

Torture, Democracy, and the War on Terrorism

By J. Peter Pham

Before the attacks of September 11, 2001, most Americans found it rather difficult to credit the existential threat posed by the terrorist phenomenon in the manner poignantly described by British historian Paul Johnson over a decade and a half earlier:

Terrorism is the cancer of the modern world. No State is immune to it. It is a dynamic organism which attacks the healthy flesh of the surrounding society. It has the essential hallmark of malignant cancer: unless treated, and treated drastically, its growth is inexorable, until it poisons and engulfs the society on which it feeds and drags it down to destruction.¹

And even if 9/11 raised awareness of the challenge to the international community in general—and in the open societies of liberal democracies in particular—posed by terrorism, nonetheless the indications are that full scope of Johnson's cancer metaphor has yet as to be fully appreciated even as America's "global war on terror" enters its fifth year. Cancer, after all, is a disease which, when reduced to the most generic terms, develops when the cells in a given part of the body begin to grow out of control. Certain types of cancer respond very differently to different types of treatment, and certain treatments elic-

it distinct responses from varying patients, so determining the type of cancer and understanding the health and lifestyle of the patient are vital steps toward knowing which treatments will be most effective. Thus necessarily the treatment of cancer is characterized by a rather carefully regulated regimen of surgery, radiation, chemotherapy, and biologic therapies based on the unique situation of the patient. Consequently, while a cancer diagnosis usually engenders a sense of urgency in making choices about treatment and services, the best medical professionals urge their patients to take the time to consider all the options available in order to make decisions as well informed as possible.

If terrorism is to be likened to a cancer, then the patient—in this case liberal democracies in general and the United States in particular—may well have been notified on 9/11 of the diagnosis but has so far refused to listen to, much less to discuss, the treatment options. As a result, carrying the metaphor perhaps a bit further than its urbane author intended, the attending physicians have given way to technicians who hack away at tissue with little input from the patient who will ultimately bear the scars of their handiwork. In this sense, the citizens of the United States should be no more surprised by the abuses reported out of Guantánamo and Abu Ghraib than the

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cancer patient who, refusing to discuss treatment options, discovers that his caregivers went ahead with some crudely effective, albeit drastic, therapy.

While some of the most horrific cases reported out of the worldwide network of detention centers run by U.S. military and intelligence agencies, those of detained terrorist suspects who died under interrogation—including that of Manadel al-Jamadi, whose body was wrapped in plastic and packed in ice when it was carried out of an Abu Ghraib shower room where he had been handcuffed to a wall, or that of Abed Hamed Mowhoush, who apparently suffocated after being thrust headfirst into a sleeping bag²—have received widespread notoriety (and almost equally widespread condemnation), it has yet to lead to what I described in another journal more than a year ago as "a public debate long overdue on the balance to be struck between the competing demands of civil liberties and national security and whether or not violent responses to violence render both sides morally indistinguishable."³

If anything, the confidential (and not-so-confidential) findings of the International Committee of the Red Cross,⁴ the recommendations of non-governmental human rights groups,⁵ and the investigative work of various journalists⁶—to say nothing of the official reports of government panels⁷—indicate that, beyond the factual question of whether or not acts of torture have been committed by some of those fighting the war on terror (it has by almost any common sense definition of "torture"), lies a whole host of issues. What interrogation techniques are our forces allowed to employ and under what circumstances? Are any of these tactics even effective, or are they counterproductive? And if the tactics adopted fail to elicit the hoped for results, can we hand prisoners over to other powers who may not be similarly constrained? If yes, under what circumstances and with what guarantees, if

any? If not, what should we do?

The fact is that it has been two years since the emergence of the riveting images of Iraqi prisoners being forced by members of the now-disgraced 372nd Military Police Company into simulated sexual positions and otherwise abused generated a flurry of outrage in legal and media circles—all with little apparent consequence other than the criminal prosecution of the handful of the lower-level offenders on whom the consequences of military justice fell most heavily. While Pentagon investigations⁸ led to some superior officers being relieved of their commands and others being reprimanded and having their careers essentially ended, none of these figures who were supposed to exercise command responsibility are likely to see the inside of a prison, military, or otherwise. In fact, the failure of the scandal to result in greater *political debate*—much less fallout—speaks volumes about our democratic polity and what it needs to confront. Why was it that, as Craig Whitney of the *New York Times* had piously hoped in his introductory essay to a volume of the abridged investigation reports, the electorate declined to render "judgment on November 2, 2004, on what responsibility should be borne by those who made the political and policy decisions that led, indirectly or not, to the aberrations at Abu Ghraib"?⁹ Could it be that the reports—to say nothing of the photographs of the Abu Ghraib detainees and their smiling tormentors that led to the investigations of abuses—actually revealed more than many Americans wanted to know?

Beyond the Torture Warrant

If the juridical obligations of both international and U.S. law are fairly clear,¹⁰ the practical (and ethical) application of those legal norms in some cases is perhaps more ambiguous. In a chapter provocatively entitled "Should the Ticking Time Bomb Terrorist Be Tortured?" in his book *Why Terrorism Works:*

Understanding the Threat, Responding to the Challenge, Harvard Law School Professor Alan Dershowitz, a noted civil libertarian, presented the case of Zacarias Moussaoui, the so-called 20th hijacker who was arrested before 9/11 after flight instructors reported suspicious statements he made while taking flight lessons (including his lack of interest in learning how to land an airplane), and noted:

The government decided not to seek a warrant to search his computer. Now imagine they had, and that they discovered he was part of a plan to destroy large occupied buildings, but without any further details. They interrogated him, gave him immunity from prosecution, and offered him large cash rewards and a new identity. He refused to talk. They then threatened him, tried to trick him, and employed every lawful technique available. He still refused. They even injected him with sodium pentothal and other truth serums, but to no avail. The attack now appeared to be imminent, but the FBI still had no idea what the target was or what means would be used to attack it. An FBI agent proposes the use of non-lethal torture—say, a sterilized needle inserted under the fingernails to produce unbearable pain without any threat to health or life...The simple cost-benefit analysis for employing such non-lethal torture seems overwhelming: it is surely better to inflict non-lethal pain on one guilty terrorist who is illegally withholding information needed to prevent an act of terrorism than to permit a large number of innocent victims to die. Pain is a lesser and more remediable harm than death; and the lives of a thousand innocent people should be valued more than the bodily integrity

of one guilty person.¹¹

In response to the near-hysterical tenor of the criticism with which his proposal was greeted by his peers across the political spectrum,¹² Dershowitz appealed, among other authorities, to the utilitarian argument advanced by Jeremy Bentham who argued that happiness can be calculated and quantified, and it is consequently acceptable to inflict pain and suffering on the few to serve the wants and needs of the many.¹³ Dershowitz went on to resolve the dilemma between the demands of public safety and security on the one hand and civil liberties and human rights on the other by appealing to a third value, accountability and visibility, to argue for the revision of legislation to accommodate torture in the "ticking bomb case" through the use of carefully delimited judicial "torture warrants" that would authorize the administration of a predetermined amount of non-lethal pressure.¹⁴

Dershowitz's reassurances about the constitutionality of his proposal¹⁵ are hardly convincing to many civil libertarians and other human rights advocates¹⁶—to say nothing of their being comforting to anyone who might find himself or herself the object of one of the proposed warrants. Nevertheless, the professor may be on to something. Under the current controlling legal regime, there is almost universal opposition to torture (as well as the euphemistic "moderate physical pressure" that some have referred to as "highly coercive interrogation" or even "torture lite").¹⁷ However, confronted with another Moussaoui, is there any doubt that officials would subject him to what the director of Central Intelligence Agency, Porter J. Goss, told a Senate committee earlier this year were "professional interrogation techniques"?¹⁸ Moreover, is there any question that a large plurality—if not an absolute majority—of Americans would *expect* officials to use those tech-

niques, treaty obligations, and legal strictures notwithstanding? In short, is there no little hypocrisy in the liberal polity's condemnation of torture even as it knows full well—or at least it would know were it not in denial—that it has occurred, is occurring, and will likely occur again?

While Dershowitz's proposal is problematic (to civil libertarians) to say the least and, in any case, the evidence for the effectiveness of various coercive techniques for loosening the tongues of suspected terrorists is necessarily anecdotal and apparently mixed at best,¹⁹ there is much truth in the Harvard professor's assertion that "it seems logical that a formal, visible, accountable, and centralized system is somewhat easier to control than an ad hoc, off-the-books, and under the radar-screen system."²⁰ In fact, I would take Dershowitz's argument a step further and posit that while imposing a ban on torture may be morally satisfying, doing so while knowingly avoiding evidence of the actual or likely occurrence of abuses only serves to promote disrespect for the rule of law in general and may even have the effect of increasing the instances of detainee abuse in particular.

Irrespective of whether we as individuals choose to acknowledge it or not, the democratic polity that we are a part of has implicitly—and, one could argue, even explicitly—struck a Faustian bargain. The primary task of military, security, and intelligence agencies is the prevention of future attacks, especially those directed against the homeland. In order to carry out this charge, agents of these services may come to believe that it is necessary to "work...sort of the dark side," as Vice President Dick Cheney told one interviewer shortly after 9/11.²¹ Tactics adopted may include (and apparently have included) a number that are of dubious legality if not patently illegal, including the abduction, "rendition," and physical and psychological abuse of suspected terrorists. In exchange for the

security that these measures presumably assure, the American public has allowed those it has entrusted with its defense a great deal of discretion, ostensibly because such latitude and secrecy concerning *modus operandi* are necessary so that terrorists do not develop means of circumventing or otherwise resisting the new counterterrorism efforts. Furthermore, there is, for many members of the American public, what may constitute an

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additional advantage to this arrangement: the less they know about the methods used by those charged with protecting the commonweal, the less they have to contemplate the costs, real and moral, of their newfound sense of security. Of course, unspoken is the fact that secrecy, as Dershowitz intuits, contains within itself the potential for abuse and, consequently, the heavy price that it exacts from those embracing it may at some point exceed that of the disaster averted.

The Israeli Experience

To date, the only country in the world to publicly acknowledge its use of coercive techniques against suspected terrorists is, not surprisingly, the state of Israel, which has not only been a target of terrorist attacks since its foundation, but is also the only functional democracy in its neighborhood. As a conse-

quence, the citizens of the Jewish state had an opportunity to thresh out some of the dilemmas that such attacks pose for a democratic polity. In 1987, two well-publicized abuse cases led the government of Israel to establish a commission of inquiry to examine the methods of the principal state agency responsible for counterterrorism and internal security, the General Security Service, generally called by its Hebrew acronym as the Shabak (*Sherut ha-Bitachon ha-Klali*) and better known abroad as the Shin Bet. In carrying out its mission, the Shabak carries out investigations to gather the intelligence that it needs to preempt or otherwise prevent terrorist attacks. As court documents attest, in the past this has meant that the security service has resorted to physical force during its interrogations.²²

The first case was that of Izat Nafsu, a member of the Circassian minority who was serving as a lieutenant in the Israeli Defense Force (IDF) when he was arrested and convicted of treason for spying for Syria in 1980. In 1987, Nafsu's conviction by a military tribunal was overturned by the Israeli Supreme Court which, sitting as the Court of Criminal Appeal, ruled that the confession that had been its basis had been obtained by his interrogators through coercion.²³ The second case involved the 1984 hijacking by four armed Palestinian terrorists from Gaza of a civilian commuter bus, the Egged No. 300 which runs from Tel Aviv to Ashkelon (both cities are within Israel's pre-1967 borders). A counterterrorism team stormed the bus, killing two of the hijackers and capturing the other two. Journalists who were present at the scene saw the two taken alive from the bus and took pictures of them being taken away. Shortly afterwards, however, a government spokesman announced that the two captured terrorists had died of their wounds on the way to a hospital. A subsequent inquiry by the comptroller of the Ministry of Defense concluded that the two terrorists had been taken alive from the

bus but left open the question of how they died. A further investigation, conducted the following year by the state prosecutor, concluded that while there was insufficient evidence to bring charges for the killing, there were grounds for indicting a senior IDF officer, five Shabak agents, and three police officers for assault for their roles in the affair. The criminal case, however, ended when President Chaim Herzog pardoned the men involved.²⁴ A lively public debate nonetheless ensued around both these two cases, leading to the decision to publicly examine the issues raised through the vehicle of a special commission established under the chairmanship of retired Supreme Court Justice Moshe Landau, who earlier in his judicial career had presided at the 1961 trial of Nazi Adolf Eichmann.

Regardless of one's view of the specific recommendations made by the Landau Commission, the work of the panel and its final report are without parallel in any other contemporary democracy for its public examination and discussion of the investigative procedures employed by the government's security services in cases of terrorism.²⁵ While the report has been roundly criticized by human rights advocates in Israel and abroad,²⁶ it did condemn the use of torture which it acknowledged had been used by Shabak interrogators during their questioning of detainees. Nonetheless the commission recognized that the interrogators themselves labored under intense pressure—ultimately derived, although the report does not make this point explicit, from the public wherein sovereignty resides in a democratic polity—to protect the would-be targets of terrorists. Thus the commission called for the legislative articulation of a series of guidelines for the use of "moderate physical pressure" and "non-violent psychological pressure" in the interrogation of prisoners withholding information about impending acts of terrorism, when the knowledge thus obtained could save lives.²⁷

The commission's unprecedented call for statutory regulation of specific interrogation practices—those often mentioned include shaking prisoners, depriving them of sleep, and placing them in various physically uncomfortable positions including the *Shabach* (where the prisoner is seated on a low stool or chair, tilted forward, with his or her hands tied behind the back and head covered by a sack, while loud music is played), the *Kasa'at at-tawlah* (where the prisoner is painfully stretched, using a table and direct pressure), and the *Qumbaz* or "frog crouch" (where the prisoner is forced to crouch on tip-toe with his or her hands tied behind his back)—was widely ridiculed, even by those who accepted that there are circumstances when extreme measures might be employed. One scholar asked whether there was ever a case where a state proclaimed its interrogation practices, torture or not, in its legal code.²⁸ (Codified or not, many interrogation techniques are known today either because they have been documented in legal proceedings, reported by those subject to them or their advocates, or even published by interrogators past and present.²⁹)

Despite a considerable body of necessarily anecdotal evidence—albeit much contested by opponents of the techniques used—that the coercive methods employed by the security services have saved a number of lives by preventing terrorist attacks, the Israeli Supreme Court brought the brief decade of openness to an end in 1999.³⁰ Writing for the tribunal, its president, Aharon Barak, prohibited the employment of physical pressure even if its use is considered necessary to prevent acts of terrorism. The court's judgment came even as its head acknowledged:

The facts presented before this Court reveal that one hundred and twenty people died in terrorist attacks between 1.1.96 and 14.5.98. Seven

hundred and seven people were injured. A large number of those killed and injured were victims of harrowing suicide bombings in the heart of Israel's cities. Many attacks—including suicide bombings, attempts to detonate car bombs, kidnappings of citizens and soldiers, attempts to hijack buses, murders, the placing of explosives, etc.—were prevented due to the measures taken by the authorities responsible for fighting the above described hostile terrorist activities on a daily basis.³¹

Its acknowledgment of the country's unique security challenges notwithstanding, the court held that the Shabak interrogations violated Basic Law: Human Dignity and Liberty clauses guaranteeing freedom from violation of an

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individual's body or dignity, rights that could lawfully be infringed upon only "by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required."³² Consequently, the tribunal granted an absolute order *nisi* declaring that the security agency "does not have the authority to 'shake' a man, hold him in the 'Shabach' position...force him into a 'frog crouch' position and deprive him of sleep in a manner other than that which is inherently required by interrogation."³³

Irrespective of what one thinks of the wisdom or folly of the experiment initiated by

Justice Landau's commission and/or the ruling of Justice Barak's court, the remarkable fact remains that Israel's is the only democratic polity to directly and publicly confront the dilemma posed by Dershowitz's "ticking time bomb terrorist." While I do not know of such a case having arisen since the *Public Committee Against Torture* decision, the outbreak of the so-called "al-Aqsa intifada" in late 2001 with its attendant spike in suicide bombings and other terrorist attacks would tend to suggest a high probability that it has.³⁴ In any event, inevitably such a circumstance will occur and while the security services will, undoubtedly, be prepared to deal with it tactically and operationally, they and the society they are charged to protect will be bereft of the juridical framework necessary for the nation's elected political leadership to give them legitimate guidance on confronting it. Whether this scenario, with the security services dealing extra-legally with the situation, represents anything approaching ideal in a liberal society is, of course, entirely another question.

Fighting the Battles, Winning the War

Even if one opts to categorically as well as specifically—the ruling graphically catalogued some examples of banned measures—"prohibit all forms of physical pressure" as the Supreme Court of Israel does,³⁵ it could be argued that the tribunal's public confrontation of the awful dilemma over coercive interrogation practices—to say nothing of its equally unparalleled track record of granting emergency judicial review even during ongoing military operations—is inconceivable outside the vigorous (to say nothing of vociferous) culture of Israeli democratic politics. Dershowitz has convincingly argued that Israel's highest tribunal "was able to confront the issue of torture precisely because it had been openly addressed by the Landau Commission in 1987."³⁶ The State of Israel is,

of course, exceptional in a number of ways. A small country where everyone seemingly knows everyone else, it has an extraordinary tradition of public discourse concerning its constantly precarious security situation about which no citizen is unaware. And while the debate is often heated, once definitive decisions are made, they tend to be widely respected. A number of Israeli contacts have told me that after the Supreme Court's ruling was released, clear directives were handed down the military and security chains of command to obey it, notwithstanding the personal and professional reservations of many experienced counterterrorism officers.

While human rights groups continue to document abuses, I have received credible—if at times grudging—acknowledgments from several Israeli and Palestinian activists that interrogation methods currently employed are markedly different from those before 1999. Tellingly, while human rights lawyers acting on behalf of detained terrorist suspects have brought a whole host of complaints before Israeli courts in the six years since the torture ban was established, Justice Barak has yet to hear a case alleging that his ruling banning torture has been flaunted. Instead, reports indicate that the security services have been forced to develop effective means of obtaining the intelligence they require without transgressing the now-acknowledged legal standards. (During a research trip to Israel this past summer, my colleagues and I visited a special facility for prisoners who had been convicted by courts of violent terrorist activities, included the murder of Israeli soldiers and civilians. The prison authorities allowed us to freely interview a number of Palestinian prisoners, including both Arab citizens of Israel and residents of the territories occupied after 1967. Although we recorded quite a number of grievances, running the gamut from the legitimate to the ludicrous, none of those we spoke with complained of torture.)

My point is not so much to extol the virtues of the Israeli approach as to contrast it with what has occurred in the United States in the aftermath of 9/11. The *New York Times*, for example, has reported that "[in] early November 2001, with Americans still staggered by the September 11 attacks, a small group of White House officials worked in great secrecy to devise a new system of justice for the new war they had declared on terrorism."³⁷ According to officials, the plan was considered so sensitive that "senior White House officials kept its final details hidden from the president's national security advisor, Condoleezza Rice, and the secretary of state, Colin Powell."³⁸ It goes without saying that the same officials were quoted by the report as saying they "hardly thought of consulting Congress."³⁹

Thanks to the efforts of dedicated non-governmental human rights organizations, both international and American, combined with the tenacity of a number of investigative journalists, the mechanical elements of this "new system of justice" have been unveiled, including such investigative techniques as forcing naked detainees to stand with their feet shackled and their hands chained above their heads as well as covering the heads of prisoners with black hoods, forcing them "stand or kneel in uncomfortable positions in extreme heat or cold" that can shift quickly from "100 to 10 degrees," depriving them of sleep, subjecting them to disorienting lights and sounds, and withholding painkillers to those wounded during their capture.⁴⁰ Still other detainees are even less fortunate in the treatment they have received: an unknown number of those in this latter category have been turned over to authorities in states that are less than renowned for their human rights records. *The Wall Street Journal* quoted one "senior federal law-enforcer" as saying about one terrorist suspect, "There's a reason why [Mr. Mohammed] isn't going to be near a place

where he has Miranda rights or the equivalent of them. He won't be someplace like Spain or Germany or France. We're not using this to prosecute him. This is for intelligence. God only knows what they're going to do with him. You go to some other country that'll let us pistol whip the guy."⁴¹ Countries frequently named as receiving these "extraordinary renditions" include Egypt, Jordan, Saudi Arabia, and Uzbekistan.⁴²

The problem with these crude methods is that, aside from the operational legal and ethical questions, they assume that torture (or "torture lite") necessarily works. As one veteran national security correspondent has observed: "Professional intelligence officers know that prisoners will confess to anything under intense pain. Information obtained through torture thus tends to be unreliable, in addition to being immoral."⁴³ Even conservative scholar Reuel Marc Gerecht, himself a former Central Intelligence Agency operative, has complained in the pages of the *Weekly Standard* that "[i]t is clear that the Bush administration hasn't thought through what it's doing in these prison facilities."⁴⁴ Gerecht's assessment of the *modus operandi* in America's fight with terrorists is, given its source, particularly damning:

The Pentagon and the CIA should admit, however, that their intelligence officers can *regularly* make mistakes in their interrogations and debriefings. Interrogation is an art, not a science. Even in the best of hands judgments can always remain uncomfortably subjective. We should be honest and say that we don't always have the best of hands doing the questioning...Has the Pentagon or the CIA introduced standard procedures to review the quality of the product of its interrogations—or even to listen to the tapes of those interrogations? It's a good bet

that neither the Senate and House intelligence oversight committees, nor the senior reaches of the administration, have any firm idea who the interrogators are at the secret CIA facilities, or their preferred methods.⁴⁵

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U.S. military and intelligence officials to task for the abuses that have been exposed, none has taken on the responsibility of providing the executive branch with any legislative guidance on interrogation and other tactics to be used against terrorists and suspected terrorists. The closest thing in the United States to Israel's Landau Commission has been the unofficial (although partially funded by a grant from the Department of Homeland Security) Long Term Strategy Project for Preserving Security and Democratic Freedoms in the War on Terrorism, a joint project of Harvard University's John F. Kennedy School of Government and Harvard Law School involving roughly two dozen former government officials from the United States and Great Britain. The group's final report asserted that there were "highly coercive interrogation techniques" that "also comply with our additional treaty obligations not to engage in 'cruel, inhuman, or degrading treatment.'"⁴⁶ A list of techniques meeting these requirements—unlike the Landau Commission's appendices, no menu of sug-

gestions is included here—would be prepared by the President and communicated to the relevant congressional oversight committees. Even then, these would be used in individual cases only when exigent circumstances are certified by a designated senior government official who communicates the certification to the Attorney-General and the Senate and House Intelligence Committees. Detailed oversight and other accountability mechanisms were also delineated.⁴⁷ A similar case, albeit without the detailed statutory architecture, was made by Gerecht, who has argued: "If the CIA believes it's necessary to 'water-board' a chief al-Qaeda operative who may have information about a devastating terrorist strike, then the administration should make the case before Congress, or at least before the intelligence oversight committees, that simulated drowning is morally and operationally justified."⁴⁸

In the end, however, while the idea that America should set up the institutions and mechanisms that would make its interrogation of terrorist suspects less arbitrary and more accountable has attracted, not unexpectedly, the ire of civil libertarians and human rights advocates, it has found little traction on either side of the aisle in the halls of Congress. And, despite its foreign policy of spreading democracy abroad, the Bush administration has not gone out of its way to pursue a debate that would subject its tactics to public scrutiny, much less risk the possibility of having its executive authority in the war on terror circumscribed. In the face of this stance, the elected representatives of the people apparently prefer, like their constituents, to continue with their Faustian arrangement of obtaining what they perceive to be security in exchange for ignorance of its costs—legal, diplomatic, moral, or otherwise.⁴⁹

In his 2002-2003 Gifford Lectures at the University of Edinburgh, journalist and human rights scholar Michael Ignatieff sum-

marized the dilemma that democratic societies face in confronting international terrorism:

When democracies fight terrorism, they are defending the proposition that their political life should be free of violence. But defeating terrorism requires violence. It may also require coercion, deception, secrecy, and violation of rights. How can democracies resort to these means without destroying the values for which they stand?⁵⁰

The answer to this query is by no means easy. And the give-and-take of the democratic process, no matter how open or inclusive, offers no guarantee concerning the virtue or even justice of its public policy choices—to say nothing of their transcendent rightness or wrongness. After all, choices, even erroneous ones, as well as their attendant consequences are unavoidable elements of the human experience. However, while the adversarial dynamics of democratic proceedings are fallible, they also allow for the possibility of exposing and, ultimately, correcting mistakes. Consequently, in liberal societies, every action, especially those involving controversial clashes between values, ought to be subject to open debate and due deliberation, rather than surreptitiously carried out by unaccountable functionaries—a point that somehow eluded an administration otherwise committed to exporting the notion that in any society, regardless of cultural circumstances, openness and democracy are the keys to improving political life. Our not-too-distant history is replete with the wreckage of policies undertaken without the benefit of the imprimatur of the democratic political process. However a free people, who will ultimately bear the burden of decisions made in their name, can neither approve nor disapprove of governmental action of which they (or at least their elected representatives) are

ignorant—willfully, hypocritically, or otherwise. If free polities are to prevail through the current conflicts without becoming irredeemably weakened, then no topic, no matter how unpleasant, should be off limits. If the ticking time bomb terrorist must be subjected to coercive interrogation techniques, then our political process must go through the battle of prospectively contemplating that possibility. If he or she should not be tortured, even if a threat of mass devastation can only be avoided through coercion, then the decision to assume the cost of adhering to that value—if it is indeed a value of the *demos*—needs to likewise be considered in advance and *that* burden democratically assumed. Any war, even a "war on terrorism," can only be won by fighting each battle as it comes—winning some and perhaps losing others. Whatever the momentary surge or ebb of the tides of conflict and the opposing shoals of anarchy and tyranny, history has shown that the liberal vessel has a remarkable resilience so long as it remains anchored in the legitimacy that can only be conferred by the battles of an open democratic process. ■

Endnotes

¹ Paul Johnson, *The Cancer of Terrorism*, in *TERRORISM: HOW THE WEST CAN WIN* 31 (Benjamin Netanyahu ed., 1986).

² See Joseph Lelyveld, *Interrogating Ourselves*, N.Y. TIMES MAG., June 12, 2005, at 36.

³ J. Peter Pham, *Law, Human Rights, Realism and the "War on Terror,"* 4 HUMAN RIGHTS & HUMAN WELFARE 91 (2004) (reviewing Michael Ignatieff, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR* (2004)).

⁴ See, e.g., INTERNATIONAL COMMITTEE OF THE RED CROSS, REPORT ON THE TREATMENT BY THE COALITION FORCES OF PRISONERS OF WAR AND OTHER PROTECTED PERSONS BY THE GENEVA CONVENTIONS IN IRAQ DURING ARREST, INTERNMENT AND INTERROGATION (2004), available at http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.pdf.

⁵ See, e.g., AMNESTY INTERNATIONAL, ISSUE BRIEF: AMNESTY INTERNATIONAL CALLS FOR INDEPENDENT COMMISSION (2005), available at http://www.amnestyusa.org/uspolicy/issue-briefs/independent_commission.pdf.

⁶ See, e.g., Seymour M. Hersch, *CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB* (2004).

⁷ See, e.g., OFFICE OF THE INSPECTOR GENERAL, *THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS* (2003), available at <http://www.usdoj.gov/oig/special/0306/index.htm>; also see INDEPENDENT PANEL TO REVIEW DEPARTMENT OF DEFENSE DETENTION OPERATIONS, *FINAL REPORT* (2004), available at <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>.

⁸ See, e.g., ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE (2004) ("the Taguba Report"), available at http://www.johnmccrory.com/download/taguba_report.pdf; see also ARTICLE 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND THE 205TH MILITARY INTELLIGENCE BRIGADE (2004) ("the Jones Report"), and ARTICLE 15-6 INVESTIGATION OF THE ABU GHRAIB PRISON AND THE 205TH MILITARY INTELLIGENCE BRIGADE (2004) ("the Fay Report"), available at http://www.washingtonpost.com/wp-srv/nation/documents/fay_report_8-25-04.pdf.

⁹ Craig R. Whitney, *Introduction*, *THE ABU GHRAIB INVESTIGATIONS: THE OFFICIAL REPORTS OF THE INDEPENDENT PANEL AND PENTAGON ON THE SHOCKING PRISONER ABUSE IN IRAQ* vii, xxiii (Steven Strasser ed., 2004).

¹⁰ See, e.g., United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51 at 197, U.N. Doc A/39/51 (1984) (defining torture 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, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" and declaring "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture"); see also Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8490 (1999) (interpreting the Convention in the light of the U.S. Senate's reservation limiting the acceptance of the treaty's proscriptions against "cruel, inhuman, or degrading treatment or punishment" to the understanding in the American constitutional jurisprudence of the "Fifth, Eighth, and/or Fourteenth Amendments to the Constitution"). For an anthology of declassified and otherwise released internal legal memoranda with which certain members of the Bush administration sought to justify policies undertaken, see *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

¹¹ Alan M. Dershowitz, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE*

143-144 (2002).

¹² See generally Marcy Strauss, *Torture*, 48 N.Y.L. SCH. L. REV. 201 (2003).

¹³ Alan M. Dershowitz, *The Torture Warrant: A Response to Professor Strauss*, 48 N.Y.L. SCH. L. REV. 275, 275-276 (2003).

¹⁴ *Id.* at 277-279; also see Alan M. Dershowitz, *Torture "Off the Books"?*, NATION, June 10, 2002, at 2 (Letter to the Editor) (responding to a review by Amnesty International U.S.A. executive director William Schulz).

¹⁵ Alan M. Dershowitz, *SHOUTING FIRE: CIVIL LIBERTIES IN A TURBULENT AGE* 470-477 (2002) (arguing that as long as the information obtained is not used in criminal prosecution of the subject the Fifth Amendment is not violated and as long as the intent is prevention rather the retribution the Eighth is likewise not transgressed).

¹⁶ See generally Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 J. CONST. L. 278 (2003).

¹⁷ Mark Bowden, *The Dark Art of Interrogation*, ATLANTIC MONTHLY, Oct. 2003, at 54.

¹⁸ Faye Bowers, *Interrogation Tactics Draw Fire*, CHRISTIAN SCIENCE MONITOR, Mar. 30, 2005, at 2.

¹⁹ See generally Jason Vest, *Pray and Tell*, THE AMERICAN PROSPECT, July 2005, at 47.

²⁰ Dershowitz, *supra* note 11, at 158.

²¹ *Meet the Press with Tim Russert* (NBC television broadcast, Sept. 16, 2001), available at <http://www.whitehouse.gov/vicepresident/news-speeches/speeches/vp20010916.html>.

²² See generally H.C. 5100/94, *The Pub. Comm. Against Torture in Israel v. The State of Israel*, 53 (4) P.D. 817, available at <http://www.derechos.org/humanrights/mena/doc/torture.html>.

²³ See Cr.A. 124/87, *Nafsu v. Military Prosecutor Gen.*, 41 (2) P.D. 631.

²⁴ See Ian Black & Benny Morris, *SECRET WARS: A HISTORY OF ISRAEL'S INTELLIGENCE SERVICES* 400-405 (1991).

²⁵ See REPORT OF THE COMM'N OF INQUIRY INTO THE METHODS OF INVESTIGATION OF THE GENERAL SECURITY SERVICE REGARDING HOSTILE TERRORIST ACTIVITY (1987) [hereinafter LANDAU REPORT].

²⁶ See generally Emanuel 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 & FOR. AFF. 89, 107 (2001).

²⁷ See generally LANDAU REPORT, *supra* note 25.

²⁸ See Sanford H. Kadish, *Torture, the State and the Individual*, 23 ISR. L. REV. 345, 352 (1989).

²⁹ See HUMAN RIGHTS WATCH, TORTURE AND ILL-TREATMENT—ISRAEL'S INTERROGATION OF PALESTINIANS FROM THE OCCUPIED TERRITORIES 111-146 (describing interrogation techniques used by Israeli security forces); see also Chris Mackey & Greg Miller, THE INTERROGATORS: INSIDE THE SECRET WAR AGAINST AL QAEDA 479-483 (2004) (Mackey is the pseudonym for a U.S. military interrogator in Afghanistan who details sixteen different interrogation approaches used by American personnel against detainees suspected of belong to al-Qaeda or the Taliban).

³⁰ See *Pub. Comm. Against Torture v. State of Israel*, 38 I.L.M. at 1471 (1999).

³¹ *Id.* at 1473.

³² *Id.* at 1489.

³³ *Id.*

³⁴ See generally Michele K. Esposito, *The al-Aqsa Intifada: Military Operations, Suicide Attacks, Assassinations, and Losses in the First Four Years*, 34 J. PALESTINE STUD. 85 (2005).

³⁵ *Pub. Comm. Against Torture v. Israel*, *supra* note 30, at 1488.

³⁶ Dershowitz, *supra* note 13, at 288.

³⁷ Tim Golden, *After Terror, A Secret Rewrite of Military Law*, N.Y. TIMES, Oct. 24, 2004, at A1.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Don Van Natta, Jr., et al., *Threats and Responses: Interrogations; Questioning Terror Suspects in a Dark and Surreal World*, N.Y. TIMES, Mar. 9, 2003, at A1.

⁴¹ Jess Bravin & Gary Fields, *How Do U.S. Interrogators Make a Captured Terrorist Talk?*, WALL ST. J., Mar. 3, 2003, at B1.

⁴² Don Van Natta, Jr., *Growing Evidence U.S. Sending Prisoners to Torture Capital; Despite Bad Record on Human Rights, Uzbekistan is Ally*, S.F. CHRON., May 1, 2005, at A4.

⁴³ David Ignatius, *"Rendition" Realities*, WASH. POST, Mar. 9, 2005, at A21.

⁴⁴ Reuel Marc Gerecht, *What's the Matter with Gitmo? Detention, Torture, and Other Illiberal Things*, WKLY. STANDARD, July 4/July 11, 2005, at 19.

⁴⁵ *Id.* at 24.

⁴⁶ LONG-TERM STRATEGY PROJECT FOR PRESERVING SECURITY AND DEMOCRATIC FREEDOMS IN THE WAR ON TERRORISM 2 (Philip B. Heyman & Juliette N. Kayyem eds., 2004).

⁴⁷ *Id.* at 23-32.

⁴⁸ Gerecht, *supra* note 44, at 25.

⁴⁹ At the time of this writing, there were reports in the media

that Vice President Cheney was leading an administration lobbying effort to block legislation, still being drafted, offered by three Republic senators—John McCain, Lindsey Graham, and John W. Warner—that would bar the military from hiding prisoners from the International Committee of the Red Cross; prohibit cruel, inhumane, or degrading treatment of detainees; and require interrogators to use only techniques authorized in a new Army field manual. If the reports are accurate, then there is at least some possibility of public discussion. See Eric Schmitt, *Cheney Working to Block Legislation on Detainees*, N.Y. TIMES, July 24, 2005, at A16.

⁵⁰ Michael Ignatieff, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR* vii (2004).