

Can Torture Ever Be Justified for a Democracy?

by

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Bachelor of Arts, University of Toronto, 2003

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Supervisory Committee

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Abstract

In this work, I defend the view that torture is an inexcusable practice for a democracy. Philosophical defenses of torture rely on hypothetical, abstract scenarios in which we are asked to imagine that a ticking bomb has been planted in the center of a metropolitan area and will kill thousands of innocents unless the terrorist, who has been captured by state agents but refuses to divulge the bomb's location, is tortured. This model gives insufficient attention to the problematic relationship between pain and truth and reduces the recognition of torture as a practice of social and political domination. By taking a closer look at how democracies have practiced torture and how they have tried to reconcile its practice with democratic norms such as accountability and the rule of law, we are better equipped to understand what is at stake in justifying torture. The justifications that service and promote this violent practice fail to satisfy epistemic conditions of truth and evidence, and neglect moral restraints regarding our treatment of others as well as the profound consequences for allowing torture to persist in a democratic society.

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Chapter 1

Torture, Democracy, Justification

I. Introduction

At the Bagram Detention Facility in the province of Panawar, Afghanistan, the detainees, captured on suspicions of terrorism from various points throughout the Middle East, have been dubbed by their American captors as PUCs, or Persons Under Control.¹ It is an apt designation for tortured bodies in general. Torture is often inflicted against individuals who are suspected of belonging to, or sympathizing with, organizations that question the legitimacy of the government.² It is a technique that uses pain and injury to exercise control over ostensibly threatening subjects.

Given that international law has closed off all justifications of torture and other forms of cruel, degrading treatment, it is not surprising that democracies that resort to such forms of violence go to great lengths to conceal their actions.³ If complicity in

¹ Joseph Pugliese, *State Violence and the Execution of Law*.

² Henry Shue, "Torture," 134.

³ Common Article 3 of the Geneva Convention prohibits violence to life and person, including torture and other forms of mistreatment. Article 7 of the International Covenant on Civil and Political Rights (ICCPR) prohibits in absolute terms subjecting anyone to torture or other forms of cruel, inhuman or degrading treatment or punishment. The first article of the United Nations Convention against Torture (CAT) follows the language of the ICCPR and reaffirms the non-derogability of the prohibition against torture. However, national security considerations may provide states with grounds for expelling (or "refouler") refugees or asylum seekers to their home country, even if there is risk that they would be subject to human rights violations upon their return. Under CAT, the duty not to transfer someone to another state extends to those vulnerable to torture, but perhaps not to those likely to face cruel, inhuman or degrading treatment, and so the state's legal responsibility seems to hinge on the notoriously slippery distinction between the two categories. Since the terrorist attacks on New York and Washington in 2001, many have sought national security restrictions on the duties to protect against torture and *refoulement* toward terrorist suspects as well. For discussion of these issues, see Aoife Duffy, "Expulsion to Face Torture? *Non-refoulement* in International Law"; Rene Bruin and Kees Wouters, "Terrorism and the Non-derogability of *Non-refoulement*"; James Hathaway and Colin Harvey, "Framing Refugee Protection in the New World Disorder."

torture is brought to public attention, one of the first strategies state actors take is to deny their level of involvement or authorization.⁴ This may be on account of the fear of losing political legitimacy.⁵ Public officials rarely justify torture openly or submit its use to public deliberation. It is frequently a tool of the state's covert operations and takes place on foreign soil, far from mechanisms of democratic oversight. Since the operations and decisions of these authority structures are often hidden, assigning responsibility for torture is exceedingly difficult. Political elites claim the actions of subordinates were unauthorized (the "bad apples" theory)⁶ while interrogators on the ground feel pressured to get results and please their superiors, and believe that responsibility will fall on the shoulders of the politicians who decided such methods were necessary for preserving the state.⁷

While there are strong legal and political incentives for state officials to conceal their involvement in torture, the question that will be addressed in this work will be whether there are reasons that would support torture as an acceptable practice for a democracy. I will argue that torture is never justifiable, even in an emergency where our moral intuitions might be responsive to such an extreme action. Some of these reasons are practical, grounded in the unreliable utility of torture to compel true information from prisoners. The more interesting reasons are philosophical, having to do with the plausibility of our beliefs that support moral justifications of torture. When these beliefs

⁴ John Conroy, *Unspeakable Acts, Ordinary People*, 244.

⁵ Darius Rejali, *Torture and Democracy*, 26.

⁶ Mark Danner, "The Logic of Torture," *New York Review of Books* (May 27, 2004); reprinted in Danner, *Torture and Truth*, 22.

⁷ Herbert C. Kelman, "The Social Context of Torture," 22, 27.

are not adequately supported by an attunement with the practice of torture as an act of state control, then our justifications can actually fail to recognize torture itself. Many of the justifications of torture rely too heavily on hypotheticals that treat the tortured subject as an abstract danger. They often depend on premises that mischaracterize the practice of torture, render invisible its effects, and minimize the role it plays in relationships of political power.

In a democracy, public officials must give an account of their actions and policies, the reasons that support them, and the results that might be expected to follow. This is what it means to treat people as rational agents capable of making considered moral choices, rather than as things to be governed through fears of bodily harm or insecurities about their collective future. I will assume that the ideological differences that invariably exist within a democratic society should not hamper citizens and policymakers from engaging in a public discourse grounded in respect, accountability, and truth.

In light of these considerations, the question of whether torture is ever justifiable for a democracy requires some expansion. The more precise question is the following: is the socio-political control of persons by means of the intentional infliction of physical and psychological injury justifiable for a system of government obligated to accountability and respect for truth? While an adequate philosophical response to this question will require an exposition of the falsehoods that characterize much of our current debates about torture, an equally important part of the story is how public actors avoid responding to it at all.

In chapter 2, I will examine the practices of state torture, focusing in particular on two contemporary techniques, stealth torture and extraordinary rendition. Stealth torture,

the infliction of physical pain in ways that do not leave marks on the body, reduces recognition of state torture by concealing evidence of injury and severing lines of communication between victims and their larger communities.⁸ Extraordinary rendition, the inter-state transfer of prisoners to locations where they face substantial risk of being tortured, also reduces recognition of state complicity in torture. By transporting prisoners into the hands of foreign intelligence agencies or to secret prisons, known as “black sites,” where they are denied access to family and friends, legal counsel, and human rights monitoring bodies like the ICRC, state officials involved in the rendition of detainees can maintain control over threatening subjects without drawing the attention of public scrutiny.

It has been posited that stealth techniques, such as forced standing or sleep deprivation, are not really torture at all because they are only implemented in order to compel prisoners to provide information the state requires in order to protect its citizens. The intent is not to brutalize detainees or subject them to humiliating degrees of pain, but to preserve the national community and keep citizens safe from violent assault. In this spirit, lawyers for the U.S. Department of Justice have sought to restrict the scope and meaning of international legal instruments,⁹ while every effort has been made to narrow the definition of torture to ensure that state actors who authorize the mistreatment of detainees do not suffer moral and legal consequences.¹⁰

Extraordinary rendition is frequently justified on grounds that it takes dangerous terrorists off the streets, enhances national security, and does so in a way that is legal,

⁸ Rejali, *Torture and Democracy*, 31.

⁹ Margaret Satterthwaite, “Rendered Meaningless: Extraordinary Rendition and the Rule of Law,” 1353.

¹⁰ John T. Parry, “The Shape of Modern Torture,” 527.

humane, and sensitive to the cultural norms and practices of prisoners.¹¹ Ostensibly, sending states receive diplomatic assurances, a type of non-binding promise that prisoners will not be tortured or mistreated upon their reception in foreign jails, but from most accounts, there is no oversight to verify that prisoners are being treated humanely. In fact, many scholars and human rights activists have argued that diplomatic assurances are empty formalities, meant to give a veneer of legality to an illegal practice, and that torture is the very *raison d'être* for transferring prisoners to secret locations in countries known to practice torture.¹²

The focus in chapter two will be on the techniques of state torture, the depth of institutional involvement, and the effects on victims and their communities. This should bring into stark relief the mischaracterizations of torture as a productive and necessary practice states can rely upon in order to resolve existential threats. In the final chapter, I will analyze the lines of reasoning that present torture as a potentially productive tool for resolving national emergencies and address how scholars have tried to reconcile torture with democratic norms such as accountability and the rule of law. With the knowledge at hand of how states practice torture, the question of whether torture is ever acceptable for a democracy can take on a broader significance, allowing us to see more distinctly what is at stake in allowing torture to be practiced by a democratic government. Taking torture as it is – a practice of controlling bodies, of destroying physical integrity, of exploiting

¹¹ David Weissbrodt and Amy Bergquist, “Extraordinary Rendition and the Torture Convention,” 591-598.

¹² Leila N. Sadat, “Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror,” 1205; Amnesty International, *USA: Below the Radar – Secret Flights to Torture and Disappearance* (April, 2006), 2-3; Committee on International Human Rights of the Association of the Bar of the City of New York and Center for Human Rights and Global Justice, New York University School of Law, *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Rendition”* (2004), 84-92.

human beings who may or may not have information relevant to state interests – can torture still be defensible for a democracy? If the moral question is answered positively, then how can torture be integrated into a system of government obligated to public accountability and the rule of law? Some scholars advocate a deeper integration of emergency torture with public law through a system of torture warrants, while others worry about the slippery slopes that legally sanctioned torture would imply for our societies, preferring to leave some emergency loophole for public officials to engage in torture during national crises.

The purpose of this opening chapter will be to help the reader navigate some of the prevalent lines of reasoning used to address torture's justifiability. When appropriate, I will refer to examples of torture as a practice of state control that either support or shine critical light on the arguments under consideration. Part 2 will explore some plausible criteria for a sound justification and how they might apply to a violent social practice like torture. In Part 3, I will examine some of the distinct ways scholars have framed the torture debate. I will conclude by restating the position that the recognized attempts to justify torture rely on misdescriptions of the practice and effects of torture, failing to establish the link between the cruel mistreatment of persons in custody and the fulfillment of morally worthy purposes such as protecting the innocent and preserving shared political structures.

II. Torture and the Criteria of Justification

In this section, I will present some plausible conditions for a sound justification of torture, and then, illustrate how the prevalent justifications of torture fail to satisfy these conditions, either by misdescribing the practice they are trying to validate, by stabilizing

the intrinsically unstable relationship between pain and truth, or by concealing important factual premises.¹³

The term “justification” requires some preliminary unpacking. To make a claim of justification is to assert that there are reasons binding individuals to act in a certain way or believe in certain things. Justifications are normative, which entails that they must attach in some way to human rationality. If a public official presents reasons that justify torture, then her reasons are meant to inspire assent to her conclusion. Justifications cannot simply be counterfactual assertions that appeal to our fears and anxieties about the future, something along the lines of, ‘Were we not to approve policy or legislation *x*, negative consequence *y* would result, and therefore, we are justified in implementing *x*.’ We can accept claims as justified if they meet criteria of sound argumentation, such as evidence of effectiveness, respect for counter-argument, and the willingness to alter beliefs based on a fuller understanding of the available facts. Failure to respect these criteria gives citizens reasonable grounds to be skeptical of the claim that the act in question is acceptable.

Public officials have claimed that torturing suspected terrorists is justified because it will generate information vital to saving lives and that saving lives is a sufficient reason to permit resort to torture, or to excuse or forgive an official’s having stepped outside what is permitted.¹⁴ In order for citizens to reasonably accept this claim as true, it is not

¹³ As Arrigo and Bufacchi point out, torture is rarely justified *tout court*, but is occasionally deemed permissible on rare occasions when innocent lives are on the line and other methods of investigation have been exhausted. See Vittorio Bufacchi and J.M. Arrigo, “Torture, Terrorism and the State: A Refutation of the Ticking-Bomb Argument.”

¹⁴ Khaled Shaik Mohammed, alleged to be a high ranking Al Qaeda operative, was waterboarded by CIA agents 183 times; needless to say, there are conflicting accounts concerning the utility of the information he provided after being subjected to such treatment. Mr. Mohammed’s treatment was justified on the basis of the intelligence he provided, and yet he often misled his interrogators with time-consuming falsehoods. The underlying assumption that without enhanced interrogation techniques (EIT’s), terrorist suspects have

enough to apply a moral balancing act between the citizenry's need for freedom and security and the legal rights of a potential terrorist. The substantive content of the argument must also be justified, including the claim of a causal relationship between torture and the discovery of true information. It is rare for public officials to make available the content and structure of their claims about torture. It is often the case that when they do so, claims of torture's effectiveness in producing truth and security are wildly exaggerated or later proved to be untrue.¹⁵ Thus, the question of whether torture can be justified has two components – whether there are moral reasons to torture, and whether there are valid factual reasons to torture.

a. Moral Reasoning

Arguments that oppose torture on absolute terms frequently rely on deontological premises.¹⁶ For instance, torture is argued to be inherently wrong because it violates the unassailable dignity of the human being. Similar to rape, it is a violent assault upon another person's body to which no consent was offered beforehand, and to which no mercy is shown toward visible signs of suffering and resistance. As rational moral agents, individuals are deserving of unconditional respect, and yet it is precisely this capacity for moral agency that torture undermines.¹⁷ Moreover, torture attacks this

almost no incentive to cooperate, is not borne out in practice. See The Report of the Constitution Project's Task Force on Detainee Treatment (2013), 247; also, International Committee of the Red Cross, *ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody* [hereafter ICRC Report (2007)].

¹⁵ Claudia Card notes the example of a CIA agent, John Kiriakou, who claimed Abu Zubayda, a terrorist suspect, "answered every question" after being waterboarded for a few seconds. This turned out to be false on several counts. See Claudia Card, *Confronting Evils*, 207. Zubayda suffered prolonged isolation, torture, and mistreatment that lasted years, dating from his original arrest in Pakistan on March 28, 2002 to his rendition to Afghanistan and subsequent captivity in a secret CIA prison, or "black site." See also ICRC Report (2007).

¹⁶ Oren Gross, "The Prohibition on Torture and the Limits of the Law," 229.

¹⁷ Elaine Scarry, *The Body in Pain*, 13.

capacity deliberately, with the destruction of agency being essential to the ends pursued by such violent action.

Torture is one of the purest cases of a violation of the Kantian principle that no person is to be used merely as a means for another's ends.¹⁸ It narrows freedom of choice to the simple binary of obedience/resistance. This restriction of freedom is complicated further for the one who is tortured for information he does not possess. He may have no meaningful way to indicate that he lacks relevant information to share.¹⁹ In the eyes of interrogators, then, ignorance appears identical to resistance, which, under conditions of tremendous pressure from superiors and political elites to secure "actionable intelligence," may incentivize torturers to use increasingly brutal forms of treatment.

In addition to undermining a human being's capacity for rational self-governance, one may also speculate that torture forces its victim to turn on himself, "so that he experiences himself as simultaneously powerless and yet actively complicit in his own violation."²⁰ People who have experienced torture testify to this sense of self-betrayal. Jean Améry, arrested by the Gestapo for his role in the French Resistance, writes of his experiences of torture at the prison of Breendonk.

I talked. I accused myself of absurd invented political crimes, and even now I don't know how at all they could have occurred to me, dangling bundle that I was.... It was over for a while. It is still not over. Twenty-two years later, I am still dangling over the ground by dislocated arms, panting, and accusing myself.²¹

Philosophers who have considered potential justifications of torture have almost

¹⁸ Immanuel Kant, *Groundwork for the Metaphysics of Morals*, 46; Shue, "Torture," 132.

¹⁹ Shue, "Torture," 135.

²⁰ David Sussman, "'What Wrong with Torture?'" 4; Shue also highlights the inability to defend oneself against torture as one of the morally salient features of this form of violence.

²¹ Jean Améry, *At the Mind's Limits*, 36.

exclusively focused on the decisions facing torturers and their ratifiers.²² While deontological ethics would seem to preclude the possibility of justifying torture, some scholars question the analytical value of pursuing the torture question with vague and ill-defined notions such as “agency” or “dignity.” It has been argued that the duty not to commit torture may plausibly be overridden as a matter of distributive justice for ticking bomb emergencies.²³ It seems to be unjust to preserve a terrorist’s right not to be tortured at the expense of civilian lives. As long as the torture is conducted under certain strict conditions, such as necessity and proportionality, a fair distribution of harms would require that the ticking bomb terrorist be tortured. Without accepting torture and other cruel, inhuman treatment as an institutional practice, sanctioned by law, it may be possible to leave conscientious public agents room to commit torture as an act of official disobedience in a dire emergency.²⁴

Do the high stakes of the ticking bomb count as *moral reasons* that would reduce the culpability of torturers? Does the moral cost of *not torturing* justify the use of torture? Not necessarily. There are several factors to consider. Torture is painful. It causes incredible and long-lasting harm, physically and psychologically, to those who are subject to it. It is wrong to deliberately inflict pain and suffering onto another person. There are certain occasions where a benevolent intent can relieve someone of moral responsibility for subjecting another human being to excruciating pain. A conscientious torturer might be relieved of the charge of moral wrongdoing if her intention is to prevent

²² Card, *Confronting Evils*, 207.

²³ Jeff McMahan, “Torture in Principle and Practice,” 95.

²⁴ Gross, “The Prohibition on Torture and the Limits of the Law,” 239-244.

the painful death and injury of innocent citizens. Her eminently noble intent seems to carry weight as a legitimate moral reason that, if not fully justifying torture, at least provides a mitigating excuse that reduces her culpability for what is, in general, a grievous wrong.

b. Epistemic Reasoning

The use of a noble intention such as preventing the death and injury of civilians as a mitigating excuse for state torture is deeply problematic. Part of the problem is moral, but the primary problem is epistemological. The torturer of a ticking bomb terrorist does not have knowledge of the sort that would make deference to his judgment about whether torture is necessary justified in the epistemological sense. We have no basis to believe that torturers have specialized knowledge of whether torturing is necessary to avoid the disastrous consequences typically cited. If the information cannot be gathered by other means, that is to say, if less violent or coercive methods of inquiry have been made, and still prisoners have not disclosed any pertinent intelligence to interrogators, at what point does torture become an excusable option? What are the epistemic standards torturers are required to meet before they can justifiably transgress the moral and legal prohibition against torture?

In the context of collecting national security intelligence, the demand for certainty prior to pursuing a course of action may be too demanding. However, since the infliction of pain against prisoners for purposes of information is illegal and immoral, the epistemic standards for implementing torture as a justified response to an emergency would have to be very high indeed. Often, the resort to torture arises out of a sense of frustration from interrogators who believe that prisoners are not providing them with sufficient

information. In order to support the case for torture, interrogators must possess a reasonable belief, based on the probability that the prisoner in question possesses the relevant information, that torture will compel the prisoner to reveal what he knows. So the moral question of whether torture *ought* to be used in such cases depends on the probabilistic judgment, based on the intelligence available to interrogators, of whether prisoners possess the information state agencies require to protect the nation and its citizens, as well as on the reliability of torture to access this information in comparison to other methods of investigation.

Torturers, like other violence workers, operate under highly stressful conditions. Under a ticking bomb scenario, we can imagine that the stress level of state officials responsible for bringing the crisis to a peaceful conclusion would be high. Situations that produce tremendous fear and anxiety, especially if they are “affect rich,” such as a potential terrorist attack, distort our probabilistic judgments, conducing people to focus more on the horror of the outcome than the likelihood of it occurring, a phenomenon Cass Sunstein terms “probability neglect.”²⁵ There is scant evidence to suggest that torturers, or the politicians who authorize them to inflict pain and injury on prisoners, are immune to probability neglect.²⁶ The fear of a terrorist attack may compel states to institutionalize

²⁵ Cass Sunstein, “Terrorism and Probability Neglect,” 122.

²⁶ A point evident in Dick Cheney’s much criticized use of the “1% doctrine”: “We have to deal with this new type of threat in a way we haven’t yet defined. . . . With a low-probability, high-impact event like this . . . If there’s a one percent chance that Pakistani scientists are helping al Qaeda build or develop a nuclear weapon, we have to treat it as a certainty in terms of our response.” Sunstein argues that in a certain respect, responding to potential threats that promise particularly horrible outcomes makes sense even if the likelihood of their occurring is only 1/100. However, he rightly criticizes Cheney for failing to consider the risks and harms of the response to the unlikely, though potentially disastrous, crisis. The same point could be made to philosophers who advocate the use of torture to resolve a ticking bomb emergency. The hypothetical scenario has a built-in structure of epistemic certainty: the bomb *will* inevitably explode if we do not act quickly and the terrorist we have in custody *does* have the information that will help us defuse it. While we can rightly criticize this example for being artificial or unlikely, the burden for torture advocates is not only to satisfy epistemic conditions of evidence and reasonable belief, but to show that the costs of torture do not outweigh the harms produced by the bomb’s ignition.

torture and sanction its use on individuals who may not possess information that could disrupt terrorist activities.

In addition to the imperfect knowledge that torturers are often forced to work with and the likelihood of making erroneous judgments about the probability that torturing prisoners will prevent disastrous outcomes, there are several moral considerations that have to be considered in addition to those documented above. Torturers do not respect the moral agency and communicative potentiality of their subjects: there is no mutuality or shared respect. Torture for interrogational purposes requires that autonomous communication between moral equals be suspended and that the torturer presuppose that the testimony of the other is unreliable and difficult to access. In torture, suspension of equality and respect for physical integrity serves the interests of one party – the state – at the expense of the other – the tortured subject. Because of the moral costs of torture, we are warranted in asserting that the epistemic standards for its justifiable use in an emergency must be very high, and yet the practice of torture by democratic states favours a scattershot or “hit or miss” approach.²⁷ Because of these features, the threat of a terrorist attack provides *neither a moral nor an evidentiary reason* to support the use of torture. Claudia Card puts it quite well here:

[F]or the appeal to urgency to count, morally, as a reason, it is not enough to argue that the information is *necessary* to prevent a disaster and that the interrogee might have it. When the means are as drastic as torture, there must be good reason to believe that with that information, there is a decent chance that a disaster can be prevented and there must be good reason to believe that the interrogee does (or interrogees together do) have that information.²⁸

It is true that some state officials have a duty to fulfill their roles as keepers of

²⁷ Rejali, *Torture and Democracy*, 461-465; Arrigo, “A Utilitarian Argument Against Torture,” 560-561.

²⁸ Card, *Confronting Evils*, 197 [her emphasis].

public welfare. However, to claim that this duty is a reason to torture detainees is not plausible once the dynamics of torture are clearly understood. A better knowledge of how torture operates helps us to see more clearly that emergency circumstances do not count as moral justifications for torture because there is no rational connection between them.

Torture as a routine practice of state control, whether performed by officials of a democracy or a dictatorship, is frequently inflicted upon individuals who pose little genuine threat to the national polity or its shared interests. It is an institutional practice with a division of labour. It is authorized or permitted by political elites and is usually carried out by lower-level agents who may presume that superiors will shoulder the responsibility for any negative consequences. As mentioned above, torturers work with imperfect knowledge. They are often authorized by political elites or military superiors to use harsh interrogation methods to extract information that would serve the state's current interests, such as winning a war, suppressing internal dissent, or combatting transnational terrorist organizations. But it is often the case that whatever information is extracted from detainees is passed along to other officials within the state's national security apparatus. This takes time and resources, elements of counter-terrorism that ticking bomb hypotheticals do not address. Information extracted by torture is seldom, if ever, used to resolve an urgent and impending threat. Torture is an instrument of repression used during prolonged socio-political struggles. It is often credited for disrupting terrorist activities and reducing the power of militant groups to harm innocent civilians, regardless of the actual extent of its contribution. Due to the numerous incentives state officials have to exaggerate or misrepresent the value of the information

gained under coercive interrogation, and to conceal the other motives for practicing violence against prisoners, citizens have grounds to be skeptical about claims validating torture as an effective tool for producing truth and security.²⁹

Arguments that torture is acceptable are often restricted to conditions in which its use is guided by fairly reliable information that supports the conclusion that the person being subjected to such treatment is guilty of planning or contributing to some future atrocity. The knowledge of guilt here is not of an atrocity that has occurred, but of an act that is believed to inevitably occur and produce large-scale suffering unless torture is committed. Since the consequences that will result from the terrorist's plot are so dire, and there is no time for due process of law, extraordinary measures are necessary. It is stipulated that the procedural justice considerations normally available to a suspect detained on criminal charges cannot be followed without compromising duties to protect citizens. While due process rights are essential norms for maintaining equality before the law, a fundamental principle for a democratic system of government, it is plausible that citizens might agree to the use of torture in rare circumstances where their lives are at stake. It would not be unreasonable for them to prefer torturing one terrorist set on doing

²⁹ Paul Aussaresses, French General and chief intelligence officer in the Battle of Algiers between 1955 and 1957, credits his prolonged torture interrogation program for crushing the Algerian resistance movement and putting an end to FLN terror bombing. But there are no cases in which the discriminate torture of one Algerian prevented the deaths of innocents. In fact, scholarly consensus is that torture during the Battle of Algiers was systematic, brutal, and inflicted upon roughly 30-40% of the male population. Another common example, cited by Alan Dershowitz and others, to cite the productivity of torture to prevent impending catastrophes, was the torture of Abdul Hakim Murad in the Philippines in 1995. Murad ostensibly planned to hijack and blow up a dozen airplanes over the Pacific Ocean and assassinate the Pope. Murad was tortured for sixty-seven days. Filipino police beat him, burned him with cigarettes, and placed him on slabs of ice. Still, he did not reveal any information to his torturers. Rather, the relevant information that interrogators learned about his plans came from the laptop that they discovered at the site of his arrest. In other words, the catastrophes were thwarted by peaceful methods of criminal investigation, not by torturing a person until he gave up life-saving information. For analysis of Murad's case, see Rejali, *Torture and Democracy*, 507-508; Luban, "Liberalism, Torture, and the Ticking Bomb," 1440-1441; Stephanie Athey, "The Terrorist We Torture: The Tale of Abdul Hakim Murad"; and for a misleading defense of Murad's interrogation as "proof" that torture works, see Dershowitz, *Why Terrorism Works*, 137-138.

them grievous harm over suffering, or allowing fellow citizens to suffer, a violent death.

I argued above that extraordinary circumstances do not count as reasons in support of a moral justification of torture largely because torturers lack the epistemic authority that would make assent to their judgment justified, all things considered. There is another reason for skepticism about arguments that torture is acceptable in extreme emergencies. Torture is valued for its *productivity*: for what and how much it produces. Torture creates knowledge and confidence in the rightness of conclusions and judgments. The machine that produces these goods is the body of the detained subject. Without this capacity to produce knowledge and confidence, there is little reason to believe that torture is justifiable. However, there is a problem with this picture that those who justify torture would sooner not address: torture's ability to produce epistemic confidence is conditional upon its being institutionalized, prolonged, and used against multiple subjects. Torture is less valuable, even counterproductive, against one person in a ticking bomb emergency.³⁰

Torture's utility as an instrument of truth depends on the development of what David Luban calls a "torture culture."³¹ Torture can be rare, or it can produce truthful information, but it cannot do both with the consistency and reliability that would allow us to use its imagined outcomes as a reason in favour of its general application. Claiming otherwise fails to understand the conditions under which torture extracts information and mischaracterizes the relationship between torture and averting public emergencies. These confusions can be partially resolved by looking more closely at the practice of torture and its use as an instrument of power and control.

³⁰ Rejali, *Torture and Democracy*, 474.

³¹ Luban, "Liberalism, Torture, and the Ticking Bomb," 1427.

III. Disparities Between Justification and Political Practice

Assessing the justifiability of torture depends a great deal upon how we frame the terms and conditions of our critical discourse. For example, Steven Lukes argues that the problem of torture arises for liberal democracies in cases “where it appears to be the only available means of averting some terrible outcome.”³² He frames the problem of torture for democracies as a tragic choice between general goods, such as protecting the public from imminent harm, and particular wrongs, such as torturing a suspected terrorist for needed information. In other words, he sees the problem of torture in democracy as an instance of what Michael Walzer labeled the “dirty hands problem in politics.”³³

However, the problem of dirty hands is a misleading conceptual frame from which to examine the nature and justifiability of democratic torture. Democracies that have resorted to torture have implemented it as a systematic practice against hundreds, even thousands of individuals, lasting for prolonged periods of time with little discrimination between guilt and innocence. The assertion that torture is a problem of dirty hands, or a tragic choice between evils, ignores this reality. Indeed, to describe torture as a tragic choice is already to presuppose the reduced culpability of those who chose to commit or authorize torture. It is to presuppose that torture is necessary to avoid a greater evil. Yet this necessity claim only holds up if there are grounds for the belief that the evil to be avoided is greater and requires the evil of which torture consists. An assertion that there are extreme circumstances and that something must be done is not grounds to conclude that torture is a lesser or necessary evil.

³² Steven Lukes, “Liberal Democratic Torture,” 2.

³³ Lukes, “Liberal Democratic Torture,” 2-3; Michael Walzer, “Political Action: The Problem of Dirty Hands,” 164.

It is true that scholars who advance the view that torture in democracies is a tragic choice moral dilemma, such as Steven Lukes and Oren Gross, often fall on the side of maintaining the absolute prohibition against torture as a matter of law and public policy. However, even if we ultimately adopt the view that torture should be absolutely prohibited, the strength of this prohibition can be undermined if we do not frame the torture problem in a way that is attuned to the practice of torture. Lukes, for example, ultimately concludes that torture is unjustifiable.

[Torture] is doubly vicious, combining the vice of concealment and the vice of violence – specifically against the defenseless. The first is anti-democratic, preventing us from reaching a collective judgment; the second is anti-liberal, constituting, if anything does, a violation of the dignity of the person.³⁴

It is puzzling, though, why Lukes and other scholars choose to approach the torture in democracy problem using abstract moral frameworks such as dirty hands dilemmas or ticking bombs scenarios. Such methodological frames privilege the hypothetical over the actual. Arguments that resist addressing the torture problem as a moral abstraction are often criticized as evading the problem, as though they are not addressing the threat posed by terrorists with sufficient intellectual rigour.³⁵ For example, Lukes explicitly dismisses scholars like Elaine Scarry and Henry Shue, who claim, from different points of view, that conceptualizing the problem of torture as a “lesser evil” moral dilemma fails to track the reality of how torture is practiced.³⁶ But relying on hypothetical moral scenarios fails to engage with a central feature of torture: it is a political act, used by governments to control subject populations. The point advanced in arguments such as Scarry’s and Shue’s is not that ticking bomb scenarios are rare or unlikely; it is that such

³⁴ Lukes, “Liberal Democratic Torture,” 13.

³⁵ McMahan, “Torture in Principle and Practice,” 95.

³⁶ Lukes, “Liberal Democratic Torture,” 11.

scenarios are not relevant to the practice whose acceptability is being debated.

This would not be damaging to Lukes' overall argument if state torture were openly acknowledged and subject to public deliberation.³⁷ Since these conditions rarely obtain, Lukes needs to support his position that torture is a problem of dirty hands with a mechanism of accountability that incentivizes state actors to openly acknowledge the choice to torture, as well as the reasons that informed that choice. If state officials can violate the law without accountability, then even if dirtying their hands is for an eminently worthy cause, democracy, a system of government obligated to accountability and respect for the rule of law, is compromised, a fact would-be torturers and their apologists would need to factor into their judgment. Accountability is meant to act as a check against unbridled political authority; standing alone, democratic principles do not have the teeth to ensure that politicians only dirty their hands when absolutely necessary. (In Chapter 3 I will discuss at length how democracies develop institutional mechanisms for licensing resort to torture in the face of an existential threat.)

Without a plausible mechanism of accountability that will incentivize torturers to come clean and refrain from turning torture into a routine, institutional practice, Lukes must illustrate more clearly how the principles and institutions of a liberal democracy make such a choice (to routinize torture) unthinkable. Lukes acknowledges that liberal democracies do not always live up to their commitments to protect individual rights and human dignity, especially against people outside of their territorial jurisdiction, but his belief that democratic values provide a generally reliable bulwark against state torture is

³⁷ Simon Chesterman, "Deny Everything: Intelligence Activities and the Rule of Law," 315. This is the problem that Oren Gross' mechanism of official disobedience and *ex post* ratification is supposed to remedy. See Gross, "The Prohibition on Torture and the Limits of the Law."

not supported by the historical record.³⁸ These shifts in argumentation would not be necessary if he framed the torture problem in a way that is more attentive to the practice of torture. Walzer's analysis of dirty hands in politics is not an appropriate or even a very fruitful guide for understanding torture and its potential justifiability.³⁹

The judgment that politicians must occasionally dirty their hands in order to preserve the integrity of the state applies to emergency torture only if torture is reliably productive in averting catastrophe. As we have seen, certain epistemic features of the models we use to analyze torture muddy the moral judgment that torture is occasionally permissible for a democracy.

Ticking bomb scenarios do not always rely on dubious epistemological assumptions. Oren Gross, for instance, acknowledges their debatable nature.⁴⁰ He is sympathetic with David Luban's view that the only certainty about torture is that the victim will suffer pain and anguish.⁴¹ We have reliable knowledge of this because it relates to what torture is and how it affects those subject to it: humiliating pain and the destruction of moral agency is central to the experience of torture. It is possible that state officials will have in their custody the person who has knowledge of when and where the bomb will explode, and it is possible that he will disclose this information under physical duress, but in order to justify torturing him on the basis of a fair distribution of harms or on other moral grounds, those

³⁸ Lukes, "Liberal Democratic Torture," 14.

³⁹ Walzer might not disagree. His essay is not really about torture at all. However, the resurgence of torture as a topic of academic discourse over the past decade or so has renewed interest in his now classic essay. For instance, Sanford Levinson included it in his anthology, *Torture*, in a section entitled "Philosophical Considerations." There is much that is philosophically interesting in Walzer's piece, but I doubt readers will learn anything about torture, making its inclusion in an anthology entitled *Torture* somewhat misleading.

⁴⁰ Gross, "Torture and an Ethics of Responsibility," 37.

⁴¹ Gross, "Torture and an Ethics of Responsibility,"; also Luban, "Liberalism, Torture, and the Ticking Bomb," 1444.

charged with administering torture would require an epistemologically sufficient basis for the belief that these possibilities are real. Torturers should not get moral credit for guessing correctly.

Even if we reduce the epistemic conditions that have to be met to assert that torture is justified, the ticking bomb hypothetical remains overly presumptuous. As Kim Lane Scheppele puts it:

The hypothetical assumes an extraordinary degree of clarity about the situation in which you find yourself when the question of whether to torture arises. You know *with reasonable certainty* both that it *is* a nuclear bomb in the middle of Manhattan and that the bomb *will explode* and *will kill many people* absent your intervention.⁴² Such certainty may be hypothetically possible, but it will likely never exist.

It is more likely to be the case that bureaucracies responsible for public safety, not a single omniscient interrogator, will be trying to locate the explosive device. A detained suspect is a potentially fruitful piece of evidence, but whether tortured or not, his statements will have to be researched and corroborated. Torture does not produce a stronger foundation of belief in this respect. Since the many facets of the state bureaucracy charged with ensuring public safety will likely be engaged by the problem, timely response to an existential crisis will require coordination between multiple state actors. This could plausibly increase the depth of knowledge available to interrogators. The problem for prospective torturers is that even if their epistemic assumptions happen to obtain at this moment, this will merely be a matter of luck, and not something that torturers could reliably foresee prior to making the judgment that torture was right, all things considered. If we are going to justify something as morally abhorrent as torture,

⁴² Scheppele, "Hypothetical Torture in the War on Terrorism," 294.

we need more than a lucky guess. If a torturer gets it right, he may be considered a hero for defusing the bomb and saving lives, but his action will not have been justified for all that.

The normative justifications for torture in rare cases rely on the presumption of torture's efficacy. In this respect, it shares a questionable hidden premise with the justification for implementing torture as a practice of state in general: it is not clear that torture actually works to produce true, valuable information. It is somewhat of a cliché for torture abolitionists to claim that we should not torture because victims will say anything to stop the pain.⁴³ Eliminating doubts about torture's capacity to function as a means of securing true information might make abolitionists more willing to concede that it can be a principled tool in an emergency. However, increasing torture's reliability as a tool of intelligence gathering would require scientific research into the relationship between the intentional infliction of human suffering and a person's willingness to disclose the truth. It would also require a professional class of torturers who can put this research to practical use. Clearly, if these are requirements for torture's efficacy, then they should be acknowledged by those who justify torture on the basis of distributing harms in an extreme, albeit rare, situation where innocent lives are at stake. The bureaucratization of torture, its implementation within state and professional institutions, is central to the practice of torture, but is generally what scholars who make use of hypothetical examples deny or fail to properly address.

⁴³ Rejali, "American Torture Debates," 398.

There are serious doubts that torture could ever be grounded on scientific certitude.⁴⁴

This is partly due to the subjective nature of pain. Torture apologists generally rely on what social psychologist J.M. Arrigo calls the “animal instinct model” of pain.⁴⁵ This view of pain asserts that if enough pressure is applied, prisoners, animals vulnerable to physical stimuli, will submit to the authority of their captors and, out of fear of further torment, disclose the truth. This model rests on a facile conception of pain as the reciprocity between stimulus/response, and does not account for the way pain is interpreted. People display a wide variety of responses to injury, dependent perhaps on their life experiences.⁴⁶

How individuals respond to torture may also depend on the contextual circumstances of their arrest. Being an embodied person means more than simply responding to external stimuli – it means having a place within a social world structured by shared beliefs, values, language, etc. This set of structures condition how the body responds to these stimuli. For some, being subjected to torture can be an opportunity to prove their orthodoxy or their commitment to a cause or ideology. Innocent people caught up in dragnet torture operations, enraged by the injustice they are forced to endure, frequently provide interrogators with false leads, which waste valuable time and resources.⁴⁷ Failing to consider basic features of pain and its significations, the normative conclusion that torture is permissible under emergency situations does not seem well supported.

⁴⁴ Rejali, *Torture and Democracy*, 478.

⁴⁵ Arrigo, “A Utilitarian Argument Against Torture,” 547-550.

⁴⁶ Rejali, *Torture and Democracy*, 449.

⁴⁷ *Ibid.*, 461.

Since pain is not only experienced, but interpreted, torturers often require a great deal of time and patience to break the wills of prisoners. Since time is necessary to break down the walls of resistance, to overcome prisoners' subjective interpretations of their pain, it stands to reason that the effects of torture will be difficult to predict. This is as true for emergency torture as it is for the routine, bureaucratic torture of police and military operations. More time required to break a person's will means we have moved beyond the view of pain as animal response to Arrigo's second model, the "cognitive failure model," wherein a prisoner's will must be crushed to the point where they see no way out of their torment but to provide interrogators with information.⁴⁸ A detainee's human claim must be eviscerated; a sense of being at the complete mercy of the state must take its place. This transformation takes time, however, and in the meantime, the bomb is ticking away. Torture is not likely to be of any assistance in this case. Rejali states:

Torture would work well when organizations remain coherent and well integrated, have highly professional interrogators available, receive strong public cooperation and intelligence from multiple independent sources, have no time pressures for information, possess enough resources to verify coerced information, and release innocents before they are tortured. In short, torture for information works⁴⁹ best when one would need it least, peacetime, nonemergency situations.

If torture were better integrated into the fabric of legal and political institutions, if it were more tightly regulated and professionalized, and used only during nonemergencies, then it has the potential to effectively develop useful, true information that might bolster national security. Deeper integration of torture within political and legal systems is, however, an unwelcome prospect for societies that

⁴⁸ Arrigo, "A Utilitarian Argument Against Torture," 550-554.

⁴⁹ Rejali, *Torture and Democracy*, 478.

value liberty, human rights, and fair and equal treatment under the law. Torture is deemed justifiable as long as it is committed against a known enemy of the state bent on mass destruction, performed by an omniscient, conscientious torturer, and safeguards are established such that our democracies do not descend down the slippery slope toward institutionalized cruelty. To my knowledge, these conditions have never been satisfied in an actual case of torture. When torture apologists make use of thought experiments or abstract models that cater to our intuitions about protecting life and balancing harms, they should not be permitted to exclude the reality of torture to render their conclusions more plausible.

IV. Conclusion

The justification of torture requires a prior analysis of reasons that count in favour of its defense. The urgency of the stakes does not count as a valid moral reason if it is not clearly established that there is a plausible link between the act of inflicting physical and psychological injury on detained persons and the preservation of national security. If the latter is unfounded, then the existence of emergency circumstances does not count as a reason at all. In order for a claim of justification to shape public beliefs, citizens require more than the assertion that something is necessary in order to achieve a certain *telos*, even if the end in question is eminently noble. When we will the end, as Kant might put it, we also will the means, and must therefore take responsibility for the implications of these means. We cannot ignore the foreseeable results of torture and still claim that torture is a fair way of distributing harms onto the shoulders of terrorists. If torture only affected evildoers and was used by states only during national emergencies,

this claim might carry weight, but there are reasons, both moral and factual, to be suspicious enough to withhold our assent to it.

Torture is not a noble instrument of truth and security. It is a technique of power and control used against subjects the state finds particularly frightening: foreigners, immigrants, racial and ethnic minorities, colonial subjects. It corrupts civic and professional institutions, destroys lives, and makes those subject to it vulnerable to other crimes such as disappearance, rape, and murder. All of these results are reasonably foreseeable as they corroborate available evidence and previous analyses of the consequences of state torture. The common riposte from public officials who wish to justify torture is to blankly assert that it is necessary for extracting national security intelligence from terrorist captives, without offering any satisfying link between the infliction of pain and the production of truth. This fails to satisfy the basic criteria of a valid justification and renders invisible the likely effects of subjecting others to humiliating forms of pain and mistreatment.

Due to the strength of the prohibition against torture, and the lack of any evidence that pain and injury can reliably produce truth, there are strong incentives to keep torture a secret from international human rights monitors as well as citizens. Covert torture undermines the essential democratic principle that government officials be held accountable for their decisions. As I will show more clearly in the next two chapters, democracies torture for several reasons – as part of a misguided national security policy, to secure confessions for criminal convictions, or to exert discipline on marginalized subjects. Justifications of torture lean heavily on its productive value; it produces truth, security, control of dangerous situations, etc. This value is then balanced against the high

stakes of inaction; if the security of the national polity is at risk, then coercive interrogation techniques are warranted providing they produce information to help minimize these risks.

Torture is valued for its utility, but focusing on its productive value renders invisible the deleterious effects of torture and changes its meaning from a practice of cruelty and control to a practice of noble ends. These misdescriptions make torture hard to see. One of the most important lessons we can learn from contemporary torture debates is that the problem of justification and the problem of recognition are deeply intertwined.

Chapter 2

Torture as a Secretive Practice of State Power

I. Introduction

Arguments in support of torture tend to rely on its utility as a rational and reliable means of securing life-saving truths. This claim about torture is not consistent with the practice of torture and distracts our attention from the more problematic features of its phenomenology. A justification of a phenomenon that fails to appreciate its history, practice, and socio-political dynamics will not only ring false by failing to satisfy epistemic conditions of evidence and sound argumentation, but it will fail on moral grounds as well. The prohibition against torture may be defeasible, yet many of the justifications of torture or cruel, inhuman treatment in public discourse misdescribe the practice, giving it ideal characteristics and erasing its negative ones.⁵⁰ This mystifies the debates surrounding state violence and reduces to silence those who are subject to it.

Relatively recent strategies of state violence, such as stealth torture and extraordinary rendition, help to conceal state torture from public scrutiny. Through concealment, the justifications of modern torture practices can sustain their integrity, impervious to the critical light of public accountability and legal intervention. These strategies for avoiding accountability raise some puzzling questions. Why is it, if torture is necessary for the procurement of truths vital to national security, have democracies gone to such lengths to conceal the practice, either by developing techniques that leave

⁵⁰ Henry Shue, "Torture in Dreamland," 231.

few marks on the body or by outsourcing torture interrogation to the intelligence services of foreign states?

Without a plausible connection to truth, interrogational torture seems short on defenses. Without public accountability, there is little reason to believe in the claim that applying physical and psychological pain produces true information that keeps nations safe. A persistent fear for state officials who authorize or practice torture is that victims will offer testimony that contradicts the fiction of rational, judicious, and necessary violence.

I will address these issues by examining the relationship between torture, secrecy, and accountability (Part 2), the development of stealth torture (Part 3), and the practice of extraordinary rendition, the inter-state transfer of prisoners to locations where they may be tortured (Part 4). I will conclude by restating the position I am advocating throughout this thesis, namely, that the socio-political control of others through pain and injury is unjustifiable for a democracy. The introduction of techniques that leave few lasting marks on the body, as well as the persistent practice of outsourcing interrogation to foreign agencies, give citizens strong reasons to be skeptical that torture is a justified instrument of national security. These techniques do nothing to improve the effectiveness of torture for securing true information. In fact, the annihilation of personhood that results from many stealth techniques, and the loss of control over how prisoners are treated that results from renditions, makes it likely that they are rather useless as evidentiary tools. The defense of torture as a rational, instrumentally necessary means to life-preserving truths is a political fiction, one that allows state actors to avoid

having to acknowledge and defend the actual activity in which they are engaged, namely, the violent control of putatively threatening subjects.

II. Torture, Secrecy and Accountability

Modern states do not typically endorse torture openly for fear of undermining their claims to legitimacy. State officials who authorize or practice torture have a powerful incentive to keep it a secret from their citizens and from the gaze of the international community. In order for a democratic state to practice torture, in defiance of the rule of law and its human rights commitments, it must do so secretly. William Nagin and Lucie Atkins argue that torture entails “an obfuscation of accountability, a strenuous cloak of secrecy to prevent any level of transparency, a denial of any sense of responsibility for torture, and a complete disregard for the will of the people.”⁵¹ Darius Rejali argues that state torture programs inevitably imply an abuse of the public’s trust by officials who, for one reason or another, acted outside of the law.⁵²

Concealing torture is a strategy for maintaining plausible deniability, thus avoiding criminal prosecutions and the loss of political legitimacy.⁵³ It also ensures that the rationalizations for treating prisoners harshly are not undermined by facts on the ground. If it turns out that prisoners subjected to torture posed no threat, nor held information that would save lives, this undermines the rationalization of harsher techniques of

⁵¹ Winston P. Nagan & Lucie Atkins, “The International Law of Torture: From Universal Proscription to Effective Application and Enforcement,” 90.

⁵² Darius Rejali, *Torture and Democracy*, 39.

⁵³ In the perhaps most notorious of the “torture memos,” penned by Assistant Attorney General Jay Bybee with the heading *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*, it is offered in the final section of the memo that the standard criminal law defenses of necessity or self-defense “could justify interrogation methods needed to elicit information to prevent a direct and imminent threat to the United States and its citizens.” See Danner, *Torture and Truth*, 149.

interrogation. If citizens can recognize that the practice of torture does not coincide with the limits (torturing only dangerous terrorists) and criteria (torturing only in emergency situations to extract information) presented by state officials, then they will expect and allow these officials to be held accountable for their mistakes. Maintaining a cloak of secrecy around torture can ensure that this eventuality does not arise.

If or when the public eventually learns that state actors have authorized or practiced torture, these actors often go to great lengths to persuade their electorates and the global community that it was unauthorized, an aberration from clear directives, perpetrated by rogue police or military interrogators. The political response seems tailored to ensure that accountability does not reach the top levels of government. This compounds the already challenging problem of showing that superiors are responsible for torture. They rarely issue specific orders to torture subjects. While torture is an instrument of social control that serves the ends of those in political power, it is not common for those at the top of the political hierarchy to directly order the torture of this or that individual. Rather, the top levels of the political hierarchy establish the policy framework and environmental conditions within which subordinates form their own judgments about how to proceed.⁵⁴ It is frequently a *crime of obedience*, a violation of law that takes place under instructions from authorities or in an environment in which torture is implicitly sponsored or tolerated.⁵⁵

State officials recognize that human rights violations undermine legitimacy and moral standing. State actors who judge that it is necessary to exercise social control by

⁵⁴ Herbert C. Kelman, "The Social Context of Torture," 22.

⁵⁵ *Ibid.*, 21.

means of violent coercion are thus caught between “their desire to repress ‘outside the law’ and their obligations, juridically codified or externally demanded, to do so without torture.”⁵⁶ The key to resolving the tension between adherence to the *jus cogens* norm prohibiting torture and the desire to repress threatening social forces is to give torture itself a patina of justification, to legitimate the violence by appeal to the exceptional circumstances in which it is deemed to be necessary, highlighting the vulnerable position into which insurgents or terrorist groups place our political communities. Public officials of democratic states who believe torture is necessary tend to sidestep troubling moral and legal questions by secretly creating a permissive environment in which agents of the state bureaucracy can commit torture without fear of prosecution or accountability, while averring in public their unequivocal support for human rights and the rule of law.

For example, days after the terrorist attacks of September 11, 2001, the CIA was given *carte blanche* to conduct renditions, the transfer of prisoners suspected of terrorist affiliations to foreign countries for interrogation. President Bush signed a Memorandum of Notification on September 17 authorizing the CIA to conduct renditions without the need for approval from the White House or the Departments of Justice and State.⁵⁷ Many of these renditions have been to countries that routinely practice torture and other forms of cruel, degrading treatment. On September 6, 2006, President Bush declared that “the United States does not torture,”⁵⁸ but granting the CIA, an organization already under intense pressure to gather information conducive to national security, full autonomy to

⁵⁶ Rejali, *Torture and Democracy*, 28.

⁵⁷ Stephen Grey, *Ghost Planes*, 149; also Douglas Jehl and David Johnston, “Rule Change Lets C.I.A. Freely Send Suspects Abroad to Jails,” (New York Times Web Edition).

⁵⁸ Sadat, “Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror,” 1201.

transfer prisoners, without oversight or due process of law, to countries like Egypt or Syria, almost ensures that torture will take place.⁵⁹ Given the pervasiveness of torture in many of the countries on the receiving end of these renditions, transferring prisoners under such circumstances is certainly illegal.⁶⁰ Under these institutional conditions, there are grounds to be incredulous of state officials who claim they do not support torture but deliberately and frequently turn individuals over to police and security forces that are known practitioners of torture.

The problem runs deeper than political hypocrisy. Once members of a bureaucracy have been told that its operations take place in a legal vacuum, they have little incentive to give a truthful account of their practices and whether these practices genuinely serve the public's interest. A bureaucracy that is given permission from the top levels of the federal government to conduct renditions without worries over congressional or judicial oversight will proceed as though they are not accountable to the public.

The United States Government's justification of its rendition policy is that these transfers save lives by taking terrorists off the streets. However, turning prisoners over to another country means losing control over how they will be treated.⁶¹ It also entails losing control over the integrity of the information that prisoners provide. One senior CIA official told journalist Stephen Grey, "The truth is we could not get access to prisoners once they have been rendered even if we tried. Once you've lost control of a prisoner, it

⁵⁹ Jane Mayer, "Outsourcing Torture," 110.

⁶⁰ Sadat, "Extraordinary Rendition, Torture, and Other Nightmares," 1220. Article 3.1 of the Convention against Torture (CAT) states: "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

⁶¹ Louis Fisher, "Extraordinary Rendition: The Price of Secrecy," 1419.

is almost impossible to check what is done with him.”⁶² Nevertheless, rendition has been publicly advocated as an effective counter-terrorism measure, while the details, such as the loss of control over the prisoners’ treatment and the potential unreliability of the information they provide are concealed or denied.⁶³ The claim that renditions save lives is not supported by facts or evidence. It is rather an assertion that is supposed to command assent without meeting the epistemic conditions that would make such assent justified. Since citizens are denied the empirical evidence that would support the claim that extraordinary rendition actually works to produce the noble ends public actors ascribe to it, they have grounds to be skeptical about the claim that rendering terrorist suspects abroad for interrogation is necessary or acceptable. Further, since acts of violence without oversight of law constitute arbitrary expressions of state force, they have reasons not only to be skeptical, but to be frustrated and angry as well.

Since the loss of control over the treatment of prisoners and the veracity of the information the prisoners provide are predictable results of renditions, there are strong reasons to doubt the link between this practice and public safety. A state that proclaims its opposition to torture while granting its intelligence bureaucracy unsupervised discretion to transfer prisoners to countries known to practice torture loses its credibility. This is so not only because of the manifest illegality of rendition, but because the possibility of forming a collective judgment regarding the fit (or lack thereof) between the facts of rendition and the reasons meant to support it are denied by keeping the rendition program a secret.

⁶² Grey, *Ghost Planes*, 224.

⁶³ Fisher, “The Price of Secrecy,” 1426-1429.

Torture is often marginalized from our collective political discourse.⁶⁴ As we have seen, this can be the result of the hypocrisy of espousing non-violent principles while secretly encouraging national security bureaucracies to subject detainees to brutal treatment. Failure to generate sincere and open debate about state torture may also be grounded in facts about *where* it is practiced, and against *whom*: overseas, during military campaigns, against enemies of the state. Citizens may respond to torture that is plainly visible with moral outrage, but to covert torture against social undesirables with favour or indifference. Rejali writes, “[T]he public proceeds in an uncomfortable bad faith, what Bourdieu so aptly calls *méconnaissance*, or misrecognition, so that things move along.”⁶⁵ Misrecognition is more likely when torture is enacted on a vilified group and takes place far beyond the state’s borders.⁶⁶ It is also facilitated by the fictions that surround torture, namely, that it is instrumentally necessary to subject prisoners to dehumanizing pain for the sake of securing life-saving information. The combination of geographical distance and the failure to recognize the moral equivalence of others, especially those who are publicly demonized as dangerous extremists, helps to promote the public’s complacency toward state torture. Complacency is also supported by a belief in the defensibility of state violence if it is directed toward noble ends, such as protecting the lives of citizens.

If the ways that torture is implemented and practiced by democratic states are concealed, then there are strong grounds for questioning the link between torture and life-saving truths. During public emergencies that appear to threaten the state and its citizens,

⁶⁴ Parry, “The Shape of Modern Torture,” 521.

⁶⁵ Rejali, *Torture and Democracy*, 58.

⁶⁶ Stephen Holmes writes that since Ancient Greece, torture has been perceived as an act of state only to be inflicted on “the other,” not on citizens. This tradition persists in the contemporary war against terrorism. See Holmes, “Is Defiance of Law a Proof of Success?” 120. For further analysis of torture as a tool of demarcation separating free citizens and others, see Page duBois, *Torture and Truth*, 63.

the torture question seems to gain greater moral traction in public discourse. Fear of future loss of life no doubt makes people more susceptible to misrecognition, more vulnerable to the claim that torture is necessary for the preservation of a shared form of life. The important point to take away here is not that people are passive spectators of state violence, but that misrecognition, the failure to openly acknowledge the violence democratic states engage in, requires a certain degree of political manipulation, namely, exaggerating threats, undermining the moral character of others, and deeming them to be torturable on that basis. Government officials make use of these strategies to create a space where they are not accountable for violence.

III. Stealth Torture

It would be reasonable to assume that international law and the institutions charged with enforcing it would shine critical light on the practice of state torture, and encourage states to comply with their human rights obligations. However, international human rights regimes shape the behaviour of states in some unexpected ways.⁶⁷ In his *universal monitoring hypothesis*, Rejali argues that democracies resort to stealth torture, the infliction of physical pain upon prisoners that does not leave noticeable marks on the body, because they have more robust institutions to monitor human rights. Human rights monitoring does not necessarily lead states to torture *less*, but to torture *differently*, in ways that will leave fewer lasting marks on the bodies of victims.⁶⁸ Democracy does not

⁶⁷ Rejali, *Torture and Democracy*, 25-26; 439-440.

⁶⁸ Rejali, *Torture and Democracy*, 8.

seem to effectively bring torture to an end, but is productive of techniques that will minimize the likelihood of being held accountable for it.⁶⁹

If the tortured subject survives her ordeal and manages to escape her captors, without visible signs of torture she is not likely to be believed. Victims of human rights violations therefore have fewer chances of making a successful legal claim if there is no physical evidence on their bodies. In addition to undermining their legal standing, Rejali argues that “[S]tealth torture breaks down the ability to communicate. The inexpressibility that matters here is the gap between a victim and his or her community. Stealth torture regimens are unlike other torture procedures because they are calculated to subvert this relationship and thereby avoid crises of legitimacy.”⁷⁰

What do states have to fear from prisoners’ capacity to fully communicate their experiences to others? Most obviously, they fear exposure of having implemented or supported torture, a clear violation of human rights. Victims of torture can also strike a weighted blow to the premises that support the justification of torture as a vital tool for collecting life-saving national security intelligence. If a person with no affiliation with groups that threaten the state, or one with such an affiliation but who possesses little knowledge of value, was tortured during interrogation, then what could the state say in defense of having resorted to the actions visited on the tortured subject? If the justification of torture is based on its discriminate, restrained use in order to discover intelligence vital to national security, then how do state officials who authorize torture account for the bodies and words of those who contradict this justification?

⁶⁹ Pallitto, *Torture and State Violence in the United States*, 2.

⁷⁰ Rejali, *Torture and Democracy*, 8-9.

The use of stealth techniques is a strategic initiative that undermines victims' capacities to speak to others about their experiences as a prisoner of the state. Stealth torture effectively controls the social world of the state's detainees and helps to prevent the false premises that support the necessity of state violence from imploding. In other words, stealth torture techniques, such as forced standing for prolonged periods of time, sleep deprivation, mock executions and threats against family or associates, are effective mechanisms of social control against those defined as the state's enemies, and since they do not leave any signs of physical scarring, obviate the need for torturers to respond to their captives or to the public in whose name these captives are abused.

Rejali argues that democratic states resort to stealth torture in order to maintain plausible deniability about torture happening at all, thereby avoiding crises of legitimacy. But he does not take this point far enough. Since the relationship between inflicting injury and the extraction of true information is unstable, making this relationship central to the arguments for torture requires a contingency plan to deal with circumstances in which the relationship does not obtain. If the effects of torture are invisible, as they are from techniques that do not physically scar the body, then the relationship between pain and truth remains invulnerable to destabilization, even if the victim of such techniques does not possess the information state officials claim to require.

When one imagines torture, one is likely to imagine first and foremost an assault on bodily integrity and the freedom of movement, but just as fundamental is the assault on autonomous communication. Elaine Scarry argues that torturers reduce their victims to a pre-linguistic silence. "Physical pain," she writes, "does not simply resist language but actively destroys it, bringing about an immediate reversion to a state anterior to language,

to the sounds and cries a human being makes before language is learned.”⁷¹ As the intentional infliction of pain upon another person, torture is, then, not only the physical abuse of a defenseless subject, but an act of infantilization. It seeks to terrorize and humiliate individuals, undermining their capacity to think and speak autonomously.⁷² After reducing victims to silence, torturers can invent their own fictional universe.⁷³ As agents of the state, their created fiction tells a tale of legitimate political power. Without the opportunity to speak, the tortured body is an inert thing, unable to question the integrity of the fiction state power has created. Torture does not only destroy the power to speak for oneself, but also destroys the authority to speak alternative truths to institutions of political power. The legitimation of the state’s power runs in inverse proportion to the disempowerment of the tortured subject.

Scarry’s analysis illustrates how torture reduces victims to silence while allowing the torturer to create a fantasy world of legitimate state violence. However, in order for this to ring true, the victim has to reaffirm the legitimacy of political power by responding positively to the torturer’s questions. The silence of the torture victim is not, as she puts it, pre-linguistic, the mute frustration of an infant who has not yet mastered language; it is more apt to describe this silence as the negation of the autonomy to communicate freely.

In this respect, torture is control over the possibility of social existence. French historian Pierre Vidal-Naquet claimed that torture forces victims to recognize their tormentors not only as masters of their bodies and physical sensations, but as owners of

⁷¹ Elaine Scarry, *The Body in Pain*, 4.

⁷² Luban, “Liberalism, Torture, and the Ticking Bomb,” 1430.

⁷³ Scarry, *The Body in Pain*, 27.

their speech and, therefore, of their humanity.⁷⁴ He cites cases of Gestapo torturers forcing their prisoners to say, “I’m a dirty Jew,” and French torturers extorting from the mouths of their FLN captives, “Vive la France!” Torturers enforce upon their victims the recitation of dominant state narratives, for instance, in the cases cited by Vidal-Naquet, the inferiority of Jews under the Third Reich, or the rightness of the French colonization of Algeria. Torture may be instigated by the pressing need for information vital to national security. However, it is frequently a means for dominant states to ensure that oppressed subjects confer a stamp of legitimacy upon the very systems that oppress them.⁷⁵ Uttering the words the torturer wants to hear transforms violence into political right.

Rejali agrees with both Scarry and Vidal-Naquet that torturers control the autonomy of their prisoners’ speech in order to construct a narrative of legitimacy around the expression of state power. However, the important political consequence of controlling communication is not so much the reduction of an individual to a debased mouthpiece for state power, but the creation of a gap of expressibility between victims of torture and their larger communities.⁷⁶ When victims of torture escape their tormentors, they ought to be able to satisfy their need to give an account of their ordeals to their families, friends, or other social networks. This rendering of accounts is also the opportunity to hold torturers accountable for their actions and to shed light on the actual practice of torture. International human rights instruments profess that victims have the

⁷⁴ Pierre Vidal-Naquet, *La Torture Dans La République*, 13.

⁷⁵ David Sussman, “What’s Wrong with Torture?” 4.

⁷⁶ Rejali, *Torture and Democracy*, 31.

right to speak before the law⁷⁷ and to be compensated for their pain and suffering.⁷⁸ Not only is this right to speak before the law jeopardized by stealth torture, but if there is no visible proof to corroborate the details of their experiences, victims' friends and families have reason to doubt them. The physical and psychological damage of being tortured are then compounded by alienation from one's community and the inability to receive proper legal redress.

Political legitimacy for democracies that resort to torture depends largely on maintaining structural mythologies that prevent the public from recognizing the wedge that exists between the practice and justifications of torture. One of these structural myths is that subjecting a person to increased pain and degradation will generate intelligence that the state can use to keep the national polity safe from harm. Victims can put these mythologies into question – the truth is written on their bodies. Therefore, if states wish to maintain a space of freedom within which they can practice torture without having to give a truthful account, they must do what they can to destabilize the credibility of victims and undermine their moral standing. Stealth torture serves these ends nicely.

As I argued in the first chapter, the claim that torture is necessary for collective self-preservation rests on some false or simplistic beliefs about pain. Speaking philosophically about his experiences as a torture victim, Jean Améry echoes Scarry's assertion that the pain of torture negates the possibility of language.

It would be totally senseless to try and describe here the pain that was inflicted on me.... The pain was what it was. Beyond that there is nothing to say.

⁷⁷ United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 13.

⁷⁸ United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 14.

Qualities of feeling are as incomparable as they are indescribable. They mark the limit of the capacity of language to communicate.... Whoever is overcome by pain through torture experiences his body as never before. In self-negation, his flesh becomes a total reality.⁷⁹

The reductive quality of pain in general should not allow us to forget that it remains a complex phenomenon, subject to a variety of types, degrees, and subjective methods of interpretation and description. Pain is difficult to describe, but not wholly indescribable. We can speak sensibly about a threshold of pain, a point at which an individual can no longer tolerate her physical afflictions, even if this point tends to differ among people. Subjecting prisoners to more intense and lasting physical pain tends to provide a diminishing rate of return, providing torturers with fewer useful results over time. In an earlier passage from his essay on torture, Améry confesses to becoming accustomed to the physical blows, learning with some relief that they can be endured.⁸⁰ Other victims of torture express similar views.⁸¹

There are two important implications for the subjective nature of pain and the potential for increases in an individual's capacity to endure it. One implication is that if information is required quickly, it is best to exert a great deal of pain right away, aiming for an overwhelming show of force to coerce the detainee into submitting to the torturer's demands. This contradicts the image of a restrained, gradually escalating level of pain in order to coerce the truth from prisoners. Aiming to quickly and aggressively subvert a prisoner's pain threshold is no guarantee that the information sought will be granted, nor that, if it is provided, it will be useful and reliable. When an interrogator's professional

⁷⁹ Améry, *At the Mind's Limits*, 33.

⁸⁰ *Ibid.*, 29.

⁸¹ Rejali, *Torture and Democracy*, 448.

objectives are frustrated, he may feel there is little else to do but to inflict greater pain, but that takes us back to where we started: it is not clear that the prisoner will respond positively to further injury. They may become accustomed to the pain, feel that it validates the rightness of their own political beliefs, or shore up their will to resist for some other reason.⁸²

A second, related implication is that torture will often and inevitably exceed guidelines for its practice. Since it is not predictable whether or not increasing levels of pain will induce cooperation from prisoners, interrogators with little training and few resources to pursue more humane methods of intelligence gathering frequently resort to intense forms of brutality. Even professional interrogators could not reliably predict an individual's "breaking point." They may gain the prisoner's cooperation quickly, or it may take considerable time and patience. Rejali writes:

When governments authorize torture, they also offer a list of approved interrogation techniques. Professional police [or military], they reason, will stick to these procedures. In fact, the empirical record shows something quite different. In cases where historians know the list of authorized techniques, the actual practice of torture on the ground regularly exceeds the authorized list.⁸³

The torturers at Abu Ghraib Prison in Iraq illustrate this principle well. Even when states are highly permissive of torture, agents responsible for fulfilling government objectives for timely, actionable intelligence frequently exceed the list of approved techniques. The interrogators at Abu Ghraib, underskilled and poorly supervised, knew the techniques the Pentagon had approved,⁸⁴ but frequently went beyond them, trying

⁸² Rejali, *Torture and Democracy*, 442.

⁸³ *Ibid.*, 454.

⁸⁴ For a list of these techniques, see Karen Greenberg, *The Torture Papers*, 348-353.

whatever worked to induce prisoners to cooperate.⁸⁵ Pain is insufficient, so humiliation (forced masturbation, leashing, taking photographs for posterity) and day-to-day environmental conditions (isolation, sleep deprivation, malnutrition) are put to use in order to break the wills of detainees. When the photos of Abu Ghraib were exposed to the public, the visceral shock that ensued was not solely the result of witnessing the degradation of prisoners by American soldiers, but the collapse of the state's justifications for subjecting prisoners to tougher methods of interrogation, that these methods would be fair, restrained, and necessary for improving national security. Many viewers of the Abu Ghraib photos were hard pressed to recognize much truth in these assertions.

IV. Outsourcing Torture

Outsourcing torture interrogation is similar to using stealth techniques in that victims are often denied the likelihood of contradicting state narratives of rational, necessary violence. Extraordinary rendition, the transfer of an individual without legal process to a country where she is at risk of torture,⁸⁶ is a violation of international human rights law.⁸⁷ It is distinct from rendition to justice, a procedure where a fugitive is kidnapped or otherwise captured on foreign soil and returned to a state to face criminal

⁸⁵ Rejali, *Torture and Democracy*, 454.

⁸⁶ Satterthwaite, "Rendered Meaningless: Extraordinary Rendition and the Rule of Law," 1336. *See also* Committee on International Human Rights of the Association of the Bar of the City of New York and Center for Human Rights and Global Justice, New York University School of Law, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions"* (2004), available at <http://www.chrgj.org/docs/TortureByProxy.pdf>.

⁸⁷ Extraordinary rendition most clearly engages Article 3.1 of the Convention against Torture, which states that "[n]o State Party shall expel, return ("refouler") or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subject to torture. For an in-depth analysis of other human rights issues engaged by extraordinary rendition, *see* David Weissbrodt and Amy Bergquist, "Extraordinary Rendition: A Human Rights Analysis." For perspective into how extraordinary rendition violates Canadian law, *see* Laura Barnett, *Extraordinary Rendition: International Law and the Prohibition of Torture*, 19-24.

charges. This is usually done when there is no extradition treaty between the two states, such as Adolf Eichmann's abduction in Argentina and transfer to Israel to stand trial for war crimes. What is "extraordinary" about the American post-9/11 rendition policy is that terrorism suspects, not fugitives, are transferred to states in order to be interrogated, not to stand trial. Often, the means by which victims are interrogated in these foreign jails include torture or other forms of cruel, inhuman treatment. Prior to the terrorist attacks of September 11, 2001, the rendition program's objective was largely to disrupt terrorist cells by arresting al Qaeda members and bringing them to justice. After the attacks, the numerous arrests that had caused profound disruption to Al Qaeda and other terrorist groups were overshadowed by an emphasis on interrogation in order to glean useful intelligence.⁸⁸

The prisoners caught up in the rendition program have been divided according to their relative importance for the United States Government's national security objectives.

They faced the possibility of three types of rendition:

1. Held *incommunicado* by the CIA in one of their "black sites." This type of rendition has been largely reserved for the most vital prisoners (High Value Detainees), those believed to have the most valuable intelligence to share.
2. Held by the United States military as "unlawful enemy combatants" and rendered either to the Bagram Air Force Base or to Guantanamo Bay, Cuba.
3. Captured by U.S. military forces or kidnapped by the CIA and rendered to prisons in foreign countries, such as Egypt, Jordan, Morocco, Syria, or Uzbekistan, all known for systematically torturing prisoners.⁸⁹

Outsourcing interrogation, whether or not it has led to torture, became policy largely out of political necessity and practical expediency. For less important prisoners, those detained on slim evidence or who may only have peripheral associations with

⁸⁸ Grey, *Ghost Plane*, 145.

⁸⁹ *Ibid.*, 239.

terrorist networks, it was simply impractical for the CIA to handle their interrogations. As in other military conflicts where intelligence is a priority, armed forces arrested more people than they could accommodate, without any way of challenging or countering the assumption that they had information of value.⁹⁰

As I noted above, transferring prisoners to foreign intelligence services gives up control over how they are treated as well as over the integrity of any extracted intelligence. This seems not to be in the state's interests, and likely even contrary to them. How could the sending state ensure the veracity of the information the prisoner provided to the receiving state? Is the production of truth through interrogation really what is at stake in extraordinary rendition? It seems there are at least two possibilities. First, the prisoner is transferred in order to be tortured, following the implicit belief that torture generates true information. So, it might be the case that, to put it somewhat crudely, government agents for the sending state believe that if they transfer a prisoner to foreign intelligence agents, their allies will be able to coerce the prisoner into providing relevant, verifiable intelligence. Another possibility is that these detainees are of such low priority, that whatever small pieces of information they provide might help to form a larger picture of what terrorist groups are planning and how they are organizing themselves.

There are reasons to doubt that torture is an effective means of generating true information. These doubts would only be strengthened by the practice of handing prisoners over to third parties for interrogation, third parties that may have their own self-

⁹⁰ Rejali, *Democracy and Torture*, 24; see also Rejali's analysis of torture during the Battle of Algiers, an illuminating point of reference for the U.S.-led war on terrorism, especially with regard to the sweeping arrest and torture of individuals with little to no association with the state's declared enemy, 481-492.

interested reasons for coercing information from prisoners, or that may be compelled to offer the information the sending state wants to hear as part of a diplomatic *quid pro quo*. It is not clear whether the architects of the rendition program were guided by the beliefs presented in these scenarios, but in either case, the practice itself puts into question the relationship between harsher methods of interrogation and the collecting of true intelligence for the purposes of national security. Yet belief in this link is generally what instituted torture programs presume.⁹¹

If this relationship is indeed tenuous, then extraordinary rendition is not only incompatible with democratic norms (a point I will stress in greater detail in the next chapter), but it is also a waste of time and resources. This is a pragmatic point, but my argument throughout has been that normative justifications depend a great deal on the misrepresentation of how torture works and how it is practiced on the ground. This has grave consequences for democracies that choose to practice torture. J.M. Arrigo examines the implementation and effects of torture programs on civic and professional institutions. The justification for instituting such a program rests on the presumption that torture leads to the truth, and that the truth won through interrogation can save lives. She examines three causal models for determining the link between torture and truth. I made reference to the first two models in the first chapter,⁹² but here they are in greater detail:

1. The animal instinct model: The prisoner tells the truth in order to escape bodily pain.
2. The cognitive failure model: Since pain is not only felt, but also interpreted, prolonged stress, physical and mental, must be used to break down the prisoner's ability to form his or her own interpretations of pain.
3. The data processing model: Torture inspires people with little or no affiliation

⁹¹ Arrigo, "A Utilitarian Argument against Torture," 545.

⁹² *Supra*, n. 22.

with terrorist groups to provide small bits of information, which can be coagulated and analyzed to form a larger picture of these groups' tactics and methods of organization.⁹³

Arrigo argues that “the inadequacies of each model lead to the next, with increasing involvement and compromise of key social institutions.”⁹⁴ It leads to increasing devastation for civil society and a more desperate need for secrecy, a need that is frustrated as more people and institutions become involved in the state's torture program. For instance, the animal instinct model is often relied upon to address the moral justifications of torture during ticking-bomb scenarios. The torture of the captured terrorist may only involve a few people – an interrogator and medical personnel to ensure that the subject does not die prematurely, i.e., before he can provide the relevant information. As we move to the second and third models, however, the time it takes for torture to bear fruit and the involvement of legal, political, and professional institutions expands, demanding, among other things, training a cadre of professional torturers, research into how to torture better and without detection, as well as deeper coordination between torture agencies and the police, military, and judiciary.

As torture programs expand, their consequences become more severe. Prisoners die in custody. Lengthy interrogations weaken the value of information, as terrorists have the opportunity to change their plans and locations. Dragnet operations are performed, during which innocents are swept up, tortured, and either released, detained indefinitely, or killed, the public disclosure of which damages the credibility of the state and alienates its citizens, who may begin to recognize that the justifications for such acts

⁹³ Arrigo, “A Utilitarian Argument against Torture,” 546.

⁹⁴ *Ibid.*, 545.

are suspect.

The three models Arrigo lays out postulate causal links, however tenuous, between torture and truth. To these models she appends a fourth, which she calls the “rogue model of truth telling.” Outsourcing torture fits in with this model. Arrigo argues that there is no causal link between outsourcing torture interrogation to foreign states and the search for politically necessary, life-saving truths.⁹⁵ This is an important insight, and fits especially well with the third type of rendition we outlined above, the kidnapping of suspects by the CIA, occasionally with the consent or acquiescence of the sovereign states in which the suspects are residing, and their subsequent transfer into the hands of foreign intelligence services known to practice torture.

After September 11, 2001, the CIA was given a great deal of latitude to interrogate prisoners with techniques that push the torture envelope, and some, including waterboarding, that cross the line.⁹⁶ The rendition team, a group within the CIA, has carried out kidnappings on foreign soil, but despite the political justifications offered in support of its covert program, neither the CIA nor the United States Government as a whole have been forthcoming about what essential truths have been uncovered from prisoners rendered to foreign jails. As noted above, this is largely because of the lack of critical oversight, an absence of supervision that serves to incentivize, rather than discourage, violations of law and basic human rights.

The grave, unintended consequences of overt state-sponsored programs of torture interrogation have made covert programs attractive. In the *rogue models*, torture is not necessarily the causal factor in extracting truth from captives but may be emotionally, culturally, or historically inseparable from

⁹⁵ Arrigo, “A Utilitarian Argument Against Torture,” 546; 560-561.

⁹⁶ Parry, *Understanding Torture*, 175.

customary tactics. Or torture may be one tactic among many in a hit-or-miss approach fostered by lack of accountability for errors.⁹⁷

Transferring suspects to foreign countries shelters democratic states from crises of legitimacy, much as stealth torture does. Instead of torturing in a way that does not mark the body, however, extraordinary rendition allows the body to disappear completely.⁹⁸ If the tortured body reappears, democratic states can point out that they received diplomatic assurances that the prisoner would not be harmed, which immunizes them from charges of wrongdoing. Further, they can point out the barbarity of the receiving state's "customary tactics." States are attracted to outsourcing torture because the secrecy involved in inter-state intelligence sharing defrays the likelihood of being held accountable for torture. One of the advantages of using proxies for covert actions, such as interrogations that push the legal boundaries, is deniability, the chance for states to deny knowledge of any operations that leads to wrongdoing in case their involvement becomes an issue in public debate.⁹⁹ Also, government institutions are less vulnerable to corruption if the torture takes place overseas, at the hands of others, in secret or undisclosed locations. "The practical liability," Arrigo states, "is the difficulty in breaking off or limiting relationships with rogue collaborators, on account of sensitive information held in 'dirty hands.' In effect, terrorist information is purchased through long-term tolerance of political and criminal wrongdoing..."¹⁰⁰ Cooperation between states in counter-terror operations frequently descends into collusion to violate

⁹⁷ Arrigo, "A Utilitarian Argument Against Torture," 560.

⁹⁸ For the connection between renditions and disappearances, see Parry, "The Shape of Modern Torture," 528-533.

⁹⁹ Grey, *Ghost Plane*, 10-11.

¹⁰⁰ Arrigo, "A Utilitarian Argument Against Torture," 561.

fundamental human rights.¹⁰¹

The typical justification democratic states propound for interrogational torture – that it may lead to information that could prevent a terrorist atrocity – is absent here. As Arrigo rightly notes, outsourcing torture to third parties obfuscates any causal link between torture and discovery of the truth. The illegality of torture and its threat to the normative force of human rights, the political consequences of making Faustian deals with rogue states, have both received a great deal of critical attention from scholars. Arrigo’s insight that outsourcing interrogation bears little relationship to the search for truth is an important contribution to this larger narrative.

V. Conclusion

International and domestic human rights monitoring has an effect on democratic states that choose to exercise coercive measures against individuals who pose a threat, real or imagined, to the integrity of their political systems and the citizens who reside within them. Rather than torturing less, democracies have used strategies to implement torture surreptitiously in order to evade public dissent and crises of legitimacy. By marginalizing public debate, using techniques of torture that leave no trace of evidence on the body, and transferring prisoners into the hands of states reputed to use torture, democratic states can conceal their use of violent coercion, thereby skirting accountability for human rights violations. It also conceals from public perception the gap that exists between the practice of torture and the ways it is represented as a justified form of instrumentally valuable and necessary violence.

¹⁰¹ Audrey Macklin, “From Cooperation, to Complicity, to Compensation,” 12.

Concealment of torture affects the type of debate citizens are likely to have about the uses and justifications of state violence. If there is any debate at all, it is likely to be plagued with mischaracterizations, a skewed conception of the moral relationship between torturer and victim, and misunderstandings about the depth of government involvement. But democratic governance demands that citizens engage in, and be encouraged to engage in, a discourse of critical assessment, evaluating the government's actions and the justifications presented for them, so as to ensure they meet standards of legality, morality, and truth. Torture is an international crime as well as a breach of most domestic systems of law, and so it is understandable that state officials who authorize and practice torture would be reluctant to disclose their involvement, and yet without accountability, it is nearly impossible to determine if the violence is rational under the circumstances, and hence justifiable, or if it is arbitrarily pursued for reasons of intimidation or revenge. It is not possible to have an effective democracy by keeping citizens in the dark. By opening up torture to critical judgment, we can shed a brighter light on the gap between how torture is practiced and the ways it is misrepresented and concealed.

Chapter 3

Torture and Existential Threats to the National Community

I. Introduction

When there is an existential threat to the political community, some argue, the state can and should do whatever it can to address it, even if it must violate human rights and international law. In chapter 1, I argued that many of the justifications for torture in democracy, whether they rely on “lesser evil” models or on ticking bomb hypotheticals, or some combination of the two, use a picture of torture as a rare, singular, and effective technique for resolving an imminent political crisis. One of the conditions for torture’s effectiveness is its institutionalization. This is a feature of torture that many of the justifications we looked at in that chapter fail to acknowledge. In chapter 2, I looked at how states have concealed evidence of torture by using stealth techniques that leave no scars on the body, and in recent times, transferred prisoners to foreign countries with laxer safeguards on torture, a practice known as extraordinary rendition. The secrecy that surrounds state torture is facilitated by modern techniques of violence like stealth torture and rendition, but also by the lines of argument and conceptual models that we use to analyze them. Ticking bomb arguments, for instance, conceal torture’s routine use by state agencies to effectively control despised groups or anti-government forces. We tend to misrecognize acts of state torture to the extent that those affected are subjects from a foreign and threatening culture or class. The use of recent technologies of violence that conceal evidence and culpability, as well as arguments that rely on hypothetical abstractions and ignore essential features of what torture is and how it works in practice,

breathe life into the notion that torture is a means to life-saving information, rather than an instrument of social and political control.

When there is an impending threat that could destroy or severely disrupt the political community, the state has the right to protect its interests and its citizens, even if the means it chooses to protect these goods are violent. But should the means of self-protection include torture? If so, what does it mean to institutionalize torture in a democracy, given the essential conditions of accountability, respect for the rule of law, and engagement with citizens on a level of dignity and respect? This chapter will address these questions.

I will argue that rather than challenging the absolute prohibition against torture, arguments for institutionally containing torture bewitch us into thinking that torture can be limited, and that it is reconcilable with the norms and principles of democracy. It is an intellectual deceit that ignores too much of the practice of torture. But ignoring features of reality that should inform our collective judgment about state torture facilitates the lack of accountability that incentivizes states to torture in the first place. States can put themselves in a position to use violent coercion, even torture, against individuals in their custody largely because they are never held to account for it. Part of the explanation for this lack of accountability is that states believe they do not have to justify their actions if they are directed by a venerable goal, the preservation of innocent civilians.

II. Mechanisms of Accountability for Emergency Torture

Apologists for torture sometimes claim that under threat of an imminent terrorist attack, the legal constraints on political action may impede a swift response from the government to address the threat. Gaining information about how terrorists operate and

the details of their future plans is necessary for maintaining national security. When captured terrorist suspects are reluctant to cooperate, when they refuse to freely offer the information that would prevent an imminent attack, torture may be justified as a last resort. In this section, I will look at the diverse ways scholars have come to understand how torture might be contained by and reconciled with democratic principles such as accountability and the rule of law. While some thinkers on this issue believe that torture might be minimized if subject to judicial scrutiny, others believe that, while torture under exceptional circumstances might be defensible in principle and so it can be something that a state official conceives as a possibility and even acts on, it should not be codified in law or public policy.

For Alan Dershowitz, states faced with a terrorist threat will inevitably use torture against a suspect in custody if it is the only means of stopping the attack. He argues there are good justifications for this. First, there are legal loopholes that may allow for it in the exceptional case.¹⁰² Second, torture has occasionally worked to produce actionable information that saved lives. If torture never worked, it would not be such a persistent tool of states worldwide.¹⁰³ Third, under cost-benefit analysis, the evidence seems overwhelming that it is a much better option to torture one terrorist suspect than to allow innocent civilians to die.¹⁰⁴ Upholding the absolute prohibition against torture in this context seems morally naïve. Then, on the balance of harms, most people would endorse the act utilitarian position, which is simply that, if all options for gaining the information from the suspect have failed, then, if torture may with some degree of certainty produce

¹⁰² Alan Dershowitz, *Why Terrorism Works*, 136.

¹⁰³ *Ibid.*, 138.

¹⁰⁴ *Ibid.*, 146.

the morally desirable outcome, the preservation of the lives of innocents, torture may be permissible.¹⁰⁵

Democracies, however, are constrained by the rule of law and sensitive to human rights monitoring. Thus, state officials cannot torture unless they do so under-the-radar, without accountability to the legal system or to their political constituents. This poses a dilemma for democratic states. Torture is prohibited by law and moral doctrine, but governments have a responsibility to protect public safety, now under threat by a terrorist conspiracy. Torture seems to be the least bad choice, but in order to act in this way, laws must be circumvented, giving states an incentive to conceal their actions. It seems to be the case that the violation of some values (government accountability, respect for the rule of law) is necessary to preserve other values (the sanctity of life, government protection of citizens).¹⁰⁶

Dershowitz's concern about torture is the lack of transparency and judicial oversight, which he (rightly) sees as corrosive to a democracy's civil liberties, that unsupervised, illegal torture entails. If emergency torture is not restrained by "acceptable moral principles," then there may be no feasible way of preventing the slippery slope from occasional, one-off torture to political tyranny.¹⁰⁷ Juridical supervision may be an effective and principled safeguard against the tyranny that secret government invariably brings about. He therefore proposes that during an emergency, police should be required

¹⁰⁵ Claudia Card notes the distinction here between a straightforward endorsement of torture on utilitarian grounds and Dershowitz's belief that in a life-threatening emergency, people tend to favour utilitarian rather than principled-based moral reasoning. The issue for Dershowitz is not whether torture would be morally acceptable to most people under such circumstances – he believes it would be – but rather how to reconcile this inevitable response with the state's duties to honour the rule of law and protect civil liberties. *See* Card, *Confronting Evils*, 178-79.

¹⁰⁶ Holmes, "Is Defiance of Law a Proof of Success?" 118.

¹⁰⁷ Dershowitz, *Why Terrorism Works*, 146.

to get a “torture warrant” from a judge.¹⁰⁸ Torture can be limited by its transparent and juridically supervised use during times of public emergency. Since torture is the least bad option between the loss of thousands of lives and the rights and dignity of a person bent on mass destruction, and since democracies would most likely resort to torture in such cases, but, due to current legal restrictions, do so below-the-radar, it would further the interests of civil liberty and minimize abuse to implement a system of torture warrants for these extraordinary cases.

The knowledge that state officials’ decisions will be openly debated and subject to legal scrutiny by an impartial judge may encourage them to torture less. He writes:

In a democracy governed by the rule of law, we should never want our soldiers or our president to take any action that we deem wrong or illegal... Our system of checks and balances requires that all presidential actions, like all legislative or military actions, be consistent with governing law. If it is necessary to torture in the ticking bomb case, then our governing laws must accommodate this practice. If we refuse to change our law to accommodate any particular action, then our government should not take that action.¹⁰⁹

Since it is the case that torture regularly occurs outside of the context of formal juridical procedures, would it not be wiser for a democracy forced into a choice between two evils to provide legal avenues to make this choice openly? In other words, if torture were a justifiable act in the pursuit of a morally desirable outcome, would it not be more consonant with democratic norms to bring torture under the purview of legal administration?

Dershowitz’s concerns with accountability and the rule of law as mainstays of democratic governance echo Aharon Barak’s judgment from the bench of the Israeli

¹⁰⁸ Dershowitz, *Why Terrorism Works*, 140-141.

¹⁰⁹ *Ibid.*, 153.

Supreme Court, stating that for a democracy, preserving the rule of law and respect for individual rights and freedoms are central components in its understanding of security.¹¹⁰ While Dershowitz would concede this general point, an indiscriminate terrorist attack puts tremendous strain on a government committed to preserving these institutions. Granting public officials an adequate legal avenue to make the impossible decision would help to ensure that state violence is restrained by the critical judgment of the law and, though this is difficult to prove with certainty, would lessen the frequency of torture in the long run.¹¹¹ If a captured terrorist is granted immunity from prosecution, informed of his compelling obligation to testify, threatened with imprisonment for noncompliance, and still refuses to cooperate with his interrogators, then, and only then, could torture become a defensible option for eliciting the information needed to prevent the attack. Knowing there are formal conditions and legal procedures that will be followed, suspects in custody may be more willing to cooperate with their interrogators, which will minimize the need to resort to torture and hasten the production of information requisite for avoiding catastrophe.

There are some who defend torture as a last resort to an imminent threat, but would oppose Dershowitz's proposal for legally administered torture warrants. Jeff McMahan argues that despite the flaws of ticking bomb hypotheticals, it has the positive feature of exposing "the intuitive implausibility of absolutism about torture."¹¹² If all other techniques of police investigation have failed, then state agents will likely feel justified in using torture to compel a suspect's cooperation. If one could save thousands of lives by

¹¹⁰ Supreme Court of Israel, "Judgment Concerning the Legality of the General Security Service's Interrogation Methods (September 6, 1999)," 181.

¹¹¹ Dershowitz, *Why Terrorism Works*, 158.

¹¹² McMahan, "Torture in Principle and Practice," 94.

torturing the individual who put those lives at risk, then we are on morally sound footing to claim that torture is justified under these circumstances. The moral principles that might make us reconsider our commitment to this conclusion – the inviolable dignity of the human being, the liberty to be an agent with self-directed ends, never to be used as a means for the ends of others – are important sources of the tension that this moral dilemma entails.¹¹³ McMahan argues, however, that these principles do not capture the salient features of the emergency torture case, and hence fail to persuade that torture must be ruled out.¹¹⁴ He argues that we should concede the point that torture is permissible under these circumstances, and that the pressing question is what implications this judgment entails for law and public policy.

According to McMahan, the fact that moral absolutists about torture often suggest otherwise reveals an important misunderstanding about emergency situations such as the ticking bomb case. The significance of this example is often thought to be the justification of torture on the grounds that it constitutes the lesser evil between two choices. While this is true, he states, it is not terribly interesting, for it merely reasserts the intuitive implausibility of the absolute prohibition against torture. The more salient point is the following:

[T]he terrorist, by virtue of his responsibility for a threat of wrongful harm to innocent people, has made himself *liable* to be tortured if that is a necessary and proportionate means of preventing his having planted the bomb from killing those people. To say that he is liable to be tortured is to say that torturing him would not wrong him or violate his rights, in the circumstances.¹¹⁵

¹¹³ Walzer, “Political Action: The Problem of Dirty Hands,” 168.

¹¹⁴ McMahan, “Torture in Principle and Practice,” 95.

¹¹⁵ *Ibid.*, 97. [italics his]

The claim that a terrorist who attacks innocent civilians is liable to be tortured rests on the conditions laid out in the above passage, namely necessity and proportionality, but also on the view that it is a matter of justice in terms of the fair distribution of harms.¹¹⁶ Hence, it is distinct from the claim that torture is justified as the lesser of two evils in an act utilitarian calculus. In order to assess the strength of his argument, we need to examine what he sees as the conditions for suspending someone's right not to be tortured. How can we know that torture is *necessary*? How do we determine that torture is *proportionate* to the likely harm the terrorist will cause if he fails to cooperate with the authorities? Perhaps more important is a question that McMahan does not address: who can be trusted to make these decisions and how can they be held to account if they get it wrong?¹¹⁷

The terrorist who has planned an attack has made himself liable to be tortured as a matter of preventive justice. One way of understanding the condition of necessity from this perspective would be to argue that the terrorist has an obligation to provide the information that will save innocent lives. Failing to do so, his right not to be tortured can be overridden in the interest of saving the innocent lives that he himself has put in danger. If we are interested in a fair distribution of harms, it seems decidedly unjust to cast the totality of harm onto innocents because we believe the terrorist's right not to be

¹¹⁶ McMahan, "Torture in Principle and Practice," 99.

¹¹⁷ Card, *Confronting Evils*, 200. Card asks the question in order to evaluate the judgment that torture is justified on grounds that it is more merciful than allowing innocents to be killed. The same could be asked of McMahan's proportionality condition: even if torture reflects a proportional response to the harms posed by the tortured subject, who should have the authority to administer this form of treatment? Presumably, they would have to be trained in the art of torture in order to successfully extract the information prior to the point where the interogee's suffering *exceeds*, or becomes disproportionate, to the harms he has planned to commit. But this changes the game: we are now no longer talking about emergency, one-off torture to resolve a ticking bomb, but a social and political environment in which those innocent citizens protected by torture are living in "a torture culture." Assent to such developments puts our innocence into question, not to mention the mercifulness of administering torture in this or any other case.

tortured is unassailable. Failing to act in this way, that is, torturing the terrorist for information, will unfairly shoulder innocents with the totality of the harm. Hence, it is necessary that the terrorist be tortured in this case if he refuses to discharge his duty to others by voluntarily providing the information needed to keep others from harm. Failing to do so is tantamount to participating in an injustice against innocents.

This does not entail that the terrorist *deserves* to be tortured, only that by his own actions, he renders himself liable to be treated in this way. To claim that a terrorist bent on killing innocents deserves to be tortured implies that his suffering such treatment is “intrinsically good.” The assertion that he is liable to be treated in this way means that he has no reasonable grounds for complaint if his intended actions lead to the state’s responding with torture.¹¹⁸ If it is necessary for a just distribution of harms, then a terrorist suspect can justifiably be tortured.

McMahan’s picture of defensive torture seems not to square with what we know about how torture is practiced, even its basic structure as a duel between an interrogator and a captured suspect.¹¹⁹ In his classic essay, Henry Shue argued that one of the salient features of torture is that it is an attack upon the defenseless.¹²⁰ Killing in war may be horrible to contemplate, but it is plausibly justifiable because combatants have a fighting chance; they have means of defending themselves against their enemies. Torture as it is actually practiced is almost never defensive in this way, McMahan acknowledges, but this is not to say that defensive torture is entirely implausible. Once a terrorist has

¹¹⁸ McMahan, “Torture in Principle and Practice,” 98.

¹¹⁹ Stephanie Athey challenges the model of torture as a duel between an omnipotent interrogator and a helpless victim in her essay, “The Torture Device: Debate and Archetype.”

¹²⁰ Henry Shue, “Torture,” 125.

initiated a sequence of events that will foreseeably result in the harm of innocents, capturing him after this sequence has already been initiated does not necessarily minimize the harm that will result from his previous actions. If this sequence of events will progress unimpeded unless the terrorist is forced to provide the relevant information, then torturing him for this information can plausibly be justified as defense of the innocent.

As a test of proportionality, however, it may not be important whether we conceptualize the torture as defensive or not; what matters would be if the torture of one individual who has threatened to kill innocents is proportionate to the harms he has set out to impose.¹²¹ For McMahan, it seems clear that this is indeed the case. Therefore, if these conditions hold, it makes sense to torture the terrorist as a matter of distributive justice, and to view the absolute prohibition as an indefensible shying away of the significant moral features of this case. Standing up for the absolute prohibition against torture is too simple-minded, and fails to take seriously the harms terrorists pose to innocent civilians.¹²²

While McMahan agrees with Dershowitz that torture may be justifiable in a genuine emergency scenario, he does so for different reasons and he strongly disagrees with the proposal that state torture should be implemented into the legal system. The theoretical possibility that torture would be defensible as a matter of preventive justice is irrelevant for the creation of sound law making. Another way of putting this would be to say that torture may, in exceptional circumstances, be justified as a matter of *distributive*

¹²¹ McMahan, "Torture in Principle and Practice," 98.

¹²² *Ibid.*, 106.

justice, but would prove disastrous as a sanctioned tool of *procedural* justice. Granting authority, *ex ante*, to state officials to commit torture even in circumstances in which it would be morally defensible is a foolhardy proposition. He has three reasons for this. First, a law that only permitted morally justifiable torture (based on the conditions set out above) would be unenforceable. Second, such a law lends itself too easily to overuse and exploitation by the unjust. The moral judgments we develop through thinking philosophically about torture would not necessarily carry over as a set of norms to guide political and legal institutions. Although he does not address Dershowitz specifically in his paper, we can imagine McMahan asking whether judicial review is a reliable safeguard against political exploitation of legally sanctioned torture. Why simply presume that judges are morally superior to the rest of us, such that they can keep at bay what mere mortals seemingly cannot, the corrupting influence that the power of torture inscribes upon its user? Third, making it easier for governments to use torture will doubtless result in greater, not fewer, violations of human rights.¹²³ As such, the absolute legal prohibition against torture ought to remain entrenched as a matter of public policy, even if we accept that torture may be theoretically justifiable in certain emergency situations.

The emergency argument cannot gain normative traction unless it represents a realistic and plausible scenario interrogators and other state personnel are likely to encounter.¹²⁴ Thus, an important question remains: how, if torture is morally justifiable, yet not permitted by law, can the conscientious official charged with handling an emergency act on her beliefs that saving innocent lives is the right thing to do?

¹²³ McMahan, "Torture in Principle and Practice," 104-105.

¹²⁴ Scheppelle, "Hypothetical Torture in the War on Terrorism," 293.

Recognizing that the rule of law is best served by maintaining an absolute prohibition against torture, Oren Gross acknowledges that there are times when public officials may still feel the need to disobey existing laws regulating their conduct. He argues that officials charged with addressing threats to the stability and security of the national polity may act extra-legally, while remaining prepared to accept the legal consequences of their acts at a future point in time.¹²⁵

Gross argues that if a state official faces the choice between torturing a terrorist suspect, on the one hand, and allowing thousands or perhaps millions of innocents to be killed, upholding the absolute prohibition against torture is morally indefensible. On this point, he is in agreement with the other authors we have looked at so far. He is suspicious, however, of *ex ante* measures to legalize torture, and would thus reject Dershowitz's proposal for a system of torture warrants. Like McMahan, he argues that we ought to maintain an absolute *legal* prohibition against torture, but has an intricate and compelling procedural mechanism by which to give public officials the freedom to act extra-legally while maintaining the strength of the absolute prohibition of torture under law. "The prospect of extra-legal action," he claims, "supports and strengthens the possibility of formulating (and maintaining) an absolute prohibition on torture."¹²⁶

In a catastrophic case, such as an imminent terrorist attack, the resources of absolutist morality are not sufficient to anchor the claim that torture is impermissible. Even if we generously unpack the content of the absolutist position, more is required to persuasively argue that we ought to uphold the terrorist's rights not to be tortured in this

¹²⁵ Gross, "The Prohibition on Torture," 231.

¹²⁶ *Ibid.*, 232.

case.¹²⁷ If we wed our beliefs regarding the *prima facie* wrongness of torture to pragmatic reasoning, Gross argues, then we may better develop a theoretical framework with which to bolster the absolute legal ban on torture, lessening the frequency of torture and increasing levels of accountability and transparency into government actions. Gross lays out five pragmatic reasons why upholding an absolute legal ban on torture makes sense:

1. Even if the ticking bomb hypothetical is a genuine hard case, its infrequency renders it unwise to use as a template for general policy.
2. The absolute prohibition against torture serves important pedagogical functions, attaching special condemnation to the practice.
3. Upholding the absolute legal ban serves to resist the use of torture in less-than-catastrophic cases or institutionalizing it within the normal functions of the criminal justice system.
4. Rejecting torture in absolute terms negates the legitimacy of weighing fundamental rights in a balance of values test.
5. The prohibition against torture prevents the slippery slope from rare, exceptional torture to its routine use by the state. It is, in other words, a central condition for sustaining political liberty and individual rights.¹²⁸

These pragmatic considerations give strong reasons to support an absolute legal ban on torture. However, it is nevertheless the case that public officials may be required to make a tough choice in the face of an imminent catastrophe. Gross rejects the view posited by Henry Shue that such scenarios as the ticking bomb are artificial, abstract cases dreamed up in the ivory tower.¹²⁹ Since they are real, and since we would not want our state officials to uphold the absolute ban in the face of imminent disaster,¹³⁰ some procedural mechanism ought to be established that allows public officials to make a

¹²⁷ Gross, "The Prohibition on Torture," 233.

¹²⁸ *Ibid.*, 234-236.

¹²⁹ Henry Shue, "Torture," 142.

¹³⁰ Gross echoes the point made earlier by Michael Walzer in his essay, "Political Action: The Problem of Dirty Hands." Walzer argued that we would not want our politicians to sustain a position of moral absolutism in defiance of competing values; the moral politician is one who rejects moral absolutes, in other words, is willing to dirty his hands, but openly discloses this fact for public scrutiny rather than hypocritically concealing it.

difficult moral choice in a catastrophe without undermining essential legal norms. Gross labels this mechanism “official disobedience.” He writes:

[T]he way to reconcile the absolute ban on torture with the necessities of the catastrophic case is not through any means of legal accommodation... but rather through a mechanism of extralegal action that I would term *official disobedience*: in circumstances amounting to a catastrophic case, the appropriate method of tackling extremely grave national dangers and threats may entail going outside the legal order, at times even violating otherwise accepted constitutional principles.¹³¹

Once a state official has acted beyond the purview of the law, it is incumbent upon her to openly acknowledge her actions and their illegal nature.¹³² Once an account of the act of official disobedience has been disclosed for public deliberation, civil society may choose to condemn the practice as an illegitimate expression of state authority or approve of it as a justifiable choice in a morally difficult situation. Gross dubs this mechanism of public dis/approval “ex post ratification.” If the public chooses to ratify the official’s act of disobedience, by not calling for criminal charges or advocating for pardon or clemency in cases where torturers are prosecuted, torture as a practice of state nevertheless remains outside of the legal system. The mechanism of official disobedience and *ex post* ratification has an essential virtue that the model of torture warrants lacks: it provides a reliable system of accountability for state torture while not allowing it to infect the institutional framework necessary for maintaining governance according to law.

It also addresses Henry Shue’s concern about creating bad law on the back of rare, hypothetical cases.¹³³ We are not creating new law to better accommodate torture as a

¹³¹ Gross, “The Prohibition on Torture,” 240. [italics his]

¹³² Ibid., 241.

¹³³ Shue, “Torture,” 141; Gross is also concerned about the rush to create new legislation as a response to actual emergencies, rather than questioning the merits and limitations of existing law to address the threats against the political community. See Gross, “Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?”

legitimate form of emergency response. The model of extra-legal practice that Gross is advocating maintains an important sense of uncertainty in the mind of a state official contemplating the use of torture. If subject to the open deliberation of civil society, deliberation that may result in the torturers' condemnation, the choice to authorize torture would be given added moral weight.¹³⁴ This may reduce torture in the long run, whereas a system of torture warrants that give authorized justification for the use of torture in exceptional cases may, long-term, increase torture by normalizing it as a valid judicial practice.

III. Accountability Mechanisms and Socio-Political Control

The absolute ban against torture under international law was agreed upon by the community of states in order to sustain clarity of thought from abridgment by seductive, yet flawed, hypothetical cases.¹³⁵ As Henry Shue put it in a recent reappraisal of his own position on the occasional permissibility of torture, "One can imagine rare torture, but one cannot institutionalize rare torture. The suggestion of rare torture has no place in the real world of politics. It is an optimistic thought with no social embodiment."¹³⁶

When discussing the justifiability of torture in a democratic system, we are often bewitched by the compelling picture of a state of emergency.¹³⁷ The attempts to create mechanisms of accountability to support the practice of rare, targeted torture against terrorist suspects suffer from a disconnect between their descriptions of how torture

¹³⁴ Gross, "The Prohibition on Torture," 246.

¹³⁵ Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture: A Commentary*, 89.

¹³⁶ Shue, "Torture in Dreamland," 238.

¹³⁷ Luban, "Liberalism, Torture, and the Ticking Bomb," 1441.

operates to resolve national emergencies and how democracies have typically implemented torture as an institutionalized practice. It is not my contention that hypothetical thought experiments have negative utility for clarifying our moral judgments. However, conceptualizing torture in democracy as a response to existential threats, and then questioning how mechanisms of democratic accountability can be instituted such that public officials can respond to emergencies in a transparent way, guided by norms and regulations understood ahead of time, will not prove to be a fruitful method of intellectual inquiry if we have mischaracterized how democracies actually practice torture. Put briefly, if we have mischaracterized democratic torture, then we have not adequately clarified our moral judgments about whether it is permissible, and if we have failed to clarify our judgments, then our mechanisms of accountability will fail to satisfy the goals we ascribe to them.

We saw in chapter two how democracies practice torture in ways that attempt to shirk accountability for government violence and destroy individuals' capacities to participate in a shared social life. Stealth torture and extraordinary rendition create conditions of isolation, terror, and pain for the duration of prisoners' captivity, but alienation from their social world persists long after their release (if they are in fact released). In the early moments of this chapter, we looked at arguments that address the fundamental question of accountability, assessing, first, whether torture is permissible when states face an imminent existential threat, and if so, how public officials can respond to such a threat without undermining civil liberties, government transparency, and the rule of law. So far, I have not addressed how successful these arguments are in

illustrating how democracies can practice torture with full accountability. I will turn to this point now.

Both Dershowitz's torture warrants model and Gross' extra-legal measures model presume that torture will only be resorted to in order to gain information that will prevent a public catastrophe. They envision that torture will only be used under rare and extreme circumstances. But if torture is a pervasive practice, a routine instrument of social control against subject populations or despised groups, can these respective models reduce torture and enhance accountability for state violence? In his illuminating book, *Understanding Torture*, John T. Parry presents a survey of torture in modern democracies, offering a tri-partite argument meant to help the reader understand democratic torture and the various modes of reasoning public officials rely on to excuse or justify it.

First, torture is not an aberrational form of conduct in modern democracies. It is, rather, pervasive and may even be essential to their methodology and practice of government.

Second, while the world's democracies possess different institutional structures, they tend to use similar modes of reasoning to justify torture. These modes of reasoning rely on various racist or colonialist assumptions about the Other; queries into the appropriate limits of the rule of law; and propositions concerning states of emergency, exception, and necessity.

Third, torture may be pervasive, but it is often hidden. Concealing it helps to reinforce its exceptional character, defraying recognition of its normality or

routinization.¹³⁸

A vast body of evidence supports the argument that torture is pervasive in modern democracies. French paramilitary troops in Algeria used torture, including the use of water and electricity, to maintain control over the Algerians' self-determination struggle. The police and military forces in Algiers used torture and indefinite detention to collect information, intimidate the non-European population, and defeat the FLN (Front de Libération National), helping to momentarily secure French colonial control.¹³⁹

The British Army as well as the Royal Ulster Constabulary subjected Irish Republican Army members and suspected sympathizers to “the five techniques,” – prolonged standing against a wall, hooding, continuous loud and hissing noise, sleep deprivation, and dangerous restrictions of food and water – ostensibly as a means of collecting intelligence about the IRA, its methods of operation, as well as any future violent attacks.¹⁴⁰ The torture techniques used against Irish Catholics were developed earlier in the twentieth century against subjects of Britain's various colonial holdings.¹⁴¹ While officials within the British Government did not publicly acknowledge the use of torture, the use of these techniques became part of standard operating procedure to suppress “internal security problems.”¹⁴² The European Court of Human Rights, in the pivotal case *Ireland v. United Kingdom*, determined that these techniques “did not occasion suffering sufficient in cruelty and intensity to constitute torture,”¹⁴³ though this

¹³⁸ Parry, *Understanding Torture*, 97-98.

¹³⁹ *Ibid.*, 99.

¹⁴⁰ Conroy, *Unspeakable Acts, Ordinary People*, 40.

¹⁴¹ Parry, *Understanding Torture*, 104-105.

¹⁴² *Ibid.*, 104.

¹⁴³ *Ireland v. United Kingdom* (http://lawofwar.org/Ireland_v_United_Kingdom.htm).

decision has proved controversial. Notwithstanding the important debate surrounding the definition of torture, and how the ECtHR's decision in *Ireland v. United Kingdom* has served as a precedent for discussion of this issue, there is an important trajectory in British torture that is worth noting: techniques of counter-insurgency and political control developed in the colonies are often brought home to the metropole.¹⁴⁴

The torture of numerous IRA suspects at Crumlin Road Jail in the 1970's illustrates the inadequacy of framing the torture problem as a tragic choice between evils, or as a necessary response to a public emergency imposed by radical extremists. Most of the Irish Catholics subjected to "interrogation in depth" presented little genuine threat to the state. The more interesting point, though, is that conceptualizing torture as a tragic choice between evils mischaracterizes the actual practice of torture. It is a picture that hinges upon the monogamous relationship between torture and the quest for national security intelligence.

While torture may at times have as its purpose the extraction of national security intelligence, Parry notes that torture is used frequently against colonial populations as a means of socio-political control. He couples this valid point with an intriguing, though flawed, notion that torture may be essential to the very nature or constitution of democratic governance.¹⁴⁵

It is an intriguing position because it undermines the assertion that torture is reconcilable with democratic norms as long as it remains exceptional, used only during national crises for the noble end of preserving innocent lives and shared political

¹⁴⁴ Rejali also notes this trend – the migration of torture techniques from colony to metropole – in the context of France's struggle to maintain control over Algeria. *Torture and Democracy*, 46-49.

¹⁴⁵ Parry, *Understanding Torture*, 97; see also his Introduction, 1-13.

institutions.¹⁴⁶ For instance, as we saw above, Jeff McMahan argues that a terrorist who seeks to kill innocents cannot rightly complain if state officials seeking to learn the details of his plans torture him for the information he will not voluntarily disclose. In other words, his human right not to be tortured cannot be protected without undermining more important moral objectives, in this case, the preservation of innocent life. Human rights are meant to act as a wall between the power of the state and the body of the individual, but because the costs of a terrorist attack are so high, it is posited that the suspect's rights can be suspended in this case.

Parry would not disagree. He finds fault with the expectation that human rights will provide a reliable means of protecting individuals against state encroachment. Part of the naivety of this expectation has to do with mistaken views about the ontology of human rights. For Parry, human rights and other principles of justice derive their authority from political relationships that take shape in modern nation states: they are not transcendent, *a priori* norms that forbid in absolute terms general modes of conduct. Neither the institutions of liberal, constitutional democracies, nor international human rights, provide individuals with a reliable buffer against state violence. This may be true – the prevalence of torture in democratic societies seems to support this claim – but the more conjectural point that torture might be essential to democratic governance is not as well established.

The use of violence to maintain social control is not the privileged domain of

¹⁴⁶ For an excellent survey of the fantastical ways liberals try to reconcile such principles with exercising torture and other forms of political brutality, see David Luban, "Liberalism, Torture, and the Ticking Bomb."

dictatorships. Democracies are privy to its use as well.¹⁴⁷ However, by essentializing the relationship between democracy and torture, Parry may be inadvertently relinquishing state officials from the responsibility of *choosing* to authorize torture against the (real or perceived) enemies of the state. The distinction between normality and a state of exception is often used to leverage the claim that torture is morally permissible under certain circumstances. If we concede that this distinction serves as a rhetorical weapon to conceal the state's routine forms of repression, this is not sufficient to illustrate that torture is essential to democratic governance. Further, we lose the finer contours of analytical clarity once we hypothesize that torture is simply what democracies do. It is correct to criticize elected officials and bureaucrats for justifying torture on grounds of national security goals. While democracies frequently rely upon states of emergency to validate extraordinary and violent measures, these measures do not always include torture or other forms of cruel or degrading treatment. By not asking the question of how democracies torture, we risk conflating more severe forms of violence such as torture with other, possibly more routine instruments of repression. As Darius Rejali puts it, “[h]ow torture happens is an important check on misleading or overly general accounts of why torture happens.”¹⁴⁸ The historical record indicates that “torture has characterized democratic as well as authoritarian states.”¹⁴⁹ However, to assert that torture happens because democracies are prone to use violence as an instrument of social control is not precise enough for our purposes here.

¹⁴⁷ Parry, *Understanding Torture*, 98.

¹⁴⁸ Rejali, *Torture and Democracy*, 61.

¹⁴⁹ *Ibid.*, 45.

Rejali's research into the history of torture technology is more helpful here. He presents three models that establish necessary, but not sufficient, conditions for a democracy's use of torture.

The first is the *national security model*. When democratic states face a real or perceived threat, bureaucrats from the state's national security apparatus can often outmuscle elected officials. The latter are accountable to the people but may lack the expertise needed to implement viable and realistic solutions to vexing security issues.¹⁵⁰ They can be persuaded to circumvent the rule of law, disregard the general will of the people, and implement secret policies to commit torture and/or cruel, inhuman treatment. "Military bureaucracies can overwhelm a democracy sufficiently to make it democratic in name only."¹⁵¹ State of emergency legislation is often passed to allow sweeping executive powers to detain people for prolonged periods of time without charge, practice interrogation techniques that constitute torture or other forms of mistreatment, and inhibit proper legal redress for victims of state violence. These processes create what Rejali calls "a state within a state," a lawless zone where police and military can engage in torture with near impunity. The lack of accountability and the vociferous rhetoric of national security soon infect, and lead to the collapse of, other democratic institutions such as the free press, the legislature, and the judicial system.¹⁵²

My focus throughout has been on the justifications of torture for interrogational purposes, supported by beliefs that torture produces true and timely information that will bolster the security of the state and prevent the deaths of innocents. Rejali argues that

¹⁵⁰ Rejali, *Torture and Democracy*, 46.

¹⁵¹ *Ibid.*, 49.

¹⁵² *Ibid.*, 47; Arrigo, "A Utilitarian Argument Against Torture."

exclusive focus on interrogational torture allows a great deal of domestic torture to go unrecognized. In the *juridical model*, democratic torture is correlated to extensive police powers to detain without charge and to the judicial system's strong reliance on confessions to secure convictions.¹⁵³ A permissive legal environment in which torture is routine, a tool of domestic policing, supports this form of torture. Since under this model, police seek to secure confessions, rather than information that will defuse an impending crisis, torturers can take their time with their subjects, working them over until they have enough "evidence" to sustain a conviction. Predictably, this form of domestic torture does not receive the same level of critical attention from philosophers. It tends to garner support less from moral or philosophical reasoning than from cultural norms and accepted practices.

In the *civic discipline model*, torture is used as a weapon of ontological demarcation, separating populations into classes and shaping civic identities. Citizenship in a democracy can mean many things, including access to law, choosing the leaders of government, and equal opportunity to pursue one's life goals. It also means that one is untorturable. In democracies that have practiced slavery, for instance, the unfree status of slaves was often marked on their bodies.¹⁵⁴ In contemporary democracies, certain segments of the population are much more vulnerable to state violence and torture than established citizens. Immigrants and illegal aliens, for example, have been increasingly incarcerated on the grounds that they pose a threat to the state's security. In the United States, Immigration and Customs Enforcement (ICE) prisons hold over 400,000

¹⁵³ Rejali, *Torture and Democracy*, 51-53.

¹⁵⁴ *Ibid.*, 56.

immigrants each year.¹⁵⁵ They are denied the constitutional rights and freedoms allowed to citizens and are often vulnerable to being tortured and otherwise mistreated. Here is a case where two of Rejali's models – civic discipline and national security – overlap. The diminished civic status of immigrants and foreigners makes them more vulnerable to torture, but it also weakens the pressure on public officials to justify subjecting them to forms of mistreatment. If torture can reinforce existing civic identities and help to maintain the current social structure, then citizens, protected by rights and access to the law that assure their status as untorturable, may even look the other way to the torture of social undesirables, a process Rejali, following French social theorist Pierre Bourdieu, calls “misrecognition.”¹⁵⁶

The techniques of torture favoured by democracies allow much of it to go unrecognized. The so-called “clean techniques,” which do not leave scars or other visible signs of injury on the body, were developed in large part by modern democracies, particularly France, Great Britain and the United States, in order to elude human rights monitors as well as legal accountability. State officials in a democracy are accountable to the public. If complicity in torture is a justifiable trade off for enhanced national security, then what it means to be accountable is to offer the reasons that support the justification of such a violent act. Stealth techniques obviate the need to provide such reasons by concealing any evidence of torture. The ways that modern democracies practice torture serve to undermine democratic accountability. Scholars who advocate institutional

¹⁵⁵ Pugliese, *State Violence and the Execution of Law*, 25.

¹⁵⁶ Rejali, *Torture and Democracy*, 58.

mechanisms to allow democracies to practice torture during national crises or existential threats should acknowledge this.

On the other hand, both Rejali and Parry find some advantages in Dershowitz's proposal for torture warrants. For Parry, juridical supervision places "additional and different layers between the interrogator and the prisoner. Under a warrant regime, interrogators or their commanding officers cannot simply decide to use coercion."¹⁵⁷

Rejali notes that the poverty of our scholarly research into democratic torture is the result of government secrecy and strategies to evade moral, legal and political accountability. If torture were juridically supervised and fully transparent, then states would be quicker to learn (or relearn) that the costs of institutionalized torture – the decay of civic institutions, the erosion of human rights norms, the failure to defray these costs with enhanced security – far outweigh any residual benefits that may arise from information gathered from tortured prisoners.

For both scholars, however, the salient point to make about institutionalizing accountability mechanisms for democracies to practice torture is that they do not adequately describe the practice of torture, its methods and purposes, nor do they give a proper account of the victims and their experiences. Parry is quite correct to note that torture is an instrument of political domination against colonized subjects, despised racial or ethnic groups, or feared social classes. Rejali agrees, but his three models illustrate even further how democracies torture for a multitude of reasons, not simply as a means of extracting information vital to preventing existential crises or the deaths of innocent citizens. Stealth techniques are used in democracies for evading accountability. State

¹⁵⁷ Parry, "Torture Warrants and the Rule of Law," 887.

officials who advocate such techniques are guilty of abusing the public's trust, helping to sustain the lie that they do not torture, a lie that, if realized, could jeopardize the support of the electorate on which they depend to maintain their positions.

The burden of proof for Dershowitz's system of torture warrants is to illustrate how torture can be effectively restrained by judicial review, how a practice that is routine in many prisons, immigration detention camps, and military facilities can be brought under the control of the rule of law. But it is the routinization of torture that Dershowitz fails to acknowledge, and the presumption that it is only used during emergencies to the national polity, a presumption poorly supported by the historical evidence available to us, that belies the utility and plausibility of an *ex ante* system for bringing accountability to such a violent practice.

Does Gross' extra-legal measures model fare any better? As I noted above, the advantage of his model for introducing accountability into democratic torture is that it grants state officials charged with overseeing public safety the discretion to make hard moral choices in a catastrophe, but without sanctioning torture as a legal practice. Thus, it meets McMahan's objections that a law or policy providing state agents the authority to use torture would be unenforceable, and would invite abuse by the overzealous or unjust. However, his model of extra-legal action followed by *ex post* ratification suffers from a similar shortcoming as the torture warrants model: it conceptualizes torture as a tool for gathering life-saving information rather than a technique for dominating threatening social groups. In other words, it does not speak to the practice of democratic torture. As Rejali, for instance, sees the abuse of public trust as one of the great moral problems of democratic torture, we can imagine Gross' model as providing a compelling response to

his concern. Gross' model grants public officials the discretion to use violence, even torture, to protect the national polity and keep citizens safe from harm, but Rejali's historical research offers strong evidence that torture is not effective in generating true and timely information, and is even less effective under circumstances in which a threat against the state is imminent and seemingly unavoidable.¹⁵⁸ If torture is not likely to be helpful in resolving existential threats to the state, then arguments about whether we, as a people, *should* grant public officials the authority to use torture through a system of judicial warrants, or ratify their decisions to torture after the fact, will have limited value.

IV. Conclusion

Rather than challenging our moral beliefs about the absolute wrongness of torture, descriptions of ticking bombs wreaking imminent havoc on innocents act as red herrings that distract us from the practices and technologies democracies have implemented to control threatening subjects with pain and injury. Any discussion of the moral and legal limits of torture ought to give considerable weight to how it operates in practice. Giving a fuller, more illuminating description of the act of torture within its social and political contexts curtails our ability to draw normative conclusions from hypothetical scenarios that, consciously or not, exclude these details. It is therefore troubling when scholars reach the conclusion that the prospect of an existential threat to the political community renders torture permissible. Since physical pain can induce prisoners to cooperate with state officials charged with protecting the lives of innocents and their shared institutions, then, if there are circumstances where torturing one person may save lives, on the balance of harms it seems intuitively correct to claim that torture is justified. However, because

¹⁵⁸ *Supra* n. 47.

democracies value human rights, accountability, and public trust in government, the secretive nature of state torture poses particular dilemmas. If it is justifiable under rare, exigent circumstances, then democracies require some mechanism of legal or quasi-legal control over state officials in charge of authorizing and carrying out the interrogation of prisoners.

We have looked at two models for introducing accountability into democratic torture. One of the concerns with legalizing torture, or with giving public officials the discretion to use it, followed by a democratic process of ratification, is that it will send governments down the slippery slope toward indiscriminate tyranny. Rather than take up this concern, I have preferred to focus on the disconnect between the practice of torture by democratic states and the institutional mechanisms scholars have promoted to render those who authorize torture accountable to citizens and the rule of law.

It is not reasonable to assume that torturers have the knowledge of their detainee's guilt but are clueless about the logistical information needed to prevent catastrophe. Torture is not practiced in these conditions, nor is it likely that such conditions could be satisfied. If they were satisfied, this would only be knowable *after* torture has occurred, whereas judgments about torture's necessity and proportionality require that it be reasonably understood *beforehand*. Torture is an instrument of state control, used for intimidation, revenge, to secure criminal convictions, or to demarcate social groups into distinct classes. It is also used as a tool for gathering national security intelligence, but its effectiveness in this regard is dubious and often wildly exaggerated in order to support the state's justifications for using violent coercion against foreign prisoners.

The assumption that useful information will be extracted from a subject simply through the application of physical pressure belies what we know about the nature of pain. People display a wide diversity of responses to physical injury. When we imagine that the inevitable response will be the prisoner's truthful disclosure of his involvement in a criminal conspiracy to murder innocents, our naivety might be considered comical if it did not lead us to endorse a practice with such tragic consequences. Torture victims frequently respond with silence, with practices of protest such as hunger strikes or self-inflicted injuries, or by providing torturers with false and misleading information that lead governments on wild goose chases. One of the implications of the institutionalized practice of pain and injury against state prisoners is that these mechanisms of resistance have to be overcome if interrogators are to be successful in extracting the truth from their captives. The prominent strategy in recent years has been to implement prolonged and systematic regimens of stealth torture, for example, restrictions on diet and sleep, forced standing or kneeling, solitary confinement, and techniques of humiliation. These are all practiced to dehumanize prisoners and eliminate any sense of hope that they might escape their predicament. These implications, a recognized feature of torture as an institutional practice, are what torture apologists tend to neglect or deny, resting their justifications instead on the facile and unsubstantiated belief that a little pain can produce invaluable truths.

Torture in its actual social and political contexts is not, or rarely, a means to useful intelligence the state requires to keep its citizens safe. To make this the centerpiece of our moral thinking about torture is unsound, for it is based on dangerous misdescriptions of torture that serve to reduce the visibility of the other's pain and negate her human

claim to respect and dignity. When we are persuaded that torture is a justifiable act in an emergency, are we less likely to cry foul when it is used in a non-emergency situation, or worse, becomes a routine weapon in the fight against crime or terrorism? Perhaps.

Holding states accountable for torture certainly begins at the level of knowledge. It makes a difference to the health of our political communities how torture is integrated into the imaginations of our citizens as well as our policy-makers. Torture is a secretive practice. That makes it difficult to form collective judgments about its use and the justifications that are available to it. The democratic need for transparent government is not well served by asking whether a state could justifiably torture if faced with an existential threat. Our conceptual models for addressing the moral permissibility of torture, as well as the mechanisms we imagine will introduce accountability into such forms of state violence, exclude and sanitize the aspects of torture that do not fit neatly into its picture of a conscientious and targeted use of physical coercion that generates timely, and true, information. If we are to have an informed discussion about torture, and hold states accountable for it, we would do well to scuttle hypotheticals aside and focus on the practice of torture as a complex and prevalent tool of state violence.

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