

ther liberty nor safety.”<sup>106</sup> In a similar vein, Thomas Paine, another great American patriot of our founding period, reminded us that “those who expect to reap the blessing of freedom must, like men, undergo the fatigue of supporting it.”<sup>107</sup> By that he meant that they must also undergo the sacrifices that are necessary to uphold our values.

### *A Personal Testimony*

In 1957, I was placed in house arrest in Egypt, in part for having stepped up to government officials against the deportation of one of my former professors and his family, who was Jewish, as well as another Jewish family friend. In addition, I had stood up against the expropriation of a Jewish family's property.<sup>108</sup> What may have been the last straw was my vocal and forceful denunciation of torture when I saw the picture of a member of the Muslim Brotherhood who had been tortured to death. Even though I was a young man, my voice carried because of my prominent family background, but also because I had fought in the 1956 War and received the medal of military valor, a fact that was publicized by the media. At the age of 20, the self-deluding belief of youthful invincibility carried me to do things that good judgment would have prevented. Having raised too much protest with too many officials I was placed in house arrest with the explicit threat that I would likely either be tortured or killed. During house arrest in my apartment in Cairo the shutters were nailed, telephone and radio cut off, and food delivered once a day. I had no contact with the outside world, and lived with the constant fear of being taken to an interrogation center where I would be subject to the types of torture that I had protested. My living space shrank to my bedroom and then to my bed, where I spent most of my time in a fetal position, jumping at the slightest noise. I understood firsthand what psychological torture meant. Some seven months later I was released and tried to resume normal life, but lived with this trauma for a long time, and even today I have to admit to its lingering effects. I am grateful to God for having spared me the experience of physical torture, and have vowed since then to do everything I could to eliminate this inhuman and abhorrent practice. From 1977-1978, I was given this opportunity when I was named co-chair, along with the late Niall MacDermott of the International Commission of Jurists, of the Committee of Experts which prepared the first draft of the Convention Against Torture. That text, which I had the honor of

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<sup>106</sup> Benjamin Franklin, Pennsylvania Assembly: Reply to the Governor, Nov. 11, 1755, in 6 THE PAPERS OF BENJAMIN FRANKLIN 242 (Leonard W. Labaree ed., 1963). This quote is inscribed on the pedestal of the Statue of Liberty.

<sup>107</sup> Attributed to Thomas Paine, Sept. 12, 1777.

<sup>108</sup> See M. Cherif Bassiouni, *Bearing Witness*, in PIONEERS OF GENOCIDE STUDIES 315, 355 (Samuel Totten & Steven Leonard Jacobs eds., 2002).

drafting, was first submitted in 1978 to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, which in turn forwarded it to the Commission on Human Rights.<sup>109</sup> The text was then re-introduced by Sweden, whose representative served as a member of the Committee of Experts, as did representatives from The Netherlands and Austria who were the principal governments supporting the adoption of a convention. To my great satisfaction, many of the provisions of the text I prepared in 1977, including the definition of torture, were embodied in the 1984 CAT. Again, God was gracious to me when he allowed the circle to close by allowing me to contribute to the world's anti-torture effort.

During the Committee of Experts' work at the International Institute for Higher Studies in Criminal Sciences (Siracusa, Italy), a member of the Committee of Experts from one of the Permanent Five asked me privately one late evening what would I do, since I urged an absolute prohibition against all forms of infliction of physical harm, if I knew that a bomb was about to go off in a building with the potential of killing 10,000 persons. Would I torture the person who knew where the bomb had been placed? Since he was not from the Common Law system, I brought to his attention a well-known American legal maxim that "hard facts make bad law." The facts in this hypothetical, I told him, were hard, and they should not be relied upon to make a law which addresses a wide variety of factual patterns that cannot be based exclusively on extreme possibilities or highly improbable ones. He pressed me for an answer, and I admitted to him that if I knew for a fact that this person could, with reasonable certainty, help in discovering the whereabouts of the bomb, and, thus, that I could save 10,000 lives, that I would either acquiesce to or do whatever was necessary, up to and including torture, to obtain the information. He smiled as if having scored a victory, at which point I added that I would then write a full report and turn myself in to the authorities for having committed a crime. Hopefully, I added, the judge would be lenient and take into account my motive, even though I had broken the law and committed a crime.<sup>110</sup>

When I took the oath of citizenship in 1967, I fervently believed that the Constitution was the greatest barrier against tyranny and that nothing like what I endured in my beloved native country could happen in the U.S. because of its adherence to the rule of law. That evening, a special ceremony was held for the some 1,200 newly-naturalized citizens and their

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<sup>109</sup> See *supra* note 32.

<sup>110</sup> This represents the theory of just desert, and also reflects the philosophy of natural law. See generally LLOYD L. WEINREB, *NATURAL LAW AND JUSTICE* (1987). This view has also been represented in connection with civil disobedience and other forms of breaches of the law whereby the person who violates the law has to assume responsibility. For a discussion of the moral considerations in the "ticking bomb" scenario, see David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425 (2005).

families. The Citizenship Council of Metropolitan Chicago had selected me as the "Outstanding New Citizen of the Year," and I was to deliver a speech before this gathering of some 5,000 persons, including the city's civic leaders and many members of the Bench and Bar. My speech was on the rule of law, the difference between democracy and tyranny, and between civilization and barbarism. That is what America meant to me.

The problem with this Administration is that it assumes neither moral nor legal responsibility, and in the end, it is hard-put to show what positive results it may have obtained for so many transgressions.

So far we know that at least 200 people may have died under torture, and that, cumulatively, thousands of persons may have been tortured in Guantanamo, Iraq, Afghanistan, and elsewhere.<sup>111</sup> Yet it seems that none of these cases resemble the extreme hypothetical posed to me in the example above. And yet, I cannot help but think of another highly-regarded academic, Alan Dershowitz, who advocates torture only because some extreme case might justify the means.<sup>112</sup> The history of law and legal institutions has

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<sup>111</sup> The Department of Defense and other government agencies have purposely not kept cumulative records of numbers of persons detained in publicly known facilities, as well as in secret detention facilities. There have been periodic media reports based on publicly available information of numbers of detainees held in some facilities such as Abu Ghraib and Guantanamo. Sometimes the numbers have been consistent over a period of times, such as Guantanamo. At others, such as Abu Ghraib, the numbers related to a certain period of time. No one has ever put together the bits and pieces of information released by the government, however, by collecting numbers from various media reports, it appears that in Iraq the number of persons detained for a period of over 24 hours may well have exceeded 100,000. Since physical mistreatment has been common, if one accepts the definition of torture under Article 17 of the Geneva Conventions and Article 1 of the CAT, then it is reasonable to conservatively extrapolate a projected number of no fewer than 10,000 persons tortured in Iraq.

<sup>112</sup> See ALAN DERSHOWITZ, *WHY TERRORISM WORKS* (2002); Alan Dershowitz, *Is There a Torturous Road to Justice?*, L.A. TIMES, Nov. 8, 2001, at M4; Alan Dershowitz, *Want to Torture? Get a Warrant*, S.F. CHRON., Jan. 22, 2002, at A19. This represents a primal retributive view, whereby justification for torture is found in retribution for the acts of the perpetrator. This, of course, presupposes having certainty that the person tortured is the perpetrator of a particularly heinous crime which is likely to cause harm to a large number of persons. This view also combines the utilitarian approach which is devoid of social moral significance, that is, the social moral significance of torture in the name of a society purporting to uphold higher values. Taken to its logical extent, this view would re-introduce torture as a form of punishment for abhorrent crimes as was practiced in the middle ages. See JOHN H. LANGBEIN, *TORTURE AND THE LAW OF PROOF* (1977). Dershowitz does not, however, address the implications of such a practice on the character of the society engaging in it, nor in the consequences that it would have on perpetrators of terrorism who could then find legitimacy in the acts of torture as a way of further perpetrating such crimes. See M. Cherif Bassiouni, *Terrorism: The Persistent Dilemma of Legitimacy*, 36 CASE W. RES. J. INT'L L. 299, 303 (2004). A different view is taken by Judge Richard Posner, who considers that torture under some conditions may benefit from the defense of necessity, even though necessity in criminal law has never been a defense for the acts of another. Moreover, he departs from an objective definition of torture to make it a subjective one. He states that torture begins at "the point along a continuum at which the observers' queasiness turns to revulsion."

for all too long proven to us the error of accepting the Machiavellian principle that the ends justify the means.

I will conclude this presentation with a related personal story that happened in Egypt in 1956 during the so-called "Sinai War." I was a second lieutenant assigned to a camp in downtown Cairo, and on that night I was the duty officer with a small detail of ten men within the camp and a few guards. Sometime around 23:00, I heard a commotion on the street outside the camp and went out to check, asking the two guards on duty what was happening. They told me that an Israeli pilot had parachuted behind the camp, his white chute having been observed by persons who then cried out to others, and a crowd was gathering to capture him. Knowing that this meant that he would be hacked to death, I instinctively rushed back inside, gathered the ten men under my command, ordered them to carry weapons, and ran out to try and find the pilot before the crowd did. Fortunately, it turned out to be a rumor. The parachute was a white bed sheet that had been left on a rooftop to dry, and had flown off appearing at a distance to be a parachute. As I ended my duty the next morning, I found myself in trouble for having left my post and had to plead with my commanding officer that if his son were in that same situation in Tel Aviv, he would have wanted a unit of the Israeli army to save him. It was not only a matter of humanity, but for the military it was also a matter of honor. Many years later, after the Camp David Accords of 1978, in which I had some involvement, I recounted the story to the late general Abrasha Tamir, then Director General of Prime Minister Menachen Begin's office, who became a friend and with whom I subsequently worked with on Middle East affairs for several years. General Tamir's reply was that one of the reasons why it had been so easy for Israel to make peace with Egypt was because none of its POWs had been tortured or killed by the Egyptian military. Of all the utilitarian arguments in favor of humanitarian treatment of POWs, this one struck me the most.

I shudder at the thought that American military personnel may fall in the hands of someone like Abu Musab al-Zarqawi and his violent jihadists in Iraq, or in the hands of some violent Taliban group in Afghanistan, or, for that matter, in the hands of any Al Qaeda-affiliated group anywhere in the world, who would torture them. Will their answer to pleas not to torture our detainees be that they are doing nothing more than what the U.S. has been doing? What to say then? That they are barbarians and that we are not?

Torture is a crime under the Geneva Conventions, the CAT, and under U.S. law.<sup>113</sup> It is an outrage on human decency. Its institutionalized

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Richard A. Posner, *Torture, Terrorism, and Interrogation*, in *TORTURE: A COLLECTION* 291 (Sanford Levinson ed., 2004).

<sup>113</sup> Geneva I, *supra* note 18; Geneva II, *supra* note 18; Geneva III, *supra* note 18; Geneva IV, *supra* note 18; CAT, *supra* note 6; 18 U.S.C. § 2340 (2000).

practice undermines the integrity of the American legal process and our system of law, and its depravity undermines our moral leadership in the world. It lends credibility, if not legitimacy, to the violent acts of the anti-American jihadists. Moreover, it seldom produces reliable information. Under torture, most people would say anything the interrogators wanted. Lastly, each person tortured, as well as his/her family, are likely to become enemies of the U.S. and seek revenge for their treatment, thus generating more potential enemies likely to threaten the security of this country and its people.

The fact that so much of what has happened was the result of a few jurists using their talents to serve the political interests of those whose legal and moral sensitivities were not strong enough to resist the temptation of resorting to torture will surely discredit our legal profession. As stated above, when the full scope of what has happened is revealed, how will we as a nation explain our indifference to such an outrage? Shame will be the least of the consequences we will reap from the commission of what will surely prove to be senseless and useless crimes.

Almost on a daily basis, stories about torture are reported which reinforce the element of knowledge that the Administration has, and its obligation to investigate, and where appropriate, to prosecute. Rather than doing that, it contents itself with public relations responses to the effect that these are old stories. Discovery of new facts about what may be an old story has nothing to do with the criminality of what occurred and the obligation to pursue it. To avoid legal obligations by equaling them with media relations responses is not only disingenuous, but it confirms the dereliction of duty.

Torture is not only morally and legally wrong, it is counter-productive. To denounce it is not unpatriotic—it is patriotic, because it is the right thing to do.

As General Douglas MacArthur said in his farewell speech to the corps of cadets at West Point, May 12, 1962:

The code which those words perpetuate embraces the highest moral laws and will stand the test of any ethics or philosophies ever promulgated for the uplift of mankind. Its requirements are for the things that are right, and its restraints are from the things that are wrong.

....

Others will debate the controversial issues, national and international, which divide men's minds; but serene, calm, aloof, you stand as the Nation's war-guardian, as its lifeguard from the raging tides of international conflict, as its gladiator in the arena of battle.

For a century and a half you have defended, guarded and protected its hallowed traditions of liberty and freedom, of right and justice.

... These great national problems are not for your professional participation or military solution. Your guidepost stands out like a ten-fold beacon in the night: Duty, Honor, Country.

... The Long Gray Line has never failed us. Were you to do so, a million ghosts in olive drab, in brown khaki, in blue and gray, would rise from their white crosses thundering those magic words: Duty, Honor, Country.<sup>114</sup>

If, as stated by the President in his State of the Union message quoted at the top of this article, this Administration is to “determine the character of our country” with the policy and practices described above,<sup>115</sup> then this nation is likely to find itself on the same slippery slope that brought about a decline of democracy and erosion of the rule of law that other countries have experienced before plunging into dictatorship. Before re-determining the character of this country, which hardly needs it, perhaps this Administration should be reminded of the wise words of George Santayana, “those who do not remember the past are condemned to repeat it.”<sup>116</sup>

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<sup>114</sup> Douglas MacArthur, Gen., Thayer Award Acceptance Address (May 12, 1962), *available at* <http://www.americanrhetoric.com/speeches/douglasmacarthurthayeraward.html>.

<sup>115</sup> Bush, State of the Union Address, *supra* note 1.

<sup>116</sup> GEORGE SANTAYANA, *THE LIFE OF REASON* (1905).