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TORTURE: WHO DECIDES?

The real dilemma's not about using torture -- it's about authorizing it



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By Julius (Jay) Wachtel. Where did “enhanced interrogation” techniques come from? No, they’re not an outgrowth of the [3D experiments](#) (“debility-dependence-dread state”) that the C.I.A. commissioned during the Cold War. Neither did they originate with [SERE](#), the program that prepares special ops troops for those nasty “we have ways to make you talk” methods that made North Korean interrogators famous. Nope, for the *real* scoop we must turn to...Hollywood!

A vicious criminal buried a comely teen alive and abandoned her to suffocate. After the requisite number of chases and shootouts Inspector Callahan caught up with the kidnapper. There was no time to argue. *Where is she?*

While “[Dirty Harry](#)” has its comic-strip moments much of it rings true. Its depiction of the kidnapping seems nearly prophetic. In 2002 real [German police](#) arrested the abductor of an 11-year old boy when he tried to pick up the ransom. But the man stubbornly refused to help officers find the child. After hours of fruitless questioning Frankfurt’s deputy police chief bluntly warned him that if he didn’t cooperate a “specialist” would be summoned to inflict unbearable pain. Although the ruse worked, it failed to save the victim: his body was found in a lake, swathed in plastic.

Scorpio’s victim also turned up dead. But unlike the German cop, who was relieved of duty and investigated for merely threatening torture, Inspector Callahan, who really did it (on screen) got off scot-free. Well, there *were* sequels to be filmed!

Dirty Harry's actions stirred spirited debate in the halls of academe. In his classic essay "[The Dirty Harry Problem](#)," criminologist Carl Klockars used what the Inspector did to explore the means-end dilemmas that real cops encounter. But long before the movie hit theaters a string of Supreme Court decisions had already made it clear that anything remotely smacking of torture would make whatever the police got inadmissible in court:

- [Rochin v. California](#) (1953): Officers choked a suspect who was swallowing pills, and when they couldn't get him to stop had his stomach pumped out. (In this landmark case the Court ruled that police behavior which "shocks the conscience" violates the [Due Process clause](#) of the Fourteenth Amendment.)
- [Leyra v. Denno](#) (1954): During a relentless interrogation a psychiatrist posing as an ordinary physician told the defendant, who was suffering from a severe sinus condition, how much better he would feel if he confessed.
- [Spano v. New York](#) (1959): The defendant confessed after a friend (a police cadet) begged him, saying that if he didn't the cadet would get in trouble and his wife and kids would suffer.
- [Rogers v. Richmond](#) (1961): After a prolonged, fruitless interrogation officers threatened to arrest a suspect's sick wife
- [Frazier v. Cupp](#) (1969). Officers subjected a defendant to a grueling 36-hour interrogation.

Next thing we knew there was [Abu Ghraib](#). Shocked by disclosures that "unlawful combatants" were being starved, deprived of sleep, forced to stand in stress positions for hours, and so forth, attorney [Alan Dershowitz](#) wrote that it was time to give the whole matter of torture a proper airing. A year later Dershowitz wrote a [follow-up article](#) suggesting that requiring interrogators to justify the necessity for "rough interrogation" techniques by securing special warrants could help assure that unsavory methods were used only when really, really necessary.

As Dershowitz is a well-known civil libertarian, his piece set off a ruckus. In "Torture: the Case for Dirty Harry and Against Alan Dershowitz" philosopher [Uwe Steinhoff](#) lauded Inspector Callahan's instincts:

The Dirty Harry case, it seems to me, is a case of morally justified torture. But isn't the kidnapper right? Does not even he have rights? Yes, he has, but in these circumstances he does not have the right not to be tortured. Again, the situation

is analogous to self-defence. The aggressor does not lose all of his rights, but his right to life weighs less than the innocent defender's right to life...Harry made the right decision.

Steinhoff nonetheless warned against officially endorsing torture, reasoning that giving it legitimacy would amplify its use and coarsen the system. Agreeing with Klockars, he suggested that the best way to keep repugnant yet potentially lifesaving practices within bounds was to place would-be torturers on notice that they could be prosecuted. His moral calculus brings to mind a 1999 ruling by the [Israeli Supreme Court](#) (cited by Dershowitz) that outlawed all forms of torture but left it up to judges to forgive interrogators who thought they had no option.

In a [rejoinder](#) Dershowitz pointed out that Bill Clinton had supported using Presidential findings to authorize torture should extreme situations warrant. What neither the lawyer nor the ex-President knew was that Justice Department attorneys crafted secret guidelines so permissive that two Al Qaeda suspects wound up getting waterboarded [a total of 266 times](#). Just as Klockars and Steinhoff feared, trying to regulate "enhanced interrogation techniques" only managed to grease an already slippery moral slope.

History tells us that crusades (think War on Terror) have led otherwise good people to endorse and engage in the most brutal and despicable behavior. Remember the [Milgram experiment](#)? It's not surprising that when our new President realized what was happening under the Stars and Stripes he would adopt the Klockars/Steinhoff approach and ban torture altogether. It may not be a perfect solution. But in this world it's as close to perfection as we're likely to get.