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Torture Cannot Be Used As A National Security Policy

by

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This paper looks at the acceptability of torture as a national security policy to combat terrorism. This paper finds that torture is an ineffective and unconstitutional practice. It also explains that torture infringes upon the most basic human rights as well as basic democratic rights. The legalization of torture for antiterrorism would lead to the expansion of torture in the future as society became more accepting of torture. The legalization of torture could increase the amount of torture that occurs across the globe because the United States often sets global precedents. Finally, this paper explains that a national security option must be found that places the loss of some liberties on all those who enjoy the benefits.

I. Introduction

The terrorist attacks of September 11th brought a heightened sense of vulnerability to the United States. A group led by non-state actors managed to infiltrate the infrastructure of the United States and carry out an attack that led to the death of thousands of people. The people of the world's greatest superpower suddenly realized that they were vulnerable to terrorist attacks. It seemed that the U.S. thought that all of its economic and military power had made it invincible, but 9/11 opened up the eyes of Americans to the fallacy of this fantasy. The threat of terrorism against the United States is very real, and this nation must come up with a method to prevent this type of incident from repeating itself.

The United States had to reevaluate its shortcomings in preventing these attacks and look for ways to prevent similar events from occurring. The goal of preventing terrorist attacks opened up the age-old debate between national security and civil liberties. The government must try to protect itself from foreign and domestic threats, but must also observe the rights promised to individuals. The goals of national security and civil liberties seem to be at odds with each other, so the government must strive to find a balance between the two. However, throughout history it seems that each threat to national security brings a cry for more security, but as time passes people begin to cry for more civil liberties. Then once another attack occurs, the cycle will repeat itself. People are only willing to sacrifice civil liberties after an attack because that is the only time they acknowledge the threat, but as time passes they only think about the past attack instead of potential attacks in the future.

The terrorist attacks of September 11th have showed us that the United States is now in a new position regarding security. In the past, the wars that the United States engaged in were against defined states with identifiable enemies and the conflicts had an end point. The threat posed by groups like al Qaeda will not dissipate like the threats of past wars. In fact, it is hard to consider the threat posed by terrorists as a war because the threat is never ending. The threat from non-state actors is one that will be constant, so the United States cannot afford to allow its security policy to ebb and flow with public opinion. The country must decide what the best balance is between civil liberties for the future of this country and not just the present.

The United States needs a national policy security that can be implemented to combat the constant threat posed by terrorists. One of the suggested options for national security was the use of interrogational torture to prevent future terrorist attacks. Interrogational torture is a type of coercive interrogation that utilizes torture to extract information from people. It differs from other forms of torture because it is not supposed to be used to punish people or to try and threaten certain groups. The use of torture may seem repulsive to some, but some people in the American public support this notion because they feel the security threat is great enough that this action is justified. Many citizens feel that the imminent threat of an attack like 9/11 is enough to justify the use of torture to try and extract information from someone who knows about a terrorist plot. They feel that torturing one person to save countless lives is a trade that they can live with. The concept is that torturing one guilty individual is the lesser of two evils in the situation.

In this paper, I will show the variety of reasons why torture should not be used as a national security policy. The first reason is that torture is not an effective means of preventing terrorist attacks. Furthermore, the very practice of interrogational torture, even used for prevention, is at odds with the United States Constitution. Torture is also at odds with our country's democratic principles, and also at odds with basic human rights standards across the world. Finally, the use of torture could have far more social implications than many people believe. The use of interrogational torture could lead to moral degeneration among American society, as well as the rest of the world, as the use of interrogational would eventually lead to the expansion of torture. It is important to acknowledge how flawed torture is, because if it is not a viable national security option, then people must look for a better solution. Torture infringes on the rights of individuals far more than other methods. This paper will describe other possible national security options that could be used instead of torture. Concessions regarding civil liberties must be made, because the threat of terrorism is just as prevalent as ever, but one of these concessions must not be torture. Torture is arguably the most serious violation of civil liberty that could occur, and there are methods the government could utilize that are far less intrusive to individuals.

II. Torture Is Not Effective

The threshold consideration of whether any method should be used as national security policy should be whether or not that method will be successful. This means that unless a method would be effective it is not even worth seriously considering as national security policy. In the times following 9/11, many people have voiced opinions that the use of torture would help to protect the United States from more terrorist attacks. There is

no doubt that torture can be effective for certain things. Torture can be used effectively to punish people or send out a warning to those who oppose the government in control. However, it is clearly unthinkable to use torture for either of these methods. The use of torture to punish, threaten, or silence opposition is clearly at odds with the foundations of the United States, and this will be discussed in a later section. However, while torture is effective if used for these purposes, there are a multitude of reasons to doubt the effectiveness of interrogational torture. First, there is a high probability that a suspect will have no information about an imminent attack. Second, even if a suspect has information, it is unlikely that their information that the suspect's divulges will be reliable. Another issue is that even a suspect with knowledge of an attack has an incentive to lie. Finally, torture would not be effective because it would not slow down terrorists, but rather, would fuel them to try and perform more acts against the United States.

One of the major supporters of interrogational torture has been Alan Dershowitz, who proposes that interrogational torture should be used in "ticking-time bomb" scenarios. In his scenario, he argues that we will only torture a suspect we know that is guilty of planning this terrorist attack and that this attack will occur imminently.¹ He believes that it is the lesser of two evils to torture on guilty individual, in order to potentially save thousands of lives. The key points of his beliefs are that the government will be absolutely sure that the suspect is a terrorist, and that he or she has knowledge that can stop an imminent attack. However, the flaws in Dershowitz's scenario are highlighted by the ineffectiveness of torture.

¹ Alan M. Dershowitz, *Should the Ticking Bomb Terrorist be Tortured?*, in *Civil Liberties vs. National Security in a Post 9/11 World*, comp. M. Katherine B. Darmer, Robert M. Baird, and Stuart E. Rosenbaum (Amherst, NY: Prometheus Books, 2004), 194-197.

The first issue with the use of torture is that it is unlikely that the accused will be someone with knowledge of a terrorist attack. There is a large chance that the detained individual is an innocent person. The trade off between torture and saving lives is a very different dynamic when the person being tortured is an innocent individual. This problem is exemplified by large multitude of wrongful arrests and detentions of innocent people in the wake of 9/11. The numerous errors in this process show the government does not always arrest a terrorist, and many times they are completely mistaken with their accusations. It would be unthinkable to torture all of these innocent people. The amount of suspects who are actually terrorists is too small to allow torture to occur. Also, there will hardly be a situation where will we have the accused by someone we are sure is a terrorist, and a terrorist who is involved with an imminent attack against the United States.² There is just not way to be completely sure that someone who has not had a chance to defend his or herself is guilty.

The next problem is that even if the government found a known terrorist, they may not have enough information to prevent a terrorist attack. This is due to the organizational set-up of terrorist groups. They are often divided up into different cells, and information is given on a need to know basis.³ A terrorist may know information need for perform a small job that is part of a terrorist plot, but he most likely does not know the whole elaborate set-up of the plan or who is in charge. Therefore, even gaining information from a confirmed terrorist may be futile in preventing a terrorist plot. The

² Bob Brecher, *Torture and the Ticking Bomb* (Malden, MA: Blackwell Publishing, 2007), 33-34.

³ Philip Jenkins, *Images of Terror: What We Can and Can't Know About Terrorism* (New York: Aldine de Gruyter, 2003), 90-94.

United States would be needlessly engaging in the torture of an individual because that person cannot provide them with any information to stop an attack.

The next problem with torture is that suspects, guilty or innocent, may lie during interrogational torture. In the early 20th century, police claimed that physical interrogation was necessary to solve cases. This involved using coercive interrogation that essentially amounts to torture. They needed this threat in order to get information out of suspects in order to solve cases. However, the Wickersham Reports showed that coercive and physical interrogation used by police of this era produced many false confessions and wrongful confessions.⁴ False or wrongful confessions occur because the use of interrogational torture produces so many false positives.⁵ False positives are where a suspect gives information, but this information is not true even though authorities may believe that it is. False positives are so prevalent because the individuals that are being tortured have an incentive to lie. The first reason is because the individual will want the pain to stop, and they will do anything to achieve this end.⁶ The individuals will say anything that the torturer wants them, regardless of what they know, just to stop the pain they are feeling. Therefore, it would make sense that a similar method would also produce many false positives.

A second reason terrorists may lie during torture is that they are usually very dedicated to their operations, especially since many of these acts are related to their

⁴ John T. Parry and Welsh S. White, *Interrogating Suspected Terrorists: Should Torture be an Option?*, in *Civil Liberties vs. National Security in a Post 9/11 World*, comp. M. Katherine B. Darmer, Robert M. Baird, and Stuart E. Rosenbaum (Amherst, NY: Prometheus Books, 2004), 232-233.

⁵ Philip B. Heymann, *Torture Should Not be Authorized*, in *Civil Liberties vs. National Security in a Post 9/11 World*, comp. M. Katherine B. Darmer, Robert M. Baird, and Stuart E. Rosenbaum (Amherst, NY: Prometheus Books, 2004), 216.

⁶ Bob Brecher, *Torture and the Ticking Bomb* (Malden, MA: Blackwell Publishing, 2007), 27-30.

religious beliefs. Al Qaeda and other groups will do anything to carry out these missions, including sacrificing themselves. Terrorists have an incentive to lie because it forces our intelligence agencies to spend their time finding out if the information they were given is true. During this time, a terrorist act may be carried out or the agencies will simply waste valuable time investigating the false testimony. The accused has very little incentive to tell the truth because any information will stop the pain and telling a lie carries no extra punishment if the agencies are just using torture for interrogational purposes.⁷ These scenarios highlight why the use of torture can be so ineffective.

The counterargument would be to respond to false positives by punishing the suspect. This would clearly violate the basic principles of the United States, which will be discussed later in this paper. Also, if the individual does not know anything, then punishing them would simply be hurting an innocent person even more. As I have already discussed, this process would inevitably involve people with no knowledge of any attack who may say something to simply stop the pain. The use of punishment would not do anything to stop this problem, and again it is supremely unlikely that authorities could be sure a suspect is guilty with complete certainty. This evidence highlights why the use of interrogational produces ineffective results. When someone has no incentive to tell the truth, the majority of the answers will not be helpful in aiding antiterrorism efforts.

These false positives are not only dangerous because of the time that is wasted, but because the government could become too dependent on interrogational torture and its questionable results. In doing this, the government may be ignoring more effective and

⁷ Bob Brecher, *Torture and the Ticking Bomb* (Malden, MA: Blackwell Publishing, 2007), 27-30.

efficient antiterrorism methods.⁸ Their use of torture would be an attempt at a “quick-fix” in terrorism prevention, but it is not an effective one. This type of interrogation could impair the government’s use of programs that would be more effective in protecting the United States. These methods could include monitoring suspicious persons, or relying on information and detective work to uncover these plots. A more elaborate discussion on alternative security methods will be discussed in the last section of this paper. The point of this argument is that if interrogational torture were used, authorities would ignore methods that produce more reliable information without infringing so greatly on people’s civil liberties. An analogous argument can be seen in *Miranda v. Arizona* (1966). In this case, the court found that there are techniques that are more effective than coercive interrogation. The court believed that if coercive interrogation was allowed, police would become too dependent on it, and do anything just to gain a confession.⁹ This is the type of reasoning that highlights the danger of authorities becoming dependent on interrogational torture to prevent attacks.

The goal of any antiterrorism policy is to help prevent future terrorist acts and limit terrorism as a whole. Another reason why interrogational torture would fail to achieve these goals is because the use of torture has the potential to create more terrorists. The first way torture could encourage terrorism is if the United States tortures innocent people, which is a real possibility. The horrible acts that would occur during the torture of an innocent person could cause hatred for the United States to grow within that individual. This hatred could turn them into a radical who promotes terrorism against the

⁸ Philip B. Heymann, *Torture Should Not be Authorized*, in *Civil Liberties vs. National Security in a Post 9/11 World*, comp. M. Katherine B. Darmer, Robert M. Baird, and Stuart E. Rosenbaum (Amherst, NY: Prometheus Books, 2004), 217.

⁹ 384 U.S. 436

United States.¹⁰ Also, their friends and family may be so angry after the individual is tortured, that they may seek retribution against the country that carried out the torture. Therefore, the use of interrogational torture could turn innocent people, who may approve of the United States, into radicals.

However, torture may also create more terrorists even if we torture the “right” people. By torturing convicted terrorists, the United States may turn them into martyrs.¹¹ This is because even if the United States is torturing people that the public thinks is “bad” or “evil”, many in the Muslims or people from the Middle-East will not feel the same way. This is because many people will think that the U.S. is simply attacking innocent people. Torture will increase hatred for the United States in the Middle East and other areas of the world. In fact, evidence of Americans using torture at Abu Ghraib may have boosted the number of insurgents during the campaign in Iraq.¹²

It is important to remember that most terrorist organizations use terrorism to send a political message because they have political goals and aspirations. They want to achieve some kind of end or make some kind of point. The goal of a terrorist organization may be trying to get the United States to use torture or some other tactic to show that the United States is an uncaring and cold-hearted nation. Terrorist groups want to take away everything that America has come to stand for, but they cannot do themselves. Their goal is that their attacks will lead to our own form of self-destruction. Many terrorist

¹⁰ Eyal Press, *In Torture We Trust?*, in *Civil Liberties vs. National Security in a Post 9/11 World*, comp. M. Katherine B. Darmer, Robert M. Baird, and Stuart E. Rosenbaum (Amherst, NY: Prometheus Books, 2004), 224.

¹¹ Philip Jenkins, *Images of Terror: What We Can and Can't Know About Terrorism* (New York: Aldine de Gruyter, 2003), 67-86.

¹² Laura L. Finley, *The Torture and Prisoner Abuse Debate* (Westport, Connecticut: Greenwood Press, 2008), 127.

organizations often operate with the goal of being sympathy campaigns.¹³ Terrorists want the public to believe that they are the oppressed, and that their goal is simply to fight back against the evil that is keeping them down. Therefore, America would be playing right into the hands of the terrorists if interrogational torture was institutionalized. The public would not care that these terrorists carry out horrific plots with the intentions of killing as many Americans as possible. The public outside of the U.S. would only care the world super-power was brutalizing a “freedom fighter”. This scenario highlights how using interrogational torture would help to provide support for terrorists, and potentially create more terrorists.

The arguments above have helped to highlight the reasons that torture is not effective as a national security policy. The fact that torture is not effective does not mean that torture could never or that it has never worked. Dershowitz claims that everyone must admit, “Torture sometimes works, even if it does not always work.”¹⁴ There has been evidence that coercive interrogation helped to thwart numerous terrorist plots in Israel, and there are claims that evidence gained from interrogational torture helped the French to defeat insurgents in Algeria.¹⁵ However, there is not enough hard evidence or specific testimonies that highlight cases where the use of torture was the primary reason an attack was thwarted. Any practice, if you try it enough, is bound to work at some point, but that does not mean it is an effective practice to use. An effective practice should work the majority of the time, and almost always if it involves such huge

¹³ Philip Jenkins, *Images of Terror: What We Can and Can't Know About Terrorism* (New York: Aldine de Gruyter, 2003), 67-86.

¹⁴ Alan M. Dershowitz, *Should the Ticking Bomb Terrorist be Tortured?*, in *Civil Liberties vs. National Security in a Post 9/11 World*, comp. M. Katherine B. Darmer, Robert M. Baird, and Stuart E. Rosenbaum (Amherst, NY: Prometheus Books, 2004), 192.

¹⁵ Mirko Bagaric and Julie Clarke, *Torture: When the Unthinkable is Morally Permissible* (Albany: State University of New York Press, 2007), 54.

violations of basic rights. Any practice, whether it is electronic surveillance, indefinite detentions, or torture, if used enough is bound to work on some occasion just because of chance. If torture was so effective at preventing these attacks, then its successes should be more than claims that it may have worked or helped.

However, even if torture was effective, there are a multitude of other reasons why torture should still be prohibited. These reasons include that torture is unconstitutional and morally wrong. Torture is a grave violation of human rights, and there are negative consequences of legalizing this practice. These consequences include expanding torture, and increasing human rights violations across the world.

III. Torture is Unconstitutional

The next area that this paper will examine is whether torture is allowed under the Constitution. The arguments about torture have centered on the fourth, fifth, eighth, and fourteenth amendments. Supporters of torture have tried to use the language of the Amendments to assist the notion that interrogational torture is acceptable. However, many of the court's decisions have shown that they consider what the minimal standard of treatment of humans should be. The design of the Bill of Rights was to protect the basic liberties of individuals, and there can be no greater violation of these liberties than the use of torture. The cases relevant to the torture debate involve the 4th, 5th, 8th, and 14th Amendments. The cases demonstrate how the Court believes that there is a minimal standard of life that people should be given. Although there are some cases that would seem to serve as precedent that torture is constitutional, I will argue that the Court's ruling was flawed.

Many of the cases that serve as precedent against torture revolve around the notion that the court believes that humans have a minimal standard of how humans should be treated. This viewpoint can be seen in cases relating to the due process clause of the 14th Amendment. Section 1 of the 14th Amendment provides that the state cannot deprive any person of life, liberty, or property with the due process of law. It also guarantees all citizens equal protection under the law. This clause was created to protect the legal rights to all citizens of the United States. This type of thinking highlights the view that humans should be afforded at least a certain type of minimum treatment. The clause shows that all people have a right to life, liberty, property, and equal protection. The Constitution requires that the court appeals to very general principles about human beings. While, torture supporters rely on technical arguments to defend torture, I believe that the Constitution is more than these arguments. The Constitution protects against an individual's basic liberties and should prevent torture from being used.

One group of cases whose precedent highlights the unconstitutionality of torture involves the 8th Amendment. The 8th Amendment says that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted". This clause again highlights that a concern for how people are treated because regardless of how horrible a crime had been committed, it protects individuals from being subjected to excessively cruel treatment. This is the same reason why the government has worked to find more "humane" ways of executing death row inmates. I believe that interrogational torture should qualify as cruel and unusual punishment. However, in 1977, *Ingraham v. Wright* found that the 8th Amendment only protects punishment that is used by

government as punishment for a criminal offense.¹⁶ Interrogational torture is not used as punishment, but as means to get critical information when innocent lives are at stake. Therefore, torture that was used for these cases would not violate the 8th Amendment.¹⁷ However, the suspect is subjected to inhumane treatment because the government is positive that that individual has knowledge of an imminent attack. The knowledge of that crime, and presumably involvement of the attack, gives the government grounds to use methods that even prisoners cannot be subjected to. This should qualify as cruel and unusual punishment because the government is hurting someone because they believe that they are involved in a crime. Punishment may not be the primary goal of torture, as getting the information about the attack is the main objective. However, the action of allowing some people to be subjected to such inhumane treatment simply because of their suspected involvement with activity should constitute punishment. Therefore, the use of torture would be unconstitutional as defined by the 8th Amendment.

I believe that torture should qualify as punishment, even without a conviction, because how can you protect a convicted person from cruel and unusual punishment, but not people who have not been convicted of a crime. In 1976, the Court held in *Estelle v. Gamble* that deliberately ignoring a prisoner's serious injury or illness was cruel and unusual punishment, and therefore unconstitutional.¹⁸ If pain cannot be inflicted on prisoners as punishment for serious crimes, then we should not inflict pain on people who have not even been brought to trial. Also when the government incarcerates a person they are taking part of their free will. The responsibility of making some decisions is placed in

¹⁶ 430 U.S. 651 (1977)

¹⁷ Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven: Yale University Press, 2002), 135.

¹⁸ 429 U.S. 97 (1976)

the hands of the government, and the government should be responsible for this person. These responsibilities should include ensuring the physical security of a person when they are in government custody.¹⁹ This type of view reinforces that there are certain standards for how human beings need to be treated. If convicted criminals still enjoy protection from cruel and unusual punishment, that it does not make sense that people who have not even been convicted of a crime should be subjected to it. Therefore, torture should clearly be considered as punishment under the 8th Amendment.

The use of torture could also be a 4th Amendment issue. The 4th Amendment says that people have a right “to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures”. This clause says that the government cannot seize anything from a person without probable cause and a warrant that explicitly states what the government is looking for. Interrogational torture could be viewed as the use of unreasonable force to seize information from an individual. Torture could be regarded as a violation of the 4th Amendment because the government if forcibly invading the person of a suspect through torture in order to seize information that the suspect may have. People often cite *Schmerber v. California* (1966), where the court found that a forced blood sample to determine an individuals BAC, was not a violation of constitutional rights.²⁰ This is because a blood sample is a relatively minor invasion on the body, and that the results can have a large effect on increasing public safety. Torture would obviously be a much greater infringement on the body of an individual than taking a blood sample.

¹⁹ Seth F. Kreimer, "Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror," *University of Pennsylvania Journal of Constitutional Law* 6 (2003): 297-298.

²⁰ 384 U.S. 757 (1966)

However, the threat of more serious breaches of public safety calls for more serious invasions of the body.²¹ If sticking someone with a needle is acceptable to save only a few lives, proponents of torture say that the measures allowed should increase when thousands of innocent lives are at stake. People say that torturing one person is acceptable to save the lives of thousands of people. In spite of this, there are many reasons why this viewpoint is mistaken. The first example can be found in the case that was cited in support of torture. *Schmerber* says that a BAC test is only minor inconvenience in the name of public safety, but if the intrusion on an individual as too great than it would not be acceptable.²² It is hard to think of any greater intrusion on an individual than torture, except for murder. Therefore it is hard to equate interrogational torture with a blood sample. One is an inconvenience that poses no threat or real bodily harm, while the other is a practice that is meant to cause excruciating pain. This type of thinking again highlights the Supreme Court's view that certain acts are simply too heinous to be used against humans. The basic treatment of humans is clearly something that the Supreme Court has come to consider, and allowing torture would be at odds with the precedents that defend the basic standard of living for all humans.

Many people claim that the use of interrogational torture is not a 4th Amendment issue, but it is a 5th Amendment issue. The 5th Amendment says that no person can be forced to testify against himself in a criminal trial. This protects individuals from self-incrimination, and torture clearly forces a suspect to admit to being involved with criminal activity. In 1952, the Supreme Court ruled on *Rochin v. California*, a case where

²¹ Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven: Yale University Press, 2002), 144.

²² Chanterelle Sung, "Torturing the Ticking Time Bomb Terrorist: An Analysis of Judicially Sanctioned Torture in the Context of Terrorism," *Boston College Third World Law Journal* 2003 (2003): 205-206.

the police forced a suspect to vomit up illegal drugs. In their ruling, the court found that evidence obtain using interrogation methods that shock the conscience of the court was a violation of an individual's due process rights. The court found that the fact that police's abusive and "shocking" behavior forced a suspect to unwillingly incriminate way it violated the 14th and 5th Amendments.²³ This is because the court found that the actions of the police constituted self-incrimination, and the due process clause protects this right for all citizens. This ruling helps to show a few major reasons why torture should be unconstitutional. The first is that if forcing a suspect to vomit up drugs shocks the conscience of the court, it would seem that the procedures used in torture would appall the judges. The judges clearly feel that there is some behavior that is too shocking to allow because there is a minimum standard with how individuals should be treated. The premise of torture, to put an individual through an interrogation that would be so horrible, physically or mentally, that they would reveal anything you wanted, is a clear violation of the basic human rights that the Supreme Court tried to protect with its ruling in *Rochin*. The 5th Amendment gives citizens the right to remain silent in order to prevent self-incrimination, and torture is clearly at odds with this. The goal of torture is to invade a person's body and inflict physical or mental pain until that person gives up what he or she may be hiding in their mind. The use of torture deprives citizens of the basic protection afforded by the 5th Amendment.

Supporters of interrogational torture claim that it does not necessarily violate the 5th Amendment. An example is in 2003, the Court held in *Chavez v. Martinez* that coercive interrogational measures were only unconstitutional if the statements used from

²³ 342 U.S. 165 (1952)

this interrogation method were used during criminal prosecution.²⁴ In 1972, the Court held in *Kastigar v. United States* that if an individual who was being interrogated were given immunity from criminal prosecution, the methods used during interrogation would not violate the 5th Amendment self-incrimination clause.²⁵ Therefore, if a suspect were given immunity about the possible criminal repercussions that could stem from admitting to a future attack, torture of the suspect would be constitutionally acceptable. Therefore, as long as the statements gained from torture were not used to prosecute the suspect, they could not claim that their 5th Amendment rights had been violated.

I believe that the Court's ruling in these cases was flawed. During the *Chavez* case, Justice Kennedy dissented saying that allowing the use of obscenely abrasive interrogation to not be protected by the rights of self-incrimination could only serve to diminish the celebrated goal of the 5th Amendment.²⁶ Kennedy also said that the use of torture to gain statements clearly would qualify as an infringement of the right to liberty guaranteed by the 14th Amendment.²⁷ Kennedy claimed the self-incrimination clause protects against government behavior that causes self-incrimination. He also says that self-incrimination should not just come into play if no criminal charges will be filed or if immunity is given because a future privilege does not nullify a present right.²⁸ Other justices also shared this view as well, who said that while they did not believe *Chavez* represented a case where self-incrimination was infringed upon, the plaintiff might have a

²⁴ 585 U.S. 760 (2003)

²⁵ 406 U.S. 441 (1972)

²⁶ Jerome H. Skolnick, "American Interrogation: From Torture to Trickery," in *Torture: A Collection*, ed. Sanford Levinson (New York: Oxford University Press, 2004), 121.

²⁷ Jerome H. Skolnick, "American Interrogation: From Torture to Trickery," in *Torture: A Collection*, ed. Sanford Levinson (New York: Oxford University Press, 2004), 121.

²⁸ 585 U.S. 760 (2003)

case because of due process.²⁹ I agree with this thought process because the inclusion of the right against self-incrimination represents the Constitution's acknowledgement that a person has a right to withhold information if they choose to do so, and simply allowing abusive interrogations because the person would not be charged with a crime does not reflect the basic rights that people should be afforded by the Bill of Rights. Therefore, I do not believe the methods used in the cases were constitutional.

There are some Supreme Court cases that provide precedent for why torture could be constitutional, but I believe that these ruling are wrong. History is marked by cases where the ruling in Court cases was wrong, and these rulings were later overturned. Cases such as *Plessy v. Ferguson (1896)* and *Dred Scott v. Sanford (1857)* highlight mistakes that the court has made in the past. Many of these rulings have been rectified because over time, the court has placed more emphasis on the basic treatment of humans, and behavior that may shock their conscience. Therefore, I believe that the precedents that defend torture would fail to make torture constitutional because it clearly violates the basic human rights that people should be afforded. The Constitution clearly demonstrates that is has concern about the minimum standards of protection afforded to all humans. Torture clearly is at odds with this type of thinking. The minimum treatment of humans that Supreme Court justices allude to is based on the notion of basic human rights, and this idea will be discussed in the following section.

IV. Torture Is Morally Wrong

Human Rights

²⁹ John T. Parry, "Escalation and Necessity: Defining Torture at Home and Abroad," in *Torture: A Collection*, ed. Sanford Levinson (New York: Oxford University Press, 2004), 151.

This section will focus on why it is morally impermissible to allow interrogational torture to be used as national security policy because torture violates basic human rights. This is because torture is one of the greatest, if not the greatest, violation of human rights that can occur. Human rights are rights that humans are entitled to simply by being born into this world. They are not allocated by society; they are the basic standards of how people should be allowed to live their lives. This section will highlight how the use of interrogational torture is at odds with these basic human rights. Additional evidence will also show how torture is at odds with the basic democratic principles that the United States was founded on. This is because the use of torture places the burden of lost civil liberties on a few individuals, as opposed to the whole population.

These basic rights to life and liberty indicate that all people have an equal right to live and that they all should be viewed equally as members of the human race. These rights also include the right of an individual to have control over their own basic free will. The problem with torture is that it denies this right. The use of interrogational torture clearly tries to take these basic rights from them. The goal of torture is to take all control from someone until that person is a puppet that will do what the interrogator wants.³⁰ The theft of an individual's control over his or her own life shows that the interrogator views the alleged terrorist as less than human.³¹ The use of torture treats people as if they are objects. Suspects are not looked at as humans with families and outside lives; they are simply looked at as a source of information. All humans deserve to be treated as part of humanity. The deprivation of control over one's life that occurs with

³⁰ Derek S. Jeffreys, *Spirituality and the Ethics of Torture* (New York: Palgrave Macmillan, 2009), 34.

³¹ Liz Philipose, "The Politics of Pain and the Uses of Torture," *Journal of Women in Culture and Society* 32, no. 4 (Summer 2007): 1049.

torture denies that the suspect is human. That is not to say that all individuals should be able to whatever they want, but that all people should be able to exercise some control over their own lives. When this control is taken away, it takes away what makes people human. Therefore, torture dehumanizes individuals and must not be allowed.

Human rights are more important than the constitutional issues because these rights are not bound by geographical boundaries, they are meant to exist everywhere and at all times. It does not matter whether the suspected terrorist is a United States citizen or from a foreign country, he or she all are entitled to basic human rights. Human rights are the minimum protection that humans are given, and they should not be suspended for an emergency.³² There are many legal technical arguments that allow for derogation or suspension in times of emergency, but I believe that these arguments have no place in the discussion of human rights. Everything should be done to prevent the emergency situation from occurring, but if the situation arises basic rights cannot be sacrificed. Human rights represent the minimum standard of treatment that all humans should have, and no emergency should make any individual have to suffer substandard treatment in regards to human rights. The type or depth of an emergency is a politically determined choice by the government and human rights should not be subject to this type of subjectivity. Human rights should be an unwavering constant, and not government prerogative should override them.

The very concept of antiterrorism acknowledges the concept of human rights. Antiterrorism exists because all humans have a right to security and to life.³³ Citizens are

³² 1. Derek Jinks, "International Human Rights Law and the War on Terrorism," *Denver Journal of International Law and Policy* 31, no. 1 (2002-2003): 67.

³³ Paul Hoffman, "Human Rights and Terrorism," *Human Rights Quarterly* 26, no. 4 (2004): 954.

so adamant about national security because they want the lives and liberty of citizens to be protected. We do not want to risk the loss of lives of any American citizens.

Americans want to defend against terrorism because the goal of many terrorist groups is to change the way that Americans lead their lives. Americans want to keep the freedoms they enjoy, and live their lives they want. They want the liberty to determine their courses for life. In our effort to prevent terrorism, we must also impose restrictions on how we do it. In our haste to stop terrorists from attacking the freedoms and rights we care about so dearly, we may infringe on these same basic rights for other individuals.

Over history there has been several attempts to codify these basic rights. The United Nations General Assembly introduced the Universal Declaration of Human Rights in 1948. This document lists a variety of rights that should be protected, and Article 1 states, “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”.³⁴ Article 5 also explicitly says “No one shall be subjected torture or to cruel, inhuman or degrading treatment or punishment.”³⁵ This language shows the basic rights that the UN feels that all human beings should be afforded.

However, human rights are not limited to the UN’s description of them. Ronald Dworkin explains that the political rights are special moral rights against the government, and that human rights are special and very important types of political rights.³⁶ This means that human rights are the most basic rights that every human should have in his or her life, and that the government should never be able to infringe on these rights. The

³⁴ Universal Declaration of Human Rights (1948)

³⁵ Universal Declaration of Human Rights (1948)

³⁶ Ronald Dworkin, *Is Democracy Possible Here?: Principles for a New Political Debate* (n.p.: Princeton University Press, 2006), 31-33.

most fundamental of these human rights is the right to be treated with an attitude that shows that each person's life and liberty matters. This means that no person should have to be treated in a way that denies his or her life of its intrinsic value and his or her personal responsibility over his or her own life.³⁷ Torture would clearly violate human rights based on Dworkin's views, as the use of it denies that the suspected terrorist's life is worth as much as others because he is subjected to treatment that even convicted criminals cannot face. I find that Dworkin's description of what human rights should entail as persuasive because I agree with the view that human rights are rights that every person is born with. The government should not be able to delegate whether these rights are given because these rights should protect individuals from certain practices that could be performed by the government.

Proponents of torture cite that the United States government already violates the right to life by allowing the death penalty to exist. Proponents of interrogational torture say that if the death penalty is acceptable then torture should be as well.³⁸ There is no denying that the death penalty clearly takes away someone's right to life, but the two issues are very different. This is because the death penalty is only used in cases where an individual has been convicted of a crime. Suspected terrorists are tortured without ever being convicted of a crime. Torture is always inhumane because by the time a suspect could be convicted the threat of an immediate attack would no longer be imminent. Therefore, with the death penalty the individual may have given up his right to life by

³⁷ Ronald Dworkin, *Is Democracy Possible Here?: Principles for a New Political Debate* (n.p.: Princeton University Press, 2006), 35.

³⁸ Alan M. Dershowitz, *Should the Ticking Bomb Terrorist be Tortured?*, in *Civil Liberties vs. National Security in a Post 9/11 World*, comp. M. Katherine B. Darmer, Robert M. Baird, and Stuart E. Rosenbaum (Amherst, NY: Prometheus Books, 2004), 198-199.

being convicted of performing horrific crime. However, it is unfair to take the right to life from someone who has not been found guilty of anything. Finally, while the death penalty does kill people, the courts not only allow the most humane method available and this implies that they acknowledge that no one deserves a horrific death. Death by lethal injection may be preferable to torture, as torture can haunt the suspects far after the interrogation.³⁹ The goal of torture is to cause as much pain as possible in order to break the will of a human, which seems to infringe on human dignity much more than the death penalty. This is because a death row inmate has been convicted of crime, but the fact that we find humane ways to kill them acknowledges their humanity. Torture fails to do the same, as it inherently dehumanizes people by turning them from a person to a source of information.

Torture seems like an acceptable suggestion to some people because the media and the government have dehumanized and demonized enemy combatants and prisoners so that the public views them as not having the same human rights that they do.⁴⁰ Many types of media portray Arabs, Muslims, and other people from the Middle East as the villain or evil terrorist.⁴¹ People in American culture began to associate all people of these backgrounds with terrorists. This leads to the demonizing of all people who meet this shallow stereotype. Another example is how the death number of American soldiers is reported, but the number of Iraqis or Afghans who die is not mentioned. This is because the government does not want to gain any sympathy for the force that opposes

³⁹ Bob Brecher, *Torture and the Ticking Bomb* (Malden, MA: Blackwell Publishing, 2007), 79-81.

⁴⁰ Gregory Hooks and Clayton Mosher, "Outrages Against Personal Dignity: Rationalizing Abuse and Torture in the War on Terror," *Social Forces* 83, no. 4 (June 2005): 1639.

⁴¹ Philip Jenkins, *Images of Terror: What We Can and Can't Know About Terrorism* (New York: Aldine de Gruyter, 2003), 157-160.

America. However, in the effort to limit sympathy, it desensitizes Americans to the culture and people who represent what we are meeting. This allows people to view the suspected terrorists as less than human because they have begun to believe that these people are less than human. They are viewed as humans who have no place in this world. This should not happen because all humans, regardless of race, color, or ethnicity are still humans and should be entitled to the same basic rights.

American Values and Democratic Rights

Human rights are not the only rights that should be considered when looking at the use of torture. Americans should consider the basic American values and democratic rights that this country was founded on when examining the debate about torture. The United States has claims to be the standard by which all countries should model themselves after. We claim to be the model of democracy. Engaging in torture would only hurt this standing. This is because we would be violating our basic core of values. This includes that all people are equal within the United States and that all people are innocent until proven guilty. Finally, we must remember that terrorism is a very political and subjective term when evaluating every situation. Torture violates these American traditions and ideals, and we should not abandon these beliefs for torture.

Another argument that has been made in favor of torture has been that the terrorists are violating human rights, and that justifies the use of torture. The public believes that if terrorists are using these methods, then the United States should be allowed to use torture because it is not as bad as the methods the terrorists use. They feel torturing one person is not as bad as bombing a whole building. However, this type of thinking is unacceptable. The United States must hold itself to higher standards than

terrorists. The goals of democracy that we strive for are not easy to achieve, but we must be strong enough to stay true to our principles. The terrorists engage in unthinkable acts, and we must not stoop to their level. If we want to continue to be the flag bearer of democracy we must hold our country to the highest standards.

One of the biggest issues with the use of torture is that it places the entire burden on the victim. The interrogator bears no burden if he tortures the incorrect person.⁴² The victim bears all the pain, even if they are innocent, and there are no repercussions to the torturer if an innocent individual is tortured. The burden of torture has not just been unfairly placed on the suspect, but also minorities. Most of the suspects and detainees since 9/11 are minorities or foreigners. The media of the United States also has portrayed many Arabs and Muslims as terrorists so much of the public has begun to associate these groups with terrorists.⁴³ This is likely why many people have suggested torture as a policy, or stayed silent when photos of torture at Abu Ghraib surfaced. Many whites still view other races as subhuman, which is why they allow these atrocities to occur.⁴⁴ In surveys, people are more likely to oppose the monitoring of e-mails or phone calls than the indefinite detainment of non-citizens.⁴⁵ This is because people are more concerned with whether their civil liberties are infringed upon, as opposed to how grave the offense is. This type of thinking occurs because individuals look at the people that have to bear the burden as less than human, and torture would only increase this type of thinking.

⁴² Philip B. Heymann, *Terrorism, Freedom, and Security: Winning Without War* (Cambridge: The MIT Press, 2003), 110.

⁴³ Philip Jenkins, *Images of Terror: What We Can and Can't Know About Terrorism* (New York: Aldine de Gruyter, 2003), 157-160.

⁴⁴ Liz Philipose, "The Politics of Pain and the Uses of Torture," *Journal of Women in Culture and Society* 32, no. 4 (Summer 2007): 1049.

⁴⁵ Darren W. Davis and Brian D. Silver, "Civil Liberties vs. Security: Public Opinion in the Context of the Terrorist Attacks on America," *American Journal of Political Science* 48, no. 1 (January 2004): 33.

Individuals are willing to shift these burdens, whether it is torture or racial profiling, to minorities because it will affect their lives less. They want the minority to bear the burden of lost civil liberties instead of them. This type of thinking is at odds with democracy. The minority should not have to bear all the costs for the majority. If everyone is benefiting from added security, then everyone should have to be involved in the costs. There can be no free riders when it comes to civil liberties. The United States made this mistake when it interned Japanese-Americans during World War II. In order to make the public feel safer, they allowed one minority group to lose their rights while the rest of the country reaped the supposed benefits. This country cannot make an egregious mistake like that again. It is not the job of the minority to support the majority. This country was supposed to prevent against the whims of the majority. Interrogational torture would be a stain on our country's history, just as the Japanese internment was. This is because in order to acknowledge the humanity of all people, we must all equally share the loss of certain civil liberties for national security.

Another one of the basic principles of the United States is that individuals are innocent until they are proven guilty. This view has been a staple of the United States, and it basically guards against a person being erroneously imprisoned. This concept highlights that our founding fathers did not want the liberty of our citizens because of false charges. The use of torture on suspects who have not been convicted of anything is completely at odds with this belief. Also, while these rights may only apply to citizens, it is important to look at them more broadly. These rights were included because our founders believed that these rights were intrinsic to living a good and fair life. Our country was committed to allowing individuals "life, liberty, and the pursuit of

happiness.”⁴⁶ This belief was not limited to Americans, these beliefs were included because our founders believed that these rights are what humans should be entitled to, even if other governments did not think the same. If we limit these rights to people just because they are from outside our borders, we would be ignoring the basic foundations of our country.

The use of interrogational torture is also at odds with American values because it could be used to limit free speech or to threaten groups that oppose the United States government. This is because the concept of “terrorism” is politically determined.⁴⁷ Oftentimes governments cite their opponents or groups that are acting out against them as terrorists, such as how the French labeled Algerians. In fact, the actions of our founding fathers during the Revolutionary War could have been termed as “terrorism”. The government could potentially label all those who oppose it as a terrorist threat.⁴⁸ Throughout history, the use of torture has been used to silence critics of groups who are in power. Therefore, the consequences of interrogational torture are not limited to the suspected terrorist who is being tortured. There are negative social implications that come with torture that would affect our society, and many corners of the globe. These consequences include expanding the use of torture beyond antiterrorism and they will be discussed in the next section.

V. The Negative Social Implications of Torture

Society

⁴⁶ Declaration of Independence (1776)

⁴⁷ Philip Jenkins, *Images of Terror: What We Can and Can't Know About Terrorism* (New York: Aldine de Gruyter, 2003), 157-160

⁴⁸ Liz Philipose, "The Politics of Pain and the Uses of Torture," *Journal of Women in Culture and Society* 32, no. 4 (Summer 2007): 1049-1050.

This far, this paper has examined the reasons for why the torture of an individual based on the rights of that individual. This section will look at the dangerous implications that legalizing torture could have on society as a whole. The consequences of interrogational torture are felt far beyond the locked room that contains the interrogator and the suspect. Interrogational torture could affect society's overall sense of morality. The implementation of government-sanctioned torture could also effect the way society views the government. Finally, if the United States decides to allow torture, even in limited cases, this may set a negative precedent for the rest of the world.

One of the most dangerous things that could occur if torture is allowed is that society may begin to think it is an acceptable practice. Past sections of this paper have elaborated on why the practice of torture, for any reason, is one the most horrible acts that can be done to any individual. However, if the government allows torture to be used, society may begin to see torture as just another national security measure. This is because the laws of the government help to establish the norms of what society considers acceptable.⁴⁹ This process is not instantaneous, but as time passes people will eventually become more accepting of a process that is promoted by the government. In general, people become more accepting of things over time, which is good in some cases and bad in others.⁵⁰

The process of becoming more accepting over time can be good or bad. A positive example of this process can be seen in race and sexual orientation relations. In the past, people have not been nearly as accepting of homosexuality or racial relations as

⁴⁹ Bob Brecher, *Torture and the Ticking Bomb* (Malden, MA: Blackwell Publishing, 2007), 41-42.

⁵⁰ Bob Brecher, *Torture and the Ticking Bomb* (Malden, MA: Blackwell Publishing, 2007), 41-42.

they are today. Although there are still issues today, people have generally become more accepting of these two groups. This trend figures to continue with each passing generation, and is a positive example of people becoming more accepting of a practice over time. There was a huge outcry when schools were initially desegregated, but now there are a very limited number of people who would question desegregated schools. However, people becoming more accepting of torture, or similar practices, would be a disaster. If the government allowed torture to be legalized, each passing generation would become more accepting of the practice. The initial outcries against torture would fade into the distance, as society would begin to regard torture as commonplace. This should not happen because torture is the ultimate human rights violation, and society should be repulsed if it occurs.⁵¹ The legalization of torture would help deteriorate society's revulsion.

The fact that torture occurs behind closed doors also would contribute to society becoming more accepting of the practice. This is because people will be able to enjoy the benefits of torture without seeing the costs. The dynamic that drives acceptance is that people come to think of things as commonplace if they are not faced with the issues and it seems to be an effective practice. Torture is not something that is public information; the act of torture would be concealed from public view. People will not have to come face to face with the atrocities that occur. When Jim Crow laws were in effect people could see the injustice of segregation and the lack of equality between people. In spite of the visibility of these injustices it still took a large amount of time to right these wrongs. Torture would occur in a place that is beyond the realm of the average citizen's thoughts.

⁵¹ Philip B. Heymann, *Torture Should Not be Authorized*, in *Civil Liberties vs. National Security in a Post 9/11 World*, comp. M. Katherine B. Darmer, Robert M. Baird, and Stuart E. Rosenbaum (Amherst, NY: Prometheus Books, 2004), 216.

As society becomes more accepting of the practice, they will begin to forget the brutality involved with torture. People will forget that torture is a violent violation of human rights. This type of mindset can also have other negative consequences in society.

Society will proceed down a slippery slope if interrogational torture or any other form of torture is allowed. If society becomes accepting of torture, this will lead to the eventual expansion of torture. Even if torture is just implemented for interrogational methods, the public will eventually want to use it for more.⁵² This is because the public will view torture as a common and acceptable security method, and if it is allowed in “ticking-time bomb” scenarios, then they will wonder why it is not used more broadly. Police officers will wonder why they cannot use the same methods to solve murders or other serious cases. Growth of practices that people think are effective will always eventually lead to their expansion. The public will want to know why some security issues are more important than others. People will be faced with every day crimes and cases that seem much closer to them than any terrorist attack. This will drive them to call for the use of torture to be expanded.

Eventually, there will be a sensitive case that will strike an emotional cord with the public. An example of this occurred in Germany when the police knew that a man had kidnapped a boy, but the man would not reveal where the boy was. The police president demanded that the officers threaten the man with violence. This threat caused him to reveal the boy’s location, but the boy was already dead.⁵³ In this type of case, people will want to do anything possible to save the child’s life. In many peoples’ eyes there is

⁵² Bob Brecher, *Torture and the Ticking Bomb* (Malden, MA: Blackwell Publishing, 2007), 59.

⁵³ Doris Schroeder, "A Child's Life or a 'Little Bit of Torture'?" *Cambridge Quarterly of Healthcare Ethics* 15 (2006): 188.

nothing more precious than the life of a child, and they will want to use any means available to save it. If torture is allowed to stop terrorist attacks, people will eventually want to use it for a case like this. However, once torture is used for one of these cases, it will just be the first step in the growth of this practice. Therefore, this practice should not be allowed in the first place. If torture is legalized for interrogational torture, it will eventually expand and grow. Since torture is a grave violation of human rights, this must not be allowed to occur.

Government

There could be dangerous consequences if the government becomes entangled with torture. If torture is legalized and the public begins to accept the practice, or even if it doesn't, the government may see the legalization of one method of torture, such as interrogational torture, as a green light to use torture whenever it is necessary.⁵⁴ An example of this is that photographs and the actual act of lynching blacks in the past were used to help establish the power of whites over blacks.⁵⁵ These photos were used to scare blacks from challenging the white supremacy of the social order. The government could use torture in a similar fashion if it felt a threat from any group. Any group considered to be a security threat could be tortured as a deterrent to prevent them from challenging the established hierarchy. The government could use the practice to intimidate, punish, or scare opponents without fear of retribution because the practice is legal. History is filled with times where torture was used for these exact purposes. The regimes in Nazi

⁵⁴ Bob Brecher, *Torture and the Ticking Bomb* (Malden, MA: Blackwell Publishing, 2007), 62.

⁵⁵ Liz Philipose, "The Politics of Pain and the Uses of Torture," *Journal of Women in Culture and Society* 32, no. 4 (Summer 2007): 1049-1050.

Germany, USSR, and Iraq all used torture as a threat to keep their opponents silent. The use of torture could pose a threat of internal repression.

The United States should not legalize torture because the government of the United States should not be entangled with any type of lawlessness. Torture would violate the purity of the government, by entangling them with the abuse of individuals. The government has the responsibility to act as role model for how the rules should be followed. This is why people get extremely angry when they discover that elected government officials are involved in scandals. The public trusts the government to set the rules, and to follow them as well. In Judge Brandeis's dissent in *Olmstead v. United States* (1928) he says,

*“Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen... Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law...”*⁵⁶

It is for these reasons that the government cannot be associated with torture. If the courts condone a certain act, the rest the country will eventually follow. As we discussed earlier, the erosion of intolerance towards human rights would be a disaster. The government is supposed to protect against the flaws of men, not promote them. Therefore, the government cannot be associated with a cruel, inhumane act like torture. However, the implications of legalizing torture would not just be limited to the United States.

In spite of these concerns, Dershowitz suggests that a process involving torture warrants would limit torture. In this scenario, in order for torture to occur, a judge-issued warrant would be needed to proceed. Dershowitz hypothesizes that this process would

⁵⁶ 277 U.S. 438 (1928)

limit the amount of cases where torture occurs.⁵⁷ Alan Dershowitz hypothesizes that torture already occurs, and that legalizing it will increase accountability and decrease its use.⁵⁸ He feels that this process will cause interrogators to ask to use interrogational torture, and that the openness of the process would limit how much torture is used. However, his scenario has many flaws in its' reasoning.

Dershowitz's theory would only exacerbate the problems of involving government with torture. The first issue is that just like the rest of the government, the judicial branch should not be involved in torture. The concept of judicial integrity is that the judiciary should set a good example. Judges are the ones who ensure laws are obeyed, so they should not be associated with acts that are unfair or illegal.⁵⁹ The judiciary is the branch that tells the executive and legislative branch that the certain bills or law cannot be enacted because they are unconstitutional. They have the final say on what is allowed, and entangling this role with torture would dilute their standing in the eyes of the public.

Another problem is that judges would not dismiss enough of the requests for torture.⁶⁰ Justice Rehnquist says that the Supreme Court typically avoids going against the executive branch in cases that deal with national security. They typically stall their decisions until the conflict has passed, which is what happened during the Japanese

⁵⁷ Alan M. Dershowitz, *Should the Ticking Bomb Terrorist be Tortured?*, in *Civil Liberties vs. National Security in a Post 9/11 World*, comp. M. Katherine B. Darmer, Robert M. Baird, and Stuart E. Rosenbaum (Amherst, NY: Prometheus Books, 2004), 206-207.

⁵⁸ Alan M. Dershowitz, *Should the Ticking Bomb Terrorist be Tortured?*, in *Civil Liberties vs. National Security in a Post 9/11 World*, comp. M. Katherine B. Darmer, Robert M. Baird, and Stuart E. Rosenbaum (Amherst, NY: Prometheus Books, 2004), 202-204.

⁵⁹ Chanterelle Sung, "Torturing the Ticking Time Bomb Terrorist: An Analysis of Judicially Sanctioned Torture in the Context of Terrorism," *Boston College Third World Law Journal* 2003 (2003): 207.

⁶⁰ Philip B. Heymann, *Torture Should Not be Authorized*, in *Civil Liberties vs. National Security in a Post 9/11 World*, comp. M. Katherine B. Darmer, Robert M. Baird, and Stuart E. Rosenbaum (Amherst, NY: Prometheus Books, 2004), 216.

Internment during World War II.⁶¹ This type of thinking can be seen in how the court has dealt with the Patriot Act and Guantanamo Bay.⁶² The judges do not want to oppose national security measures because judges do not want blood on their hands. They do not want to be responsible for the loss of American lives, so when a request for a torture warrant comes up, they will be hesitant to deny it.

Judges might also lower the necessary evidence for urgent cases, but this precedent would lower the threshold for allowing torture in the future.⁶³ It is unfair to place this type of decision in the hands of any person, because no one wants to be responsible for allowing a horrific terrorist attack to occur. Therefore, most of the time the judge will inevitably side with allowing torture. There could also be a backlash if a judge does not allow torture and an attack occurs, and judges in the future may be afraid of making a similar mistake. This pressure is compounded by the fact that if it is someone's job to stop an attack by any means, they may exaggerate the evidence or threat.⁶⁴ This will only increase the pressure on judges to allow the use of torture. Therefore, it seems unlikely that torture warrants would decrease torture, and it seems much more plausible that they would only expand the use of torture.

Global Precedent

The United States is often considered the only current superpower in the world. The United States is the preeminent military and economic power. We also champion our

⁶¹ William Rehnquist, *Inter Arma Silent Leges*, in *Civil Liberties vs. National Security in a Post 9/11 World*, comp. M. Katherine B. Darmer, Robert M. Baird, and Stuart E. Rosenbaum (Amherst, NY: Prometheus Books, 2004), 26-27.

⁶² Bob Brecher, *Torture and the Ticking Bomb* (Malden, MA: Blackwell Publishing, 2007), 54.

⁶³ Bob Brecher, *Torture and the Ticking Bomb* (Malden, MA: Blackwell Publishing, 2007), 54-58.

⁶⁴ Bob Brecher, *Torture and the Ticking Bomb* (Malden, MA: Blackwell Publishing, 2007), 54.

government as the best model, and constantly view ourselves as the moral leaders of the world. For this reason, the rest of the world closely examines our decisions and actions, and many of our choices set precedents across the globe. Therefore, allowing torture would not just be dangerous because of the consequences within the United States, but it would also be dangerous because of how the United States legalizing torture would affect the rest of the world. If the United States legalizes torture, other countries will be less hesitant to legalize it as well.⁶⁵ However, these countries may not have the same standards that the United States would.⁶⁶ Other countries would not require the same level of evidence to torture. The government of a country such as Iran or North Korea could freely use torture because we have legalized it. These countries may already engage in torture, but they could start using it openly. It is doubtful that these countries would use the same type of moral restraint when deciding whether or not to use torture. The legalization of torture in the United States would give these countries a “carte blanche” to use torture however they saw fit. Torture and human rights violations would become more rampant across the globe.

The United States should not engage in torture because it could promote more terrorist attacks around the world. This is because the U.S. would be violating many agreements that prohibit the use of torture. The United States has ratified several treaties designed to protect human rights, such as the Geneva Convention and the International Covenant on Civil and Political Rights.⁶⁷ The United States has defended these rights, but

⁶⁵ Eyal Press, *In Torture We Trust?*, in *Civil Liberties vs. National Security in a Post 9/11 World*, comp. M. Katherine B. Darmer, Robert M. Baird, and Stuart E. Rosenbaum (Amherst, NY: Prometheus Books, 2004), 228.

⁶⁶ Philip B. Heymann, *Torture Should Not be Authorized*, in *Civil Liberties vs. National Security in a Post 9/11 World*, comp. M. Katherine B. Darmer, Robert M. Baird, and Stuart E. Rosenbaum (Amherst, NY: Prometheus Books, 2004), 217.

⁶⁷ Derek Jinks, "International Human Rights Law and the War on Terrorism,"

all of this would be undone if torture is legalized. The United States would also no longer have the moral high ground when dealing with terrorists because it would have matched the brutality of the terrorists.⁶⁸ America has looked itself as the hero, while claiming that terrorists are the villains because of their disregard for human life. Our country could no longer use this rationale if it implements torture. The United States could not longer say it was disgusted by the acts of terrorists because we would engaging in the same kind of behavior. The United States should not stoop to the level of terrorists, because it then gives the terrorists credence to behave in these types of activities and also promotes the legalization of torture across the globe.

All of these sections illustrate the “slippery slope” that society, the government, and the rest of the world could go down if torture is legalized. This section, along with the past discussions, has shown why the United States should not allow torture for any situation. However, this does not mean that the issue of national security should not be addressed. The final section will examine alternatives to torture to aid the United States national security policy.

VI. What This Means for National Security Policy

The goal of this paper thus far has been to highlight the fact that the use of torture is not acceptable as a policy to help combat terrorism. However, the fact that torture should not be used does not solve the problem of stopping terrorist attacks from happening. Torture is at the extreme end of the spectrum as one of the worst things that can possibly done to a human being, and this means that after we exclude torture from consideration we must look at other options to combat terrorism. This section will look at

Denver Journal of International Law and Policy 31 (2002): 59-62.

⁶⁸ Philip B. Heymann, *Terrorism, Freedom, and Security: Winning Without War* (Cambridge: The MIT Press, 2003), 119-126.

some other options that could be considered, but it will not set out a definite solution. Instead this section will set up the basic framework that should be considered when implementing new security policies. I will first look at why the United States needs to actively pursue a counterterrorism policy. Then I will look at the use of electronic surveillance, restricting immigration, and coordinating with other countries.

America must consider other forms of national security because terrorism is a very real threat. The “War on Terror” is a war unlike many wars of the past. This war is not a temporary conflict with a determined enemy. This war consists of a battle with many enemies and the danger of an attack from one of them is always present.⁶⁹ It is easy to forget that the United States is still at war with every day that passes without an attack, but national security cannot reflect this belief.⁷⁰ The threat of an attack is always present, and America needs to be prepared. The United States needs to find a policy that should not vary depending on when the last attack was. The national security policy must be a policy that can be enacted at all times. It should not be affected by when the last attack was because there is a chance an attack could occur on any day. This plan may infringe on some civil liberties, but it must be a plan that can be assimilated into society, and not just a temporary fix. Therefore, the United States should consider a variety of policies.

One option would be to increase electronic surveillance using public information. The United States attempted this with the Total Information Awareness Project, but the Senate stopped funding it. However, Germany has a system that does use public

⁶⁹ Philip B. Heymann, *Terrorism, Freedom, and Security: Winning Without War* (Cambridge: The MIT Press, 2003), 20-23.

⁷⁰ Chicago Tribune Editorial, *Erring on Enemy Combatants*, in *Civil Liberties vs. National Security in a Post 9/11 World*, comp. M. Katherine B. Darmer, Robert M. Baird, and Stuart E. Rosenbaum (Amherst, NY: Prometheus Books, 2004), 299-300.

information to try and find patterns that might suggest a terrorist plot.⁷¹ If this type of program were implemented there would probably be a larger public outcry than there has been about the incidents at Abu Ghraib. This is because more of the public would be affected by this program than interrogational torture, where a few people would bear the burden for society as was discussed earlier in the paper. People are wary that this type of surveillance will lead to a “big brother” type of society and that it represents a grave violation of privacy.⁷² The right to privacy is important, but a violation of privacy seems trivial compared to the basic human rights that are violated with the use of torture. The entire country would have to bear the burden of decreased privacy. This seems more fair than placing the burden of national security on a miniscule amount of the population. It makes sense that is better to have some rights slightly infringed upon for everyone than to simply violate the most basic and important rights of any individual. Therefore, the security policy of the United States must be consistent and place the burden of lessened civil liberties on the whole nation.

Another option to consider for national security is restricting immigration. This would include increasing efforts to stop illegal immigration because these immigrants can pose a security risk.⁷³ They pose a huge security risk because the government is not aware of the background of these individuals, and they also are unaware that these people are even in the country. Therefore, securing the border against illegal immigrants would

⁷¹ Michael Jacobson, *The West at War: U.S. and European Counterterrorism Efforts, Post-September 11* (Washington, DC: The Washington Institute for Near East Policy, 2006), 56.

⁷² Jay Stanley and Barry Steinhardt, *Bigger Monster, Weaker chains*, in *Civil Liberties vs. National Security in a Post 9/11 World*, comp. M. Katherine B. Darmer, Robert M. Baird, and Stuart E. Rosenbaum (Amherst, NY: Prometheus Books, 2004), 53.

⁷³ Michael Chertoff, *Homeland Security: Assessing the First Five Years* (Philadelphia: University of Pennsylvania Press, 2009), 41-44.

force people to enter legally. This would allow the government to perform background checks on these people and substantially decrease security risks. This option is not intended to lock people out of the country or place the burden on minorities; it is just to make our country more cautious. This option would not restrict the current civil liberties of any citizens, and is a process that could be continued into the future.

In addition to creating a policy that is can be used indefinitely and that places the burden on society as a whole, the most important thing that must happen is for the United States to work with other countries. This has to happen because terrorism cells are located across the globe, and are mostly based in foreign countries. The United States counterterrorism efforts would be greatly aided by information from other countries.⁷⁴ In order for this to happen there has to be greater efforts by the EU and the US to coordinate security information.⁷⁵ In order for this to happen, the US cannot stoop to using policies that violate the most basic human rights because it degrades our moral standing in other countries eyes. If we stand firm to our country's core beliefs, the chances of greater international cooperation will increase.

The most important lesson should be that all people in the United States benefit from national security, and everyone should be willing to give up something to enjoy this benefit. It is unfair to place this burden on the shoulders of a select few. There is an ongoing discussion about the balance between civil liberties and national security. However, this balance should use a policy in which everyone's balance is the same. I cannot say what policy is best, but policies such as racial profiling; indefinite detentions

⁷⁴ Philip B. Heymann, *Terrorism, Freedom, and Security: Winning Without War* (Cambridge: The MIT Press, 2003), 77.

⁷⁵ Michael Jacobson, *The West at War: U.S. and European Counterterrorism Efforts, Post-September 11* (Washington, DC: The Washington Institute for Near East Policy, 2006), 128-130.

of enemy combatants, and torture clearly place the burden on small group of people, who are usually an ethnic or racial minority. This type of policy is at odds with democracy, as we all enjoy the universal benefits, and a small number of people should not have to pay to achieve this. Therefore, torture and policies like it must not be used.

VII. Conclusion

This paper explains why torture should have no place in American society. The thought of the use of torture on any person should repulse any person. This is because the use of torture is wrong on a variety of levels. It should not be used because torture is not an effective method of national security. It produces a high rate of false positives, and the likelihood of capturing a suspect that actually possesses knowledge of an imminent attack is miniscule. The use of an ineffective and inefficient method such as torture would only serve to hurt national security policy. False positives could delay authorities from pursuing the right course of action, and more reliable methods could be ignored in favor of torture. However, there are other reasons besides effectiveness for why torture should not be allowed.

The Supreme Court has shown that it believes the Constitution has implicit standards about the minimal treatment that should be afforded to human beings. The use of torture would violate this type of thinking. The 4th, 5th, 8th, and 14th Amendments guard against unreasonable search and seizure, self-incrimination, cruel and unusual punishment, and violations of due process. These type of rights were clearly integrated into the Bill of Rights to protect the minimal rights that people should have. The use of torture would violate at least one, if not all, of these rights. Therefore, the legalization of torture should not be allowed because it is unconstitutional.

There are also other rights that should prevent torture. Basic human rights are the rights that all people should have regardless of where they live or where they are. They are inviolable rights that are supposed to protect against their life and basic liberties. The use of a brutal practice such as torture clearly violates these basic rights. The goal of torture is to put someone into so much pain that they lost the will to fight back or to control what they want to do. Essentially, the goal is to break the will of a human and turn them into an object. This type of process has not place in the world, as all people deserve to be treated equally as people.

There are also dangerous consequences that could occur if torture is legalized. Society could become too accepting of the practice because they do not see it happening, and may eventually come to accept it as commonplace. If this happens, there were will eventually be calls to expand the use of torture beyond cases where there is an imminent attack. People will want to use it for police cases because they will think it is an effective process that should be used for everything. This will only lead to the social degeneration of our society, as we become more accepting of brutal practices like this. There is also the danger that government would fail to limit the amount of torture that occurs because they do not want to be responsible for the loss of lives from a terrorist attack. Finally, the government should not be entangled with a practice like torture because the government should be a role model for rule following. If the government is involved with torture, society will see it as a sign that torture is acceptable.

The threat of a terrorist attack is very real, but torture cannot be a method that is used to defend against it. The use of torture represents the extreme in terms of balancing civil liberties and national security. It represents the gravest violations of basic liberties

and human rights, and this cannot be allowed to happen. It also places the entire burden of national security on the backs of a few people. This should not be allowed to happen, everyone who enjoys the benefits of national security should have to share equally in its costs. People may decry other methods, such as electronic surveillance, as violations of privacy, but in order to guard against terrorism some civil liberties must be infringed upon. Torture represents what we absolutely must not do, and by showing what we cannot do it also shows that we must consider other options. No one wants to lose civil liberties, and there is always going to be a compelling argument against each potential security solution. However, we must consider these methods that only slightly infringe on the vast civil liberties we enjoy. This is because we cannot allow torture or other methods that infringe on the most basic human right to be allowed.

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