud noise or music, prolonged exposure while hooded to the sun over several hours, including during the hottest time of the day when temperatures could reach 122 degrees Fahrenheit … or higher;
*Being forced to remain for prolonged periods in stress positions such as squatting or standing with or without the arms lifted.[38]

Furthermore, the Red Cross details techniques which illustrate what Secretary Rumsfeld must mean when he specifies as allowable 'attacking or insulting the ego of a detainee'

[35] Danner, *Torture and Truth*, p. 76.
[36] Danner, *Torture and Truth*, p. 76.
[37] K. J. Greenberg, 'From Fear to Torture', in Greenberg and Dratel, *The Torture Papers*, p. xvii. According to the still-classified Church Report into detainee abuse, there was 'no link between approved interrogation techniques and detainee abuse', and some of the more extreme arguments in these memos were never adopted as policy by the adminstration. But, as Feldman argues, it is plausible to associate the thought-world of these memos with the abuses that took place. Furthermore, the memos can be seen as having had the function of protecting the CIA, which is not bound by the Uniform Code of Military Justice (Feldman, 'Ugly Americans').
[38] Danner, *Torture and Truth*, p. 6.

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and gives discretion to interrogators to vary techniques depending on the detainee's culture. Thus,

> Detainees are kept hooded and bound, made to crawl and grovel on the floor, often under the feet of American soldiers, forced to put shoes in their mouths [Arabs consider feet or the soles of feet as unclean]. And in all of this, as the Red Cross report noted, the *public* nature of the humiliation is absolutely critical; thus the parading of naked bodies, the forced masturbation in front of female soldiers, the confrontation of one naked prisoner with one or more others, the forcing together of naked prisoners in 'human pyramids'. And all of this was made to take place in full view not only of foreigners, men and women, but also of the ultimate third party: the ubiquitous digital camera with its inescapable flash, there to let the detainee know that the humiliation would not stop when the act itself did but would be preserved into the future in a way that the detainee would not be able to control … for the prisoners the camera had the potential of exposing his humiliation to family and friends, and thus served as a 'shame multiplier,' putting enormous power in the hands of the interrogator.[39]

## DEFINING TORTURE

But on reflection we can see that there is not, as Posner suggests, one continuum or scale on which torture can at a certain point be said to begin, but several such continua or scales. There is a physical-force-inducing-pain continuum. There is a distress continuum, measuring the effectiveness of techniques in inducing 'anguish' which, as the Bybee Report expresses it, can become 'extreme' and at the limit cause 'long-term mental harm' or, as the Working Group put it, the profound disruption of 'senses or personality'. There is a fear continuum, measuring the effectiveness of threats to break the will or resistance of detainees. There is a humiliation continuum, of which the last quotation gives instances, which need not involve much in the way of physical force or the fear of it and can leave the will intact and even strengthen the power to resist. And there is an offensiveness continuum along which, as Posner suggests, queasiness turns into revulsion – or rather, there will be various offensiveness continua, depending on what people from different cultural backgrounds (the detainee and the interrogator, for instance) find to be offensive.

The debate within the Bush administration focused entirely on aiming to locate what is to count as torture along the far extreme ends of the first three of these continua (with the additional restrictions that these effects of pain, anguish and fear must be specifically intended, and that if treatment is to count as cruel, inhumane or degrading it must be malicious or sadistic, without a 'legitimate purpose' and shocking to the conscience). But, we must ask, is this a reasonable way to define 'torture' (and its appropriate penumbra of torture-like acts that are cruel, inhuman and degrading), where what is reasonable is determined both by linguistic usage and by the accepted meaning of international covenants and conventions, notably the United Nations Convention against Torture and other Inhuman and Degrading Acts? The concept of torture, I suggest, actually straddles all five of the continua I have distinguished. Thus the United Nations Convention definition

[39] Danner, *Torture and Truth*, pp. 18–19. Seymour Hersh reports that a book by the cultural anthropologist Raphael Patai, *The Arab Mind*, was said to be the bible of the neoconservatives in Washington, encouraging them in the belief that Arabs only understand force and that their biggest weakness is shame and humiliation (Hersh, *Chain of Command*, pp. 38–9). In 'The Experiment' (from the *New Yorker*), Jane Mayer details how ideas acquired through training Americans to resist abuse, through a Pentagon-funded programme called SERE (Survival, Evasion, Resistance, Escape), have been 'spread to Americans who used them to perpetrate abuse'. These include the 'religious dilemma', involving the desecration of a holy book and the use of sexual gambits (Mayer, 'The Experiment', fn. 3, p. 64).

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refers to 'severe pain or suffering, whether physical or mental' and aligns torture with 'other inhuman or degrading acts'. Historically, of course, it referred to the rack, and the first definition in the Oxford English Dictionary reads as follows: 'The infliction of excruciating pain, as practiced by cruel tyrants, savages, brigands, etc. in hatred or revenge, or as a means of extortion, etc.' and judicial torture is defined as 'inflicted by a judicial or quasi-judicial authority, for the purpose of forcing an accused or suspected person to confess, or an unwilling witness to give evidence or information.'

We are, of course, interested in this last sense and in its contemporary meaning. The point of the concept is, I suggest, to identify a range of extreme cases involving the judicial or quasi-judicial infliction of severe pain or suffering, whether physical or mental, for the purposes indicated. But then we need to ask what constitutes suffering and how is 'extreme' to be understood: extreme with respect to which continuum, according to which scale?

Judge Posner gives an answer to this which I do not find convincing. He suggests that

> as we move up the pressure curve we encounter a kink, an inflection point where the coercion changes from the psychological to the physical. After that point is reached, the fixing of the term 'torture' to describe the interrogation is, I am inclined to believe, mandatory, even if the physical contact is not painful, provided it is deeply offensive [To whom? The observer? The interrogator? The victim?]; before the point is reached, however, the use of the term is optional, unless the psychological methods employed are mild, in which event the label of 'torture' would clearly be inappropriate.

Posner thus draws a sharp line between the psychological and the physical and he gives an interesting reason:

> A major project of modernity is to make people squeamish in order to discourage recourse to violence, especially political violence, the most dangerous kind – is, in other words, to turn the beast of prey that is natural man into a tame domestic animal, as Nietzsche put it. The inviolability of the body is a symbol of that project, and the best practical argument for barring the use of violence to defend property rights, for prohibiting flogging as a form of punishment, and for abolishing capital punishment or at least making it painless – and for affixing the 'torture' label certainly to the infliction of pain, and probably to any offensive touching, when aimed at extracting information.[40]

So Posner concludes that 'we should respect the line that separates psychological from physical coercion, and permit it to be crossed only *in extremis*; but we should not feel the same reluctance to impose a degree of psychological pressure that might challenge the conventional limitations.'[41] Now, I concede that, faced with the apparent alternatives of inflicting pain and threatening it, the latter is to be preferred (though fear does not have a long shelf life: threats will have little effect if it becomes known that the jailers have no record of following through). Threats can also be more effective than pain itself: according to a CIA interrogation manual, 'Most people underestimate their capacity to withstand pain. Sustained long enough, a strong fear of anything vague or unknown induces regression. Materialization of the fear is likely to come as a relief. The subject finds that he can hold out, and his resistance is strengthened.'[42] But humiliation, I submit, is another story. In short, I suggest, and shall proceed on the assumption, that Nietzsche is not a better guide than Kant in these matters, that the sacredness of the individual person is not just

[40] Posner, 'Torture, Terror and Interrogation', p. 292.
[41] Posner, 'Torture, Terror and Interrogation', p. 293.
[42] C. Mackey and G. Miller, *The Interrogators: Inside the Secret War against Al Qaeda* (New York: Little, Brown, 2004), p. 284.

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or even centrally a matter of the inviolability of the body and that therefore humiliation and offensiveness are, in our times, to be viewed as no less important as indices of extreme suffering and thus as criteria of what is to count as torture.

## AVOIDING THE PROBLEM

So let us return, once more, to our hard question: is torture just another case of dirty hands in politics? Many people try to escape, or soften, this question by suggesting that it is, somehow, irrelevant to the real world. On the one hand, they seek to defuse the so-called 'ticking bomb' argument (recently adduced by Alan Dershowitz in making a case for minimizing and controlling the torture that is any case going to happen, whether practised by us or outsourced to others, by regulating it in the form of 'torture warrants').[43] Elaine Scarry protests that such scenarios have 'no correspondence with the thousands of cases that actually occur': that 'what makes the ticking bomb scenario improbable is the notion that in a world where knowledge is ordinarily so imperfect, we are suddenly granted the omniscience to know that the person in front of us holds this crucial information about the bomb's whereabouts.' (She points out that since 11 September 2001, 'five thousand foreign nationals suspected of being terrorists have been detained without access to counsel, only three of whom have … eventually been charged with terrorism-related acts; two of these three have been acquitted').[44] And Henry Shue argues that our hard question is misconceived. He concedes that

> it cannot be denied that there are imaginable cases in which the harm that could be prevented by rare instance of pure interrogational torture would be so enormous as to outweigh the cruelty of the torture itself and, possibly, the enormous potential harm which would result if what was intended to be a rare instance was actually the breaching of the dam which would lead to a torrent of torture.

But, citing the saying in jurisprudence that hard cases make bad law, he writes that in philosophy:

> artificial cases make bad ethics. If the example is made sufficiently extraordinary, the conclusion that torture is permissible is secure. But one cannot easily draw conclusions for ordinary cases from extraordinary ones, and as the situation described becomes more likely, the conclusion that the torture is permissible becomes more debatable.[45]

On the other hand, many seek to avoid our hard question by arguing that torture is in any case ineffective, or less effective than alternative methods of interrogation. Torture, they suggest, may elicit compliance but not truth; according to one expert, 'pain alone will often make people numb and unresponsive. You have to engage people to get into their minds and learn what is there.'[46] It is also, they go on to argue, massively counter-productive, only encouraging the enemy. The journalist Robert Kaplan cites a captured al-Qaeda manual which even advises Muslim prisoners that people in the West do not 'have the stomach' for torture, because 'they are not warriors'. And as for the alternatives, Kaplan plausibly writes that an 'interrogator armed with fluent Arabic and

[43] See Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven, Conn.: Yale University Press, 2002), chap. 4, and also his chapter 'Tortured Reasoning' in Levinson, ed., *Torture,* chap. 14.

[44] Elaine Scarry, 'Five Errors in the Reasoning of Alan Dershowitz', in Levinson, ed., *Torture*, chap. 15, p. 284.

[45] Henry Shue, 'Torture', in Levinson, ed., *Torture*, chap. 2, p. 57.

[46] Cited by Sanford Levinson in his 'Contemplating Torture: An Introduction', in Levinson, ed., *Torture*, chap. 2, p. 33.

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every scrap of intelligence the system can muster, who has mastered the emerging science of eye movements and body signals, who can act threatening as well as empathetic towards a prisoner, should not require the ultimate tool.'[47]

And yet I persist in doubting that our hard question can be so readily avoided. Dershowitz cites one example from the mid-1990s. According to the *Washington Post,*

> Philippine authorities tortured a terrorist into disclosing information that may have foiled plots to assassinate the Pope and to crash eleven commercial airliners carrying approximately four thousand passengers into the Pacific Ocean, as well as a plan to fly a private Cessna filled with explosives into CIA headquarters. For sixty-seven days, intelligence agents beat the suspect 'with a chair and a long piece of wood [breaking most of his ribs], forced water into his mouth, and crushed lighted cigarettes into his private parts' – a procedure that the Philippine intelligence service called 'tactical interrogation.' After successfully employing this procedure, they turned him over to American authorities along with the lifesaving information they had beaten out of him.[48]

The Israeli Supreme Court, despite ruling against physical torture, allowed that the use of some of these procedures 'in the past has led to the thwarting of murderous attacks' and after its ruling the Israeli Security Services claimed that at least one preventable bus bombing killing several people had taken place. Experts seem to agree that torture enabled the French to gain information about future terrorist attacks and to destroy the infrastructure of terror in Algeria. I agree with Sanford Levinson that we really have no idea whether or not torture is a reliable way to secure information and that the evidence is inherently anecdotal.[49] But that should give us pause and make us less secure in endorsing Professor Shue's conviction about the vast distance between imaginable artificial cases and the real world. Besides which, it is not at all difficult to imagine cases posing the problem of torture that are far more plausible than that of the proverbial ticking bomb.

## TORTURE AND DIRTY HANDS

So let us return yet again to the problem before us and, finally, try to address it. Is torture just another case of dirty hands and how should it be addressed in liberal democracies? Well, first, how should democracies, and in particular liberal democracies, deal with the problem of dirty hands?[50] Officials – politicians, diplomats and others – are, in all political systems, going to be faced with the problem or dilemma of dirty hands (whether or not they see it as such): they will do wrong to do right. How, then, are the wrongs they do to be dealt with? The natural answer is that those who order them and those who perpetrate them should be held accountable. Democracy, definable in different ways, is on almost every account a system with mechanisms that hold its officials responsive and responsible to the people's wills or preferences. A liberal democracy will have a further feature: it will

[47] Robert D. Kaplan, *New York Times Book Review,* 23 January 2005, pp. 11, 12.

[48] Dershowitz, *Why Terrorism Works*, p. 137.

[49] Corey Robin has made the point to me that these cases all leave elements of doubt and that 'no-one has conclusively demonstrated anything regarding the ticking time bomb scenario'. True, but, first, what would such a demonstration look like? And secondly, why presume that, in its absence, we should assume such scenarios to be fantastical?

[50] See Dennis Thompson's discussion of this question in D. F. Thompson, *Political Ethics and Public Office* (Cambridge, Mass.: Harvard University Press, 1987), chap. 1: 'Democratic Dirty Hands,' to which the ensuing discussion is indebted.

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hold its officials responsible for respecting the principles of liberal equality: for not violating their citizens' rights and respecting their dignity.

There are obvious types of case where officials committing wrongs are held democratically accountable. Here the wrongs are typically vices of concealment, involving deception and manipulation. Leaders lie and sometimes, when found out, they resign (or at least this used to happen). Alternatively, the lie is popularly endorsed (for instance, in deceiving an enemy) and official hands are wiped clean. Sometimes, the wrongs require concealment to be effective (for instance, concerning military preparedness or in economic policy, in advance of devaluation or during a fiscal crisis, or in espionage abroad or law enforcement, involving surveillance and invasions of privacy at home). Here the accountability has to involve mechanisms that substitute for open debate: notably, some kind of retrospective review, a general authorization in advance or some kind of supervisory mediation (as by congressional committees or judges). A further kind of case involves the tragic choices that arise most notably in the allocation of scarce medical resources. Here I am inclined to think that full democratic accountability can be problematic, above all in a liberal democracy, where decisions involving life and death (and moreover involving putting a value on lives) have to be made in a consistent way, involving ever-more complex cost–benefit calculations, but in a culture that proclaims the sacredness and thus pricelessness of every individual's life. I suspect that in any feasible world we must continue to pay people (medical administrators and policy makers in this case) to take on the burden of making decisions that we would prefer not to know about. Perhaps in these cases we democratically endorse being non-democratic.[51]

What, then, about torture? In our time we may, I hope, assume that torture is no longer conceivable as a public spectacle (though we should not forget how recently lynching died out in the United States). It has become the most covert of state activities, so that when photographs of it are published, it becomes all-important to prove that it was unauthorized private enterprise. So torture is doubly vicious, combining the vice of concealment and the vice of violence – specifically violence against the defenceless. The first is anti-democratic, preventing us from reaching a collective judgement; the second is anti-liberal, constituting, if anything does, a violation of the dignity of a person. An aspect of the latter is, it would seem, its inherent *unfairness*. Henry Shue captures at least part of the 'peculiar disgust' that torture evokes by contrasting it with what might seem a worse harm, namely, killing in combat. Torture is, he argues,

> not analogous to the killing in battle of a healthy and well-armed foe; it is a cruel assault upon the defenceless. In combat the other person one kills is still a threat when killed and is killed in part for the sake of one's own survival. The torturer inflicts pain and damage upon another person who, by virtue of being within his or her power, is no longer a threat and is entirely at the torturer's mercy.[52]

Torture, unlike the other cases of dirty hands previously cited, cannot be rendered liberal-democratically accountable, in the sense that it will sometimes be legitimate and, when not, punished. Its practice cannot be publicly recognized without undermining both the democratic and liberal components of liberal democracy.[53]

[51] See my discussion of these cases in Steven Lukes, *Liberals and Cannibals: The Implications of Diversity* (London: Verso, 2003), chap. 5: 'On Comparing the Incomparable.'

[52] Shue, 'Torture', p. 51.

[53] Which is what gives force to John Gray's satirical 'modest proposal' that we recognize that torture is inherent in liberal democracies (cited in fn. 3).

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## THE DURKHEIMIAN ARGUMENT

To make this point clearer, let me refer to an argument that comes from Emile Durkheim. During the Dreyfus Affair, Durkheim published an article entitled 'Individualism and the Intellectuals' in which he neatly turned on its head a favourite argument of the anti-Dreyfusards, advanced by supporters of the army and the Catholic Church, that national unity was threatened by the 'individualism and anarchy' of various intellectuals who, for the sake of one individual's rights, presumed to put their reason above authority by questioning the legally suspect judgment of the Court that had condemned Dreyfus. To the contrary, Durkheim argued, it was individualism – a 'religion of which man is, at the same time, both believer and God' – which was 'henceforth the only system of beliefs which can ensure the moral unity of the country'.[54] This religion, this 'cult of man', which had 'for its first dogma the autonomy of reason and for its first rite freedom of thought', viewing the individual person as sacred, had 'penetrated our institutions and our customs'.[55] Accordingly, outrages against individuals' rights

> cannot rest unpunished without putting national existence in jeopardy. It is indeed impossible that they should be freely allowed to occur without weakening the sentiments they violate; and as these sentiments are all that we still have in common, they cannot be weakened without disturbing the cohesion of society. A religion which tolerates acts of sacrilege abdicates any sway over men's minds. The religion of the individual can therefore allow itself to be flouted without resistance only on penalty of ruining its credit; since it is the sole link which binds us to one another, such a weakening cannot take place without the onset of social dissolution. Thus the individualist, who defends the rights of the individual, defends at the same time the vital interests of society.[56]

The language here is rather heated, but the central argument – that allowing certain core individual rights to be violated by officials of the state threatens moral disintegration – applies, I submit, with even greater force to the practice of torture. What is meant by 'moral disintegration' in Durkheim's argument is not, of course, literally social dissolution or anarchy. Obviously enough, liberal-democratic societies can, as I have already stated, survive even the systematic practice of torture without their national existence being threatened (though they do tend to prefer practising it abroad). What puts 'national existence in jeopardy', in Durkheim's meaning, is the disintegration of bonds of reciprocity that rely upon various unquestioned and uncalculated assumptions, assumptions concerning mutual respect, fair dealing, restraints upon cruel and degrading behaviour, concern for protecting the vulnerable and so on, which have, so Durkheim claims, 'penetrated our institutions and customs'. Of course, that penetration is both limited and patchy and, moreover, far more precarious and reversible than Durkheim, writing in the late nineteenth century, can have imagined. And of course the assumptions can be widely made and still fail to shape public policies and everyday behaviour. And yet there is a residue of deep insight in the argument. For, like Tocqueville, Durkheim saw that, in spite of all the failures to implement it, and contests over how to do so, there has been, over the *longue durée*, an irreversible penetration of the 'cult of man', or the idea of equal human dignity, into 'our' (liberal-democratic/capitalist) institutions and customs. In his essay,

[54] E. Durkheim, 'Individualism and the Intellectuals' (1898), translated by S. and J. Lukes, *Political Studies,* 17 (1969), pp. 21–2.

[55] Durkheim, 'Individualism and the Intellectuals', p. 24.

[56] Durkheim, 'Individualism and the Intellectuals', pp. 26–7.

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Durkheim sought to defend freedom of thought and the rule of law by claiming that to violate them is to subvert basic components of that idea. In the same way, but perhaps with even greater plausibility, one can argue that the right not to be tortured (in the sense we have specified) is an even more basic such component.[57]

In the context of the Dreyfus Affair, Durkheim deployed this argument to make the case for a fair trial. But the argument can also be deployed to rule out certain ways of thinking and talking about torture. It suggests, in short, what is wrong with Ignatieff's talk of greater and lesser evils, of 'balancing' the claims of risk, dignity and security – or rather, why, as Ignatieff himself finally says, thinking and talking about torture in that way is inappropriate. For to treat the individual, at some level, as 'sacred' – in Durkheim's sense, as being set apart and forbidden – is to reject the very idea of a scale or metric that can allow one to compare and measure the benefits as against the costs of violating his or her most basic rights.

It also shows how deeply misconceived is Dershowitz's idea of torture warrants issued by judges. Removing the general prohibition would soon dissolve inhibitions. For, as Posner argues, if 'legal rules are promulgated permitting torture in defined circumstances, officials are bound to want to explore the outer bounds of the rules, and the practice, once it were thus regularized, would be likely to become regular.'[58] Moreover, the contagion will rapidly spread: as Posner puts it,

> once one starts down the balancing path, the protection of civil liberties quickly erodes. One starts with the extreme case, the terrorist with plague germs or a nuclear bomb in his traveling case, or the kidnapper who alone can save his victim. Well, if torture is legally justifiable if the lives of thousands are threatened, what about when the lives of hundreds are threatened, or tens? And the kidnap victim is only one.[59]

And so I agree with Posner's conclusion that it is better to stick with the strict prohibition of torture, 'trusting executive officials to break these rules when the stakes are high enough to enable the officials to obtain political absolution for their illegal conduct.'[60]

And yet we cannot, I fear, leave the matter there. For what underlies this last statement is the thought that such absolution (note the religious vocabulary) would and should be hard to obtain: that our inhibitions against violating basic rights are intact, so that officials contemplating torture have something to fear. But I fear that liberal democracy, in the United States and in Britain, may not these days be in such good shape as this thought implies. To the extent that fear of terrorism corrodes the religion of individualism, we are to that extent losing the so-called war against terror. I agree with Diego Gambetta's thought that 'the bigger and nastier the threat is (or is thought to be) the harsher are the infringements to civil liberties that can be justified and accepted by the public. One way to defend our liberties is to be alert to the forces that could exaggerate and distort the threat.'[61]

[57] This raises a question, too large to be embarked on here, of whether the idea of inviolability and the affront to conscience that torture creates is foundational to other traditions than the liberal-democratic and thus available for the consolidation of transnational norms depending upon a sort of international 'overlapping consensus'. I thank Albert Weale for this intriguing thought.

[58] Posner, 'Terrorism, Torture and Interrogation', p. 296.

[59] Posner, 'Terrorism, Torture and Interrogation', p. 297.

[60] Posner, 'Terrorism, Torture and Interrogation', p. 298.

[61] D. Gambetta, 'Reason and Terror: Has 9/11 made it hard to think straight?' *Boston Review,* April–May 2004, pp. 32–6, at p. 33.

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These are, indeed, at work. There is the tendency of secret services to overestimate threats and the fact that secret organizations, such as al-Qaeda, are of their nature hard to declare extinct, so that what counts as victory in this war becomes obscure. There is the very doctrine of pre-emptive war, combined with the idea enunciated by Donald Rumsfeld that we should prepare for 'unknown unknowns … things we don't know we don't know' – upon which principle 'anything can look large enough to merit the intrusion of authorities and the trampling of liberty'.[62] I agree with Gambetta that the 'perils that terrorists pose to our lives and civil liberties lie as much in the Western governments' response as in the damage they can directly cause.'[63] And that is the reason why it is better, when contemplating torture in liberal democracies, that we should be Durkheimians rather than Weberians.

[62] Gambetta, 'Reason and Terror', p. 35.
[63] Gambetta, 'Reason and Terror', p. 36.

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