It Should Be Permissible to Torture Suspected Terrorists to Gather Information

In man's search for truth down through the ages, “trial by ordeal” often has been resorted to when a suspect refused to talk. In recent times, however, numerous nations and international bodies have legislated against the intentional infliction of pain or suffering in an attempt to gain information or a confession.

Most civilized people would say they oppose the inhuman or degrading treatment of another human being. But what happens when there is a so-called “ticking time bomb” — a situation when a suspect is thought to have time-sensitive information affecting the lives of thousands — or even millions — of people? When the ticking bomb is factored into the equation, the physical and psychological rules of engagement suddenly become a sticky sea of gray for many otherwise absolutists.

The U.S. once taught friendly governments how to extract information from prisoners by the use of coercive techniques known as “stress and duress.” Interview strategies were designed to exhaust the individual's ability to resist while providing him with the rationalization he needed to cooperate.

In the war against terrorism, we seek to gain intelligence about our adversary of immediate as well as long-term strategic value. In both cloak-and-dagger missions and law-enforcement operations, there may come a time when our nation must quickly try to obtain information critical to the lives of millions of people from a person who refuses to talk.

To remain a nation based upon the rule of law, the United States needs to establish a court at the national level before which the government could argue that torture was essential to extract critical information. The court would be required to rule on the matter immediately, and if in agreement, it would be able to issue a “duress-interview warrant” allowing the authorities to do whatever was necessary to obtain the needed information from the prisoner. There would be no appeal process and no public or media scrutiny. The authority of the court would be absolute.

In short, the overriding public-safety issue would take precedence over a prisoner's human rights. Without such a mechanism, we are left with conventional methods of interrogation while watching the seconds on the time bomb tick away, as the only person who might know how to stop the clock remains mute and simply awaits our fate. And lastly, should time allow, we still need to verify and corroborate the information before we act on it.
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**It Should Not Be Permissible to Torture Suspected Terrorists to Gather Information**

Torture cannot be justified by any government, for any reason, despite recent reports of U.S. officials and others attempting to justify such practices. Torture is unequivocally prohibited in international law. This legal and moral imperative was established in the aftermath of Nazi war crimes as a rhetorical statement of moral and human identity. Under the U.N. Convention Against Torture, the United States is obligated to prohibit torture, ensure prompt and impartial investigations and prosecute perpetrators. Additionally, on countless occasions the State Department’s Country Report on Human Rights Practices has criticized governments that torture, in some cases the same practices the U.S. is now accused of committing in its “war on terrorism.”

Those now advocating the use of torture risk undermining principles of justice and the rule of law in what appears to be an unfortunate public display of arrogance and ignorance:

- Torture does not make any one person or society safer or more secure. States that torture undermine their authority and legitimacy. Also, U.S. sanctioning of any form of torture will escalate its already widespread use.
- Those currently arguing in the abstract for torture only under “special circumstances” or with “humane limitations” know very little of the horror they are prescribing. Even seemingly innocuous methods of torture such as hooding can be terrorizing, for example when combined with a mock execution or other psychological methods. Moreover, hypothetical “limits” on torture cannot be ensured in the absence of independent monitoring of all interactions with detainees and investigation and prosecution of all allegations of torture — conditions that torturers do not permit.
- Labeling torture as a “stress and duress” interrogation technique does not alter the brutality that it represents.
- “Ticking bomb” scenarios are naive, abstract fantasies that serve to assuage the moral conscience of perpetrators and collaborators.

Acts of terror must be prevented and punished. To consider using acts of torture that the world has deemed unacceptable under any circumstance is profoundly disturbing. Torture will never serve the interests of justice because it undermines the dignity of us all. We all lose when the “war on terrorism” ends up threatening the protection of human rights.

The United States must be neither silent nor, in any way, complicit with such practices, or, indeed, we risk losing that which we seek to preserve — our humanity.
AUTHORIZING TORTURE IS A BAD AND DANGEROUS IDEA THAT CAN EASILY BE MADE TO SOUND PLAUSIBLE. THERE IS A SUBTLE FALLACY EMBEDDED IN THE TRADITIONAL "TICKING BOMB" ARGUMENT FOR TORTURE TO SAVE LIVES.

That argument goes like this. First, I can imagine dangers so dire that I might torture or kill guilty or innocent persons if I was quite sure that was necessary and sufficient to prevent those dangers. Second, very many feel this way, although differing in the circumstances and the certainty level they would want. Therefore, the "ticking bomb" argument concludes, everyone wants a system for authorizing torture or murder; we need only debate the circumstances and the level of certainty.

This conclusion, leading to abandonment of one of the few worldwide legal prohibitions, leaves out the fact that I do not have faith in the authorizing system for finding the required circumstances with any certainty because the costs of errors are born by the suspect tortured, not by those who decide to torture him. The conclusion also ignores the high probability that the practice of torture will spread unwisely if acceptance of torture with the approval of judges is substituted for a flat, worldwide prohibition.

The use of torture would increase sharply if there were "torture warrants." Any law enforcement or intelligence official who tortures a prisoner in the United States now is very likely to be prosecuted and imprisoned.

Punches may be thrown, but anything we think of as "torture" is considered an inexcusable practice. That revulsion will disappear if we make torture acceptable and legal whenever a judge accepts the judgment of intelligence officials that: (1) there is a bomb; (2) the suspect knows where it is; (3) torture will get the truth, not a false story, out of him before the bomb explodes; (4) the bomb won't be moved in the meantime. Every individual who believes in his heart, however recklessly, that those conditions (or others he thinks are just as compelling) are met will think there is nothing seriously wrong with torture.

Professor Alan Dershowitz wants to bet that judges will say "no" in a high enough percentage of cases of "ticking bombs" that whatever moral force their refusal has will offset the legitimating and demoralizing effects of authorizing occasional torture. It's a bad bet.

Judges have deferred to the last several thousand requests for national security wiretaps and they would defer here. The basis of their decisions, information revealing secret "sources and methods" of intelligence gathering, would not be public. And if the judge refused, overrode the judgment of agents who thought lives would be lost without torture, and denied a warrant, why
would that decision be more likely to be accepted and followed by agents desperate to save lives
than the flat ban on torture we now have?

How many false positives do you want to accept? You would get six false positives out of 10
occasions of torture even in the extraordinarily unlikely event that the intelligence officers
convince the judge that they were really 80 percent sure of each of the above four predictions.

And even if you would tolerate this number of false positives if torture were in fact the only way
to get the needed information to defuse the bomb, there are frequently other promising ways
(such as emergency searches or stimulating conversations over tapped phones) that will be
abandoned or discounted if torture is available.

Finally, if we approve torture in one set of circumstances, isn't every country then free to define
its own exceptions, applicable to Americans as well as its own citizens? Fear of that led us to
accept the Geneva Convention prohibiting torture of a prisoner of war, although obtaining his
information might save dozens of American lives.

As to preventing terrorism, torture is an equally bad idea. Torture is a prescription for losing a
war for support of our beliefs in the hope of reducing the casualties from relatively small battles.

Dershowitz misunderstands my argument. I do not accept torture either "off the books" with a
wink at the secret discretion of the torturers or on the open authority of the judges from whom
they might seek authorization. I predict so many types of harms to so many people and to the
nation from any system that authorizes torture, either secretly or openly, that I would prohibit it.

The overall, longer-term cost of any system authorizing torture, openly or tacitly, would far
outweigh its occasional, short-term benefits.

Philip B. Heymann, former US deputy attorney general, is a professor at Harvard Law School.
YES, IT SHOULD BE 'ON THE BOOKS'

BYLINE: BY ALAN M. DERSHOWITZ

SOURCE: BOSTON GLOBE, FEBRUARY 16, 2002

PROFESSOR PHILIP HEYMANN AND I SHARE A COMMON GOAL: TO ELIMINATE TORTURE FROM THE WORLD, OR AT THE VERY LEAST TO REDUCE IT TO AN ABSOLUTE MINIMUM.

The real disagreement between us seems to be over whether the use of torture, under these extreme circumstances, would be worse if done in secret without being incorporated into our legal system - or worse if it required a torture warrant to be issued by a judge.

This is truly a choice of evils, with no perfect resolution. However, I insist that any extraordinary steps contemplated by a democracy must be done "on the books."

Of course there is the risk of false positives and ever expanding criteria. But these evils would exist whether torture was conducted off or on the books.

A carefully designed judicial procedure is more likely to reduce the amount of torture actually conducted, by creating accountability and leaving a public record of every warrant sought and granted.

The legal historian John Langbein has shown that there was far more torture in Medieval France than England because in France the practice was left to the discretion of local officials, whereas in England it required an extraordinary warrant, which was rarely granted.

Heymann suggests that "any law enforcement and intelligence official who tortures a prisoner in the United States now is very likely to be prosecuted and imprisoned."

I believe that a police officer who tortured and successfully prevented a terrorist attack would not be prosecuted, and if he were, he would be acquitted.

Indeed, in a case decided in 1984, the Court of Appeals for the 11th circuit commended police officers who tortured a kidnapper into disclosing the location of his victim.

Although there was no evidence that the victim's life was in imminent danger, the court described the offending police officers as "a group of concerned officers acting in a reasonable manner to obtain information in order to protect another individual from bodily harm or death."

Elsewhere in the opinion, they described the "reasonable manner" as including "choking him until he revealed where [the victim] was being held." These police officers were not prosecuted. Under my proposal, no torture warrant could have been granted in such a case.
Our nation has had extensive experience with "off the book" actions. President Nixon authorized an off the book "plumbers" operation to break into homes and offices.

President Reagan authorized an off the book foreign policy that culminated in the Iran-Contra debacle.

President Eisenhower and Kennedy apparently authorized off the book attempts to assassinate Fidel Castro.

The road to tyranny is paved by executive officials authorizing actions which they deem necessary to national security, without subjecting these actions to the check and balance of legislative approval, judicial imprimatur, and public accountability.

We are a nation of laws, and if the rule of law means anything, it means that no action regardless of how unpalatable, must ever be taken outside of the rule of law. If the action is to be taken, it must be deemed lawful. If it cannot be deemed lawful it should not be taken.

Unless we are prepared to authorize the issuance of a torture warrant in the case of the ticking bomb, we should not torture, even if that means that innocent people may die. If we want to prevent the death of hundreds of innocent people by subjecting one guilty person to non-lethal pain, then we must find a way to justify this exception to the otherwise blanket prohibition against torture.

All the evils of torture would be multiplied if we were to accept the way of the hypocrite, by proclaiming loudly that we are against it but subtly winking an eye of approval when it is done. Hypocrisy, too, is contagious.

Several years ago, an Israeli prime minister reprimanded security officials for bringing him "unwanted information of misdeeds by Shin Bet" (the Israeli FBI).

A wise professor commented on this action in the following words: "That strategy is extremely dangerous to democratic values, because it is designed to prevent oversight and to deny accountability to the public."

That wise professor was Philip Heymann.
Michael Levin
THE CASE FOR TORMURE

It is generally assumed that torture is impermissible, a throwback to a more brutal age. Enlightened societies reject it outright, and regimes suspected of using it risk the wrath of the United States.

I believe this attitude is unwise. There are situations in which torture is not merely permissible but morally mandatory. Moreover, these situations are moving from the realm of imagination to fact.

Death: Suppose a terrorist has hidden an atomic bomb on Manhattan Island which will detonate at noon on July 4 unless ... here follow the usual demands for money and release of his friends from jail. Suppose, further, that he is caught at 10 a.m on the fateful day, but preferring death to failure, won't disclose where the bomb is. What do we do? If we follow due process, wait for his lawyer, arraign him, millions of people will die. If the only way to save those lives is to subject the terrorist to the most excruciating possible pain, what grounds can there be for not doing so? I suggest there are none. In any case, I ask you to face the question with an open mind.

Torturing the terrorist is unconstitutional? Probably. But millions of lives surely outweigh constitutionality. Torture is barbaric? Mass murder is far more barbaric. Indeed, letting millions of innocents die in deference to one who flaunts his guilt is moral cowardice, an unwillingness to dirty one's hands. If you caught the terrorist, could you sleep nights knowing that millions died because you couldn't bring yourself to apply the electrodes?

Once you concede that torture is justified in extreme cases, you have admitted that the decision to use torture is a matter of balancing innocent lives against the means needed to save them. You must now face more realistic cases involving more modest numbers. Someone plants a bomb on a jumbo jet. He alone can disarm it, and his demands cannot be met (or they can, we refuse to set a precedent by yielding to his threats). Surely we can, we must, do anything to the extortionist to save the passengers. How can we tell 300, or 100, or 10 people who never asked to be put in danger, "I'm sorry you'll have to die in agony, we just couldn't bring ourselves to . . . "

Here are the results of an informal poll about a third, hypothetical, case. Suppose a terrorist group kidnapped a newborn baby from a hospital. I asked four mothers if they would approve of torturing kidnappers if that were necessary to get their own newborns back. All said yes, the most "liberal" adding that she would like to administer it herself.

I am not advocating torture as punishment. Punishment is addressed to deeds irrevocably past. Rather, I am advocating torture as an acceptable measure for preventing future evils. So understood, it is far less objectionable than many extant punishments. Opponents of the death penalty, for example, are forever insisting that executing a murderer will not bring back his victim (as if the purpose of capital punishment were supposed to be resurrection, not deterrence or retribution). But torture, in the cases described, is intended not to bring anyone back but to keep innocents from being dispatched. The most powerful argument against using torture as a
punishment or to secure confessions is that such practices disregard the rights of the individual. Well, if the individual is all that important, and he is, it is correspondingly important to protect the rights of individuals threatened by terrorists. If life is so valuable that it must never be taken, the lives of the innocents must be saved even at the price of hurting the one who endangers them.

Better precedents for torture are assassination and pre-emptive attack. No Allied leader would have flinched at assassinating Hitler, had that been possible. (The Allies did assassinate Heydrich.) Americans would be angered to learn that Roosevelt could have had Hitler killed in 1943, thereby shortening the war and saving millions of lives, but refused on moral grounds. Similarly, if nation A learns that nation B is about to launch an unprovoked attack, A has a right to save itself by destroying B's military capability first. In the same way, if the police can by torture save those who would otherwise die at the hands of kidnappers or terrorists, they must.

**Idealism:** There is an important difference between terrorists and their victims that should mute talk of the terrorists' "rights." The terrorist's victims are at risk unintentionally, not having asked to be endangered. But the terrorist knowingly initiated his actions. Unlike his victims, he volunteered for the risks of his deed. By threatening to kill for profit or idealism, he renounces civilized standards, and he can have no complaint if civilization tries to thwart him by whatever means necessary.

Just as torture is justified only to save lives (not extort confessions or incantations), it is justifiably administered only to those known to hold innocent lives in their hands. Ah, but how call the authorities ever be sure they have the right malefactor? Isn't there a danger of error and abuse? won't "WE" turn into "THEM?"

Questions like these are disingenuous in a world in which terrorists proclaim themselves and perform for television. The name of their game is public recognition. After all, you can't very well intimidate a government into releasing your freedom fighters unless you announce that it is your group that has seized its embassy. "Clear guilt" is difficult to define, but when 40 million people see a group of masked gunmen seize an airplane on the evening news, there is not much question about who the perpetrators are. There will be hard cases where the situation is murkier. Nonetheless, a line demarcating the legitimate use of torture can be drawn. Torture only the obviously guilty, and only for the sake of saving innocents, and the line between "US" and "THEM" will remain clear.

There is little danger that the Western democracies will lose their way if they choose to inflict pain as one way of preserving order. Paralysis in the face of evil is the greater danger. Some day soon a terrorist will threaten tens of thousands of lives, and torture will be the only way to save them. We had better start thinking about this.