Terrorism and the Limits of Law

Few institutions have been more severely tested in the wake of September 11 than the law. How do we treat suspected foreign terrorists? What is the proper balance between self-defense and the protection of civil liberties? A legal scholar sees an important lesson in how America has responded.

by Michael J. Glennon

Cries of outrage erupted around the world this past January when the Pentagon released pictures of Taliban and Al Qaeda prisoners shackled, blindfolded by strange-looking goggles, and forced to kneel during their captivity at the U.S. military base at Guantánamo Bay in Cuba. Secretary of Defense Donald H. Rumsfeld's explanation that such methods were not inhumane and were used only when the men—dangerous terrorist suspects, after all—were moved from place to place did little to still the protests. But millions of Americans, and doubtless many abroad, thought to themselves: So what? It is likely, in fact, that many thought the prisoners deserved far worse. A CNN/*USA Today*/Gallup poll in early October revealed that 45 percent of those surveyed would approve the torture of captured terrorists who knew details of future attacks in the United States. One prominent American law professor has even suggested that judges be empowered to issue "torture warrants."

There is no evidence that the roughly 300 men held at Guantánamo have been tortured, but there is no question that America since September 11 has experienced a sharp clash of values, pitting freedom against security, and law against politics. Yet the months since terrorists brought down the World Trade towers also show how the United States has come to balance competing constitutional values, and—perhaps paradoxically—the way it has come to recognize the limits of the law as a tool for striking that balance.

Why not torture the terrorists? The answer is not as obvious as it may seem—and some of the most obvious answers don't hold up under scrutiny. In 20 years of teaching constitutional law, I have found that considering hypothetical cases can be a useful way to get at bigger truths. Many of these "hypos," as they are called in law schools, are simply outlandish, but one has turned out, alas, to be a lot less improbable than it seemed before September 11. That is the famous, or infamous, "ticking time bomb" hypo:

> *Assume that the police capture a terrorist whom they know has planted a nuclear bomb somewhere in New York City. The police know that the bomb will explode very soon; the city cannot possibly be evacuated. The terrorist refuses to talk. Question: Should the police torture him?*

Some students always answer with a flat no: Torture, they argue, can never be conducted under any circumstances. They usually give two kinds of reasons, one practical, the other theoretical. On the practical side, students cite the familiar "slippery slope" argument: Once we accept the per-

After the Pentagon released this January 11 photo of Taliban and Al Qaeda detainees upon arrival at Guantánamo Bay critics accused the United States of using psychological control techniques.

missibility of torture under any circumstances, we will end up torturing under many circumstances. The theoretical reason can best be described as a natural rights argument—it is an almost instinctive American response. It holds that human beings have certain rights that no government can take away, and that one of those rights is the right not to be tortured. Some natural rights proponents would add that it is impermissible to do evil even if good may come of it, or that the end can never justify the means.

Each of these arguments has flaws. The answer to the "slippery slope" view is simply that we have not yet reached the bottom of the slope, indeed, that we are far from it, and that long before we do reach the bottom we will stop. We can torture terrorists without opening the way to the torture of, say, car thieves. It is irrational not to act where we must act just because, some day, we may act where we ought not act.

The answer to the theoretical, natural rights argument is complex, as is the natural rights argument itself. At bottom, though, the response is that the natural rights argument is not really an argument at all, but rather an assertion—an assertion that is as unproved as it is unprovable. It hinges on a set of presuppositions. The most prominent of these is the assumption of eternal right and wrong, of an overarching morality contingent upon neither circumstance nor culture, a "truth" that all rational people everywhere—all persons of "right reason"—must accept. Another presupposition is the moral necessity of accepting logical consistency. But proponents of natural rights have no response to the Nietzschean superman—the person who does not accept the same presuppositions as others, the person who says, in effect: "I do what I wish, period. I accept

no morality. I simply act." Hence Jeremy Bentham's famous characterization of natural rights as "nonsense upon stilts."

On the other side of the debate over our hypothetical are students—most students, these days—who respond that of course we should torture the terrorist. Many of these students believe that this is simply a practical argument. They justify torturing, or even killing, the terrorist by relying on simple arithmetic: The lives of eight million are worth more than the life of one. No great philosophical inquiry is needed. Unlike natural rights, utilitarianism is modern and seemingly scientific—"empirical." So it's no big deal, these students believe, to fall back upon the same utilitarian philosophy in deciding to torture the terrorist.

But a vast body of philosophy does underlie the supposition that "simple arithmetic" is the proper focal point. That philosophy is utilitarianism, the notion of the greatest good for the greatest number. It is true that much of Western social policy today is built upon utilitarian scaffolding. The justification for the principle of redistributing wealth that animates many government programs, from graduated income taxes to historic preservation, is the idea that the number of people who will benefit is greater than the number of people who will be harmed.

But utilitarianism, like the natural rights approach, has its difficulties. Utilitarianism can lead to horrific social policies. A majority may somehow be "happier" if all men are required to wear crew cuts, or if all women are required to wear burkas, or if all "infidels" are put to death. How do we answer that majority?

Moreover, "empirical" though it may be, utilitarianism is not without its own presuppositions. Central among them is precisely the same assumption of the moral bindingness of logic that occurs in the natural rights argument. Why ought we give the greatest good to the greatest number? Like natural rights proponents, utilitarians have no answer to the Nietzschean superman who wants it all for himself. Utilitarianism, like natural rights, turns out to be merely a rhetorically veiled system of personal preference. If either is pushed back far enough—if the "reason" for each premise in the syllogistic chain is answered with the simple question Why?—those reasons are revealed to be arbitrary.

Even this "postmodern" objection, though, has its problems. "Postmodernism," writes Stanley Fish, himself a leading postmodernist, maintains "that there can be no independent standard for determining which of many rival interpretations of an event is the true one." But postmodernism is subject to its own critique. The assertion that there is no independent standard—no universal truth—disproves itself. What is that assertion, after all, but a claim that something actually is universally true?

So the easy answers to the hypothetical are too easy. Each approach, in the end, opens the door to precisely the evils that it seeks to preclude. Each ultimately is arbitrary in that it relies upon premises that cannot be rationally proven but must, rather, be assumed. Each leaves us looking further.

Some years ago, Justice Hugo Black (1886–1971) reportedly gave an intriguing answer to the ticking time bomb hypothetical. There's a particular reason to be interested in Black. He was one of the leading liberals of the Warren Court. Appointed by President Franklin D. Roosevelt, he had a strong commitment to civil liberties and individual freedom. Black was also the quintessential constitutional "absolutist." He liked "bright line" tests—legal standards that were easy to apply and that admitted of no exceptions. When Black read the words, "Congress shall make no law . . ." in the First Amendment, he read them to mean that Congress shall make no law—not some law, not a few laws, but *no* law.

Black disdained "balancing tests"—standards that permitted judges to weigh competing interests case by case to reach different outcomes in different circumstances. Balancing tests, he believed, gave judges too

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much discretion, allowing them to substitute their own judgment for that of legislators. The job of judges, Black knew, is to interpret the law, not to make the law. Balancing tests reduce the law to mashed potatoes, to be shaped into anything any judge wants it to be, able to support any conclusion the judge desires. Black was the perfect person to whom the hypothetical could be addressed: How would the ultimate no-nonsense, "no exceptions" jurist who had an abiding respect for the dignity of the individual apply a rule that seemed to cry out for an exception? Should we torture the terrorist?

Black's reported answer was, "Yes—but we could never say that."

It is hard to resist reveling in the pithy wisdom of these words. In one sentence, Black reconciles down-home common sense with a profound recognition of the limits of the law—I should say, with a recognition of the limits of human cognitive and linguistic capacity.

Common sense kept Black, in the end, from being a true absolutist, at least within the realm of morality, if not law. By a true absolutist I mean one who refuses to balance competing values. An absolutist would say that a certain act is always, in every situation, wrong. Killing, lying, stealing, assassination—and, of course, torture—are examples of the kinds of acts some absolutists believe are always wrong, regardless of "exigent" circumstances. In his answer to the ticking time bomb hypothetical, Black reveals that he is willing to balance one value against another, weighing the evil of torture against the preservation of human life. So in a moral sense, the hypothetical seemed to have its intended purpose of "smoking him out," of showing that even the most dedicated constitutional absolutist could, under the right conditions, be forced to jump ship.

But Black does not jump ship in the legal realm. *We could never say that.* He is unwilling to allow the law to reflect his moral judgment. It is one thing to acknowledge the moral propriety of torturing the terrorist, but quite another to conclude that such an admission should be acted upon by a court (or, presumably, by a legislature). Why? We can only speculate, but Black might have responded that courts and legislatures, unlike the police, speak with words, not deeds. Don't spell it out in a rule—don't even try to spell it out—just do it. Because the human mind simply is not capable of finding words precise enough to eliminate all unwanted discretion. Because words are too slippery to be entrusted with the responsibility of staying put when strange new facts shake them around. Because any rule that would let us torture a terrorist, however carefully drafted, would inevitably be embraced by corrupt police officers or soldiers or prison guards somewhere as justification for doing what our society finds repugnant.

This answer, however, has an obvious shortcoming. It seems to assume that no legal norm is established if one simply intends not to establish a norm. Black's answer brings to mind Abraham Lincoln's quip: How many legs does a dog have if you call a tail a leg? Four; calling a tail a leg does not make it a leg. Calling a precedent a non-precedent does not make it so. Action counts. Intent is expressed in deeds as well as words. And deeds that are allowed to stand are likely to be repeated by others. Even if those deeds are not repeated, it is possible that the police officer who did the torturing could later be hauled into court for the act. What then? Turning a blind eye to manifest illegality could taint the entire legal system—though the law may have enough give at the joints to limit torture's corrupting influence. (Those found guilty of torture where mitigating circumstances exist could be given suspended sentences, for example.)

Despite its flaws, "not saying that" is sometimes our best option. The courts have various ways of "not saying that." One is encapsulated in Justice Oliver Wendell Holmes, Jr.'s famous dictum that hard cases make bad law. To avoid bad law, avoid hard cases; avoid resolving a conflict when two fundamental values clash. To resolve such a case is to risk establishing a formal legal precedent that will require a future case to be decided in a bad way. This is why the Supreme Court, when confronted with a hard case, is inclined to

underscore that its decision is restricted to the precise facts of the case before it.

The ticking time bomb hypothetical is, to be sure, a hard and essentially implausible case. Yet it can be made even harder. Assume that the person who knows the location of the bomb is not a terrorist—or even a wrongdoer. Assume that he happens to know where the bomb is located but, acting upon some perverse principle, refuses to answer the authorities' questions. Suppose, for example, that the police know that the bomb is hidden in his mother's house, unknown to her, and that they don't know her address. Suppose that he declines to cooperate out of fear that the police will hurt his mother. Is it permissible to torture a wholly innocent bystander to spare the lives of eight million people?

One might say that the person is a wrongdoer for the simple reason that it is wrong not to reveal the whereabouts of the bomb. But I am aware of no crime that would be committed by his remaining silent. He is not legally a wrongdoer. Morally, one might think otherwise. But one could also argue that choosing one's own mother's life over the lives of strangers is no moral wrong.

Remember, this person, unlike the terrorist, has not chosen to act outside the law. He has every reason to believe that he is protected from community-sponsored violence. After all, he did what the community told him to do in the only way it could communicate authoritatively with him—through the law. If we are to permit the law's guardians to engage in an improvised and unauthorized utilitarian calculus that trumps the law here, why not elsewhere? And if "elsewhere" can be decided by the law's guardians to be anyplace the guardians wish, what has become of the law?

Since September 11 we have often heard potential departures from the legal order defended with the argument that the "Constitution is not a suicide pact." No one can quarrel with these words (Justice Arthur Goldberg's words, actually). Survival is the ultimate right, for societies as well as for individuals. But the proposition has come to be relied upon too often, in contexts in which societal survival is not at stake. The statement has come to be shorthand for the idea that whenever the Constitution seems to be at odds with some transient utilitarian calculus, the Constitution must give way.

In its strong form, this argument is not just a case for occasionally violating the Constitution. It is an objection to the very idea of the rule of law. The rule of law substitutes for the series of utilitarian calculations that would otherwise occur in a lawless "state of nature." It says that we agree not to weigh costs against benefits where a specific rule of law applies. We do not permit a bank robber to excuse himself with the defense that the bank charged the community unconscionable interest rates, or a murderer to excuse himself with the defense that the deceased was a congenital bully. No: If the law provides the answer as to how certain wrongs are to be righted, then the law's answer controls. We do not set the law aside because the benefits of doing so seem to outweigh the costs.

I say "seem to outweigh the costs" because our assessment of costs can vary under different conditions. Recall Homer's story of the Sirens, the sea nymphs whose hypnotic singing lured sailors to crash their ships onto the rocks. And recall Odysseus's solution: Knowing that he would surely succumb to the Sirens' song (yet desperately wanting to hear it), he had himself bound to the ship's mast and told his crew to plug their ears. He ordered them to ignore his pleas to be untied, no matter how forceful. Knowing in calmer times, in other words, that he would assess the cost of succumbing to the Sirens differently than he would in a moment of great stress, Odysseus set down a rule that was not to be superseded by a later rule formulated in distress.

Society is like Odysseus. When it formulates constitutional limits, society says to itself: "When confronted with temptation, we may scream to be untied—untied to censor unwanted speech, to ban unwanted religion, to impose cruel and unusual punishments—but do not untie us! We know the true costs of these actions, and those costs are too great!"

So I am not making a roundabout case for the use of torture as an interrogation tool.

The law is like the lashes that bind Odysseus, a form of self-protection against future temptations.

To the contrary: The captives in Guantánamo Bay do not pose anywhere near as clear and present a danger as the ticking time bomb terrorist. As far as we know, no single, identifiable prisoner possesses information that could save thousands of lives. Torturing prisoners absent such exigent circumstances would represent a momentous and irreversible step backward toward war as it was fought centuries ago, war with no rules, war with no safe havens, war with no limits. No civilized nation can embark upon such a course unless it has decided to write off its future.

My case can be summed up in two words: *balance* and *limits*. The ticking time bomb hypothetical is a useful analytic tool not only for thinking about terrorism but for thinking about thinking. It makes us ponder whether any one value, however central to our culture, can ever be given overriding, controlling weight in any and all circumstances. The hypothetical shows how sticking to any absolute, inflexible principle come hell or high water can ultimately undermine the purposes that principle is intended to vindicate. It reveals the need to balance competing values, to reconcile countervailing ideals, pragmatically, with an eye to real-world consequences, not abstract theory.

My argument points toward a need for a renewed respect for limits. Limits are implicit in balance: If no single value always, everywhere, trumps every other value, then every value has its limits. These limits are revealed in situations in which that value is not the only guiding principle. But respect for limits must apply not only to values. It must also apply to institutions—to the capacity of institutions to resolve problems. Law is one of these institutions, and Justice Black's position is a good example of respect for the law's limits.

Some disagree with Black. Appearing on television's *60 Minutes* after September 11, Alan Dershowitz, a noted American law professor and civil liberties lawyer, declared not only that the terrorist in our ticking time bomb hypothetical should be tortured but that judges should be authorized to issue "torture warrants" in such cases. When Mike Wallace replied that the idea "sounds medieval," Dershowitz had a thoughtful

reply: "My suggestion is that we bring it into the legal system so that we can control it rather than keeping it outside of the legal system where it exists in a netherland of winked approval."

It is easy to hop on a high horse and score points by condemning torture, as a lot of critics were delighted to do after Dershowitz made his statement. But I commend him for braving the slings and arrows of the self-righteous in bringing this issue to the fore. Whether torture should be "brought into the legal system" or left outside it needs to be discussed, and it is a question on which reasonable people can disagree.

I commend Dershowitz, but I disagree with him. I disagree with him because I believe that he fails—unlike Hugo Black—to appreciate the outer bounds of what the law is able to accomplish. The law cannot ably manage all questions that society confronts. Sometimes, in attempting to do so, the law places a stamp of legitimacy on an activity that no civilized society can afford to legitimate. Sometimes certain activities belong in the netherland. Sometimes lawmakers seeking with the best of intentions to regulate an activity end up deregulating it. Sometimes the best regulation lies in no regulation. Sometimes the best way of enforcing limits is not to carve those limits into the law, where even carefully drawn words of limitation can unwittingly provide unwanted authority, but to count upon public servants to discern and respect those limits. Sometimes we must recognize that for the law to say something—for it to say anything—would undercut the objective that it seeks to achieve. Sometimes it may be necessary for good and just and decent public servants to do things that society in normal circumstances would find abhorrent. But: The law, in Justice Black's words, "could never say that."

All this places in perspective some of the steps that government has taken at home and abroad since September 11. Rights and interests must be balanced against one another—and in that process, the role of law is limited. Consider five recent examples, each of which presents a sharp clash of values.

1. The mass arrests of people in the United States suspected of links to terrorist organizations in the weeks after September 11 stretched to the limits any reasonable interpretation of the Fourth Amendment's warrant and probable cause requirements. But the federal government does have a responsibility to protect the safety and well-being of the American people. If, as seems probable, it was reasonable to believe that Al Qaeda cells were still operating within the United States, and if it was also reasonable to believe that those cells were poised to strike again, was it not sensible to balance those competing values by arresting the likeliest terrorist suspects?

2. Racial profiling is invidious racial discrimination, and racial discrimination is subject to strict scrutiny by the courts under the Fourteenth Amendment. Strict scrutiny, however, is not the same as prohibition; the strict scrutiny hurdle is overcome with a showing of a compelling governmental interest. Government, again, has a compelling interest in protecting the physical safety of the American people. If every known perpetrator of the September 11 bombings is a male member of a certain age and ethnic group, is not a special focus on such people a reasonable way for government to vindicate that compelling interest?

3. Directing the armed forces to shoot down a passenger airliner filled with innocent civilians is not something a president normally does. Americans have a constitutional right not to be deprived of life without due process of law. But what process is "due" is a function of circumstance. When the plane may be headed for the White House or the Capitol or a nuclear power plant, does not that order represent a reasonable balancing of interests?

4. Jury trials and other procedural safeguards normally are required for nonmilitary personnel accused of serious crimes. But when the alleged offenses are committed by noncitizens (such as members of Al Qaeda) who are fighting overseas as irregular forces against the U.S. military, when those noncitizens are accused of war crimes, and when history shows that hundreds of military tribunals were used in postwar Germany

and Japan to try war criminals, would a reasonable balance of competing interests be struck by trying every last defendant in federal courts located in the United States?

5. Assassination is prohibited by executive order and by the Fourth Hague Convention of 1907. The *Army Field Manual* says that the convention's provision "is construed as prohibiting assassination . . . or outlawry of an enemy, or putting a price upon an enemy's head, as well as offering a reward for an enemy 'dead or alive.'" But the laws of war also prohibit the killing of innocent civilians. When the enemy is Osama bin Laden, who has dedicated his life to killing as many innocent civilians as possible; when his capture or extradition is not feasible; and when taking that one life can reasonably be expected to save the lives of thousands and possibly millions of innocent people, would such a provision be unreasonable?

This is not to say that every government action since September 11 has been justified by exigent circumstance. Procedurally and substantively, government officials have sometimes overreacted—perhaps most egregiously members of Congress. The joint resolution that Congress adopted in the panicky days after the September 11 attacks is a sad testimony to the capacity of even the most dedicated public officials to succumb to a herd mentality. Congress authorized the president to use "all necessary and appropriate force," without any geographical or procedural restriction, to prevent future acts of international terrorism against the United States. There is no excuse for authorizing the president—any president—to use armed force domestically, against people located within the territory of the United States, without well-defined limits. But the September 14 legislation did just that.

Also since September 11, state and local officials and some university administrators have not been consistent in their dedication to—or understanding of—the First Amendment. A number of university professors have been penalized for expressing offensive views and counseling hostility toward the government. But offensive speech is protected by the First Amendment; speech can only be curtailed when it leads to incitement to crime, not when it constitutes mere advocacy. The remedy for evil counsels, Justice Louis Brandeis wrote, is not repression and less speech; the remedy for evil counsels is more speech and good counsels.

Still, most of the steps taken by government officials since the terrorist attacks have been reasonable efforts to reconcile competing values, and if government has been slow to "say that," the reason may be that hastily writing these balances into law would not be a good way to protect cherished freedoms over the long term. Today's balances have been struck virtually overnight. But the liberties at stake have been developed over many centuries by many peoples: from the Magna Carta of the English barons who confronted King John at Runnymede in 1215, to the French Declaration of the Rights of Man and of the Citizen in 1789, to the American Bill of Rights in 1791, to the Universal Declaration of Human Rights adopted by the United Nations in 1948, these freedoms are the product of selfless struggles, of countless lives, of endless dreams, in the United States and other countries, and it would be a tragedy too great for words if we were to allow terrorists to persuade us to forgo that heritage.

It would also be a mistake, however, to think that the law is solely responsible for defending these freedoms. "Liberty lies in the hearts of men and women," said the great American jurist Learned Hand. "When it dies there, no constitution, no law, no court can save it." There is no substitute for a vigilant body politic. But neither is there a substitute for a judicious body politic, a people who recognize that there is such a thing as excessive freedom in the face of lethal danger. Protecting freedom too broadly today could lead to a backlash if more terrorist attacks occur tomorrow, leaving us with even less freedom than we would otherwise have. It is important to get it right at the start; striking a pragmatic balance between competing values is the key—a balance that recognizes that each value has its limits. ❑