Human Rights vs. Security: The Dilemma of Torture in the Modern Age

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While torture is not a new historical phenomenon, recent developments in world affairs have brought it forcefully back into the public consciousness. Specifically, the September 11th attacks and the general threat of terrorism have led governments, such as that of the United States, to increasingly turn to torture as a tool to combat the growing threat of non-state actors. With improvements in communications technology and the proliferation of weapons of mass destruction, the power of individuals to inflict harm on societies has increased dramatically and subsequently the importance of gathering information on such elusive enemies has increased. Torture is one such way of extracting information from individuals. Therefore, due to the new imperative to collect intelligence, many liberal democracies face a moral and legal predicament in which they must balance principles of human rights against the need for security. In response to this challenge that the contemporary world faces, the United States in particular has adopted limited forms of torture. Though this may seem shocking considering popular support for human rights and relevant prohibitions of international law, in a broader understanding of the phenomenon of torture this is not surprising. In the scope of history, such a dilemma naturally emerged out of modern security realities. Furthermore, although the United States has tried to legally seek security through harsher interrogation methods by altering the definition of torture so that it will not violate international and domestic law, it can be seen that any form of torture conflicts with the philosophy of liberalism that underpins the American legal system.

Before one can examine the debate between those who support a reevaluation of a complete ban on torture and those who seek to assert that all torture is impermissible, one must define the context in which such a debate occurs. Firstly, it must be understood that the use of torture by governments to achieve security is not a new phenomenon. Physical methods of interrogation were and remain an inexpensive, relatively effortless, and easily available tool.\(^1\) Although contemporary individuals might imagine that past peoples used torture out of a lack of

civility, it was approached in a serious manner by many peoples. In ancient times, the employment of physical methods of torture was common as a means of obtaining evidence or confessions, and it was often a legitimate part of legal systems and processes.\textsuperscript{2} For example, in the past many societies used torture to test the veracity of “unreliable witnesses” such as slaves, to extract confessions of guilt from suspected criminals, and to force heretics to admit to or recant their religious beliefs.\textsuperscript{3} In Europe, in the eighteenth and nineteenth centuries, this began to change as many societies took strong steps towards removing most forms of torture from the law books.

In 1874 Victor Hugo declared that “torture has ceased to exist.”\textsuperscript{4} While this might seem a strange statement, in light of history he can be forgiven for thinking that humanity was close to eliminating extreme forms of human rights abuses. The beginning of the twentieth century in particular saw the blossoming of attempts to limit the atrocities one might inflict on his fellow man, including torture. Part of the Geneva Convention of 1929, which regarded the treatment of prisoners of war, stated that “no pressure shall be exercised on prisoners to obtain information regarding the situation in their armed forces or their country.”\textsuperscript{5} After World War II, such rules were further revised and made more comprehensive.

International law on the subject of torture has only expanded since the traumatic wars of the first half of the twentieth century. After World War II, the Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights of the same year, declared principles opposed to torture.\textsuperscript{6} Another important landmark in the legal treatment of torture was the 1984 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which defined torture more comprehensively than many past efforts to do so.\textsuperscript{7} Although most such international agreements lacked means to enforce their prohibitions, such treaties represent a conscious appreciation of the need to address human rights abuses in the world.

\textsuperscript{2} Bekerman, “Absolute Prohibition of a Relative Term,” 745.
\textsuperscript{5} Bekerman, “Absolute Prohibition of a Relative Term,” 747.
\textsuperscript{6} Bekerman, “Absolute Prohibition of a Relative Term,” 749.
\textsuperscript{7} Lippman, “Problem of Torture,” 38-9.
Despite an ever-growing body of international law since World War II dealing with human rights, including prohibitions on torture, the twentieth century did witness the disappearance of torture. With the rise of totalitarian regimes, torture in the twentieth century was characterized by its use as a means to systematically crush political dissidents. However, although many associate torture most strongly with fascist and communist dictatorships, the modern dilemma regarding torture did not originate in totalitarian pursuit of societal control. Due to international law, improved flows of information, public opinion, and the desire of the democratic West to differentiate itself from totalitarian regimes, retreat from prohibitions of torture were limited throughout the century in liberal-democracies.  

While an understanding of the general history of torture suggest there should be little debate over torture in liberal democracies, an examination of the purpose of torture reveals the roots of contemporary disagreements. According to Ackroyd, Margolis, and Rosenhead in the book *The Technology of Political Control*, contemporary governments use torture mainly to extract information, prepare a detainee for a show trial, to destroy the political effectiveness of individuals through psychological or physical incapacitation, and to instill a general climate of fear among the general population. Of these general functions of torture, the latter three unambiguously represent a totalitarian view of government that is incompatible with liberal democracy.

Ultimately it is the extraction of information, such as military intelligence, through torture that presents a legitimate quandary to liberal societies. Technology and knowledge are rapidly becoming accessible to those who seek them, and subsequently the threat of terrorism has changed security needs worldwide, making the famous “ticking time-bomb” scenario and other attacks more feasible and frightening. Conflicts in the twenty-first century often take place among civilian populations and against poorly defined enemies. As Jeremy Waldron explains in “Torture and Positive Law: Jurisprudence for the White House,” With the growth of the ethnic-loyalty state and the security state in the twentieth century, the emergence of anti-colonial insurgencies and other intractable forms of internal armed conflict,

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and the rise of terrorism, torture has returned, and flourished on a colossal scale. … It is not just a rogue-state, third-world, banana-republic phenomenon.\textsuperscript{11} Governments around the world have been forced to come to terms with the fact that the power to harm, once largely monopolized by the state, is increasingly in the hands of individuals.\textsuperscript{12} When the government seeks to stop such individuals, information is often more important than brute force, and it is in acquiring this critical information that many liberal societies become torn between principles of human rights and the need for security.

The increased power of individuals to inflict harm on societies, and subsequently the increased importance of intelligence, provide the circumstances under which modern liberal societies, otherwise committed to protecting individual rights, are drawn into debates about torture. One response to the question of how to respond to the threat of terrorism and other non-state actors is to use torture as a means of acquiring valuable intelligence. In the modern world, and especially among liberal democracies, few countries would ever explicitly legalize torture; it is much more likely that the definition of torture will be contended and redrafted.\textsuperscript{13} Indeed, as Waldron points out, perhaps what is most remarkable is not that torture is used, but that it is being defended, and by well-known jurists and law professors.\textsuperscript{14} Rather than crudely embracing torture in general, contemporary governments and individuals have disputed the actual definition of torture in order to suit their perceived security needs.

Certainly, “it is a truism that torture is wrong … while we can agree on a prohibition on torture, we might not really be in agreement on what it is we agree about.”\textsuperscript{15} While most people agree on the importance of human rights, there is less consensus regarding what practices constitute torture. Following the September 11th attacks, parts of the United States government, in an attempt to prosecute the War on Terror more effectively, pushed for a more lenient definition of torture. This is perhaps most famously exemplified by secret memoranda authored during the early years of the Bush administration, which recorded the debate over methods of interrogation among attorneys in the Department of Justice. The Bush advisors and officials involved in these dialogues were seeking a legally based definition of torture that would establish a realm of coercion that did not violate international prohibitions against torture.\textsuperscript{16}

\begin{thebibliography}{99}
\bibitem{12} Bekerman, “Absolute Prohibition of a Relative Term,” 746.
\bibitem{13} Bekerman, “Absolute Prohibition of a Relative Term,” 746.
\bibitem{14} Waldron, “Torture and Positive Law,” 1684.
\bibitem{15} Bekerman, “Absolute Prohibition of a Relative Term,” 744.
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The debate regarding the definition of torture followed an important discussion of the status of enemies such as the Taliban and Al-Qaeda. The memorandums advised administration officials that, among other things, [the] humanitarian Geneva Conventions were inapplicable to Taliban detainees or persons suspected of links with Al Qaeda or terrorism … [also,] that the 1994 U.S. statute criminalizing the commission of torture did not apply to interrogations conducted at Guantanamo Bay, Cuba, because the U.S. naval station there was within the definition of the special maritime and territorial jurisdiction of the U.S. and thus outside the scope of the statute.\textsuperscript{17}

The memorandums also determined that such individuals are not prisoners of war but illegal combatants, not entitled to any of the protections of the Geneva Conventions.\textsuperscript{18} This reasoning is incredibly important. The disputed legal status of militants captured by the United States provides government officials with a justification to use harsher interrogation techniques. Subsequently, this opened up the debate as to exactly how harsh such interrogations can and should be.

The most famous example of these memorandums is the Bybee Memo. Between 2001 and 2003, Jay Bybee was the head of the Office of Legal Counsel in the Department of Justice. Federal Law in the United States does attempt to address torture per international treaty obligations and even provides federal criminal jurisdiction of acts of torture carried out extraterritorially by Americans.\textsuperscript{19} However, in a memo sent to the White House, Bybee proposed narrowing the definition of torture so that it did not cover all circumstances of deliberate infliction of pain in an interrogation, but rather only pain that could result in death or organ failure.\textsuperscript{20}

The Bybee memorandum represents some of the most lenient interpretations of the Geneva Conventions and other prohibitions against torture and was highly influential. Although American and international law prohibits torture, U.S. officials have tried to adapt the wording of such laws to justify more coercive interrogation. Such interpretations are often based on the fact that, at the heart of definitions of torture in most American law, the terms “specifically intended” and “severe physical or mental pain or suffering” are used to quantify the term.\textsuperscript{21} Such wording

\textsuperscript{18} Lukes, “Torture,” 6.
\textsuperscript{20} Waldron, “Torture and Positive Law,” 1685.
\textsuperscript{21} Bekerman, “Absolute Prohibition of a Relative Term,” 768.
provides the basis for Bybee’s conclusion that a definition of torture need not include all forms of pain and suffering intentionally inflicted on a detainee. To Bybee, only the most extreme acts of violence and degradation ought to be considered torture. He argued that “certain acts may be cruel, inhuman, or degrading, but still not produce pain or suffering of the requisite intensity to fall within the proscription against torture.”

The legal reasoning of Bybee and other government officials who contributed to the controversial secret memorandums is important because it represents conceptual efforts commonly made around the world by those wishing to provide a legal basis for harsher interrogation techniques. The Bybee memorandum in particular is significant in that its arguments were directly used as a basis for adopting harsher interrogation techniques. Secretary of Defense Donald Rumsfeld, “used the Bybee Memorandum as the legal basis and justification for the infamous interrogation techniques applied to suspected terrorists at Guantanamo detention facilities.”

The stance such individuals take towards the security dilemma of the 21st century is exemplified by Bybee’s conclusion that, even if an interrogation method might violate American laws, necessity or self-defense could provide justifications that would eliminate any criminal liability.

While the need for security is always pressing, in attempting to undermine the reach of human rights laws, both domestic and international, The United States government violates core American principles. These are principles individuals such as Bybee or Rumsfeld would claim they are defending through torture of terrorists and other enemies. Opponents of torture argue that such technocratic interpretations of torture remove prohibitions of torture from their context and results in a pseudo-legal reasoning. Despite a claimed basis in the language of existing laws, attempts to limit a definition of torture to the most extreme forms of abuse miss the intent of enacting such laws, which was to repudiate torture, not to provide guidelines within which torturers could operate. Government officials such as Jay Bybee consider the topic of torture according to how far they can go before violating torture laws, when the real issue is what implications harsh methods of interrogation have for core American values and how the nation wants to be perceived by the rest of the world.

While there are countless authors who argue ways in which torture violates liberal democratic principles, Jeremy Waldron has one that is particularly interesting. He argues that American law is pervaded by liberal principles of policy that make the rejection of torture archetypal of such legal values. This means that a legal policy embracing limited forms of torture will, by its nature, violate the general body of American law. To illustrate this point, Waldron emphasizes several aspects of American law that seem to epitomize a pervasive policy of non-brutality.27

His first example is the 8th Amendment, which prohibits cruel and unusual punishment. The Supreme Court has frequently opposed all forms of unnecessary cruelty, even if such acts would not be severe enough to be considered torture. Waldron points out that many rulings regarding the limits of how prisoners can be treated have even used torture as a reference point. He also supports the argument that the framers likely drafted the 8th Amendment in part due to their abhorrence of torture, which they saw as being incompatible with the liberties of free people.28

Another example Waldron feels is important is the precedence of the concept of due process in American law. References to torture and limits on the violation of individuals is common throughout American jurisprudence that deals with issues such as self-incrimination and due process. Waldron cites the language of several Supreme Court cases, in which the various forms of coercion in legal proceedings are found by the court to offend human dignity and the rule of law. He points out that, “as with Eighth Amendment jurisprudence, the point is to remind us not that torture is prohibited, but to use our clear grip on that well known prohibition to illuminate and motivate other prohibitions that are perhaps less extreme but more pervasive and important in the ordinary life of the law.”29

Examples such as these demonstrate that the Constitution and legal culture of the United States generally protects bodily integrity against invasion, while physical torture always involves such an invasion.30 The inviolability of the individual inherent in the philosophy of liberal democracy means that torture cannot reasonably coexist with such a legal system. Therefore, the prohibition of torture represents a legal archetype of American law. The importance of such a

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classification lies in the fact that, in some sense, other law regarding liberties in the United States depends on the integrity of a prohibition of torture.\textsuperscript{31} As he argues, Our beliefs—that flogging in prisons is wrong, that coerced confessions are wrong … that police brutality is wrong—may each be uncertain and a little shaky, but the confidence we have in them depends partly on analogies we have constructed between them and torture or on a sense that what is wrong with torture gives us some insight into what is wrong with these other evils. If we undermine the sense that torture is absolutely out of the question, then we lose a crucial point of reference for sustaining these other less confident beliefs.\textsuperscript{32}

The conviction that torture is wrong is important in an argument that lesser evils are also unacceptable.

A complimentary argument is made by David Luban in “Liberalism, Torture, and the Ticking Bomb.” Like Jeremy Waldron, Luban believes that torture violates the liberal democratic values that underpin American law. His example of this phenomenon is explored by examining the relationship created between the victim and the torturer. As he points out, the “self-conscious aim of torture is to turn its victim into someone who is isolated, overwhelmed, terrorized, and humiliated. Torture aims to strip away from its victim all the qualities of human dignity that liberalism prizes.”\textsuperscript{33} Luban’s argument is that torture embodies aspects of tyranny that are diametrically opposed to the sanctity of the individual inherent to liberal ideology.

The core of Luban’s argument is that liberal values are inherently opposed to torture because of the close relationship between cruelty and tyranny. Torture can be seen to be, the living manifestation of cruelty and the peculiar horror of torture within liberalism arises from the fact that torture is tyranny in microcosm, at its highest level of intensity. The history of torture reinforces this horror because torture has always been bound up with military conquest, regal punishment, dictatorial terror, forced confessions, and the repression of dissident belief—a veritable catalogue of the evils of absolutist government that liberalism abhors.\textsuperscript{34}

Similar to Waldron’s argument regarding archetypes of legal systems, Luban holds that an adoption of torture in a liberal state such as the United States will undermine the very principles of such a nation. Both arguments favor a view of a legal system that honors the sanctity of the individual, and in which torture cannot be a legitimate component.

\textsuperscript{31} Waldron, “Torture and Positive Law,” 1734.
\textsuperscript{32} Waldron, “Torture and Positive Law,” 1735.
\textsuperscript{34} Luban, “Liberalism, Torture,” 1438.
The threat of terrorism and other non-state actors due to globalization and the increased availability of technology and weapons has weakened the traditional governmental monopoly on violent force. The importance of gathering intelligence in order to identify and stop individuals with intent to harm society has subsequently become a more important imperative of government. This has forced liberal societies to come to terms with the inherent conflict in simultaneously seeking security and the promotion of human rights. Some, such as the Bush administration, attempted to resolve this conflict by redefining torture so that harsher interrogations techniques could be carried out against suspected terrorists. Although this consequentialist pursuit of security is understandable, it is theoretically untenable, as the violation of individual autonomy and dignity inherent to torture conflicts with the core principles of liberal ideology that underpin the United States legal system.