Fall 2011

To What Extent Is Judicial Intervention against Torture a Hollow Hope: Reflections on the Israeli and American Judicial Experiences since 2001

Sanford Levinson

Follow this and additional works at: http://digitalcommons.law.utulsa.edu/tlr

Part of the Law Commons

Recommended Citation

Available at: http://digitalcommons.law.utulsa.edu/tlr/vol47/iss2/6

This Legal Scholarship Symposia Articles is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact daniel-bell@utulsa.edu.
TO WHAT EXTENT IS JUDICIAL INTERVENTION AGAINST TORTURE A “HOLLOW HOPE”? REFLECTIONS ON THE ISRAELI AND AMERICAN JUDICIAL EXPERIENCES SINCE 2001

Sanford Levinson*

I begin with what should be obvious: I am sure that I am not the only person here who regards Aharon Barak as a personal hero. I have been privileged to know him since 1984, when I met him while spending a semester in Jerusalem as a visiting professor at the Faculty of Law at the Hebrew University. Many of his opinions have been genuinely inspirational with regard to the role of the judge in helping to create the central aspiration of our own Constitution, to establish justice and to create a more perfect Union. Whether or not Barak was successful, as an empirical matter, he devoted his best efforts to what I believe to be undeniably commendable goals, as one would expect of someone whose jurisprudence emphasizes the necessity of a judge taking purposes into account when construing legal materials. I am also sure that I am not unique in remembering not only remarkable conversations at his dinner table, but also remarkable — almost literally incredible — displays of hospitality. There was simply no hesitation on my part in accepting the invitation to return to Tulsa to honor this truly wonderful judge and human being.

The topic of the panel was what role judges should play with regard to monitoring interrogation of those deemed threats to state security. When accepting the initial invitation to participate, I pledged to offer some reflections on the American experience over what is now a full decade since the iconic date of September 11, 2001. In the course of transforming very sketchy intentions into an actual presentation and paper, however, I found myself reflecting a great deal on the quite stunning differences between the behavior of the Israeli Supreme Court and our own. Owen Fiss’s accompanying paper is an eloquent and heartfelt lament about the almost willful withdrawal of the United States Supreme Court from consideration of many of the issues surrounding the “war on terror,” including interrogation.¹

The interrogation of alleged terrorists — and its potential monitoring by the judiciary — is a topic of obvious importance to Israel, which has from its inception suffered from justified fear of those who wish the state and its people ill, even if some of

* W. St. John Garwood and W. St. John Garwood Jr. Centennial Chair in Law, University of Texas Law School; Professor of Government, University of Texas at Austin. I am grateful to the editors of the Tulsa Law Review for organizing this important symposium about one of the judicial giants of the past century.

us also believe that on occasion the fears go beyond what is justified into near paranoia. But, as the old joke goes, even paranoids have enemies, and one would have to be willfully ignorant to believe that Israel is lacking in enemies. In more recent years, of course, the same phenomena have been true of the United States, which basically remains traumatized by the events of September 11. The attack on the World Trade Center symbolizes an important development analyzed at length by my friend and sometime colleague Philip Bobbitt. His fundamental work, *Terror and Consent*, emphasizes, among other things, the role played now and into the foreseeable future by the evil twin of NGOs, in this case the rise of well-organized non-state institutions — Bobbitt sometimes refers to them as “virtual state[s]” — who have as one of their defining projects, wreaking havoc through acts of terrorism.² These acts, however horrendous, are quite rational inasmuch as they are designed, in substantial measure, to challenge the capacity of existing states to fulfill what is perhaps the most fundamental responsibility of the state, which is to provide security against physical threats.

Thomas Hobbes famously attributed the rise of the modern state to the desire by the populace for such security. Without the state, life is likely to be “nasty, brutish, and short.”³ With a state — and, of course, in Hobbes’s case an all-powerful sovereign executive that he named “Leviathan” — life takes place under greater conditions of security. As another great — and often ominous — political theorist, Machiavelli, writes, for most people “it is enough to live secure” and to leave the practicalities of governance to princes who will provide that boon.⁴ Both Hobbes and Machiavelli seem to describe decidedly non-romantic citizens (or subjects), relying far less on patriotic identification than on hard-headed calculation when deciding where their loyalties lie. This is especially the case in a modern world where emigration is, especially for the well-educated, well-off, or otherwise talented, a very real possibility. To the extent that the state can no longer provide basic security, it will inevitably become delegitimized in the eyes of its inhabitants.

Bruce Ackerman, a colleague of Barak’s and Owen Fiss’s at the Yale Law School, expresses in the body of his work some especially interesting tensions with regard to the state’s necessity to instill confidence in its citizenry about its ability to provide basic security. His most recent book, *The Decline and Fall of the American Republic*, is written from a decidedly different perspective than Bobbitt’s (or, for that matter, Hobbes’s or Machiavelli’s).⁵ In many ways, it is a perfect exemplar of what Adrian Vermeule and Eric Posner have sneeringly dismissed as “tyrannophobia,”⁶ inasmuch as it expresses an overriding concern that the United States is inexorably sliding into a form of presidential tyranny. Indeed, the most recent manifestation for Ackerman (and others)

---

². See *Philip Bobbitt, Terror and Consent: The Wars of the Twenty-First Century* 93 (First Anchor Books ed. 2009).
⁵. *Bruce Ackerman, The Decline and Fall of the American Republic* (2010).
of this slide is the almost casual assumption on the part of the Obama Administration that it is up to the President alone to take one of the primary stories du jour, to decide whether to impose a “no-fly zone” on Libya, a country with which the United States is not at war. The Administration apparently relies on a mixture of the President’s power to conduct foreign relations and his role as Commander-in-Chief of the armed forces, an argument that would have drawn significant opposition from many political liberals had it been made in similar circumstances by the Bush Administration.

It may well be the case that the Obama Administration has sought approval for its actions from the Office of Legal Counsel (“OLC”) within the Department of Justice, which, along with the growth of the White House Counsel’s office, is the target of independent critique by Ackerman. There is, of course, almost no sense in which one can describe the quasi-judicial OLC as “independent.” After all, one implication of the so-called “unitary” view of the Executive Branch is that the President has plenary control over the Department of Justice and any of its employees who are not covered by civil service protections. The Attorney General is basically hired — and can be fired — by the Chief Executive (subject to Senate confirmation at the hiring stage). I note, for what it is worth, that this subordination of the Attorney General to the power of the Chief Executive is rejected by 48 of the 50 American states, most of whom elect their attorneys general who are and frequently are from the governor’s own political party or otherwise do not share the governor’s own political agenda. For these states, the principle of “attorney general independence” may be less important than the more commonly feted “judicial independence.” Each, after all, involves liberating these public officials from undue influence by the executive branch, which, in Hamilton’s telling in the Federalist, is likely to be full of “energy” and thus, in our own language, constantly “pushing the envelope” regarding the extent of executive powers.

No one can address Justice Barak’s remarkable career without being attentive to his relentless independence. One should never forget that Barak was Israel’s Attorney General during the first Prime Ministry of Yitzhak Rabin. A description of this phase of his career, found on an online encyclopedia, is worth quoting at some length:

From 1975 to 1978 Barak served in the prestigious, independent, nonpolitical position of attorney general. His term of office was marked by his decisions in several well-known cases to indict public officials for political corruption. In 1977 Barak’s decision to indict the prime minister’s wife for holding an illegal foreign bank account in Washington, D.C., led the prime minister, YITZHAK RABIN, to

7. See Bruce Ackerman & Oona Hathaway, It’s Not Up to the President to Impose a No-Fly Zone Over Libya, HUFFINGTON POST (March 9, 2011, 11:05 AM), http://www.huffingtonpost.com/bruce-ackerman/no-fly-zone-libya_b_833426.html. Since writing these lines, the Obama Administration has also unilaterally chosen to execute Anwar al-Awlaki, an American citizen living in Yemen through a drone attack (on the ground that he was involved with Al Qaeda and constituted a threat to American national security). See, Charlie Savage, “Holder Outlines Policy on Killing Terrorism Suspects, New York Times, March 5, 2012, available at http://thecaucus.blogs.nytimes.com/2012/03/05/holder-expected-to-outline-policy-views-on-killing-citizens/?scp=3&sq=Holder%20on%20Al-Awlaki%20killing&st=cse.

8. I note for the record, though it is a topic for a very different paper, that “unitary executive” buffs have a hard time explaining the constitutionality of the Civil Service Act of 1886 and subsequent protections for civil servants against retaliation by their political superiors.

resign from office. Barak viewed his mission as attorney general to be not only an adviser to the government, but also “adviser” to the citizens of Israel in protecting their civil liberties.\(^\text{10}\)

Any discussion of the American response to September 11 should at least take cognizance of the potential consequences for the American political system — and those claiming to be victims of that system — of the fact that it is often quite difficult, either formally or more “realistically,” to describe the United States Attorney General as either “independent” or “nonpolitical.” The most scandalous example must surely be the appointment of Robert Kennedy as John F. Kennedy’s attorney general, even if, as is generally agreed, he turned out to be an important and able Cabinet official. I dare say there is less complacence about the appointment by Richard Nixon’s appointment of his campaign manager, John Mitchell, who of course went to jail in the aftermath of Watergate, or George W. Bush’s appointment of Alberto Gonzales, a hyperloyalist who viewed his job basically as defending whatever Bush did. The point, incidentally, is not only that Aharon Barak has greater integrity than Mitchell or Gonzales — or, for that matter, Robert Kennedy — but also that the Israeli political system, for all of its sometimes grotesque defects, has tried to maintain some kind of gap between the office of Attorney General and the sometimes virulent political nature of the rest of the Cabinet. This speaks, among other things, to the importance of constitutional design in providing the institutional context within which individuals, whether saints or sinners, must carry out their official commitments. Given, of course, that Israel does not have a formal written constitution with regard to its institutional structures — even if one regards the “Basic Laws” as providing the equivalent of a Bill of Rights — one might wonder if the relative independence and autonomy of the Attorney General will be indefinitely maintained.

Returning to the United States, though, no one can begin to understand the American debate on torture (or other modes of interrogation) or the altogether crucial issue of holding anyone accountable for what most of the world regards as American misconduct without paying close attention to the those who staffed the OLC, whether it be the head (confirmed by the Senate or not) or an unusually active member of the Office, such as John Yoo. As a practical matter, in our era the OLC may be considerably more important than almost all given federal courts, including, as a practical matter, the Supreme Court of the United States. At the very least, it is probably more important who is appointed as the Assistant Attorney General in charge of OLC than who is appointed to any given federal court, including, quite possibly, the Supreme Court. Consider only that one reason for what many of us regard as the highly questionable, if not indeed disgraceful, failure of the Obama Administration to seek legal redress against those Americans who participated in the “torture — or, if one wishes, ‘merely’ cruel or inhumane’ — regime,” particularly during the first term of the Bush presidency, is the argument that the OLC had in effect provided an immunity from prosecution to anyone who might say, altogether plausibly, that they had been told by the “supreme court

within the executive branch” that their activities were legally unchallengeable. I confess that I tend to agree with those who argue that it would therefore be unfair, and quite possibly a violation of constitutional due process, to prosecute those who engaged in good-faith reliance on legal opinions prepared by the OLC. One might well wish to deny that “I was just following orders” from political or military superiors should necessarily be accepted as a defense against prosecution, but it is harder, for me at least, to be as dismissive of the claim that “I was following orders,” whose legality was affirmed by well-trained lawyers, many of whom, as is true of John Yoo, had graduated from the Yale Law School and then clerked for the United States Supreme Court. To expect laypersons to come to their own conclusions about the inadequacy of his lawyering abilities is quite an extreme form of “legal protestantism” that rejects any deference to ostensible professional and institutional authority.

Like many of us, no doubt, I know and admire particular lawyers who have been part of the Office of Legal Counsel and have performed admirably and with great distinction. But, as Madison reminded us, we design institutions not for “angels” but for the ordinary run of men (and now women) who may well be tempted to act far more in the spirit of what Madison condemned as “faction” — including full-scale devotion to enabling Presidents to do whatever they wish — than with full devotion to the “permanent and aggregate interests of the community,” which at least sometimes can be defined as unblinking adherence to constitutional norms. Perhaps one should not overestimate the importance of constitutional architecture, but surely some systems are, at least marginally, more likely to produce admirable officials than others, especially if the attributes of admiration include a willingness to defend the legal interests of marginal, often deeply unpopular, members of the society.

Although I am, for example, an increasingly militant opponent of life tenure on the United States Supreme Court and believe that Israel provides a better model, even at the unfortunate cost of cutting short Justice Barak’s stunning membership on its Supreme Court, I would not support, say terms of only six years or a retirement age of, say, 60 or even 65. My own preference would in fact be a single, non-renewable, eighteen-year term, which I think would provide enough assurance of institutional independence and the willingness to protect the legal and moral interests of people who are not part of the polity but, in fact, committed to its destruction. But the point, at least for those of us in the United States, is that those of us interested in effective monitoring of interrogation are well advised to focus at least as much on the OLC than on the Supreme Court and perhaps to join Ackerman in thinking of developing a more independent structure of basically administrative courts.

But I want to suggest that Ackerman displays his own “Hobbesian moment” in his previous book, Before the Next Attack. He calls on Congress to adopt “framework
"legislation" that would allow the United States, following the next terrorist attack, which Ackerman regards as basically inevitable, to engage in wide-scale preventive detention for a stated period of time — 45 days. This would serve as a means of reassuring an almost undoubtedly panicked public that the government is in fact trying to protect them, whatever might be the failure signified by the attack itself. To be sure, Ackerman in no way justifies torture or other means of what has euphemistically come to be called “enhanced interrogation.” This, however, is relatively cold comfort for some. Ackerman, after all, accepts, in contrast to such critics as David Cole, the political wisdom of preventive detention and suspension of habeas corpus, whereby definition the state need offer no specified reason for its detention of ostensible suspects. Many of those detained, almost certainly, will have “qualified” for their mistreatment by virtue of their ethnicity, as was, of course, the case with the events we identify by invoking the name Korematsu.

If one is willing to go that far in deviating from what we ordinarily view as our basic constitutional norms, then why not go further and embrace harsh methods of interrogation, including torture as the ultimate form of “enhanced interrogation?” Surely millions of Americans agree with the always quotable Richard Posner: “[I]f the stakes are high enough torture is permissible. No one who doubts that should be in a position of responsibility,” a position argued, more elegantly, years earlier by Michael Walzer in his classic essay on “Political Action: The Problem of Dirty Hands.” The indefatigable Harvard law professor Alan Dershowitz, though himself personally opposed to torture, nonetheless garnered much publicity by suggesting in effect that it was inevitable that the United States would engage in torture under certain circumstances and that it would be far better to impose an ex ante “warrant requirement” — quickly dubbed “torture warrants” — than to rely on ex post legal monitoring and chastisement. Dershowitz’s own interest in torture, it is worth noting, was generated by his displeasure with the Landau Commission’s report in the 1980s that, he believed, was far too latitudinarian in the discretion it was willing to assign to Israeli intelligence operatives.

With regard to views within the United States, a recent article examining public opinion polls asserts that torture was never supported by a majority of Americans throughout the Bush Administration, though, for whatever reason, that apparently

---

15. Id. at 55, 78.
18. On support for enhanced interrogation stopping short of torture, see for example PHILIP P. HEYMANN & JULIETTE N. KAYYEM, PROTECTING LIBERTY IN AN AGE OF TERROR (2005). (It should be noted, though, that critics of this approach often refer to the methods that are tolerated as “torture lite.”).
20. See Michael Walzer, Political Action the Problem of Dirty Hands, in TORTURE: A COLLECTION, supra note 19, at 61, 64-65.
22. See id. at 259-63.
changed in the early months of the Obama Administration. Still, there were certainly many reports in the press that most Americans did in fact presumably feel reassured by the belief that the Bush Administration would, in effect, do “[w]hatever it takes” to confront those who wished the United States ill, even if a Gallup Poll taken in October of 2001 showed that “only” 45% of the public would accept torture, as against the 77% that would accept the assassination of known terrorists. Perhaps our assessments of public opinion were skewed by the influence of influential pundits who seemed eager to demonstrate their hard-headedness by embracing the cult of “[w]hatever it takes.”

One should also acknowledge, however, the possibility that many Americans continued to believe that whatever the United States was doing fell short of “torture,” so that condemnation of “torture” did not, in any direct way equal opposition to American methods of interrogation. After all, the Bush Administration never explicitly acknowledged that it tortured, preferring to describe what they were doing only as “enhanced” or “harsh” interrogation. Indeed, the notorious “torture memo” prepared by John Yoo within the Office of Legal Counsel actually cited both an opinion of the European Court of Human Rights involving British practices in Northern Island and Justice Barak’s famous opinion reining in methods of interrogation in Israel for the proposition that the methods of interrogation considered (and condemned) in those opinions were explicitly found not to be “torture,” but only “cruel” and “inhuman” violations of human dignity.

As captured by Ackerman’s own focus on “the next attack,” the concern is more on preventing future events than catching the perpetrators of completed past events, however satisfying that would undoubtedly be. This accounts for the ubiquity of the notorious “ticking time bomb” hypothetical, which by definition looks to the future and not backwards to a bomb that has, in fact, exploded. Almost no one today would defend torture as a punishment for crime, and few, I suspect, would be tolerant if the only

26. See MAYER, supra note 24, at 31.
30. ACKERMAN, supra note 14.
31. Bruce Anderson, Bruce Anderson: We not only have a right to use torture. We have a duty, THE INDEPENDENT, Feb. 15, 2010, www.independent.co.uk/opinion/commentators/bruce-anderson/bruce-anderson-we-not-only-have-a-right-to-use-torture-we-have-a-duty-1899555.html.
aim were identifying those who committed already-performed crimes, however important that may be. The context of the debate is almost entirely future-oriented, and it takes place most often in societies that are, so to speak, terrified by the possibility of terrorist activities.

I turn, therefore, to Justice Barak’s great 1999 opinion “Concerning the Legality of the General Security Service’s Interrogation Methods,” from which I drew substantial excerpts for a book I edited, Torture: A Collection. He begins by noting not only the relative frequency of various terrorist acts, but also that “many” such attacks “were prevented due to the measures taken by the authorities responsible for fighting . . . hostile terrorist activities on a daily basis.” Thus it is important to emphasize that the rationale he ultimately gives for his decision to limit the possibilities open to the General Security Service (“GSS”) lies not in utilitarian calculation — does torture work? — but, rather, the degree to which harsh methods of interrogation, whether or not they rise to the level of torture, violate basic norms of constitutional democracy and the commitment to the rule of law. “Our apprehension,” Justice Barak wrote for himself and his colleagues, “is that this decision will hamper the ability to properly deal with terrorists and terrorism, [which] disturbs us.” However, they are pledged to enforce legal norms. “When we sit to judge, we are being judged” precisely by reference to the unflinching willingness to uphold existing norms without fear or favor.

The issue before the Court was the authority of the GSS in the absence of statutory authorization to engage in the interrogation practices invalidated in the course of Justice Barak’s opinion. To this extent, there are overtones of Justice Breyer’s opinion in Hamdan, which also emphasized the lack of congressional authorization for what the Bush Administration was attempting to do. The United States Congress, to its disgrace, in effect called Justice Breyer’s bluff; then-Republican Senator Arlen Specter denounced the bill as unconstitutional but voted for it anyway, because he wished to retain his position as Chair of the Senate Judiciary Committee. (Fortunately, Specter was at least partially vindicated by the Supreme Court’s ruling to invalidate a crucial part of the legislation.) So one question that Justice Barak’s opinion forces us to consider concerns what would happen if the Knesset did explicitly authorize the GSS to engage in whatever practices the GSS deemed necessary in the name of enhancing Israeli security? One view, similar to those critics of executive overreaching in the United States who focus only on the lack of explicit congressional authorization for the behavior in

32. Supreme Court of Israel, Judgment Concerning the Legality of the General Security Service’s Interrogation Methods (September 6, 1999), in Torture: A Collection, supra note 19, at 165; see also Judgment Concerning the Legality of the General Security Service’s Interrogation Methods, 38 I.L.M. 1471 (1999).
33. Id.
34. Id. at 181.
35. Id.
36. Id. at 165-66, 180.
question, is that the Knesset has basically plenary — dare one say Hobbesian — authority to permit torture. That is just what parliamentary sovereignty, especially in the absence in a canonical written constitution, means.

But Justice Barak, who famously proclaimed the existence of a “legal revolution” in Israel because of the passage of certain Basic Laws, hints in his opinion that Blackstone may not reign in Israel and that the Supreme Court might therefore rein in an overreaching Knesset. After noting the possibility of the Knesset’s passing “required legislation,” he adds the proviso that a “law infringing upon a suspect’s liberty” must be found in accordance with “the values of the State of Israel” and (in addition?) “is enacted for a proper purpose, and to an extent no greater than is required.” After all, Justice Barak noted the fundamental principle of “human dignity” is declared so essential to the post-War conception of Germany as a legal order that it is protected against constitutional amendment. The concern for “human dignity” must have a universal referent, applying to “the dignity of the suspect being interrogated” as well as the dignity of the suspect’s presumptive target. “[V]iolence directed at a suspect’s body or spirit does not constitute a reasonable investigation practice.” What we see hinted at — and what is articulated far more extensively in his other seminal opinions on the Israeli “security fence” and the propriety of “targeted killings” — is the articulation of what has come to be called the “proportionality” doctrine, which is quite different from American “balancing” doctrine, even when it takes the form of “compelling interest” analysis.

Most American justices simply ask whether the state’s interest is sufficiently important and whether the means chosen to realize the interest are sufficiently closely related to attaining the end in question. “Proportionality analysis,” however, goes on to ask whether the costs in terms of the basic moral commitments of the state are simply too high. Thus, in his decisions involving the building of the so-called “security fence” and the use of “targeted killings,” Justice Barak does not stop with the finding that each is related quite closely to protecting the security interests of the Israeli citizenry. Rather, as he writes in the “security fence” case, [I]t is insufficient that the administrative authority chose the proper and most moderate means for achieving the objective; it must also weigh the benefit reaped by the public against the damage that will be caused to the citizens by this means under the circumstances of the case at hand. It must ask itself if, under these circumstances, there is a

42. Id. at 1488.
43. Id. at 1482.
44. Id.
proper proportion between the benefit to the public and the damage to
the citizen. Thus the Court tasks Israeli officials with “creat[ing] an arrangement which will avoid . . . severe injury to the local inhabitants, even at the cost of a certain reduction of the security demands.” Or, as Justice Barak wrote in the “targeted killings” case, “[t]hese preventative strikes, with all the military importance they entail, must be made within the framework of the law . . . It is when the cannons roar that we especially need the laws.”

In elaborating on the proportionality doctrine, Justice Barak writes that “[i]t is a manifestation of the idea that there is a barrier of values which democracy cannot surpass, even if the purpose whose attainment is being attempted is worthy.” He quotes an earlier opinion in which he notes that “human rights cannot receive their full protection, as if there was no terrorism,” but, at the very same time, state security cannot receive its full protection, as if there were no human rights. A delicate and sensitive balancing is needed. That is the price of democracy. It is a dear price, which is worthwhile to pay. It maintains the strength of the state. It makes the State’s struggle worthwhile.

The only cavil I would offer is that Justice Barak may be placing too much weight on the word “democracy,” since I think what he is really referring to is an explicitly liberal version of democracy that, in Ronald Dworkin’s formulation, takes rights very seriously indeed.

In any event, I presume that Justice Barak admires the decision by the German Constitutional Court to invalidate a law passed by the Bundestag that assigned to the President of the German republic the authority to order the shooting down of a civilian aircraft that, having been hijacked by terrorists, was presumed to be on its way to, say, downtown Berlin and the Reichstag. That decision, of course, emphasized the basically Kantian commitment of the post-War German Constitution to protect “human dignity” at all costs, including refusing to destroy an airplane that, by definition, included many passengers who were totally innocent of any terrorist inclinations. Even if we are glad that the German Constitutional Court acted as it did, would we really expect (or want) German officials to feel bound by the decision should the actual eventuality come to pass? Might we not predict they would act to defend the interests of the German state and society and then plead “necessity” or otherwise throw themselves on the mercy of understanding adjudicators, including, of course, the possibility of amnesty or pardon, depending on the specifics of the legal system? Would we, that is, want them, in

48. Id. at para. 71.
50. Id. at para. 45 (citing an unpublished opinion by Justice Barak, HCJ 8276/05 Adalah—The Legal Ctr. for Arab Minority Rights in Isr. v. Minister of Def. (Isr.)).
51. Id. at para. 62 (quoting HCJ 7015/02 Ajuri v. Military Commander of the Judea & Samaria Area, 56(6) PD 352, 383 (2002) (Isr.)).
53. Id.
Walzer’s formulation, to “dirty” their hands? These are not, I should point out, conventional rhetorical questions, as they admit, I think, to more than one answer.

After all, whatever the insistence by the Israeli Supreme Court that there could be no ex ante justification for torture and other inhumane methods of interrogation, which seems, among other things, to eliminate any possibility of adopting Dershowitzian “torture warrants,” the opinion carefully left open the possibility of presenting an ex post “necessity” defense. Israeli criminal law theorist Miriam Gur-Arye offered an interesting critique of a “necessity” defense, as against a claim of “self-defense.” She argues that claim of “necessity” opens the way to torturing, say, the family of a terrorist suspect on the rational ground that that might be far more likely to procure the desired information than torturing the suspect himself. To require a demonstration of “self-defense,” however, cuts off any such possibility, since the person against whom one engages in “self-defense” must pose the direct threat, as would certainly be untrue with regard, say, to the alleged terrorist’s child.

There is an additional problem generated by reliance on ex post enforcement of legal norms against torture and other unacceptable means of interrogation. At least within the criminal context, this requires that state officials initiate prosecutions, at which the defendant can plead necessity. But, as is often pointed out, such prosecutions are extremely rare, save against those who can be portrayed as “rogues,” such as those in charge of prisoners at Abu Ghraib. Though one can easily agree that they deserved prosecution, it is also the case that they have almost nothing in common with the “dedicated professionals” within the GSS, CIA, or other similar agencies who are given access to those deemed to be “high-value” suspects (which those incarcerated at Abu Ghraib were most definitely not). Moreover, within the United States, there is the question not only of prosecutorial discretion, but also of “jury nullification,” not to mention judicial discretion regarding the sentence or opportunities for executive clemency. All of these obviously make torture and other harsh interrogation something other than what might be called a “strict liability” offense with mandatory levels of punishment that cannot be evaded. To the extent that we would have reservations about strict liability and mandatory punishments — and my experience is that few would actually endorse strict liability and a mandatory sentence of, say, twenty years in prison with no possibility of pardon or parole — I suggest that is evidence of our own uncertainty that all such methods of interrogation can be analyzed with an identical template, a topic we might pursue in the discussion.

I want, though, to raise an awful question that is more central to my declared topic: How much hope can we really put in courts not only to act honorably and conscientiously, which Justice Barak and his associates most certainly did in the GSS case, but also to have genuine effect on those whose behavior they are trying to influence? No court in the entire world has displayed a greater willingness to monitor

54. See Walzer, supra note 20.
55. Supreme Court of Israel, supra note 32, at 180.
57. Id.
official behavior involving basic issues of national security than did the Israeli Supreme Court under Justice Barak’s leadership.\footnote{It is necessary to note, for the record, that Justice Barak has critics from the left who believe that the Court could in fact have done even more than it did, as opposed to his right-wing critics who attack him for according suspected terrorists any legal rights.} But, wearing my interdisciplinary hat as a political scientist, I suggest that we must still ask if the relevant authorities changed their behavior sufficiently to justify the hope placed in the judiciary.

One response, of course, is “who knows?”, not least because of the difficulty in getting relevant evidence. Consider the sobering conclusions reached by the distinguished American journalist Joseph Lelyveld, the former managing editor of The New York Times, who wrote an anguished article for the Times following a visit to Israel in 2005, at the height of the debate in the United States about torture.\footnote{Joseph Lelyveld, \textit{Interrogating Ourselves}, N.Y. TIMES, June 12, 2005, www.nytimes.com/2005/06/12/magazine/12TORTURE.html?pagewanted=all.} Lelyveld notes, for example, that Israeli security chief Ami Ayalon not only was “not surprised” by the decision of the Israeli Court, but also that he “promptly announced that his interrogators would obey the court.”\footnote{Id.} It is worth quoting a length the next paragraph from Lelyveld’s article:

That may sound like a happy ending, a triumph for the rule of law. But what actually changed? Not as much as the sweeping judicial edict seemed to promise, according to the Public Committee Against Torture in Israel, a human rights group that seeks to monitor what happens to detained Palestinians. The committee maintains that Ayalon’s pledge to abide by the Supreme Court’s decision was never wholly enforced and seriously broke down after the outbreak of the second intifada. Torture remains routine in Israeli detention centers, the committee contended, offering affidavits taken within the last year [i.e. 2004] from prisoners like Bahij Mahmoud Bader, who, in a statement summarized by the group, said that after his arrest last July, his interrogators actually “put before him a list of the methods of torture that they later used.” Then they worked down the list, forcing him to stand facing a wall with his hands tied behind his back and his knees bent for hours at a time; blindfolding him and slapping him; seating him backwards on a chair with his hands and feet bound in a painful position while two interrogators, one behind and one in front, shoved his upper torso back and forth as if playing catch with a medicine ball. As usual, curses, threats and denial of sleep were all chapters in his story. Later, so he testified, he was informed that his wife and mother had been arrested and that his family home might be demolished if he failed to cooperate.\footnote{Id.}

Lelyveld acknowledged, though, that there were more optimistic renderings of the aftermath of the decision as well, including those offered by the human rights group B’Tselem and the Palestinian Human Rights Monitoring Group. Jessica Montell, the
American-born director of B’Tselem, described Israel as having “a very important lesson to teach the United States,” as she pointed to what Lelyveld described as “a new restraint in Israel since the Supreme Court’s ruling.”\(^{62}\) Still, almost no one seems to believe that “new restraint,” even if genuine, means that objectionable methods of interrogation, as described by Justice Barak’s opinion, have entirely disappeared or, more to the point, could not be authorized as “special methods” by the chief of Israeli security, whatever the opinion might have suggested. So it is worth quoting one of the concluding paragraphs of Lelyveld’s ruminations on his trip to Israel, in which he noted the absence of any follow-up cases that might test current practices of the Israeli security agencies:

Hannah Friedman, executive director of the Public Committee Against Torture in Israel, explained why her group had yet to bring such a case to the Supreme Court. She had been warned that if the committee brought a new case alleging torture at a time when suicide bombings had aroused public opinion, it might provoke a decision that would weaken the legal standard that had just been raised. Under those circumstances, even the committee against torture must have felt it had to be realistic.\(^{63}\)

Any political scientist or legal sociologist would be unsurprised by the almost certain difference between “law on the books,” in this case, the opinion of the Israeli Supreme Court, and the “law in action.” There is almost always “slippage.” The question, obviously, is the extent of such slippage and its frequency, which, equally obviously, is difficult, if not impossible, to find out.

I also note the release in 2009, on the 10th anniversary of Justice Barak’s opinion, of a report by The Public Committee Against Torture in Israel (“PCATI”), \textit{Accountability Denied: The Absence of Investigation and Punishment of Torture in Israel}, that was quite scathing in its conclusions.\(^{64}\) “Israel [has no] genuine mechanism for investigating complaints of torture,”\(^{65}\) says the PCATI, which “result[s] in absolute immunity for interrogators who commit grave crimes.”\(^{66}\) Among other things, complaints are checked by an active GSS agent who is the official in charge of checking interrogee complaints.\(^{67}\) His recommendations not to open a criminal investigation are universally accepted by the high ranking attorney in charge in the Ministry of Justice and by the Attorney General.\(^{68}\) All of this, together with additional layers of protection for torturers, including GSS exemption from the obligation to provide audio or video recording of interrogations; — a dual system for keeping interrogation records; systematic denial of the detainee’s right to meet an attorney; and the deliberate concealment or withholding of detainee medical records lead to the fact that each and

\(^{62}\) Id.
\(^{63}\) Id.
\(^{65}\) Id. at 93.
\(^{66}\) Id.
\(^{67}\) Id. at 11.
\(^{68}\) Id.
every torture complaint in Israel is shelved with no investigation and no justice. 69 According to data provided by the State, since 2001 more than 600 complaints of torture by GSS agents were submitted while not even a single criminal investigation was opened. 70

Let me put it as bridge players might say, “review the bidding” with regard to this overview of one of Justice Barak’s greatest decisions and its aftermath. First of all, there is the decision and Justice Barak’s eloquent opinion explaining its basis. If one assigns to the judiciary a certain kind of tutelary role that encourages citizens to internalize an appropriate view of their society and their responsibilities as members of such a society, then this opinion, as is true of many examples of the Barak oeuvre, plays this role in exemplary fashion. And, of course, as already suggested, there is good reason to believe that at least some public officials will take such opinions seriously, even if there is indeed some slippage between what the opinion might seem to require and what these officials are in fact willing to do. “Israel is a small country,” writes Lelyveld, “in constant conversation with itself at all levels of society.” 71 Anyone who has ever visited Israel knows how intense political conversations can be among all sectors of society, not to mention the entitlement felt, at least by Israeli Jews, to express their own distinct opinions and to form a political party that might, under Israel’s remarkable — and many would say dysfunctional — threshold rules, end up electing someone to serve in the Knesset.

What is the case in the United States, especially if we confine our attention to the United States Supreme Court? The answers are almost uniformly disheartening. First of all, that Court has utterly failed to speak out with regard to American interrogation practices. There is almost literally nothing that can be quoted with regard to teaching the public about what it might mean to adhere to, what we would like to think are, basic American norms during time of war. Indeed, Justice Scalia has publicly confessed his appreciation for the fictitious Jack Bauer, the “hero” of 24, who never hesitated to torture those he deemed threats to American interests. 72 Probably the most eloquent judicial statement against modern interrogation is found in Justice Stevens’s dissenting opinion in the Padilla case:

Executive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure. Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence. For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of

69. Id. at 9-13.
70. Id. at 11-12.
71. Lelyveld, supra note 59.
tyrants even to resist an assault by the forces of tyranny.\textsuperscript{73}

One should be grateful to Justice Stevens, but it is a sad statement that a dissenting opinion is the best we can come up with. What explains the remarkable paucity of relevant statements from the Supreme Court, which, after all, has often been praised as a unique “forum of principle”? One answer involves the similar failure of the Bush and Obama Administrations, for their own reasons, to hold any public officials accountable, beyond very low-level military personnel who had almost nothing to do with “high-value” suspects. That is, there are no convictions to assess because there are basically no prosecutions. That is just what prosecutorial discretion means, which is, of course, one of the reasons for Dershowitz’s controversial emphasis on the importance of \textit{ex ante} procedures that would create a basically strict liability offense for anyone who had failed to invoke such procedures.\textsuperscript{74}

But, of course, there could also be civil cases, in which victims of illegitimate interrogation sue their interrogators or, more broadly, the United States as being liable for the acts of their agents. As a matter of fact, such cases which were filed have been met by invocations of the “state secret” privilege, which basically allows the United States to avoid even appearing in Court once it claims that national security interests require that relevant evidence not be disclosed, under any circumstances, to a court. But, of course even if, what the Constitution calls “inferior courts,” accept such claims or otherwise make it basically impossible to seek legal redress — by offering broad readings of doctrines providing “immunity” to public officials for actions they took in “good faith” as part of their “official responsibilities” — one might expect the Supreme Court to review a swathe of these cases in order to delineate the reach of doctrines that, almost by definition, work against the interests of those deprived of important liberty rights or dignitary interests (or both) by the United States. Instead, the Supreme Court has almost literally looked away when victims of those practices, including “extraordinary rendition” of alleged terrorists to other countries where torture is rife, have filed civil suits against the United States and relevant public officials and then appeal verdicts against them. The Second Circuit Court of Appeals, for example, dismissed an attempt by a Canadian, Maher Arar, who was seized in transit at the John F. Kennedy airport in New York and “rendered” to Syria, where he was tortured.\textsuperscript{75} The Canadian government, after reviewing their own participation in the event, formally apologized to Mr. Arar and paid him a significant amount of damages.\textsuperscript{76} The United States, on the other hand, has vigorously, and successfully, fought any attempt to hold it (or us) accountable for the injustice visited upon Mr. Arar.\textsuperscript{77} Former Yale Law School Dean Guido Calabresi was one of four dissenters from the Circuit Court decision. “[W]hen the history of this distinguished court is written,” Calabresi wrote, “today’s majority decision will be viewed with dismay.”\textsuperscript{78}

\textsuperscript{74} See Dershowitz, \textit{supra} note 21.
\textsuperscript{75} Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009).
\textsuperscript{77} Id.
\textsuperscript{78} Id.
refused to grant a petition for certiorari,\textsuperscript{79} which is additional cause for dismay.

The United States Supreme Court can do this, in large part, because of the fact that it enjoys almost plenary authority regarding what cases it hears. The Supreme Court hears only those cases it wishes to, and, obviously, they need not explain to anyone, least of all the litigants claiming to have been the victims of oppression, the reasons for their failure to take any given case. Whether out of cowardice or admirable prudence, based on careful calculation of when the Court can effectively intervene and when, in contrast, they should leave decisions entirely in the hand of so-called “political branches,” the Court has chosen to remain silent. It is worth noting that one of the distinct contributions that Justice Barak made to the Israeli judiciary was a conception of what Americans might call “citizen standing,” whereby his Court welcomed rather than rebuffed those who sought vindication of what they believed were their legal rights. This also means, to be blunt, that he worked far harder than does any member of the United States Supreme Court, for one implication of a generous view of standing is that courts will have more cases to decide and opinions to write. I suspect that Justice Barak would have greatly enjoyed having to write only approximately ten “opinions for the Court” a year, plus whatever concurring or dissenting opinions he might have wished to write. That is basically the workload of an American Supreme Court justice, given that recent courts have decided fewer than 90 cases per year. And, of course, each justice has four clerks to help draft and write the opinions they do write, whereas I am quite confident that in reading a Justice Barak opinion, we are hearing his own unique voice.

All I can say in conclusion is, “Long live that voice, and may it be joined by other judges in other lands.”