Unwarranted Torture Warrants: A Critique of the Dershowitz Proposal

J. Jeremy Wisnewski

I. The Argument for Torture Warrants

Unlike many versions of the ticking-bomb argument (where the use of torture is hypothetically postulated as the only way to save innocent lives), Alan Dershowitz’s defense of torture is aimed to reduce, rather than to morally justify, the use of torture. As Dershowitz has repeatedly claimed, in print and in interviews, torture is morally repugnant. This (intuitive) view, however, is insufficient (on Dershowitz’s view, as on Michael Walzer’s) to decide whether or not torture might be politically justified in particular cases. Dershowitz claims that, given the inevitability of torture, as a democracy we simply must provide some judicial oversight of this practice. Such oversight (in the form of “torture warrants”), Dershowitz claims, will limit the amount of torture currently practiced by agents of the U.S. government. As Dershowitz plainly claims, the “goal [of the advocacy of torture warrants] was, and remains, to reduce the use of torture to the smallest amount and degree possible, while creating public accountability for its rare use” (TR, 259).¹

Dershowitz’s defense of torture, of course, is predicated on the notion that torture is a fact of political reality—and one we have no chance of eliminating. This view leads him to pose the torture question as a sharp either/or:

if torture is being or will be practiced, is it worse to close our eyes to it and tolerate its use by low-level law enforcement officials without accountability, or instead to bring it to the surface by requiring that a warrant of some kind be required as a precondition to the infliction of any type of torture under any circumstances? (TR, 257)

The dichotomy is a false one.² If these were our only options (use of torture by low-level officers with no accountability or use of a warrant), there would not be much of a choice. But the issue is not simply a decision between accountability and its absence.

The Dershowitz proposal has been subjected to a number of criticisms, most of which are quite perceptive. These criticisms usually point out that torture warrants (1) would lead to the increase of torture, (2) face immense practical obstacles, (3) would degrade the judiciary, and (4) would degrade “the core values on which the democratic state rests” (365).³ I will not rehearse arguments adequately—and often more than adequately—made elsewhere.⁴
My aim in the current article is to demonstrate that Dershowitz’s either/or, resting as it does on a claim about the efficacy of torture warrants, faces several (perhaps lethal) lines of objections. After demonstrating that using torture warrants (on the basis of their supposed ability to reduce instances of torture) is unwarranted, I will turn my attention (albeit briefly) to what I regard as a rather strange tension in Dershowitz’s work between the need for debate in a healthy democracy, on the one hand, and his rather undemocratic argument that torture warrants are required if torture is inevitable, on the other.

II. The Diminished Harm Argument

Dershowitz claims that torture warrants might actually decrease the number of torture cases that occur. As he says, “I cannot see how [a warrant requirement] could possibly increase [torture], since a warrant requirement simply imposes an additional level of prior review” (TR, 270). In this section, I intend to demonstrate three ways that warrants might have no efficacy in diminishing the harm inflicted by torture by reducing its occurrence. I will then suggest why torture warrants might actually increase the amount of torture currently practiced in the world.

My argument against Dershowitz’s view would undoubtedly be stronger if I could demonstrate conclusively that torture warrants would increase torture. Unfortunately, there are not sufficient data for either Dershowitz or myself to establish such empirical assertions in any conclusive way. My aim is thus to show that we must remain agnostic about the effectiveness of warrants—that we have as much reason to suspect that warrants will increase torture as we do to think they will decrease it. This argumentative strategy has the effect (or ought to) of eliminating Dershowitz’s proposal (and those like it) from the debate—at least until some compelling empirical evidence can be produced to support Dershowitz’s view over the objections I will here raise against it.

I. A Logical Argument against Efficacy

The creation of a process of judicial review along Dershowitzian lines would legalize certain instances of torture (namely, those that were conducted after a warrant for said torture was acquired). The problem in our current situation, however, is that, despite torture’s illegality, people are still engaging in it. This demonstrates a disregard for the commitment to law, as well as a disregard for the seriousness of torture. Establishing a level of judiciary review could not possibly fix this problem—and it is this (a failure to respect the law in regard to torture) that is arguably the source of our current predicament. Making some instances of torture legal will not get people to respect the law regarding torture any more than an outright legalization of all torture would. Thus, it seems strange to claim that judiciary review would decrease the occurrence of torture. Asking people to acquire a torture warrant to limit the occurrences of torture
may well have no effect at all, given that telling people that \textit{all torture is morally abhorrent and illegal} does not prevent torture. Establishing a review process will not get those who currently do not respect the rule of law to miraculously \textit{begin} respecting the law. It thus seems, on my view, that torture warrants will have little effect—with the exception that some torture might occur with even more impunity.

In defense of the view that torture warrants would facilitate the decrease in instances of torture, Dershowitz has presented the following examples:

1. Alleged wiretaps of Martin Luther King, Jr. “This was in the days when the attorney general could authorize a national security wiretap without a warrant. Today no judge would issue a warrant in a case as flimsy as that one” (TR, 271).
2. The detention of Zaccarias Moussaui “after trying to learn how to fly an airplane, without wanting to know much about landing it” (TR, 271). In this case, no warrant was sought, because it was believed that one would not have been granted.

If the torture case is like these, Dershowitz contends, requiring warrants will prevent instances of torture, much as requiring warrants now for wiretaps (arguably) has the effect of limiting the number of wiretaps used.

Let us ignore the questionable view that fewer wiretaps are currently used. Even if what Dershowitz says about these cases is accurate, these cases cannot be said to be analogous to the case of torture. When wiretaps did not require a warrant, there was not a disincentive to use them (it was not illegal to use them). In the case of torture, however, there \textit{is} a current disincentive (namely, torture is illegal, against the sworn policy of the United States, a signatory of the International Convention against Torture). Changing the law, in the case of warrants, actually \textit{creates} a disincentive where none existed (using wiretaps becomes illegal). Torture warrants, however, would \textit{not} create a disincentive (torture is already illegal). The most it would do would be to encourage people to acquire warrants when they had a reasonable chance of doing so. If they failed to get a warrant, or thought that they would not get said warrant, there would be no \textit{additional} disincentive for refraining from torture. With or without a warrant, torture in such a case is illegal. This, I think, is sufficient to show that Dershowitz cannot rely on these particular examples to demonstrate that torture warrants would have an impact on the number of occurrences of torture in any country that instituted a policy requiring such warrants.\footnote{Dershowitz offers the following response to this line of objection: “There are of course no guarantees that individual officers would not engage in abuses on their own, even with a warrant requirement. But the current excuse being offered—we had to do what we did to get information—would no longer be available, since there would be an authorized method of securing information in extraordinary cases by use of extraordinary means” (TR, 276).}
To call this a response is actually rather generous. Dershowitz is indeed acknowledging the issue—but he offers no additional argument against the objection just raised. Rather, he seems here to simply reassert his view. Moreover, it is unclear in what sense it is true that the excuse of “seeking information” will be unavailable. Torturers could simply claim that the judiciary review overlooked their case, or that there was not adequate time to seek judiciary approval. It is in the nature of excuses that they are infinitely adaptable. No warrant process will make this less so.

2. An Historical Argument against Efficacy

In Why Terrorism Works, Dershowitz claims that evidence for his view about the efficacy regarding torture warrants can be culled from the pages of history. The practice of European courts in the sixteenth century, where torture warrants were commonly issued in order to acquire a confession from a suspect, does indeed present an example of the use of something akin to torture warrants—but this example hardly demonstrates what Dershowitz thinks it does.

Dershowitz thinks that this historical precedent constitutes evidence for his case that torture warrants can be an effective means of limiting the occurrences of torture, and that it can be appropriately used as a means to save lives. “We find it difficult to imagine a benign use of nonlethal torture to save lives . . . but there was a time in the history of Anglo-Saxon law when torture was used to save life, rather than to take it, and when the limited administration of nonlethal torture was supervised by judges, including some that are well remembered in history” (WTW, 156).

Dershowitz, it should be noted, is simply mistaken here. Torture was never a part of English judicial proceedings. Judges could not issue torture warrants. The Privy Council could issue such warrants, for a brief period, but this never became part of standard judicial procedure. As Langbein unequivocally states, “The system of judicial torture was never known in England” (99). As Langbein explains, “because the English never lodged the power to investigate under torture with ordinary law enforcement officers or courts, this century of experiment with torture [1540–1640] left hardly a trace in the Anglo-American criminal procedure” (ibid., 100). Moreover, the extra-legality of torture during this period was attested to by the best legal minds of the day. Thus, when Dershowitz writes that “the English system of torture was more visible and thus more subject to public accountability,” he is simply mistaken (WTW, 158).

But Dershowitz might have appealed to the situation in continental Europe to provide historical examples of the use of torture warrants. In European courts in this period, a series of restrictions developed around the use of torture to obtain evidence. To establish the guilt of those being prosecuted for “blood sanctions,” a prosecutor required either two eye-witnesses to the crime or a confession on the part of the suspected criminal. These high standards of proof also explain the substantial restrictions surrounding the use of torture: One could torture only when
there was either one eye-witness or substantial circumstantial evidence establishing the probable guilt of the person to be tortured—and then only if the courts agreed that the evidence warranted proceeding with the torture (in effect, issuing a torture warrant). Moreover, questioning under duress could not be leading. The suspect needed to provide information that could be corroborated by the courts (such as the location of a murder victim, or a weapon, or of stolen goods). The confessions procured through torture were, then as now, inadmissible in courts. Thus, confession had to be repeated in the court when no torture was taking place.7

But does this historical precedent actually show what Dershowitz claims that it does? As Dershowitz admits:

> it is always difficult to extrapolate from history, but it seems logical that a formal, visible, accountable, and centralized system is somewhat easier to control than an ad hoc, off the books, under-the-radar-screen nonsystem. I believe, though I certainly cannot prove, that a formal requirement of a judicial warrant as a pre-requisite to nonlethal torture would decrease the amount of physical violence directed against suspects. (WTW, 158)

As Steinhoff has (correctly) remarked, Dershowitz “should offer something more than his personal ‘belief’” (347).8 As we have thus far seen, there are substantial logical problems with the view that warrants are likely to decrease the frequency of torture. As I argued previously, for those who act regardless of the law, warrants will likely make no difference whatsoever to their conduct. A failure to get a warrant will not necessarily translate into refraining from torture. Nevertheless, it might well be the case that a judicial procedure would limit the number of others who might engage in the practice. (Though, again, the opposite argument seems just as plausible: those who refused to torture based on its illegality might now pursue torture as a means of interrogation in cases where they would not have done so before.) Does the European case give us reason to think one thing rather than another?

Dershowitz thinks that Langbein’s work constitutes evidence for his view. Langbein, however, does not agree. As Langbein points out:

> The European law of torture was suffused with the spirit of safeguard, yet it was never able to correct for the fundamental unreliability of coerced evidence. . . . I see little reason to think that modern circumstances would make investigation under torture more reliable. . . . History’s most important lesson is that it has not been possible to make coercion compatible with truth.9

Obviously, Langbein could be wrong about what history shows, and Dershowitz could be right. It will not do to simply appeal to authority in this case as an absolute arbiter in the dispute about what the historical record shows. However, it does make considerable sense to pay attention to those who have a strong familiarity with the historical record, all the while acknowledging their fallibility. Given that Dershowitz acknowledges the authority of Langbein’s analysis of the historical record of torture—and indeed even relies on this analysis—we have reason to
seriously consider Langbein’s appraisal of this record when considering Dershowitz’s proposal. No one would dispute, I think, which of these two men has more familiarity with the historical documents. Although this certainly does not demonstrate that Dershowitz’s interpretation of the judicial system of Europe in this period is mistaken, it does demonstrate that there is substantial reason to insist that Dershowitz provides much more argument to establish his case. In short, the claim that the historical record shows us that torture warrants can be effective, and that, moreover, these warrants will result in a decrease in the instances of torture, simply has not been adequately justified.

3. An Empirical Argument against Efficacy

There is a rather surprising set of empirical data, collected and analyzed by Oona A. Hathaway in “The Promise and Limits of the International Law of Torture,” that is relevant to the current issue. As I will argue, Hathaway’s analysis provides some evidence for the view that torture warrants will not decrease instances of the use of torture (though the evidence certainly does not constitute proof).

Instituting judicial review of torture (i.e., having torture warrants) would essentially make torture a legal activity insofar as a warrant was issued. If torture were so legalized in the United States, this would constitute, essentially, a breach of the UN Convention against Torture. I here assume that such a breach would constitute a renunciation of this particular legal document by the United States. There is a tricky legal issue here, as, according to the U.S. Senate, “cruel, inhuman or degrading treatment or punishment” is interpreted to cover only those things “prohibited by the Fifth, Eighth, and/or Fourteenth Amendments.” As John Parry sums up, “the Senate declared that the convention bans conduct that is already unconstitutional” (150). Thus, if “torture” were legalized (and survived any potential threats to its constitutionality), it would not be “torture” as defined in the version of the UN Convention against Torture that the United States ratified. I will not spend any time considering this rather sophistic argument. Let us simply assume that torture warrants are warrants for actual torture.

Hathaway has analyzed the practices of more than 160 nations over a forty-year period in an attempt to understand the effect of the UN Convention against Torture on actual torture practices. Hathaway has found what can only be described as surprising results. To wit: “nondemocratic nations that reportedly use torture frequently are more likely to join the Convention than nondemocratic nations that reportedly use torture infrequently” (202); moreover, “as democracies’ torture ratings grow worse, they are increasingly less likely to make legal commitments that prohibit them from engaging in torture . . . the opposite is true of dictatorships: those with worse reported torture practices are more likely to join the Torture Convention than those with better reported practices” (ibid., 203).

The explanation for this asymmetry, on Hathaway’s (quite plausible) account, has to do with the presence of effective domestic institutions. Dictatorships are
quick to sign the Convention due to the high benefit-to-cost ratio. Because there are no internal mechanisms for the enforcement of international law in dictatorships, and because occurrences of torture are difficult to detect by other states, the commitment of a nondemocratic state to the Convention has virtually no downside. “States join treaties like the Convention against Torture in no small part to make themselves look good...they may hope to attract more foreign investment, aid donations, international trade, and other tangible benefits” (ibid., 207).

In democracies, on the other hand, there are domestic institutions by which international agreements can be enforced. As Hathaway argues, “much of international law is...obeyed primarily because domestic institutions create mechanisms for ensuring that a state abides by its international legal commitments, whether or [sic] not particular governmental actors wish it to do so” (ibid., 206). In states that lack the ability to create such mechanisms, worries about enforcement of international law by domestic means are substantially diminished, if they occur at all.

Now, it would certainly be too hasty to conclude from these data that all democracies not taking part in this treaty are engaged in more torture than those that are. The data present correlation, after all, not cause. For the same reason, we cannot infer that a single state, were it to abandon its commitment to the Convention, would thereby increase the amount of torture in which it engaged. The (plausible) cause postulated in Hathaway’s analysis (in the case of democratic states) might not work the same way in reverse. That is, even if the ability of domestic institutions to enforce international law can explain why certain democracies are less likely to sign the Convention (namely, because signing the Convention would require a potentially high cost—viz. abandoning practices of torture), it does not follow from this that a state that abandoned its commitment to the Convention will thereby, automatically, increase its torturous practices.

To put this point bluntly, the data in Hathaway’s work do not constitute a refutation of Dershowitz’s efficacy claim regarding torture warrants (nor, of course, were they meant to). But while we do not have a refutation of Dershowitz’s claim, we do have, at an absolute minimum, data that offer an additional reason against his hunch that torture warrants will diminish the instances of torture in the United States. Given what we know about democracies who are not signatories of the Convention, claims that those who are no longer claiming to follow the Convention will decrease torture deserve additional skepticism and scrutiny. It is this, I think, that Dershowitz owes us before we take seriously his proposal for the use of torture warrants.

4. United States as Role-Model for International Law

There is a final objection that I want (briefly) to mention. The objection, as the one before, is not decisive. Rather, it provides an additional reason to pause when considering Dershowitz’s “torture warrant” proposal. Dershowitz claims that the
United States sets precedent in international law when it makes a particular legal decision at home. If this is correct, then establishing a torture warrant policy might actually increase the total amount of torture in the world, as those nations who would have been less likely to engage in torture might well follow the lead of the United States.

I mention this objection only because it demonstrates, in my view, some of the fuzzy thinking surrounding Dershowitz’s proposal. Although Dershowitz might well claim that he is only concerned with U.S. torture, such an assertion seems like a disastrously short-sighted one. When we are talking about decreasing torture, we must consider this in terms of the international scene. If Dershowitz is moved by the ticking bomb argument, he should also be moved by an analogous one: if the United States tortures, it will lead other nations to torture. Thus, unless we take an absolutist stance against torture (something that Dershowitz regards as bad, much like torturing), there will be disastrous consequences (a greater evil that must be avoided, much like the detonation of a ticking bomb). The logic of the ticking bomb argument here works against one of its advocates.

III. The No-Hypocritical-Democracy Argument

Dershowitz thinks that torture, if it is to be used at all, must be used under judiciary (or perhaps executive) rule. The majority of U.S. citizens (as well as citizens of many other countries) are sometimes said to think that torture is acceptable in ticking-bomb cases.15 If this is indeed the will of the people, Dershowitz contends, then we should subject this policy to the appropriate oversight. A “don’t ask, don’t tell” policy on torture, in Dershowitz’s reasoning, is simply unacceptable.

Dershowitz’s case for torture warrants makes heavy use of the worry that not having some sort of judicial review will lead to a nation of hypocrisy. This, it might be objected, misplaces our moral priorities. While it is certainly morally lamentable to engage in hypocrisy, this is hardly comparable to engaging in torture! To suggest, as Dershowitz does, that our hypocrisy is a reason for an open torture policy is, one objection runs, a severe overestimation of the importance of practicing what one preaches.

A quick example will bring the force of this objection out. Imagine an avid killer who kills only in secret. This killer routinely speaks out against killing. We might imagine he even works for a company that attempts to thwart human rights abuses. Now, certainly this hypocrisy is lamentable. What this hypocrisy is not, however, is a reason for our killer to begin to claim that his killing is acceptable when he does it under the right conditions. Even if it is right, the attempt to avoid hypocrisy is no reason to defend its rightness. Indeed, the only reason to defend a true claim is that it is true. (This same example can be given with a hypocritical smoker, smoking in secret, and telling others not to. His hypocrisy is not a reason to endorse smoking.)
But perhaps this is unfair to Dershowitz. Perhaps there is a subtler view that leads to the condemnation of hypocrisy (at least in a democracy) with such vehemence. In responding to worries about the possible legitimation of torture through the introduction of legal warrants, Dershowitz remarks that “off-the-book actions below the radar screen” are:

antithetical to the theory and practice of democracy. Citizens cannot approve or disapprove of governmental actions of which they are unaware. . . . In a democracy governed by the law, we should never want our soldiers to take any action that we deem wrong or illegal. A good test of whether an action should or should not be done is whether we are prepared to have it disclosed—perhaps not immediately, but certainly after some time has passed. (WTW, 152)

So, what seems to lurk behind Dershowitz’s hatred of hypocrisy is actually a rather compelling view: at the heart of democratic governance (at its best) is deliberative practice. To ignore secretive practices, pretending they do not exist, on Dershowitz’s view, would be a disastrous development for our nation—one that would tear at the very essence of what is worthwhile in democratic governance.

I find this claim about democracy absolutely compelling. The existence of practices that are not subject to scrutiny and critical evaluation is antithetical to democracy. What I dispute is that this point warrants engaging in torture. This is simply nonsequitur. What it warrants is a moratorium on torture until we have had an adequate debate. Dershowitz is right to say that “if we tolerate torture, but keep it off the books and below the radar screen, we compromise principles of democratic accountability” (WTW 153), but he is mistaken to maintain that this constitutes support for the torture warrant policy. To institute a torture warrant policy so that we have judicial oversight of a once-secret practice is itself antithetical to democracy, at least if such a policy is not the result of clear thinking and argument among the citizens within that democracy. If there were not a clear majority in favor of such practices, then we should tread much more carefully.

Of course, Dershowitz claims, based largely on anecdotal evidence, that the majority of U.S. citizens are in favor of using torture in some cases (based on the responses of his law students to questions asked in class). There are some data to consider. A Newsweek poll finds that:

Most Americans and a majority of people in Britain, France and South Korea say torturing terrorism suspects is justified at least in rare instances, according to AP-Ipsos polling. . . . The United States has drawn criticism from human rights groups and many governments, especially in Europe, for its treatment of terror suspects. President Bush and other top officials have said the U.S. does not torture, but some suspects in American custody have alleged they were victims of severe mistreatment. . . . The polling, in the United States and eight of its closest allies, found that in Canada, Mexico and Germany people are divided on whether torture is ever justified. Most people opposed torture under any circumstances in Spain and Italy. . . . In America, 61 percent of those surveyed agreed torture is justified at least on rare occasions. Almost nine in 10 in South Korea and just over half in France and Britain felt that way. . . . The polls of about 1,000 adults in each of the nine countries were conducted between Nov. 15 and Nov. 28 [of 2006]. Each poll had a margin of sampling error of plus or minus 3 percentage points.
Now, sixty-one percent is a majority. But notice, the commitment to a practice of open debate in democracies does not amount to majoritarian rule. If Dershowitz wants the policy debated, he cannot rely on this (rather narrow) margin to justify implementing a policy of torture warrants. There is reason to suspect that our data on the purported acceptability of torture are colored, not by rational deliberation and scrutiny, but by the post-9/11 zeitgeist. Indeed, much of the dialogue about torture has not had the status of actual deliberation, focusing instead on prejudicial, irrational attitudes, and on scenarios that have little concrete relevance to a debate concerning torture warrants. Moreover, the polling data are not consistent. Consider data collected from a (much larger) poll, where participants were asked what position was closest to their own (all results are given in percentages; the positions stated in the poll are listed at the top of the table).\textsuperscript{18}

BBC global torture poll, 2006:

<table>
<thead>
<tr>
<th>Country</th>
<th>Terrorists pose such an extreme threat that governments should now be allowed to use some degree of torture if it may gain information that saves innocent lives</th>
<th>Clear rules against torture should be maintained because any use of torture is immoral and will weaken international human rights standards against torture</th>
<th>Neither/Don’t know</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>22</td>
<td>75</td>
<td>3</td>
</tr>
<tr>
<td>Brazil</td>
<td>32</td>
<td>61</td>
<td>8</td>
</tr>
<tr>
<td>Canada</td>
<td>22</td>
<td>74</td>
<td>4</td>
</tr>
<tr>
<td>Chile</td>
<td>22</td>
<td>62</td>
<td>16</td>
</tr>
<tr>
<td>China</td>
<td>37</td>
<td>49</td>
<td>13</td>
</tr>
<tr>
<td>Egypt</td>
<td>25</td>
<td>65</td>
<td>9</td>
</tr>
<tr>
<td>France</td>
<td>19</td>
<td>75</td>
<td>6</td>
</tr>
<tr>
<td>Germany</td>
<td>21</td>
<td>71</td>
<td>7</td>
</tr>
<tr>
<td>India</td>
<td>32</td>
<td>23</td>
<td>4</td>
</tr>
<tr>
<td>Indonesia</td>
<td>40</td>
<td>51</td>
<td>45</td>
</tr>
<tr>
<td>Iraq</td>
<td>42</td>
<td>55</td>
<td>8</td>
</tr>
<tr>
<td>Israel</td>
<td>43</td>
<td>48</td>
<td>1</td>
</tr>
<tr>
<td>Italy</td>
<td>14</td>
<td>81</td>
<td>9</td>
</tr>
<tr>
<td>Kenya</td>
<td>38</td>
<td>53</td>
<td>6</td>
</tr>
<tr>
<td>Mexico</td>
<td>24</td>
<td>50</td>
<td>9</td>
</tr>
<tr>
<td>Nigeria</td>
<td>39</td>
<td>49</td>
<td>27</td>
</tr>
<tr>
<td>Philippines</td>
<td>40</td>
<td>56</td>
<td>12</td>
</tr>
<tr>
<td>Poland</td>
<td>27</td>
<td>62</td>
<td>5</td>
</tr>
<tr>
<td>South Korea</td>
<td>31</td>
<td>66</td>
<td>12</td>
</tr>
<tr>
<td>Russia</td>
<td>37</td>
<td>43</td>
<td>19</td>
</tr>
<tr>
<td>Spain</td>
<td>16</td>
<td>65</td>
<td>3</td>
</tr>
<tr>
<td>Turkey</td>
<td>24</td>
<td>62</td>
<td>19</td>
</tr>
<tr>
<td>Ukraine</td>
<td>29</td>
<td>54</td>
<td>14</td>
</tr>
<tr>
<td>UK</td>
<td>24</td>
<td>72</td>
<td>18</td>
</tr>
<tr>
<td>USA</td>
<td>36</td>
<td>58</td>
<td>7</td>
</tr>
<tr>
<td>Average</td>
<td>29</td>
<td>59</td>
<td>12</td>
</tr>
</tbody>
</table>
As this makes clear, it is by no means evident that the majority of U.S. citizens do support the use of torture in particular cases. Whereas the Newsweek poll has the number at sixty-one percent, the BBC poll has the number at thirty-six percent. It is difficult to know which poll more accurately represents the actual beliefs of U.S. citizens. Nevertheless, as I have hopefully shown, even if there is a clear majority of supporters at this time, this is not sufficient to implement the Dershowitzian proposal. As Dershowitz himself acknowledges, an actual debate concerning the very existence of torture is what is required.

Interestingly, Dershowitz’s call for debate stands in remarkable tension with his claim that the inevitability of torture constitutes a reason for implementing his policy recommendation (the claim, the reader will recall, with which we began). It seems that Dershowitz wants a debate about the frequency of torture rather than about its appropriateness (at least when he focuses on his inevitability argument). If what matters is debate, then the inevitability of torture is irrelevant in a democracy. What matters is openness about what is happening on the ground, and the willingness to subject it, as well as the policy around it, to critical scrutiny. If the inevitability argument works, though, our deliberations about allowing torture are irrelevant, as it will happen regardless of our deliberation (and hence we should have a policy of warrants, claims Dershowitz).

I see no easy way to resolve this tension. Dershowitz cannot defend both arguments without inconsistency. If he opts to defend the view (which I accept) that we must have an open debate about our policies, then he has not established that torture warrants are warranted on the basis of a desire for accountability. If, on the other hand, Dershowitz thinks that the inevitability of torture warrants the use of torture warrants, it follows that the debate about whether to allow torture is a nonstarter. But Dershowitz cannot, so far as I can see, have it both ways.

But perhaps I am being unfair to Dershowitz. Perhaps his aim in suggesting a policy of torture warrants is to contribute to a debate about torture rather than to end that debate. Consider his remarks:

There is of course a fourth road: namely to forego any use of torture and simply allow the preventable terrorist act to occur.... But it is clear that if the preventable act of terrorism was of the magnitude of the attacks of September 11, there would be a great outcry in any democracy that had deliberately refused to take preventive action, even if it required the use of torture. During numerous public appearances since September 11, 2001, I have asked audiences for a show of hands as to how many would support the use of nonlethal torture in a ticking bomb case. Virtually every hand is raised.... The real issue, therefore, is not whether some torture would or would not be used in the ticking bomb case—it would. The question is whether it would be done openly, pursuant to a previously established legal procedure, or whether it would be done secretly, in violation of existing law. (WTW, 151)

Is Dershowitz simply contributing to an urgently needed debate here? If so, his suggestion seems disingenuous. His claim is that the issue—the debate here—is between two simple options: to legalize (in some democratic procedure, to be sure), or not to legalize.
This hardly seems like a real debate starter about whether or not we should torture. In effect, it is just the opposite—it seems to function so as to end any real debate, and replace it with a debate of the form “hypocrisy or not?” While this does not entail that Dershowitz is not willing to carry on a debate, it does entail that the terms of the debate have already been set: one option that has been taken off the table for Dershowitz is the one outlined in the UN Convention against Torture—namely, that torture is never permissible, under any circumstances, and that we should do everything we can to enforce this particular position.

My claim here is not that Dershowitz does not want a debate about torture. He does want that debate about warrants. The inevitability argument, however, essentially eliminates the option of an absolute ban on torture (or so Dershowitz contends). Here, as elsewhere, Dershowitz refuses to ask the question of whether or not we should torture. That is a debate he is not interested in having. Dershowitz wants to accept the pre-reflective, gut-reaction views of his audiences—the hands that are raised at his talks—rather than to challenge those in open democratic deliberation. This is ironic, if Dershowitz is trying to avoid allowing agents of the state to act on emotion and gut-reactions when interrogating potential terrorists. If we require a deliberative process for interrogators, we should also require a deliberative process of ourselves in thinking about what types of interrogation should be carried out in our name. Even if it is the case that everyone would torture in a ticking-bomb case (as Dershowitz contends), the appeal to democratic debate entails that we should not begin by simply accepting the gut-reactions of those inhabiting a fearful post-9/11 world. What we should do, rather, is to engage in careful deliberation about whether or not we should torture at all, regardless of our gut-reactions. Only after we have had this debate will we be in a position to discuss torture warrants.

I thus want to reiterate doubt that Dershowitz’s call for a debate can stand together with his claim that torture is inevitable. Dershowitz refuses to ask the normative question about torture (is it ever morally permissible?). Instead, he relies on our gut-reactions to ticking-bomb scenarios to shape the debate into a dangerously simplified either/or: torture warrants or hypocrisy. If democratic politics requires an open forum in which debate can be carried out—in which all ideas and options can be given voice and criticized—then Dershowitz’s appeal to a “no-hypocrisy” argument is itself somewhat hypocritical: he insists that we debate torture openly, but only if our debate acknowledges that we cannot permit an absolute ban. As a rhetorical tool, this is undoubtedly clever; an honest contribution to democratic deliberation, however, it is not.

Notes

1 Alan Dershowitz, “Tortured Reasoning,” in Torture: A Collection, ed. Sanford Levinson (Oxford and New York: Oxford University Press, 2004), 257–80. Portions of the article included in this collection were first published as chapter 4 of Dershowitz’s Why Terrorism Works (New Haven and London: Yale University Press, 2002). In what follows, I will cite both versions of this
material, as some of Dershowitz’s arguments are more effectively, or more thoroughly, stated in one publication rather than another. I will use abbreviations of titles (TR and WTW) to make clear which version is being cited. It should also be noted that Dershowitz has promoted this view in numerous newspaper articles, as well as on network television. Hence its importance.

2 And Dershowitz is well aware of this. He lists five alternative choices in responding to torture (though one in a footnote) in WTW, see chapter 4, pp. 149–50, and note 25, p. 251.


5 Uwe Steinhoff has recently raised this objection, albeit without reference to incentive talk. As Steinhoff points out, although Dershowitz thinks these two examples support his case, “[w]hat his examples show (if they show anything) is that an attorney general who is authorized to put a wiretap without judicial warrant is more likely to put a wiretap than an attorney general who does need a warrant. However, the question to be answered is whether torture would be less likely under a requirement of a judicial warrant than under a total ban” (347). See Uwe Steinhoff, “Torture—The Case for Dirty Harry and against Alan Dershowitz,” Journal of Applied Philosophy 23, no. 3 (2006): 337–53.


8 Steinhoff, “Torture,” 347.


14 Ibid., 202.

15 Statistics obviously admit of quite a range, some of which can be accounted for by the time and place of the polling. One poll, discussed below, puts the percentage of Americans that accept torture under some circumstances at sixty-one percent (another, also discussed below, puts the percentage at 36).


Dershowitz claims that Scarry’s response (that we should decide about the fate of a torturer after the fact—there should be no policy for engaging in torture) is inadequate. He seems to conflate two positions: (1) having no policy regarding torture, and (2) having a “decide on the ground” policy. He attributes (2) to Scarry, which he then rightly criticizes—but this is not Scarry’s view. Her view, rather, is (1). See her “Five Errors.”
“Poll Finds Broad Approval of Terrorist Torture,” Americas, MSNBC.com, http://www.msnbc.msn.com/id/10345320/. Last consulted on August 17, 2007. It should be noted, of course, that other polls put the percentage of Americans’ approving of torture much lower. I will discuss this below.


I am indebted to an anonymous referee for pushing me on this point.