

# TERRORISTS, INTERROGATION, AND TORTURE: WHERE DO WE DRAW THE LINE?

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## INTRODUCTION

In the past, the United States handled terrorist attacks under the criminal law system. However, traditional methods of law enforcement may not succeed in preventing post-September 11 terrorist attacks, and the current United States criminal law system no longer provides an adequate framework for the problem of terrorism. This Note focuses on the interrogation of alleged terrorists and specifically whether torture, or any degree of pressure, is ever defensible. In a situation where an interrogator is questioning an individual known to have information about an imminent terrorist attack on the United States, physical or psychological pressure may be the interrogator's last resort.

While the Supreme Court has not considered a case in this context, it has held that the Fifth Amendment's Self-Incrimination Clause<sup>1</sup> is not violated until the statements at issue are introduced against the defendant in a criminal trial.<sup>2</sup> When law enforcement agents interrogate a terrorist in order to prevent a devastating attack, criminal prosecution is a distant second to the priority of saving innocent lives. In addition, the Court may distinguish this situation from its past holdings by taking into account the preventative purpose of the interrogation and the national security issues at stake.

The Court may decline to approach preventative terrorist interrogation cases differently. If so, an interrogator who chooses to subject the terrorist to some degree of torture so as to elicit the necessary information ought to raise the necessity defense in order to avoid criminal liability. In this situation, torture is not right or just, but the judge or jury can decide whether it is the lesser of the two evils.

Although some degree of torture may be necessary to prevent an imminent terrorist attack, we must be careful to confine its use to this limited circumstance. All human beings should be treated with dignity and respect, and at its core the War on Terror is being fought to secure these values for all people.

Part I of this Note analyzes terrorism, how it is changing, and why it is necessary for the United States to treat terrorism differently from other criminal activity after the attacks of September 11. Part II attempts to define the concept of torture. Part III outlines the United States' policy regarding torture, and Part IV of the Note examines

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1. U.S. CONST. amend. V.

2. *Chavez v. Martinez*, 538 U.S. 760 (2003) (discussed *infra* at Part V.A.).

three other perspectives on torture. Specifically, Part IV looks at the prohibition of torture imposed by international human rights laws, critiques the argument that torture is defensible in some situations if advance judicial approval is obtained, and examines the Israeli system's experience with forceful interrogation techniques. Part V discusses the existing legal framework that might be applied to cases involving the torture of terrorists. Finally, this Note concludes that the necessity defense should be available to a law enforcement official who subjects a terrorist to some degree of torture in order to prevent harm to innocent people.

## I. THE PROBLEM OF TERRORISM

### A. *What is Terrorism?*

The term "terrorism" first referred to the reign of terror that occurred during the French Revolution, when the government executed political opponents, seized their property, and imposed terror over the remainder of the population until they succumbed to its rule.<sup>3</sup> While no uniform definitions of terrorism or terrorist exist, many definitions have a common foundation: "terrorism is the use of violence or the imposition of fear to achieve a particular purpose. . . ."<sup>4</sup> The Oxford English Dictionary defines both terrorist and terrorism broadly: a terrorist is defined as "[a]ny one who attempts to further his views by a system of coercive intimidation," and terrorism is defined as "[a] policy intended to strike with terror those against whom it is adopted; the employment of methods of intimidation."<sup>5</sup> Section 14(1) of the English Prevention of Terrorism (Temporary Provision) Act, 1984, and Section 20(1) of the English Prevention of Terrorism (Temporary Provision) Act, 1989, explicitly define terrorism: "Terrorism means the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear."<sup>6</sup>

Terrorism has also been defined by describing the characteristics and motives of terrorists:

Terrorism is the crassest antithesis to democracy. It is the attempt to subjugate and pervert the will of the people and its elected leadership by a minute bunch of reckless people resorting to terrifying threats and unbridled violence. They say they kill for the cause. What is that cause? Liberty from oppression? Freedom from want? Justice for people? If that would be their cause, how could they plot the extermination of another people, terrorize their own kinsmen and stuff their war

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3. See Emmanuel Gross, *Legal Aspects of Tackling Terrorism: The Balance Between the Right of a Democracy to Defend Itself and the Protection of Human Rights*, 6 UCLA J. INT'L L. & FOREIGN AFF. 89, 97 (2001).

4. *Id.*

5. XVII OXFORD ENGLISH DICTIONARY 821 (2d ed. 1989).

6. Gross, *supra* note 3, at 98.

chests with oil money from Saudi Arabia, to finance the assault against the regimes of these countries? Their cause is killing. Their vocation is violence.<sup>7</sup>

In the past, “the persons forming the group [were] organize[d] in a tightly controlled structure;”<sup>8</sup> however, this may not be true of terrorist groups such as Al Qaeda. Today’s terrorism is worldwide. Terrorist organizations share intelligence information and fighting tactics, enjoy the support of states such as Iran, and thus can organize quickly. Terrorism draws its power from both political and religious sources, and terrorist violence is often a symbol for other issues.<sup>9</sup>

### *B. Laws Reflect the Changing Nature of Terrorism*

In July 1992, the Egyptian Parliament passed several antiterrorism amendments to their penal code.<sup>10</sup> The amendments broaden the definition of terrorism to include “spreading panic” and obstructing the work of authorities.<sup>11</sup> They also allow police to hold suspects for twenty-four hours before obtaining arrest warrants and impose life imprisonment or the death penalty for membership in a terrorist organization.<sup>12</sup>

Section 411(c) of the USA PATRIOT Act<sup>13</sup> amended the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)<sup>14</sup> to set forth criteria for designating an organization as a “foreign terrorist organization.”<sup>15</sup> The AEDPA gives the Secretary of State the power “to block all financial transactions involving the assets of foreign terrorist organizations in the United States, to prevent people from providing material support to foreign terrorist organizations, and to prohibit representatives of foreign terrorist organizations from entering the United States.”<sup>16</sup> The Secretary of State, along with the Secretary of the Treasury and the Attorney General, can designate a group as a foreign terrorist organization if the group meets three statutorily-defined criteria: (1) the group must be a “foreign” organization; (2) the group must “engage[] in terrorist activity”; and (3) the group’s terrorist activity or terrorism must “threaten[] the security of United States nationals or the national security of the United States.”<sup>17</sup>

The statute does not define the term “foreign organization,” but there is some evidence that the term may be narrowly construed.<sup>18</sup> However, in responding to more

7. *Id.* at 100–01 (citing Gideon Rafael, Chairman’s Opening Remarks, Third Session of Jerusalem Conference on International Terrorism (July 3, 1999), in *INT’L TERRORISM: CHALLENGE & RESPONSE* 111–12 (Benjamin Netanyahu ed., 1980)).

8. Gross, *supra* note 3, at 97.

9. *Id.*

10. Scott Kent Brown II, Note & Comment, *The Coptic Church in Egypt: A Comment on Protecting Religious Minorities from Nonstate Discrimination*, 2000 *BYU L. REV.* 1049, 1070 n.154 (2000).

11. *Id.*

12. *Id.*

13. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 411(c), 115 Stat. 272, 349 (2001).

14. 8 U.S.C.A. § 1189 (West 1999 & Supp. 2004).

15. Joshua A. Ellis, Note, *Designation of Foreign Terrorist Organizations Under the AEDPA: The National Council Court Erred in Requiring Pre-Designation Process*, 2002 *BYU L. REV.* 675, 677 (2002).

16. *Id.* at 675.

17. 8 U.S.C.A. § 1189(a)(1)(A)-(C) (West 2001).

18. See Ellis, *supra* note 15, at 678–79. In October 1999, Secretary of State Madeline Albright

recent terrorist threats and attacks against the United States, the government may include a domestic organization under this designation if it is controlled by or affiliated with a foreign terrorist organization.

The AEDPA defines terrorist activity broadly to include

unlawful activity which involves the ‘hijacking or sabotage of any conveyance,’ hostage taking, an attack or assassination, or the use of weapons or dangerous devices with the requisite intent, including biological, chemical, and nuclear weapons. Furthermore, the definition of terrorist activity includes any threat, attempt, or conspiracy to engage in any of [these] activities. . . .<sup>19</sup>

An organization participates in terrorist activity when it commits, induces, or provokes another to commit a terrorist activity, when it prepares or plans such activity, when it “gather[s] information on potential targets for terrorist activity,” when it solicits individuals to engage in such activity or become a member of such organization, or when it solicits funds for such organizations or activities.<sup>20</sup>

AEDPA’s third requirement for designation as a foreign terrorist organization is that the terrorism in which the organization engages must threaten the national security of the United States.<sup>21</sup> The statute defines national security as “national defense, foreign relations, or economic interests of the United States.”<sup>22</sup> This criterion is not limited to domestic national security; threats to United States nationals or United States interests abroad can also support the designation as a foreign terrorist organization.<sup>23</sup>

### C. *The United States Should Treat Terrorism Differently than Crime*

In the past, terrorism was often treated the same way as every other criminal offense. However, whether we create new rules or interpret old rules in a new way to deal with terrorism, we must distinguish between terrorist offenses and regular criminal offenses. Otherwise, unique measures designed for terrorist offenses may be applied to regular criminal offenses. A distinction must be drawn between rules that apply to terrorist offenses and those that apply to criminal offenses.<sup>24</sup>

However we deal with terrorism, we must not lose sight of the three essential qualities of a liberal democratic regime. First, there must be a responsible government; second, the rule of law must prevail; and third, no prohibition may be imposed on

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redesignated the Mujahedin-e Khalq (“PMOI”) as a foreign terrorist organization. She also designated the National Council of Resistance of Iran (“NCRI”) an alias of PMOI, and thus included NCRI in the scope of PMOI’s designation as a foreign terrorist organization. The U.S. representative office of NCRI (“NCRIUS”), together with NCRI and PMOI, challenged the designation. NCRIUS argued that since it was a domestic non-profit corporation organized under the laws of the District of Columbia, it was not a “foreign organization” and could not be designated as a foreign terrorist organization under the AEDPA. The U.S. government responded by agreeing that NCRIUS was not included in the designation. *Id.* at 679.

19. *Id.* at 680–81.

20. *Id.* at 681 (quoting 8 U.S.C.A. 1182(3)(B)(iv)(I)–(V) (West Supp. 2004)).

21. 8 U.S.C.A. § 1189(a)(1)(C) (West Supp. 2004).

22. *Id.* § 1189(c)(2).

23. See Ellis, *supra* note 5, at 682.

24. See Gross, *supra* note 3, at 98–100.

legitimate political opposition to the regime.<sup>25</sup> Thus, not all opposition to the existing government will fall within the definition of terrorist activity, and the distinction must be clear. In addition, we must remember that democracy is maintained not only by the preservation of rights and liberties, but also by the preservation of security.

In the past, the United States treated terrorism as a crime. Criminal statutes in the United States Code define and establish punishments for terrorism.<sup>26</sup> Yet the events of September 11 are evidence that the changing face of terrorism presents a new threat that must be dealt with in a new way. The September 11 attacks were condemned as an act of war, and the U.S. responded with extensive military action. Domestically, President Bush issued a military order giving the Department of Defense authority to establish military tribunals that could, at the President's discretion, try captured members of Al Qaeda unrestrained by the procedural and evidentiary rules of the federal court system. Congress also gave broader investigative and surveillance authority to the Justice Department and expanded the scope of criminal liability for terrorism.<sup>27</sup>

Unlike responses to previous acts of terrorism, the United States' response to September 11 has taken place outside of the criminal justice system. The passage of the USA PATRIOT Act is evidence that the leaders of our country believe that different tools are necessary to confront acts of terrorism and future threats.

The interrogation of an alleged terrorist presents a unique situation. When law enforcement officials wish to obtain information from a known criminal, they are able to offer him incentives to "turn" on his fellow criminals.<sup>28</sup> These options are not usually attractive to a terrorist devoted to his cause. Thus, when a terrorist refuses to give crucial information, law enforcement authorities may not have much leverage.

#### 1. Interrogation of a Murder Suspect: *Miller v. Fenton*<sup>29</sup>

Previous cases illustrate police tactics courts are willing to accept when a murder suspect is being interrogated. For example, in *Miller*, the Third Circuit allowed some psychological manipulation when police questioned the alleged murderer of a young girl. In that case, a seventeen-year-old girl was brutally murdered on August 13, 1973.<sup>30</sup> Her brothers said that she was sitting on the porch of their home when a stranger drove up and told her that a cow was loose at the bottom of the driveway.<sup>31</sup> She drove her brother's car to get the cow and never returned; her body was found later that day.<sup>32</sup> *Miller* fit the description that the victim's brothers gave to the police.<sup>33</sup> That evening, the police questioned *Miller* at his place of work, and he agreed to go

25. *Id.* at 101.

26. *See, e.g.*, 8 U.S.C.A. § 1189 (West 1999 & Supp. 2004).

27. *See Note, Responding to Terrorism: Crime, Punishment, & War*, 115 HARV. L. REV. 1217, 1223 (2002) [hereinafter *Responding to Terrorism*].

28. For example, police are permitted to lie to the subject in order to make him think that he has already been given up. In addition, police can immunize a criminal or make a deal with him in exchange for information.

29. 796 F.2d 598 (3d Cir. 1986).

30. *Id.* at 600.

31. *Id.*

32. *Id.*

33. *Id.*

with them to the station house.<sup>34</sup> In the interrogation room, Miller waived his *Miranda* rights, and confessed to the murder one hour into the interrogation.<sup>35</sup> After he was indicted for first degree murder, Miller moved to suppress his confession as involuntary, but the Third Circuit held that Miller's confession was "elicited in a manner compatible with the requirements of the Constitution."<sup>36</sup>

The defendant argued that his confession was not voluntary and therefore should be suppressed.<sup>37</sup> In rejecting this argument, the court closely reviewed the tape of Miller's interrogation.<sup>38</sup> It recognized that a "significant portion" of the interrogation was typical, as it developed Miller's activities and whereabouts for the day in question and sought to determine the details of the crime.<sup>39</sup> Miller argued that the detective's method of interrogation "constituted psychological manipulation of such magnitude" that his confession was involuntary.<sup>40</sup> The detective did not threaten Miller or engage in any physical coercion of him, but rather was sympathetic and wanted to help Miller "unburden his mind."<sup>41</sup> The detective emphasized that Miller was not a criminal who should be punished, but rather a sick individual who should receive help.<sup>42</sup> He also appealed to Miller's conscience and the importance of Miller's purging himself of the memories that haunted him.<sup>43</sup> After Miller confessed, he "collapsed in a state of shock. He slid off his chair and onto the floor with a blank stare on his face."<sup>44</sup>

In determining whether or not the defendant's confession was voluntary, the court examined the "effect that the totality of the circumstances had upon the will of the defendant."<sup>45</sup> The court recognized that because Miller had previous experience with the criminal system,<sup>46</sup> he was aware of the consequences of confessing. It also explained that the interrogator may manipulate the suspect's sympathies, and that the detective's supportive, encouraging manner is a tactic aimed at winning the suspect's trust and making him feel comfortable speaking.<sup>47</sup> The court stated that "the limits of permissible questioning tactics in any case depend upon a weighing of the circumstance of pressure against the power of resistance of the person confessing. What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal."<sup>48</sup> Thus, the court concluded that the detective's tactics were not sufficiently manipulative to overbear the will of a person of Miller's characteristics, and therefore Miller's confession was voluntary.<sup>49</sup>

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34. *Id.*

35. *Miller*, 796 F.2d at 600.

36. *Id.* at 601.

37. *Id.* at 603.

38. *Id.* at 603-13.

39. *Id.* at 601.

40. *Id.* at 603.

41. *Miller*, 796 F.2d at 602.

42. *Id.*

43. *Id.* at 602-03.

44. *Id.* at 602-03.

45. *Id.* at 604.

46. Miller was convicted of carnal abuse in 1969 and arrested for statutory rape in 1973. *Id.* at 600.

47. *Miller*, 796 F.2d. at 607.

48. *Id.* at 611.

49. *Id.* at 613.

## 2. Interrogation of a Terrorist: *United States v. Bin Laden*<sup>50</sup>

*Miller* illustrates one method of police interrogation that has been accepted by courts. However, it is unlikely that police officers interrogating a terrorist will be able to gain information by playing upon the terrorist's sympathies like the officers in *Miller* were able to do. In the past, officers have used other tactics to interrogate terrorists successfully. One such case arose in August 1998, after two bombs exploded outside the American embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, killing twelve Americans and over two hundred Kenyans and Tanzanians, and causing severe damage to the embassy buildings and those buildings in the surrounding area.<sup>51</sup> The attacks were linked to a fundamentalist Islamic terror network financed by Osama bin Laden.<sup>52</sup> Indictments against fifteen named conspirators, including bin Laden, were issued, but only four suspects were apprehended, tried, and convicted, all in the Southern District of New York.<sup>53</sup>

*Bin Laden* involved the interrogation of terrorist defendants who were charged with participating in these bombings.<sup>54</sup> One of the defendants, Al-'Owhali, was arrested on August 12, 1998 and interrogated in Kenya by an FBI Special Agent and an Assistant U.S. Attorney.<sup>55</sup> They presented Al-'Owhali with a modified advice of rights form ("AOR") written in English.<sup>56</sup> The AOR stated that the defendant was not required to speak with American authorities, and if he chose to speak with them, anything he said could be used against him in a court in the United States or elsewhere.<sup>57</sup> The AOR also advised the defendant that in the United States, he would have the right to speak with a lawyer before answering any questions and that the lawyer could be present during questioning.<sup>58</sup> However, since the interrogation was not taking place in the United States, the defendant was not guaranteed that a lawyer would be appointed for him before questioning.<sup>59</sup> The AOR advised the defendant that he could choose not to answer any questions at all and that he had the right to stop answering questions at any time.<sup>60</sup> The AOR was read aloud to Al-'Owhali, who could understand some spoken English and said he understood the statement, and he signed the document.<sup>61</sup> The defendant agreed to answer questions, and the interrogation lasted about one hour.<sup>62</sup> Al-'Owhali was interrogated in Kenya on several occasions between August 12 and August 21, but he "consistently denied involvement in the embassy bombing."<sup>63</sup>

50. 132 F. Supp. 2d 168 (S.D.N.Y. 2001) [hereinafter *Bin Laden* 2001].

51. See *United States v. Bin Laden*, 92 F. Supp. 2d 225, 230–31 (S.D.N.Y. 2000) [hereinafter *Bin Laden* 2000].

52. *Responding to Terrorism*, *supra* note 27, at 1219–20.

53. *Bin Laden* 2000, 92 F. Supp. 2d at 227–28; Benjamin Weiser, *4 Guilty in Terror Bombings of 2 U.S. Embassies in Africa; Jury to Weigh 2 Executions*, N.Y. TIMES, May 30, 2001, at A1.

54. *Bin Laden* 2001, 132 F. Supp. 2d at 172–73.

55. *Id.*

56. *Id.*

57. *Id.* at 173.

58. *Id.*

59. *Id.*

60. *Bin Laden* 2001, 132 F. Supp. 2d at 173–74.

61. *Id.* at 174.

62. *Id.* at 174.

63. *Id.* at 174–75.

During the August 21 interrogation, the officers disclosed to Al-'Owhali all of the evidence they had collected against him.<sup>64</sup> Al-'Owhali acknowledged that the agents "knew everything," and then promised to tell the truth about his involvement in the embassy bombings if he could be tried in the United States.<sup>65</sup> The next day, the officers presented Al-'Owhali with a document of understanding ("DOU"), which was previously approved by the United States Justice Department.<sup>66</sup> The DOU stated that the defendant had been advised of his rights, including his right to remain silent and to the presence of counsel, that the defendant understood that he was being investigated in connection with the bombing of the United States embassy in Nairobi, and that he had "a strong preference to have . . . [his] case tried in an United States Court because America is . . . [his] enemy and Kenya is not," and wanted his "past and present statements" about his involvement in the bombings "to be aired in public in an American courtroom."<sup>67</sup> The DOU also stated that the defendant was "willing to waive . . . [his] rights and answer the questions of American authorities upon the condition that the undersigned law enforcement authorities make all best efforts to see that . . . [he is] brought to the United States to stand trial."<sup>68</sup> Al-'Owhali signed the DOU on August 22 and inculpated himself in the embassy bombing during the next four days of interrogation.<sup>69</sup>

On August 25, Al-'Owhali told the officers that he "possessed time-sensitive information regarding an issue of public safety" that he would disclose in exchange for a guarantee that he would be tried in the United States.<sup>70</sup> The officers prepared a second DOU for Al-'Owhali's signature.<sup>71</sup> The second DOU was similar to the first, but it also included a more specific agreement between the defendant and the agents that Al-'Owhali would be tried in the United States and that the information relating to public safety could not be used as evidence in the Government's case in chief against Al-'Owhali.<sup>72</sup> Al-'Owhali signed the document, and on that date, he was scheduled to be removed to the United States within the next twenty-four hours.<sup>73</sup>

### 3. Is Post-September 11 Interrogation Different?

The officers interrogating the defendant in *Bin Laden* were able to get information from Al-'Owhali in exchange for their guarantee that he would be tried in the United

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64. *Id.* at 176.

65. *Id.* The court's opinion notes that Al-'Owhali said that he wanted to be tried in the U.S. rather than Kenya because the U.S. was his enemy, not Kenya. See *Bin Laden 2001*, 132 F. Supp. 2d at 176.

66. *Id.* at 176.

67. *Id.*

68. *Id.*

69. *Id.* at 177.

70. *Id.*

71. *Bin Laden 2001*, 132 F. Supp. 2d at 178.

72. *Id.* The agreement also provided that the Government could use this particular statement against Al-'Owhali to correct false or misleading testimony given by Al-'Owhali, if the defendant requests that the jury be advised that he disclosed the particular information, and that if the defendant is convicted, upon his request the Government must disclose the fact that defendant provided this information to the sentencing judge or jury. *Id.*

73. *Id.*



States rather than Kenya.<sup>74</sup> It took the officers fourteen days to make the arrangements.<sup>75</sup> However, after the 2001 terrorist attacks on the United States, officers may not have anything to offer the terrorist in exchange for his confession, nor are they likely to have much time to bargain for information.

On September 11 terrorists hijacked two commercial airplanes and flew them into the Twin Towers of the World Trade Center in New York City. Hijacked American Airlines Flight 11, en route from Boston to Los Angeles, crashed into the top of the North Tower at 8:45 a.m. At 9:03 a.m., hijacked United Airlines Flight 175, also flying from Boston to Los Angeles, crashed into the South Tower. Together the flights carried 137 passengers and twenty crew members. The South Tower collapsed at 9:50 a.m., the North Tower collapsed at 10:29 a.m., and much of the surrounding complex was destroyed. As a result of these terrorist attacks, 2,823 people died at the World Trade Center.<sup>76</sup> The same morning, terrorists hijacked two other planes. At 9:38 a.m., American Airlines Flight 77, en route from Dulles to Los Angeles, turned back toward Washington, D.C. and crashed into the Pentagon. One hundred eighty-nine people were killed at the Pentagon, including the fifty-eight passengers and six crew members on Flight 77. Due to the efforts of the forty-four passengers and crew members who fought to regain control the of airplane, United Airlines Flight 93, traveling from Newark to San Francisco, crashed in an open field in northern Pennsylvania.<sup>77</sup> The terrorist activity that took place that day resulted in the deaths of 3,056 people,<sup>78</sup> the injuries of countless others, and property damage totaling tens of billions of dollars.<sup>79</sup>

The events of September 11 were condemned as an act of war, and resulted in the United States launching the "War on Terror" in retaliation.<sup>80</sup> The Bush administration promised Americans that their nation's response would combine political, diplomatic, financial, intelligence, and military efforts, and warned that the War on Terror would be a long-term commitment.<sup>81</sup>

Shortly after the September 11 attacks, FBI agents and Justice Department investigators detained suspects believed to be connected with the attacks either because they were traveling with "false passports" and were carrying "box cutters, hair dye and \$5,000 in cash" or because they had "links to al Qaeda."<sup>82</sup> In questioning the suspects, the agents employed traditional interrogation methods and even offered them some unusual incentives, such as "a new identity and life in the United States for them and

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74. *Id.* at 177.

75. *Id.* at 179.

76. G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 BYU L. REV. 829, 851–52 n.53 ¶ 3 (2002).

77. *Id.*; See also, *Responding to Terrorism*, *supra* note 27, at 1221–22.

78. Blakey, *supra* note 76, at 852 n.53 ¶ 3.

79. See *Responding to Terrorism*, *supra* note 27, at 1221–22.

80. See President George W. Bush, Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347, 1348 (Sept. 20, 2001), available at <http://www.dartmouth.edu/~govdocs/docs/iraq/092001.pdf> (last visited Nov. 19, 2004).

81. *Id.* at 1349.

82. Walter Pincus, *Silence of 4 Terror Probe Suspects Poses Dilemma for FBI*, WASH. POST, Oct. 21, 2001, at A6.

their family members.”<sup>83</sup> When their interrogation efforts proved unsuccessful, one agent stated:

We are known for humanitarian treatment, so basically we are stuck. . . . Usually there is some incentive, some angle to play, what you can do for them. But it could get to that spot where we could go to pressure . . . where we won't have a choice and we are probably getting there.<sup>84</sup>

In our post-September 11 world, law enforcement agents interrogating a terrorist will not always have fourteen days to get the information they need, like the agents in *Bin Laden*, and the good-guy approach used in *Miller* will rarely succeed. This Note focuses on terrorists known to possess information regarding a threat to public safety. These individuals are interrogated for purposes of preventing future attacks rather than, as in *Bin Laden*, punishing those who engaged in a past attack. When law enforcement officials interrogate a terrorist who is not willing to disclose information that would allow the agents to prevent the injuries or deaths of many innocent people, there is little they can offer the terrorist in exchange for this disclosure. Terrorists in this position are often so committed to their cause that they will not disclose their plan of attack in exchange for a deal. This Note argues that torture is never right or just, but when faced with a choice between two evil alternatives, it may often be the rational path to choose.

## II. WHAT IS TORTURE?

There is no clear definition of torture or description of what means of interrogation may amount to torture. There is no definition of torture in the United States Constitution, but Article 3 of the European Convention for the Protection of Human Rights distinguishes between “torture” and “inhuman or degrading treatment”; however, the meanings of both are ambiguous.<sup>85</sup>

Torture can be either physical or psychological. Scholars disagree as to whether there is a distinction between the two forms. Emanuel Gross states that “[w]hile physical torture is bodily pain, deliberately and directly caused, psychological or mental torture injures the person’s soul. The form of the torture a person undergoes is irrelevant, the assumption is that any torture will cause both physical and mental pain.”<sup>86</sup> Others disagree, and maintain that a distinction can be made between physical and mental torture.

The majority opinion in the case of *Republic of Ireland v. United Kingdom*,<sup>87</sup> in the European Court of Human Rights, distinguishes between torture and inhumane treatment.<sup>88</sup> “Torture constitutes an *aggravated* and deliberate form of cruel, inhuman or degrading treatment or punishment.”<sup>89</sup> However, Judge Matscher believed that the

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83. *Id.*

84. *Id.*

85. See Gross, *supra* note 3, at 94.

86. *Id.*

87. *Republic of Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (1978).

88. See *id.* at 66.

89. *Id.* at 67.

distinction is not based on the degree of suffering, but on the fact that the torture is calculated, routine and deliberate, and causes either physical or mental suffering, and that it is for the purpose of breaking the spirit of the suspect, coercing him into doing something, or purely for causing him pain.<sup>90</sup> Other judges disagreed with this objective approach. For example, Judge Zekia advanced a belief that a subjective test must be used in addition to an objective test to determine whether certain conduct in a certain situation amounts to torture.<sup>91</sup> Such a subjective test should include factors such as the nature of the inhumane treatment, the age, sex, and state of health of the person undergoing treatment, and the likelihood that the treatment will cause psychological, mental, or physical pain to that person.<sup>92</sup>

Although there is no clearly accepted definition of torture, it is safe to say that some circumstances will always be considered torture from an objective point of view. Labeling certain conduct as "torture" carries with it a negative moral connotation. Every infliction of pain is not torture; it may be a permitted infliction of pain, a prohibited infliction of pain, or it may rise to the level of torture. These categories could be delineated based on several different criteria, such as the intensity of suffering, the severity of injury, the intent of the inflictor, the degree to which the treatment violates the dignity of the suspect, as well as the subjective criteria laid out by Judge Zekia.

Despite these unclear definitions, the purpose of the torturous conduct forms the basis for accepted distinctions between different types of torture. Torture finds its justification in four purposes: (1) interrogation, (2) instilling fear, (3) punishment, and (4) prevention.<sup>93</sup> Interrogational torture is "the infliction of severe physical or mental pain during the course of the interrogation, with the purpose of extracting certain information from the suspect, and not for the purpose of deterrence or instilling fear alone."<sup>94</sup> Torture of terrorists can be aimed either at instilling fear alone or instilling fear to effectuate deterrence and prevention of terrorist activities. Although there is a consensus that torture for the purposes of punishment is prohibited,<sup>95</sup> torture during interrogation could theoretically lead to prevention of terrorist attacks.

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90. *Id.* at 139. The judge went on to say that modern interrogation practices often amount to torture, while brutality may not fall within the definition of torture:

The modern methods of torture which in their outward aspects differ markedly from the primitive, brutal methods employed in former times are well known. In this sense torture is in no way a higher degree of inhuman treatment. On the contrary, one can envisage forms of brutality which cause much more acute bodily suffering but are not necessarily on that account comprised within the notion of torture.

*Id.*

91. *Id.* at 97

92. *Republic of Ireland*, 25 Eur. Ct. H.R. at 97. The judge explained the need for a subjective analysis:

As an example I can refer to the case of an elderly sick man who is exposed to a harsh treatment—after being given several blows and beaten to the floor, he is dragged and kicked on the floor for several hours. I would say without hesitation that the poor man has been tortured. If such treatment is applied [to] a wrestler or even a young athlete, I would hesitate a lot to describe it as an inhuman treatment and I might regard it as a mere rough handling.

*Id.*

93. Gross, *supra* note 3, at 97–98.

94. *Id.*

95. *Id.*

### III. OUR STANCE: "TORTURE ANYWHERE IS AN AFFRONT TO HUMAN DIGNITY EVERYWHERE"<sup>96</sup>

On June 26, 2003, the United Nations' appointed day to recognize torture victims, President Bush declared, "[t]he United States is committed to the world-wide elimination of torture and we are leading this fight by example."<sup>97</sup> President Bush's proclamation states that the United States, along with more than 130 other countries, has ratified The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment ("CAT"),<sup>98</sup> which forbids governments from "deliberately inflicting severe physical or mental pain or suffering on those within their custody or control."<sup>99</sup>

One day earlier, William Haynes, General Counsel to the Department of Defense, sent a letter spelling out these commitments to Democratic Senator Patrick Leahy.<sup>100</sup> Senator Leahy had written to Condoleezza Rice, President Bush's National Security Advisor, with several questions about American policy after the issuance of news reports in which anonymous American officials claimed that terrorist suspects were subjected to "stress-and-duress" interrogations,<sup>101</sup> were tortured outright, or were turned over to countries known to use torture.<sup>102</sup>

Haynes' letter to Senator Leahy further explains the obligations of the United States under the Convention. The United States' legal obligations include conducting interrogations in a manner that is consistent with the CAT as ratified by the U.S. in 1994 and in compliance with the federal anti-torture statute<sup>103</sup> which Congress enacted to fulfill U.S. obligations under the CAT. Haynes states that "[t]he United States does not permit, tolerate or condone any such torture by its employees under any circumstances."<sup>104</sup>

Under Article 16 of the CAT, the United States has an obligation to "undertake... to prevent other acts of cruel, inhuman, or degrading treatment or punishment which do not amount to torture."<sup>105</sup> The terms in Article 16 are not defined, but the United States ratified the CAT with a reservation to this provision, which supplies a definition for the

96. President George W. Bush, Statement by the President at the United Nations International Day in Support of Victims of Torture (June 26, 2003), *available at* <http://www.whitehouse.gov/news/releases/2003/06/20030626-3.html> (last visited Nov. 19, 2004) [hereinafter Statement by the President].

97. *Id.*

98. United National Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39<sup>th</sup> Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) [hereinafter CAT].

99. Statement by the President, *supra* note 96.

100. Letter from William J. Haynes II, General Counsel, U.S. Department of Defense, to Senator Patrick Leahy (June 25, 2003), *available at* <http://www.hrw.org/press/2003/06/letter-to-leahy.pdf> (last visited Nov. 19, 2004) [hereinafter Letter from Haynes].

101. Examples of "stress and duress" techniques include depriving prisoners of sleep and keeping them in awkward positions until they feel pain. Peter Slevin, *U.S. Pledges to Avoid Torture*, WASH. POST, June 27, 2003, at A11.

102. Letter from Senator Patrick Leahy to Dr. Condoleezza Rice, National Security Advisor (June 2, 2004), *available at* <http://www.hrw.org/press/2003/06/letter-to-rice.pdf> (last visited Nov. 19, 2004).

103. 18 U.S.C.A. §§ 2340-2340A (West 2001).

104. Letter from Haynes, *supra* note 100.

105. *Id.*, see also CAT, *supra* note 98.

term “cruel, inhuman, or degrading treatment or punishment.”<sup>106</sup> The reservation provides that “the United States considers itself bound by the obligation under [A]rticle 16 to prevent ‘cruel, inhuman or degrading treatment or punishment’ only in so far as the term . . . means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.”<sup>107</sup>

In addition, under “Article 3 of the CAT, the United States does not ‘expel, return . . . or extradite’ individuals to other countries where the U.S. believes it is ‘more likely than not’ that they will be tortured.”<sup>108</sup> In situations where it is necessary to transfer an individual to another country to be held on behalf of the United States, Haynes specifies that U.S. policy is to “obtain specific assurances from the receiving country that it will not torture the individual.”<sup>109</sup>

President Bush’s statement does not explain the qualifications the United States placed on its obligations under CAT before ratification. Rather, his statement focuses on victims of torture as innocent individuals who are tortured by their own governments.<sup>110</sup> In his statement, Bush does not consider the situation of a terrorist interrogation. Bush states that, despite the ratification of the CAT by over 130 countries, “torture continues to be practiced around the world by rogue regimes whose cruel methods match their determination to crush the human spirit. Beating, burning, rape, and electric shock are some of the grisly tools such regimes use to terrorize their own citizens.”<sup>111</sup> He cites “stories told by torture survivors, who are recounting a vast array of sadistic acts perpetrated against the innocent” as evidence that torture still occurs.<sup>112</sup> He ends the proclamation with a statement that calls for all governments to treat their citizens with dignity: “No people, no matter where they reside, should have to live in fear of their own government. Nowhere should the midnight knock foreshadow a nightmare of state-commissioned crime. The suffering of torture victims must end, and the United States calls on all governments to assume this great mission.”<sup>113</sup>

The United States’ obligations under the CAT forbid the use of torture or other degrading treatment in any circumstance, insofar as such conduct violates the Fifth,<sup>114</sup> Eighth,<sup>115</sup> or Fourteenth Amendment<sup>116</sup> of the Constitution. Thus, the United States government pledged to the world that it does not and will not use torture.

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106. Letter from Haynes, *supra* note 100.

107. *Id.*

108. *Id.*

109. *Id.*

110. Statement by the President, *supra* note 96.

111. *Id.*

112. *Id.*

113. *Id.*

114. U.S. CONST. amend. V.

115. U.S. CONST. amend. VIII.

116. U.S. CONST. amend. XIV.

## IV. PERSPECTIVES ON TORTURE

*A. Human Rights Laws: An Absolute Prohibition of Torture*

The United Nations CAT establishes an absolute ban on torture, which it defines as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>117</sup>

Article 7 of the International Covenant on Civil and Political Rights explicitly states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,”<sup>118</sup> and Article 4.2 of the Covenant also states that “[n]o derogation” from Article 7 is permitted.<sup>119</sup> Article 4.2 explicitly refers to Article 4.1, which allows states who are parties to the Covenant, during a “time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed,” to “take measures derogating from their obligations under the present Covenant.”<sup>120</sup> However, this does not include torture or “cruel, inhuman or degrading treatment or punishment.”<sup>121</sup>

Most recently, a set of “Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight Against Terrorism” were adopted on July 11, 2002.<sup>122</sup> They include a reaffirmation of the absolute prohibition on torture “in all circumstances, and in particular during the arrest, questioning and detention of a person suspected of . . . terrorist activities, irrespective of the nature of the acts that the person is suspected of. . . .”<sup>123</sup> Guideline XV, titled “Possible derogations,” specifically states that “[s]tates may never, however, and whatever the acts of the person suspected of terrorist activities . . . derogate from the . . . prohibition against torture or inhuman or degrading treatment. . . .”<sup>124</sup>

These various laws and treaties make clear the absolute prohibition of torture. They establish an “Ulyssean contract to be honored whatever the lure of the Sirens”<sup>125</sup>

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117. CAT, *supra* note 98.

118. International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 4, 999 U.N.T.S. 171, 172.

119. *Id.* at art. 7.

120. *Id.*

121. *Id.*

122. Guidelines on Human Rights and the Fight Against Terrorism adopted by the Committee of Ministers, Council of Europe, 804th mtg., H(2002)0004 art. IV, XV, (July 11, 2002), *available at* <http://www.legislationline.org/view.php?document=57199&ref=true> (last visited Nov. 20, 2004).

123. *Id.*

124. *Id.*

125. Sanford Levinson, “Precommitment” and “Postcommitment”: *The Ban on Torture in the Wake of September 11*, 81 TEX. L. REV. 2013, 2017 (2003).

and appear to leave no room for justification or exception. In practice, however, a number of countries that are parties to the Torture Convention have been accused of committing torture or engaging in cruel, inhuman, or degrading treatment. Oona Hathaway's empirical study of countries that have ratified anti-torture conventions and those that have not shows that "the differences in average level of human rights ratings for ratifiers versus nonratifiers are small."<sup>126</sup> Her studies of regional (as opposed to United Nations) treaties outlawing torture show that "[t]he countries that have ratified the treaties appear to have worse torture practices than the countries that are members of the sponsoring regional organization but have not ratified the treaties . . . ."<sup>127</sup>

### *B. The Case of the Ticking Bomb Terrorist: The Dershowitz Position*

Jeremy Bentham constructed a hypothetical case to support his utilitarian argument against an absolute prohibition of torture:

Suppose an occasion were to arise, in which a suspicion is entertained, as strong as that which would be received as a sufficient ground for arrest and commitment as for felony—a suspicion that at this very time a considerable number of individuals are actually suffering, by illegal violence inflictions equal in intensity to those which if inflicted by the hand of justice, would universally be spoken of under the name of torture. For the purpose of rescuing from torture these hundred innocents, should any scruple be made of applying equal or superior torture, to extract the requisite information from the mouth of one criminal, who having it in his power to make known the place where at this time the enormity was practising (sic) or about to be practised (sic), should refuse to do so? To say nothing of wisdom, could any pretence be made so much as to the praise of blind and vulgar humanity, by the man who to save one criminal, should determine to abandon 100 innocent persons to the same fate?<sup>128</sup>

Bentham's hypothetical illustrates his argument that the torture of one guilty person should be justified to prevent the torture of one hundred innocent people. Under this rationale, it would seem to follow that torture would also be justified to prevent the murder of thousands of innocent civilians in what's been called the "ticking bomb" case. Consider the hypothetical often presented by Harvard law professor Alan Dershowitz: A terrorist knows the location of a bomb that is about to go off and destroy a large city, but the terrorist is not willing to disclose the information.<sup>129</sup> In this situation, Dershowitz suggests, the argument for torturing the terrorist is strongest.

Dershowitz suggests that if non-lethal torture is permissible in the ticking bomb case, advance judicial approval, in the form of a "torture warrant," should be

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126. Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1978 (2002).

127. *Id.* at 1979.

128. ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 142–43 (2002) (quoting Jeremy Bentham).

129. *Id.* at 140.

required.<sup>130</sup> He proposes that the requirement that a torture warrant be granted by a judge reviewing the allegations of necessity proffered by the would-be torturers would reduce the use of torture and create a system of public accountability for its use.<sup>131</sup> Dershowitz argues that a requirement of judicial approval would result in fewer instances of torture, even if a judge rarely turns down a request.<sup>132</sup> In addition, it is likely that law enforcement officials would only seek a warrant in circumstances where they had compelling evidence that the suspect had information needed to prevent an imminent terrorist attack, and there was no alternative way to discover the information. It is also reasonable to assume that most judges would require compelling evidence in order to grant a torture warrant.<sup>133</sup>

Dershowitz argues that this warrant requirement would also serve to protect the rights of the suspect. "He would be granted immunity, told that he was now compelled to testify, threatened with imprisonment if he refused to do so, and given the option of providing the requested information."<sup>134</sup> If the suspect refused to provide the information after being immunized, he would then be threatened with torture. Dershowitz argues that the suspect might be more willing to provide the information if he knows that the use of torture has been authorized by law.<sup>135</sup>

There are two problems with Professor Dershowitz's theory. First, the torture warrant requirement is impractical. In the ticking bomb situation, there is no time for law enforcement officials to present evidence to a judge in order to obtain a warrant. In addition, many judges may not be comfortable publicly declaring themselves an accessory to torture.<sup>136</sup> Thus, it will be difficult to find judges that are willing to issue torture warrants. Some judges may choose not to be part of the process on personal moral grounds, while others may refuse to face public accountability for such conduct.

Second, the effects of the United States publicly endorsing torture would be catastrophic. The civilized world has considered torture illegitimate for over a century. Legitimization of torture by the United States, even reserved for extraordinary situations, would subject the world to an incredible setback in the campaign for human rights and would provide justification for the use of torture across the world. One of Orwell's final comments in *1984* is appropriate: "If you want a picture of the future, imagine a boot stamping on a human face—for ever."<sup>137</sup>

Two Bentham scholars, W. L. Twining and P. E. Twining, have argued that torture is impermissible, even when restricted to a limited situation.<sup>138</sup> They argue that there should be a distinction between justifying an isolated act of torture in an extreme emergency (like the ticking bomb scenario) and justifying the institutionalization of

130. *Id.* at 159.

131. *Id.*

132. *Id.*

133. *See generally id.*

134. DERSHOWITZ, *supra* note 128, at 159.

135. *Id.*

136. Justice Scalia has argued that no judge who is morally opposed to the death penalty should preside over capital punishment cases because the judge's role in the case makes him sufficiently complicit in the act of capital punishment. Antonin Scalia, *God's Justice and Ours*, 132 FIRST THINGS 17, 17 (May 2002) available at <http://www.firstthings.com/ftissues/ft0205/articles/scalia.html> (last visited Nov. 20, 2004).

137. GEORGE ORWELL, 1984 at 220 (Penguin Group 1981) (1949).

138. *See generally* W.L. Twining & P.E. Twining, *Bentham on Torture*, 24 N. IR. L. Q. 305 (1973).



torture as a regular practice (even if in limited circumstances), because “no government in the world” can be trusted not to abuse this power:

[For] the circumstances are so extreme in which most of us would be prepared to justify resort to torture, if at all, the conditions we would impose would be so stringent, the practical problems of devising and enforcing adequate safeguards so difficult and the risks of abuse so great that it would be unwise and dangerous to entrust any government, however enlightened, with such a power.<sup>139</sup>

### C. *The Israeli Experience*

Although scholars such as W.L. Twining and P.E. Twining would disapprove, some countries have advocated the use of torture in appropriate circumstances. In 1987, a commission chaired by Moshe Landau, former President of the Supreme Court of Israel, examined the interrogation techniques of Israel’s General Security Service (GSS). The Landau Commission concluded that Israel’s codified version of the necessity defense authorizes in advance the use of force in interrogation if the interrogator reasonably believes the use of force is “necessary to get information that would prevent the greater evil of loss of innocent lives.”<sup>140</sup> The Commission’s report established the bureaucratic framework for torture in Israel. According to the Supreme Court of Israel:

The decision to utilize physical means in a particular instance is based on internal regulations, which requires obtaining permission from various ranks of the GSS hierarchy. The regulations themselves were approved by a special Ministerial Committee on GSS interrogations. Among other guidelines, the Committee set forth directives pertaining to the rank authorized to allow these interrogation practices. . . . Different interrogation methods are employed depending on the suspect, both in relation to what is required in that situation and to the likelihood of obtaining authorization. The GSS does not resort to every interrogation method at its disposal in each case.<sup>141</sup>

However, the GSS did not always adhere to the guidelines put in place, and there is some evidence that the GSS tortured as many as eighty-five percent of detained Palestinians. Between 1987 and 1994, between sixteen and twenty-five Palestinians died during or shortly after interrogation.<sup>142</sup> Yet, there is also evidence that the GSS’s interrogations served to thwart some terrorist attacks.<sup>143</sup>

139. *Id.* at 348–49.

140. John T. Parry & Welsh S. White, *Interrogating Suspected Terrorists: Should Torture Be an Option?*, 63 U. PITT. L. REV. 743, 757 (2002).

141. Public Committee Against Torture in Israel v. State of Israel (Sept. 6, 1999), 38 I.L.M. 1471, 1474 (1999).

142. Parry & White, *supra* note 140, at 758.

143. *Id.*

In 1996, the Israel Supreme Court issued an order to prevent the use of force in a particular interrogation, but lifted it the next day after the GSS claimed that it was interrogating the suspect to obtain information that could prevent future terrorist attacks.<sup>144</sup> The suspect's attorney said that "the court's decision reflected its usual practice of 'grant[ing] injunctions only when the state made no objection, and allow[ing] the use of physical pressures when the state made no objection, and allow[ing] the use of physical pressures when the state sought it.'"<sup>145</sup> This decision led to a United Nations investigation of Israel's use of force in interrogations. The Israel Supreme Court soon began hearings in a case brought by six individual Palestinians and two Israeli human rights organizations. In 1999, the court issued its decision in *Public Committee Against Torture in Israel v. The State of Israel*.<sup>146</sup> The court's ruling made clear that any form of interrogation must be measured against a strong presumption of individual liberty:

An interrogation inevitably infringes upon the suspect's freedom, even if physical means are not used. Indeed, undergoing an interrogation infringes on both the suspect's dignity and his individual privacy. In a state adhering to the Rule of Law, interrogations are therefore not permitted in [the] absence of clear statutory authorization. . . .<sup>147</sup>

The court found that the coercive practices at issue were each prohibited, and the court rejected the government's claim that torture is authorized in advance by the necessity defense because it leads to information that saves lives.<sup>148</sup> The court banned torture, but also stated its willingness "to accept that in the appropriate circumstances, GSS investigators may avail themselves of the 'necessity' defense, if criminally indicted."<sup>149</sup> Although the Israeli Court held that the necessity defense does not authorize torture, it did recognize that the defense may be raised in the rare situation in which the use of force in an interrogation may be necessary.

## V. LEGAL FRAMEWORK IN THE UNITED STATES

### A. Case Law

In our own country, if law enforcement officials were to engage in conduct that amounts to torture, presumably they could be subjected to criminal liability. Federal courts have decided several cases that, while they do not deal with interrogation of terrorists for the prevention of an attack, *may* have some bearing on how a court might deal with an interrogator on trial for torture.

The United States Court of Appeals for the Eleventh Circuit seems to have

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144. *Id.* at 758–59.

145. *Id.* at 759.

146. 38 I.L.M. 1471 (1999).

147. *Id.* at 1478.

148. *Id.* at 1489.

149. *Id.* at 1486.

approved torture as a way of obtaining information necessary to find a victim of kidnapping in the case *Leon v. Wainwright*.<sup>150</sup> In *Wainwright*, the Miami police choked a suspect "until he revealed where [the victim] was being held."<sup>151</sup> A dissenting state court judge described the policemen's conduct as "'rack and pinion' techniques,"<sup>152</sup> but the federal appellate court unanimously held that it was merely "a group of concerned officers acting in a reasonable manner to obtain information they needed in order to protect another individual from bodily harm or death."<sup>153</sup>

The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment, including torture.<sup>154</sup> The Supreme Court has consistently held that "wanton infliction of physical pain" is outside the scope of legitimate punishment, regardless of the crime.<sup>155</sup> Professor Dershowitz, citing *Ingraham v. Wright*,<sup>156</sup> argues that this prohibition applies only to punishment, and that the effort to obtain information in a situation where no judicially imposed punishment is intended falls outside of the prohibition.<sup>157</sup> The plaintiffs in *Ingraham* challenged the imposition of corporal punishment, referred to as "paddling" on students in the public schools in Florida.<sup>158</sup> The "paddling" included assaults of twenty to fifty blows with a wooden slat, and sometimes left the recipients incapacitated and in need of medical treatment.<sup>159</sup> A five-member majority found the punishments in question to be outside the scope of the Eighth Amendment and construed the ban on "cruel and unusual punishment" to apply only to punishment imposed as part of the criminal process.<sup>160</sup>

Dershowitz also claims that the protection against self-incrimination bars the use of coerced disclosures at trial, but does not bar the coercion itself.<sup>161</sup> In *Chavez v. Martinez*,<sup>162</sup> the plaintiff sought damages based on a violation of his right against self-incrimination because he was interrogated for over a forty-five minutes while in pain

150. *Leon v. Wainwright*, 734 F.2d 770 (11th Cir. 1984).

151. *Id.* at 771.

152. *Leon v. State*, 410 So. 2d 201, 206 (Fla. Dist. Ct. App. 1982). (Ferguson, J., dissenting). An excerpt from the state judge's dissent:

For the first time in history, and the majority concedes as much, there is articulated a distinction between violent police conduct, the purpose of which is to gain information which might save a life, and such conduct employed for the purpose of obtaining evidence to be used in a court of law. The majority holds that where the illegal conduct is motivated by the first consideration no coercive taint will attach so as to render inadmissible evidence subsequently obtained for the purpose of securing a conviction. In essence, evidence of the whereabouts of a victim may be obtained using 'rack and pinion' techniques if the officer on the scene determines the situation life-threatening, and after the information sought has been extracted the status is 'deemed' as if the illegality had never occurred—an eerie proposition which should be rejected outright for all too obvious reasons.

*Id.*

153. *Wainwright*, 734 F.2d at 773 (11th Cir. 1984).

154. U.S. CONST. amend. VIII.

155. Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278, 283–84 (2003).

156. 430 U.S. 651 (1977).

157. Kreimer, *supra* note 155, at 284.

158. *Ingraham*, 430 U.S. at 656–57.

159. *Id.* One of the plaintiffs received more than twenty blows, required medical care, and could not return to school for several days. A second plaintiff could not use one of his arms for a week. *See id.*

160. *Id.* at 688–89.

161. DERSHOWITZ, *supra* note 128, at 135.

162. 538 U.S. 760 (2003).

and waiting to undergo medical treatment after being shot in the face by the police.<sup>163</sup> Justice Thomas' opinion holds that there was no violation of the right against self-incrimination because the plaintiff was never brought to trial on any criminal charge.<sup>164</sup> The opinion asserts that "[s]tatements compelled by police interrogations of course may not be used against a defendant at trial, but it is not until their use in a criminal case that a violation of the Self-Incrimination Clause occurs,"<sup>165</sup> and that "the absence of a 'criminal case' in which Martinez was compelled to be a 'witness' against himself defeats his core Fifth Amendment claim."<sup>166</sup> However, the Court does renounce the argument that torture to obtain relevant information is a constitutionally acceptable law enforcement technique if the information is not introduced at trial: "Our views on the proper scope of the Fifth Amendment's Self-Incrimination Clause do not mean that police torture or other abuse that results in a confession is constitutionally permissible so long as the statements are not used at trial. . . ."<sup>167</sup>

The Supreme Court, in *County of Sacramento v. Lewis*,<sup>168</sup> has also recognized that the Due Process Clause of the Fourteenth Amendment "was intended to prevent government . . . 'from abusing [its] power, or employing it as an instrument of oppression.'"<sup>169</sup> In *Lewis*, the Court rejected a plaintiff's contention that a police officer's deliberate indifference during a high-speed chase that caused the death of a motorcyclist violated due process.<sup>170</sup> However, the Court left open the possibility that unauthorized police conduct in other contexts may "shock the conscience" and give rise to liability.<sup>171</sup> In *Lewis*, the Court noted that conduct "most likely to rise to the conscience-shocking level" is "conduct intended to injure in some way unjustifiable by any government interest."<sup>172</sup> The Fourth Amendment<sup>173</sup> has been held to bar law enforcement officials from either employing excessive force in carrying out arrests even with probable cause<sup>174</sup> or engaging in brutally invasive searches for evidence even with a warrant.<sup>175</sup>

As a general protection, the Court has held that due process substantively protects against physical abuses that "shock the conscience" of the Court, even when not covered by a specific constitutional constraint. For instance, in *Rochin v. California*,<sup>176</sup> defendant Rochin swallowed two pills that were sitting on a table beside the bed when the police burst into his apartment.<sup>177</sup> The police took him to a hospital where a doctor was directed by one of the officers to induce vomiting by "forc[ing] an emetic solution

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163. *Id.* at 764.

164. *Id.* at 767.

165. *Id.* (citations omitted).

166. *Id.* at 772-73.

167. *Id.*

168. 523 U.S. 833 (1998).

169. *Id.* at 846 (citations omitted).

170. *Id.* at 854.

171. *Id.* at 850.

172. *Id.* at 849.

173. U.S. CONST. amend. IV.

174. See *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

175. See *Winston v. Lee*, 470 U.S. 753, 766 (1985).

176. 342 U.S. 165 (1952).

177. *Id.* at 166.

through a tube into Rochin's stomach against his will."<sup>178</sup> Rochin vomited, and the capsules as well as the morphine they contained were admitted against Rochin at his trial.<sup>179</sup> The Court held that due process requires respect of "certain decencies of civilized conduct."<sup>180</sup> The Court described the conduct of the police as "too close to the rack and the screw to permit of constitutional differentiation."<sup>181</sup> The shock to the Court's conscience came from the coercion, violence and brutality to the person involved.<sup>182</sup>

It is unclear whether the Court will apply any of these precedents in the context of a terrorism-related case. The Court may try to adapt some of these standards and apply them in the context of terrorism, or it may choose to develop entirely new standards, whether they be objective, subjective, or both. Although it is difficult to predict if the Court would apply these precedents in the context of terrorism, they provide a helpful context for the situation.

These cases are distinguishable from the case of the ticking bomb terrorist because in the ticking bomb situation, agents are interrogating the terrorist in order to prevent an attack rather than to investigate the attack. The objective of the interrogation is not law enforcement but public safety, and the Court is likely to take this goal into account when deciding what rule to apply. Thus, the terrorist is not yet involved in a criminal case, and the judicial adversary process has not yet begun. Therefore, the suspect does not have a Sixth Amendment right to counsel.<sup>183</sup> Under *Chavez*, a suspect's Fifth Amendment right against self-incrimination does not attach until his statements are used against him in a criminal case.<sup>184</sup> Although the Court explicitly rejects torture as a permissible law enforcement technique,<sup>185</sup> it may adopt a different standard in a situation where torture is employed to prevent an immediate and large-scale threat to public safety. For instance, the Court might choose to apply *Lewis* in conjunction with *Chavez*. The Court noted in *Lewis* that conduct that is likely to "shock the conscience" of the Court is "conduct intended to injure in some way *unjustifiable by any government interest*."<sup>186</sup> In applying this standard, the Court may conclude that the public safety interest of preventing the injury and death of many innocent people justifies the treatment of the terrorist.

### B. Necessity Defense

No one could possibly justify sacrificing millions of lives to spare a murderous psychopath a brief spell of intense pain, which he can end by his own choice. When

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178. *Id.*

179. *See id.*

180. *Id.* at 173.

181. *Id.*

182. *Roche*, 342 U.S. at 173–74.

183. *See Massiah v. United States*, 377 U.S. 201, 204–05 (1964).

184. *See Chavez*, 538 U.S. at 767.

185. *See id.* at 773.

186. *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (emphasis added).

the threat is so gigantic and the solution so simple, we are all in the camp of the Shakespeare character who said, 'There is no virtue like necessity.'<sup>187</sup>

The necessity defense was created for the situation in which a person commits an offense for which, from a social and moral point of view, it is undesirable to impose criminal liability on him.<sup>188</sup> It is applicable when a situation is forced on a person and in order to prevent a real danger, his only option is to impair the protected interests of another.<sup>189</sup>

Utilitarianism permits performing a lesser wrong in order to prevent a greater wrong. However, there are moral problems with this argument. "And not rather (as we be slanderously reported, and as some affirm that we say,) Let us do evil, that good may come? Whose damnation is just."<sup>190</sup> This passage of the Bible teaches that it is wrong to commit a sin to glorify God. More broadly, it argues that good ends never justify evil means, and one should not cause effects that are evil even if they are a necessary means to a greater good. Under a strict view of this moral philosophy, it is not permissible to torture a terrorist in order to save innocent lives. While courts have not considered the use of the necessity defense in this context, they have considered its application in homicide cases.

The 1884 case *Regina v. Dudley & Stephens*<sup>191</sup> rejects the necessity defense in a homicide prosecution.<sup>192</sup> Three adult seamen and seventeen year-old Richard Parker were forced to survive on an open boat after their ship sank.<sup>193</sup> After twenty days on the boat, the last nine days of which were without food and the last seven of which were without water, the sailors were very weak, and Parker was ill.<sup>194</sup> Dudley and Stephens killed Parker in order to eat his flesh and survive.<sup>195</sup> The third sailor did not approve of, or participate in, the homicide.<sup>196</sup> Four days later, the three men were rescued.<sup>197</sup> Dudley and Stephens were prosecuted for Parker's murder, and they raised the defense of necessity.<sup>198</sup> The Court rejected the necessity defense and found them guilty of murder.<sup>199</sup> In so doing, they cited Lord Hale's argument that the only justified necessity is self-defense.<sup>200</sup> Hale argued that if a starving man steals food in order to

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187. This quote from Steve Chapman of the *Washington Times* was quoted in DERSHOWITZ, *supra* note 128, at 105. The last line was taken from Shakespeare's TRAGEDY OF KING RICHARD II. The statement made by John of Gaunt, who was both a historical figure (Duke of Lancaster) and the character of King Richard's uncle in the play, was "[t]each thy necessity to reason thus[:] There is no virtue like necessity." *Id.* act I, sc. iii.

188. See Gross, *supra* note 3, at 107.

189. See *id.*

190. *Romans* 3:8 (King James).

191. 14 Q.B.D. 273 (1884).

192. See *id.* at 287-88.

193. *Id.* at 273.

194. *Id.* at 274.

195. *Id.*

196. *Id.*

197. *Dudley & Stephens*, 14 Q.B.D. at 274.

198. *Id.* at 288.

199. *Id.*

200. *Id.* at 282.

eat, he has committed a felony which is punishable by death under English law.<sup>201</sup> Under Hale's logic that hunger does not justify theft, it follows that hunger does not justify murder.

One could argue that the court in *Dudley & Stephens* did not, or did not have to, categorically reject the defense of necessity in homicide cases. At the time that Dudley and Stephens acted, the harm they were seeking to avoid was not yet imminent. Lord Coleridge focused on the special finding of the jury that it was "probable" that the three seamen would have died had they not killed Parker.<sup>202</sup> Thus, Dudley and Stephens deprived Parker of his life on the chance that this might preserve their own lives.<sup>203</sup> If their situation had been more extreme, their defense may have received more favorable treatment. In addition, Parker was unoffending and innocent. Under Hale's self-defense rationale, the killing of a victim who may be categorized as an aggressor might be more defensible.

The use of torture during the interrogation of a terrorist in order to gain information that will save innocent lives is distinguishable from the situation evaluated in *Dudley & Stephens*. First, the interrogation of a terrorist does not involve committing a homicide to save the lives of others. The terrorist will not be killed, but rather subjected to varying degrees of discomfort in order to persuade him to give law enforcement officials the information they need in order to prevent the deaths of many innocent people. Second, Hale's rationale for self defense applies to this case. The terrorist has taken some action that will soon cause the deaths of innocent people. He is not unoffending; his role in the situation makes him an aggressor. In addition, the terrorist has the power to end the interrogation by giving the law enforcement officials the information they are seeking.

The American Law Institute's Model Penal Code recognizes a "Choice of Evils" defense.<sup>204</sup> Under this defense, the conduct of a person acting to avoid a harm or evil to himself or another is justifiable if:

- (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.<sup>205</sup>

The Comment to section 3.02 of the Code explains that necessity is a justification for conduct that would otherwise constitute an offense, and that the legal system must look beyond the letter of specific prohibitions and consider the situation.<sup>206</sup> The Comment recognizes that "the sanctity of life has a supreme place in the hierarchy of values, [and] it is nonetheless true that conduct that results in taking life may promote

201. *Id.* at 283.

202. *Id.* at 279.

203. *Dudley & Stephens*, 14 Q.B.D. at 279.

204. See MODEL PENAL CODE § 3.02 (Official Draft and Revised Comments 1985).

205. *Id.* § 3.02(1).

206. *Id.* at cmt. n.1.

the very value sought to be protected by the law of homicide.”<sup>207</sup> For example, if an actor who floods a farm to save a whole town is indicted for the homicide of the residents of the farm house, he can argue that the objective of the law prohibiting homicide is to save life and that his conduct, while killing a few people, saved many innocent lives. The Comment acknowledges that there are ethical and moral problems with taking one innocent life to prevent many innocent deaths. However, when an actor is faced with inflicting one death to save many lives, if the choice among lives to be saved is not unfair, the actor should be allowed that choice. Thus, the Model Penal Code’s Choice of Evils justification is applicable to homicides.

Under the framework and rationale of the Model Penal Code, an interrogator who is subject to criminal liability for the torture of a terrorist in a ticking bomb situation should be able to raise the necessity defense. The interrogator engaging in torture certainly believes that the terrorist has knowledge that could help the law enforcement official prevent many deaths. The injury, suffering, and death of many innocent people is a greater harm or evil than the suffering of one terrorist who has already engaged in wrongdoing, who can control when the torturous treatment ends by telling the interrogator the information he knows. The Comment to § 3.02 of the Code states that “[a] developed legal system must have better ways of dealing with such problems than to refer only to the letter of particular prohibitions, framed without reference to cases....”<sup>208</sup>

The Landau Report, which concluded that Israel’s necessity defense authorized the use of force if the interrogator reasonably believed that force was necessary, stated that there was no need to require imminence for the defense to apply.<sup>209</sup> However, the element of imminence that is present in the ticking bomb scenario is crucial. When the danger is not imminent, an interrogator is not truly faced with a choice between two evils. For instance, an interrogator who knows that a bomb will be planted in a city building in one month and set to go off three days later is not justified in torturing a terrorist in custody today to find out where the bomb will be planted. In this situation, law enforcement officials know that danger is pending, but it is not imminent. There are many measures that they can take over the next month to try to prevent the attack. For instance, they can increase security in all city buildings as well as continue to question the terrorist in custody. The threat becomes imminent once the bomb is planted and set to go off and there is no longer enough time to evacuate. At this point, the only option is to find and disarm the bomb, and if the terrorist in custody is not willing to disclose the location of the bomb, the law enforcement official may be justified in resorting to torture techniques during the interrogation. Thus, the element of imminence must be present in order to limit the situations in which law enforcement officers resort to torture.

With a requirement of imminent danger, an interrogator may be able to claim the necessity defense regardless of whether the bomb was set to go off in one hour or in one day. As long as the interrogator does not know how much time he has to find the bomb, in his mind the danger could materialize any minute. Thus, when an interrogator has

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207. *Id.* at cmt. n.3.

208. *Id.* at cmt. n.1.

209. See Gross, *supra* note 3, at 107.



compelling evidence that the suspect in custody did plant the bomb, that the bomb is set to go off, and that the interrogator will not be able to find and disarm the bomb before it goes off unless the suspect discloses where the bomb is located, the danger is imminent.

#### CONCLUSION: WHERE DO WE DRAW THE LINE?

The way to win this war is not to adopt our enemies' evil methods. Resort to torture could conceivably stave off a catastrophe. But at what price to our self respect? ... We are in a war of the decent against the indecent. We dare not cross the line that separates the two.<sup>210</sup>

Torture is wrong: it is immoral and abhorrent, and it is never right or just. Despite the threat that terrorism poses, we must not lose sight of the right of all humans to be treated with dignity. In fact, at the core of the War on Terror we are fighting for this right of dignity. The United States must not endorse torture, as this action would only serve to provide justification for the rest of the world to engage in such practices. However, the possibility exists that our law enforcement officials will be faced with a decision between two evils: subjecting a terrorist to some degree of torture, or allowing a large number of innocent people to die. In a true ticking bomb scenario, interrogators may employ physical or psychological means to elicit information from the suspect. Torture in this scenario is not right or just, but it is the lesser of the two evils. If the officer is subjected to criminal prosecution for his conduct, he should be able to raise the necessity defense. The judge or jury would evaluate the officer's claim that he believed some degree of torture was immediately necessary to avoid a greater harm, and thus he may be relieved of criminal liability for his actions. This approach allows the use of torture in the situation in which it is absolutely necessary, but allows the government to maintain the principle that torture is prohibited. This will deter the government from using torture in unnecessary situations or for reasons other than the elicitation of information, and prevent our country from degrading itself by engaging in conduct that is inconsistent with fundamental notions of democracy and human decency.

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210. Jeff Jacoby, *How Not to Win the War*, BOSTON GLOBE, Jan. 26, 2003, at H11.

