

# **Torture, Law, and War:**

**What are the moral and legal boundaries on the use of coercion in interrogation?**

a conference at

*The University of Chicago Law School*  
1111 E. 60th Street, Chicago, Illinois 60637  
February 29-March 1, 2008

Recent events combined with shifts in government policy have reopened questions about how much and what kinds of coercion are appropriately used in the interrogation and detention of suspected criminals, enemy combatants, and accomplices. In order to promote security and pursue justice, some have urged we reexamine torture—both its usefulness and its prohibition. Yet some basic questions about torture and coercive interrogation in particular are also in need of answer: How should we define torture? What can we learn from history about it? What are its effects on the tortured, on those who torture, and on societies in which it occurs? And how should we argue about it?

In conjunction with the University of Chicago Law School's year-long Law and Philosophy Workshop focused on coercion, this conference brings together speakers from a variety of disciplines to discuss these and related questions.

This conference has been generously sponsored by The University of Chicago Law School, with additional support from The University of Chicago Center for Comparative Constitutionalism.

*All sessions except for the keynote address take place in Room I of the Law School.*

## **Schedule of events**

### **Friday Afternoon**

12:00-1:25	<b>Student Presentations</b>
1:30-1:40	<b>Opening remarks</b>
1:40-3:00	<b>Psychology and Torture</b> break
3:15-5:15	<b>Philosophy and Torture</b>
5:30-6:30	<b>Keynote Address</b>
6:30-7:15	<b>Reception</b>

### **Saturday Morning**

8:30-9:00	<b>Breakfast</b>
9:00-10:20	<b>Torture in History</b> break
10:30-12:30	<b>Law and Philosophy</b>

### **Saturday Afternoon**

12:30-1:30	<b>Lunch</b>
1:30-3:00	<b>Torture and Society</b> break
3:15-5:15	<b>Law and Policy</b>

## Friday Afternoon

### 12:00-1:25 Student Presentations

Chair: **Adam Samaha**, Law, The University of Chicago.

Panelists: **Samuel Brody**, Divinity School, The University of Chicago

*Hence Jacob Rightly Feared: On Torture, Jewish Law, and the Use and Abuse of Casuistry*

Those who defend the employment of torture in the course of the "war on terror" often do so using what may seem at first glance to be a suspect form of legal reasoning. Moral outrages seem to be excused by impossibly slight legal distinctions. One might be tempted to respond as Pascal did to the 17th-century Jesuits, by issuing a broadside against such "casuistry" (case-by-case, contextual reasoning that often turns around exceptions to broad principles), from the perspective of some universally applicable moral principles. In this presentation, however, my goal is to use a recent attempt to argue against torture from the sources of *halakha*, or Jewish law, as a model for the continuing viability of the casuistic type of reasoning about legal and ethical questions, and to argue against the necessary mutual exclusivity of principle-based and contextual reasoning.

Respondents: **Josef Lubenow**, Philosophy, The University of Chicago

**Ayla Qadeer**, MAPH, The University of Chicago

**Garrett Ordower**, Law, The University of Chicago

*Tortured Prosecutions: Holding Private Military Contractors Accountable for Torture and Violations of the Law of War*

Private military contractors have largely escaped prosecution for their actions in Iraq and elsewhere not because laws don't exist under which they can be prosecuted, but because the US government has been practically unable or unwilling to pursue prosecutions. But as the usage and roles of private military contractors expand, more situations will arise that aren't captured by current laws. The United States must create an expansive legal regime that can be used to hold its contractors accountable throughout the world.

Respondent: **Kristin Greer Love**, Law, The University of Chicago

### 1:30-1:40 Opening remarks

## **1:40-3:00 Psychology and Torture**

How does torture affect the tortured, the torturers, and those who inhabit a world with torture in it?

Chair: **Susan Bandes**, Law, DePaul University and The University of Chicago

Panelists: **William Gorman**, Counseling Center, Psychology, and Psychiatry, University of Illinois at Chicago

### *Therapeutic Challenges with Victims of Torture*

Reflections on more than 20 years working with refugees from countries across the world at the Marjorie Kovler Center for the Treatment of Survivors of Torture, suggest to me that despite the uniqueness of each individual's story, certain themes commonly recur in the narratives of their suffering and the course of their recovery. The intents of torture have been called the breaking of body and spirit, and the effects are stark testimony to its "success."

Like many other victims of trauma, typically those tortured have been rendered silent, initially lacking a language to comprehend and communicate their suffering. But in contrast to many other traumatized people, those tortured live with the knowledge that their pain and powerlessness were the very ends of a torment sought by fellow human beings. They tend to feel torn apart from their own pasts and their communities, and usually have lost some measure of fundamental trust in a meaningful or manageable world. Broadly speaking, the harm is shown in their silence, their withdrawal, their numbing, and their nightmares, as much as in their scars, burns, and broken bones.

Witnessing such evil, even at the remove of listening to its report in a therapy office, can easily lead to vicarious traumatization for the therapist. However, the opposite is more often the case. Victims over time can many times show incredible resilience in their restoration of hope and connection, although the process is often halting and too often impeded by the travails of exile and resettlement. The therapist is privileged to face not only the depths of depravity reached by the torturer, but the capacity to endure and move beyond so much loss and hurt towards the creation against all odds of a life again worth living - the transformation from victim to survivor.

**Nancy Sherman**, Philosophy, Georgetown University

### *Stoic Equanimity in the Face of Torture*

The topic I take on this talk is stoic equanimity in the face of harsh detention and torture. How plausible is a kind of stoic armor as a protection against the deprivation of military imprisonment and coercive interrogation? Throughout history, some version of stoic resilience has been a popular military ideal. As I argued in *Stoic Warriors* (Oxford University Press, 2005), soldiers are taught to be stoic in the face of battle and in its aftermath. They are taught to "suck it up," to get on with it, to endure stoically as they inflict lethal force and witness its consequences. And they are taught to survive captivity as POW's by a kind of stoic retreat to the most untouchable core of self. To be sure, torture is an extreme case for testing stoic detachment. But I believe we can learn something about the more ordinary demand for military, stoic resilience by considering the hard case and its challenges.

One question that will be before us is this: In what does a stoic sensibility protect against a fundamental vulnerability that torture aims to lay bare--namely that the victim will ultimately use her will against herself in acts of collusion and self-betrayal? Stoicism, in its ideal form, is a therapeutic practice in moral invulnerability. True goodness is a matter of the goodness of character and its constancy. Can Stoicism mentally and morally arm one against the kinds of pressures that torture and harsh interrogation offer?

### **3:15-5:15 Philosophy and Torture**

Is torture ever morally permissible, and if so, on what grounds? And if not, can some acts of torture be morally excused after the fact?

Chair: **Richard McAdams**, Law, The University of Chicago

Panelists: **Claudia Card**, Philosophy, University of Wisconsin

*Ticking Bombs and Interrogations*

Understanding the nature of torture is presently of some urgency. The Bush administration has defined certain notorious interrogation techniques as merely "rough interrogation," and not as torture, so that it can say the U.S. is in compliance with the international ban on torture that it has signed onto. I argue that torture is, in its nature, morally inexcusable. The ticking bomb scenario can be offered as a case in which there are at least four tempting apparent excuses: urgency, last resort, relative mercifulness (compared to what the tortured party was prepared to do), and laudable aim. By "excuse" in this context, I mean a partially but insufficiently justifying reason, one that would cast the agent in a better light even though it would not justify the deed all things considered. I argue that none of these apparent excuses holds up under examination, and that, consequently, torture is not simply wrong but an evil. The context in which I argue this is a revision of my theory of evils, which I now define as reasonably foreseeable intolerable harms produced by inexcusable wrongdoing (an earlier version said "culpable wrongdoing" rather than "inexcusable wrongdoing"). What I say about the nature of torture is not original; ultimately, I appeal to Henry Shue and Jean Amery, as I think they are correct about what differentiates torture from other hard treatment. But unlike Shue, I reject the idea that torture can be excusable.

**Marcia Baron**, Philosophy, Indiana University

*The Ticking Bomb Hypothetical*

Recent literature arguing for, or reaffirming, the impermissibility of torture has deplored the ticking bomb hypothetical and its frequent invocation. I have in mind in particular Bob Brecher, Claudia Card, David Luban and Henry Shue. I share their views, at least abstracting from some details, but at the same time think that just what is so problematic about the hypothetical remains to some extent unclear. I hope to bring out more sharply just how the ongoing focus on the ticking bomb hypothetical has led us astray (or, to put it in the slightly hyperbolic terms used by David Luban, how the hypothetical has "bewitched us"). In doing so I want to take issue not only with those who rely on the ticking bomb hypothetical to defend the use of torture, but also with those who, while taking a

more nuanced view, insist on “the relevance and significance of the catastrophic case.” Oren Gross writes that “there are two perspectives from which we ought to approach the question of the use of preventive interrogational torture, namely, the general policy perspective and the perspective of the catastrophic case... We can only focus on one to the exclusion of the other at our peril.” I see no peril at all in ceasing to take, as he puts it, “the perspective of the catastrophic case.”

**David Sussman**, Philosophy, University of Illinois Urbana-Champaign  
*Torture and Dirty Fighting*

I will consider torture in light Thomas Nagel’s distinction between “clean” and “dirty” fighting that he makes in his seminal article “War and Massacre”. This distinction turns on understanding conflict, even in extreme situations, as having an inherent expressive function, such that combat should be understood as a way of addressing one’s opponent. Clean fighting supposedly respects some minimal norms of inter-personal address. Dirty fighting, in contrast, does not seek to “reply” to the wrongful act, but rather strikes at the ordinary life of the enemy. Unfortunately, it is hard to apply this distinction with any consistency, and Nagel’s own discussion of torture in “War and Massacre” is not very illuminating. I will offer some suggestions about how to amend the clean/dirty distinction in a way meant to shed some light on the distinctive moral wrongs of torture.

**5:30-6:30 Keynote Address** (Weymouth Kirkland Courtroom)

Chair: **Martha Nussbaum**, Law, The University of Chicago  
Introduction: **Geoffrey Stone**, Law, The University of Chicago  
Speaker: **Albie Sachs**, Justice, Constitutional Court of South Africa  
*Four Tales of Terrorism*

A reception in honor of Justice Sachs will follow his address.

## Saturday Morning

### 9:00-10:20 Torture in History

What can we learn from history about the function and impact of the use of coercive interrogation techniques?

Chair: **Robert Gooding-Williams**, Political Science, The University of Chicago

Panelists: **Kathleen Coleman**, Classics, Harvard University

*The Fragility of Evidence: Torture in Roman Legal Thought and Practice*

Torture as a technique of interrogation in ancient Rome must be seen in the context of the degree of physical suffering that was deemed appropriate in the punishment of slaves and, later, other categories of disadvantaged persons: pain fills the vacuum created by absence of status. Under Roman law, slaves could be tortured to extract evidence and confessions of guilt. At various times under the Empire, these sanctions were also applied to free persons. Yet, Roman jurists frequently question the efficacy of torture as a means of extracting the truth, whether from free persons or from slaves. At the same time, after the virtually universal grant of citizenship to all free persons in 212 CE, judicial savagery increased. Ultimately, the use of torture as both a means of interrogation and an instrument of punishment coalesced in the treatment of the late antique Christian martyrs, who undermined the entire purpose of torture by enduring it, thereby paradoxically demonstrating their innocence in the process of proving their guilt.

**Darius Rejali**, Political Science, Reed College

*Torture, Democracy and Our Future*

Historically, state officials have used painful techniques on helpless, detained victims for state purposes: confession, intimidation and information. I don't care what you call the practices. I'm interested in two questions. One is historical: where do these practices come from and how do they spread? The other is social scientific: what is their effect and do they work for the purposes claimed? The general answer to the first is that scarring techniques come from authoritarian states, and clean techniques (painful techniques that leave few marks) almost always originate in democratic states or democratic states play critical roles in making them more common. And what drives their spread is something most people don't think about in relation to torture: public monitoring. When we watch, cops get sneaky. And as human rights monitoring spread worldwide in the 1960s, authoritarian cops learned to be sneaky too. As to the social scientific question: torture can secure false confessions and behavioral compliance, and that is its usual purpose, but for information, it is the clumsiest method available, and you would be better off flipping a coin to answer your questions. That would be less work and have fewer devastating effects on your organization and professionals. That said, states have strong incentives not to gather, much less analyze data from torture; human rights monitoring makes them vulnerable to war crimes charges; myth survives and television flourishes; and so torture will be part of our future.

### **10:30-12:30 Law and Philosophy**

Should the law absolutely ban coercive interrogation? And can and should it really mean it?

Chair: **Andrew Koppelman**, Law, Northwestern University

Panelists: **Scott Anderson**, Law, The University of Chicago, and Philosophy, The University of British Columbia

*What Song Do the Sirens Sing? The U.S. Law of Torture in a Wider Context*

The situations which seem to make torture an attractive means are ones where it counts as an instrument of war, perhaps falling under the rubric of self-defense. The context of war here is crucial, as it invokes the evils that occasion war, the perils involved in fighting one, as well as an important body of doctrine that is supposed to govern its conduct. One may be inclined to use torture in war because it seems to be useful for averting greater evils. Yet traditional just-war doctrine gives us reason to doubt that a theory of lesser evils should govern one's choice of means here. It also cautions us not to rely on a cartoonish picture of the evil of one's adversary in war. If one's goal in war is not merely self-defense but also to limit the scope and duration of war, and to achieve a just and lasting peace at hostilities' end, then there are reasons to accept a prohibition on the use of torture as conducive to one's larger ends in violent conflict.

**Jeff McMahan**, Philosophy, Rutgers University

*Torture in Principle and in Practice*

In this paper I critique moral absolutism -- about torture as well as about everything else. I will also state what I think is the best moral justification for torture: that people can make themselves morally liable to be tortured if that's the only way to prevent them from causing wrongful harm to the innocent through their prior voluntary action. But I'll also argue that, for a variety of reasons, torture should be categorically prohibited in law, with no exceptions. The main reason is that, given that the incentives to use torture are strong, especially among bad people, and given that torture can seldom be morally justified in the actual world, the bad effects of providing any loopholes for legally justified torture greatly outweigh the advantage of having a legal permission to use torture in those rare cases in which it would be morally justified.

**Eric Posner**, Law, The University of Chicago

*Should Coercive Interrogation Be Legal?*

The starting point of this paper is the proposition, which seems to be widely held, even by critics of torture, that it is acceptable in extreme circumstances but nonetheless should be illegal. For example, Henry Shue argues that torture should be illegal, but nonetheless in extreme circumstances it is justified, and the torturer should be pardoned or otherwise forgiven after it is made clear that he has violated the law. I argue that this position is not a plausible one.

## Saturday Afternoon

### 1:30-3:00 Torture and Society

How is torture portrayed in media and social discourse? How do social norms affect the willingness to use torture, and vice-versa?

Chair: **Susan Gzesh**, Human Rights Program and the College, The University of Chicago

Panelists: **Mary Anne Case**, Law, The University of Chicago  
*"You're telling me it's wrong to do to the prisoners what the Army does to its own soldiers?" Gender Performance Requirements of the U.S. Military in the War on Islamic Terrorism*

Among the many disturbing reports emerging from a variety of venues at which the U.S. military has conducted interrogations of Islamic male detainees since September 2001 are those detailing exploitation of sexual and gender stereotypes and taboos as a central part of efforts to humiliate and degrade detainees. Analysis of these practices and the gender-based harms they do will be organized around three quotations from those involved, the first of which forms part of the title for the presentation

**Scott Horton**, *Harpers' Magazine*, and Law, Columbia University  
*Torture and the American Entertainment Industry*

America's debate over torture has been driven and circumscribed by the way in which the media covers the issue. Coverage must be studied on two levels, *first*, the appearance of questions surrounding interrogation as a news and public affairs matter; *second*, the appearance of torture techniques in the entertainment sector. [With the appearance of *infotainment*, a particular product of the cable news world, the distinctions between these two lines have become blurred.] While the Administration and its supporters push the notion of a "liberal media" which criticizes its policies, challenging even the use of the word "torture," a study of both broadcast and print media will evidence a consistent and questionable orientation towards Administration rhetoric in coverage. The Administration has successfully set the rules for coverage and largely successful in its efforts to constrain language used in the debate. Serious criticism is rare. The word "torture" will be used to describe loud music coming from a neighboring apartment, but not to describe waterboarding, which is in fact iconic torture, but is described in the media only as an "enhanced interrogation technique."

[Conversely, media have not hesitated to call these practices "torture" when used by governments hostile to the United States.] On the entertainment side, the number of incidents showing torture has proliferated dramatically, especially on one cable network. Whereas torture was once something heinous done by enemies to Americans, now torture is glorious and done by heroic figures to enemies, for the purpose of saving the country. Graphic and accurate portrays of torture are absent in news coverage, but are abundant in the ideologically motivated entertainment coverage. Similarly, media coverage has limited the debate to a simple question of efficacy: does torture yield results? Moral and ethical dimensions of the question are eliminated or shoved into the background and the

Administration's claims of efficacy are generally credited even though they are unsupported by evidence. Similarly the costs of having a torture policy on the international stage—collapsing reputation, challenges to discipline and morale, lawlessness, loss of cooperation from former allies—are ignored. As the official use of torture persists, the White House has emerged as master of the torture debate, both in print and broadcast media.

### **3:15-5:15 Law and Policy**

How do U.S. and international law regulate torture and coercive interrogation? Are changes needed in these laws? How well do U.S. practices and policies implement its laws?

Chair: **Lee Fennell**, Law, The University of Chicago

Panelists: **Lisa Hajjar**, Law and Society Program, University of California Santa Barbara  
*Lawfare: Viva la Litigation!*

The concept of "lawfare" predates 9/11 but has been popularized--actually demonized--by supporters of the Bush administration's beefed up "unitary executive thesis." Lawfare is a term used to describe and criticize any type of lawyering or interpretation of law that challenges the policies and practices authorized by the executive branch, or that seeks redress for victims of torture and abuse by US agents, or that advocates penalties for authors and abettors of torture. In such hands, the right-winged lawfare demon has a robust if incoherent meaning, for example conflating habeas lawyers representing Guantanamo detainees with al-Qaeda's attacks on civilian sites. Critics of those who demonize lawfare, mainly intellectuals writing in the legal blogosphere and popular journals such as *The Nation*, *The New Yorker* and *Slate*, tend to argue that lawfare isn't "bad" if it can help to restore a standard of legality to US interrogation and detention in the "war on terror." With the exception of Scott Horton, who writes for *Harper's*, and perhaps one or two others who tackle the lawfare concept, critics of the critics of lawfare tend to be defensive, for example suggesting that litigation has become an unfortunate necessity because the other branches, and especially the Justice Department, have failed to maintain the illegality of torture and cruel treatment. In such defensively toned arguments one can hear echoes of "judicial activism is undemocratic" and "international law is unAmerican" chants from the far right. To the extent that lawfare relates to their goal to "restore the rule of law," litigation is conceived as a means to make litigation unnecessary in that happy day of restoration. In this paper I analyze the discourses of those who invoke "lawfare" whether to condemn or excuse it, and then craft a pro-lawfare argument (as distinct from a "lawfare isn't bad" argument) in the context of post-9/11 interrogation and detention policies and practices, and their consequences. As a sociologist, I am interested in the impact and politics of litigation in society, rather than narrowly confining it to the courts, as is the tendency of legal scholars. I do engage the instrumental view of litigation as a means to restore the rule of law, but I am more interested in what brings lawyers TO COURT than what the courts might provide in the way of restoration (or building higher obstacles thereto). I am interested, ultimately, in how questions of "what is legal?" are debated and dealt with at this juncture in the US and how the uses and limits of

litigation in US courts raise questions about the incompatibility of political democracy and legal justice.

**Richard Leo**, Law, University of San Francisco

*Police Interrogation and Coercion in Domestic American History*

In this talk, I will discuss the use of physically and psychologically coercive interrogation methods and strategies by American police from the late nineteenth century to the present. I will discuss the history, practice and varieties of “third degree” interrogation, focusing on in its heyday in the 1920s and 1930s (and occasional episodic reprises since); the subsequent decline of the third degree and its replacement by more psychological forms of interrogation, including psychologically coercive methods and strategies. I will also discuss the constitutional law regulating physically and psychologically coercive interrogation techniques, both the role it appears to have played in bringing about the decline of the third degree in American domestic history and how it regulates (or fails to regulate) contemporary forms of psychologically coercive interrogation. Finally, I will discuss the lessons of the American domestic experiment with the third degree in the early part of the 20<sup>th</sup> century for contemporary military interrogation practices in the early part of the 21<sup>st</sup> century.

**Kim Lane Schepple**, Program in Law and Public Affairs, Woodrow Wilson

School of Public and International Affairs, Princeton University

*The Metastasis of Torture*

One reason not to torture is that torture produces information of questionable reliability. And yet, once torture has occurred, the information has irresistible uses. Removed from its site of production, information acquired by torture seems to be information like any other. And given that torture typically occurs in contexts where all witnesses (except the tortured person) are ready to deny the torture, it is difficult to prove that any particular statement has been produced by torture.

This paper examines the reaction of courts in the US, the UK and Germany to the introduction of evidence acquired by torture and other forms of coercion in terrorism trials after 9/11. While almost all legal systems have rules prohibiting the use of coerced evidence against the person coerced, the rules are typically far less clear with respect to a) third-party statements, in which a third party is coerced to provide information about other people and b) derivative statements, in which coerced evidence leads investigators to useful information outside the interrogation context. Courts in terrorism trials in the US, UK and Germany have used evidence that was almost certainly acquired by torture and was at the very least acquired by extraordinary coercion. Because these cases reveal that tortured evidence can be used to produce terrorism convictions, there remains an incentive to torture. This produces a metastasis of torture -- encouraging the practice of torture by allowing information acquired by torture to spread through systems of proof around the world.