
Introduction: Do the Ghosts of *Leviathan* Linger On?

Law, Violence, and Torture in Liberal Democracies

The 2009 Oscar hit was a British/Indian film titled *Slumdog Millionaire* about a boy from a Mumbai slum who manages to win twenty million rupees in a game show, thereby enacting a true “rag to riches” story.¹ Less talked about is the framing of this incredibly popular film, which provides an insightful comment on the discourse on torture in contemporary India. In the very first scene of the film, one observes a constable beating up the boy while the senior police official calmly watches, both assuming that the boy has been winning the game show by cheating. Interestingly enough, news reports mention that initially the senior official was seen as torturing the boy, but the Indian government asked the film producers to change the role of the torturer in the film. As *New York Times* reporter Somini Sengupta explains,

On one occasion, Mr. Colson [the producer of the film] recalled, the Indian authorities took umbrage at a scene in the script in which a suspect is tortured by a police commissioner during interrogation. The Indian authorities told Mr. Colson to take out the police commissioner. No police officer above the rank of inspector should be shown administering torture, they said. The makers of “*Slumdog Millionaire*” obeyed.²

Here, it is striking that instead of asking for scenes of torture to be removed entirely as being improbable, indeed impermissible in a liberal democracy, the Indian government appears to have been more specific in its request that no senior police officer be represented in an act of torture. In this moment, the film simultaneously captures the routineness of torture in the Indian criminal justice system even while complying with the govern-

ment's request not to subvert the state's recent interventions, which rely on a "clean" image of its senior officials.³

Another key moment in 2009 was the public disagreement of the former U.S. vice president Dick Cheney with President Obama just as the latter was announcing the plans to close down the prison at Guantánamo Bay and espousing an unequivocal rejection of torture. When asked whether the interrogation techniques used against "high-value detainees," including waterboarding, were authorized by him, Cheney said,

I was aware of the program, certainly, and involved in helping get the process cleared, as the agency in effect came in and wanted to know what they could and couldn't do. . . . And they talked to me, as well as others, to explain what they wanted to do. And I supported it. . . . It's been a remarkably successful effort, and I think the results speak for themselves.⁴

Cheney publicly admitted his support for waterboarding, widely considered a form of torture, despite statements against torture by the administration he represented. Thus, in 2009, in both these liberal democracies, India and the United States, despite the long history of laws against torture, justifications of this violence crept directly or indirectly into popular and legal/political discourses.

This study focuses on the legal and political discourses on torture in India and the United States to theorize the relationship among law, violence, and state power in liberal democracies. In liberal legal and political theory, one of the foundational principles is that law in modern societies is primarily based on certain norms/rules and principles. In legal theory, H. L. A. Hart and Ronald Dworkin assert that law based on coercion, as upheld by John Austin and Thomas Hobbes, has been largely replaced in modern societies by law based on rules and principles.⁵ Hence, there is an assumption by political and legal theorists that violence occupies a secondary place in the legal process. This assumption in legal and political theory has been successfully challenged by critical theorists such as Robert Cover, Austin Sarat, and Timothy Kaufman-Osborn, who, using the example of the death penalty, point to law's continued dependence on violence in modern societies.⁶

With regard to torture in particular, Michel Foucault has argued that torturous spectacles used in ancient regimes to represent the sovereign's (state) power have been largely replaced by disciplinary and surveillance mechanisms in modern societies.⁷ This has meant that the state relies less on force and more on discipline. In contrast, theorists such as Darius Rejali argue that

instead of disciplinary institutions replacing torture, as Foucault suggests, torture actually becomes a part and parcel of those disciplinary institutions.⁸ He thus rightly argues that torture is not simply a feature of premodern society but also a key aspect of modern society.⁹ Further, Talal Asad points out that the existence of modern torture has a practical logic since it is “integral to the maintenance of the nation state’s sovereignty” in policing and upholding national security.¹⁰

Following this tradition of analyzing the role of violence in liberal democracies, specifically torture, I examine the jurisprudence of interrogations in the United States and India to examine how their legal discourses address the question of torture. In this study I argue that even before recent debates on the use of torture in the “war on terror,” the legal discourses were much more ambivalent about the infliction of excess pain and suffering than most political and legal theorists have acknowledged.¹¹ Rather than viewing the recent policies on interrogation as anomalous or exceptional, I argue that efforts to accommodate excess violence are long-standing features of interrogations in both the democracies.

Torture in Democracies: A Liberal Paradox

Images of U.S. soldiers engaging in torture at the Abu Ghraib prison in Iraq in 2004 brought the debate on torture back to the forefront of legal and political discourse both in the United States and worldwide. Official U.S. memos authorizing “harsh interrogation techniques,” such as waterboarding, and the military tribunals under the Military Commissions Act of 2006 debating the admissibility of coercion-based evidence, confirmed that these images were not mere aberrations. These images and memos resulted in a proclamation by both the critics and the defenders of these policies that the post-9/11 United States had witnessed a return of the unthinkable: torture. This articulation is premised on the assumption that in liberal democracies, instances of torture are considered either features of the past or, at worst, aberrations that occur rarely. As the 1999 *U.S. Report on Torture* to the Committee against Torture states, “Torture does not occur in the United States except in aberrational situations and never as a matter of policy.”¹² Similarly, in India, the late Indian prime minister Rajiv Gandhi stated in January 1988, “We don’t torture anybody. I can be very categorical about that. Wherever we have had complaints of torture we’ve had it checked and we’ve not found it to be true.”¹³ The assertions continue despite the documentation of acts of torture in both these democracies.

In this section, I explore why torture appears as a paradox for liberal democracies both theoretically and historically. One of the self-defining features of liberal democracies is the absence of torture or indeed any “unnecessary” state violence. This appears both in the political rhetoric (noted earlier) and in liberal theory. Thus, Michael Ignatieff, in his discussion of the United States as a liberal democracy, refers to it as “a constitutional order that sets limits to any government’s use of force.”¹⁴ Of course, liberal democracies are characterized not just by their relationship to violence. As Steven Lukes notes,

Democracy, definable in different ways, is on almost every account a system with mechanisms that hold its officials responsive and responsible to the people’s wills or preferences. A liberal democracy will have a further feature: it will hold its officials responsible for respecting the principles of liberal equality: for not violating their citizens’ rights and *respecting their dignity*.¹⁵

Thus, there are a number of other features that characterize liberal democracies, such as the rule of law, representational government, state accountability through a system of checks and balances, separation of powers, and protection of individual rights and liberties, including a respect for human dignity. All these features have one thing in common: they are conceptually and ostensibly based on consent.

After all, as one of the foremost theorists of classical liberalism, John Locke, put it, “For ‘tis not every compact that puts an end to the state of nature between men, but only this one of *agreeing together mutually* to enter into one community, and make one body politic.”¹⁶ Locke goes on to explain, “all men are naturally in that state [of nature], and remain so, till by their *own consents* they make themselves members of some politic society.”¹⁷ Thus, John Locke emphasized the importance of consent in the formation of the government.

Of course, the liberal state, while being based on consent, continues to be closely related to violence, as noted in Max Weber’s famous statement that “legal coercion by violence is the monopoly of the state.”¹⁸ As Weber explains,

Sociologically, the question of whether or not guaranteed law exists in such a situation depends on the availability of an *organized coercive apparatus* for the nonviolent exercise of legal coercion. This apparatus must also possess such power that there is in fact a significant probability that the norm will be respected because of the possibility of recourse to such legal coercion.¹⁹

Weber does recognize the significance of norms in the regulation of society, but he asserts that respect for these norms exists only because they can be backed by legal coercion. Thus, the functioning of the state is closely related to the concrete possibility of legal coercion. Liberal theorists, while accepting the role of violence, however, specify that the state does not govern primarily through violence and that any violence it employs is actually constrained. As Ignatieff puts it,

[L]iberal states seek both to create a free space for democratic deliberation and to set *strict limits to the coercive and compulsory powers of government*. This is the double sense in which democracies stand against violence: positively, they seek to create free institutions where public policy is decided freely, rather than by fear and coercion; negatively, they seek to reduce, to a minimum, the coercion and violence necessary to the maintenance of order among free peoples.²⁰

For Ignatieff, the liberal state both ensures the freedom for people to deliberate and also subjects them only to the minimal violence required to maintain law and order in society. Indeed, the liberal state not only views coercion as a necessary “evil”; it also requires that much introspection take place before the administration of pain and suffering. As Ignatieff notes, “Only in liberal societies have people believed that the pain and suffering involved in depriving people of their liberty must make us think twice about imposing this constraint even on those who justly deserve it.”²¹ Thus, coercion, violence, pain, and suffering are subject to scrutiny and kept to a minimum, according to Ignatieff’s framework of a liberal state and democracy.

Therefore, despite Weber’s blatant assertion about the state’s monopoly on violence, it is undisputed that the liberal state exhibits an attempt to constrain the violence. Whether the limits to violence are put in place for the purpose of masking its real nature, gaining legitimacy, or displaying a developed respect for human dignity, it is this feature of liberal democracy that makes torture and excess violence a particularly paradoxical proposition.²²

Indeed, if one traces the standard narrative of the history of Western torture, one discerns a similar assumption that the decline of torture is associated with the emergence of the Enlightenment era and a “civilized” modern society.²³ As Jeremy Waldron articulates it, “torture is certainly seen by most jurists—or has been seen by most jurists until very recently—as inherently alien to our legal heritage.”²⁴ Historically, in Europe, apart from the Greeks and the Romans, the use of torture due to the influence of Roman canoni-

cal law began in the twelfth century and was institutionalized as a practice.²⁵ Subsequently, a demand for reform in the eighteenth century by Enlightenment philosophers such as Cesare Beccaria and Voltaire, who focused on the human body and human dignity, led to the removal of many “barbaric” forms of punishment (penal torture) and interrogation (judicial torture).²⁶ In many narratives on the history of Western torture, the eighteenth and nineteenth centuries were considered to be the period when torture was abolished in almost all countries of Europe, and this phase was seen as marking the emergence of modernity.

There are of course variations on this standard narrative of Western torture. In a fascinating book, *Invention of Human Rights*, Lynn Hunt traces the process by which human rights became self-evident in the eighteenth century, particularly in the American Declaration of Independence in 1776 and the French Revolution in 1789. Hunt explains that during this time, “New kinds of reading (and viewing and listening) created new individual experiences (empathy), which in turn made possible new social and political concepts (human rights).”²⁷ More specifically, in the context of torture, Hunt notes that the decline of torture was integrally connected to the ways in which notions of empathy and autonomy emerged in Europe at this time. However, these changes did not occur just because “judges gave up on it or because Enlightenment writers eventually opposed it.” Rather, she suggests, “Torture ended because the traditional framework of pain and personhood fell apart, to be replaced, bit by bit, by a new framework, in which individuals owned their bodies, had rights to their separateness and to bodily inviolability, and recognized in other people the same passions, sentiments, and sympathies as in themselves.”²⁸

Karl Shoemaker also locates the transformation of punishment from painful to painless methods in terms of a change in the understanding of pain from medieval to modern times. In modern times, he notes, there emerged an aversion to pain and a desire to control it.²⁹ Lisa Silverman maps this change within the medical profession, which evolved from treating the root cause of a problem through surgery to treating the pain associated with the problem and getting rid of it.³⁰ Thus, scholars point to a consensus among the abolitionists of torture in Europe in the eighteenth century that pain had to decline and torture had to be seen as primarily a negative tool to be used in extremely rare cases.³¹

These scholars complicate the standard narrative on the decline of torture to the extent that they link that decline to transformations in larger social processes, such that the contribution of the abolitionists must be seen merely

as moral justification of the reforms rather than as their primary cause. However, these studies continue to fit neatly into the Enlightenment narrative of the decline of torture from medieval to modern times. In the process, they fail to explain why the revival of torture in the twentieth century could take place in many of the same European countries despite the progress against pain. In addition to the colonial powers, England and France (which used torture even prior to the twentieth century), Nazi Germany, Stalinist Russia, Italy, and Spain also used forms of torture in their regimes.³² The so-called revival of torture also questioned the dominant explanation that it was the moral and humane considerations in modern societies that led to the decline of torture in the first place.

In contrast to the “fairy tale” (as Langbein terms it) of abolition of torture as a story of progress in modern societies, Edward Peters and John Langbein point to other reasons why the use of torture declined.³³ Langbein notes that it was mainly two juridical forces that led to the rejection of torture in Europe: first, the development of “new criminal sanctions”; and second, a “revolution in the law of proof” in the seventeenth century.³⁴ Thus, in addition to death and disfigurement as punishments, there was now a range of alternatives, including the disciplinary institutions such as prisons and correctional facilities. The laws of evidence also began to be based on more circumstantial and physical evidence because of the rise of new technologies. Therefore, torture was no longer seen as an unavoidable part of the legal criminal procedure. The disappearance of the “legal and technical underpinnings of torture” allowed torture to be the target of “logical, moral, and social criticisms.”³⁵ Indeed, Lisa Silverman suggests that even Beccaria recognized the limitations of torture as a mechanism for gaining the truth.³⁶ In other words, a change in the requirements of the legal system also allowed torture to become less important in Europe in the eighteenth century. Ironically enough, although Enlightenment philosophers campaigned against torture both as contradictory to the rights and will of the citizen (humanistic reasons) and as inefficient (pragmatics), their contributions continue to be highlighted primarily in terms of a moral condemnation of torture.

Darius Rejali and Edward Peters point out that consequently, torture continues to be considered primarily in “moral and sentimental terms,” thereby limiting the debate on torture and especially moving the discussion away from the pragmatics of the phenomenon.³⁷ Addressing the pragmatics of torture in modern democracies is of course not intended to remove the moral aspects of the issue but, rather, is meant to allow for better recognition of the significance of both morality and pragmatics, historically and in modern times.³⁸

The “fairy tale” of abolition of torture is significant also because it allows for the association of torture with different stages of society. Torture is associated not only with either the ancient or medieval regimes, as noted earlier, but also with the “other,” generally non-Western societies, which continue to be considered more “primitive” and “barbaric.” Conversely, the focus on torture as a feature of the “other” suggests that it is inherently absent in more modern, “civilized,” democratic (often Western) societies. Waldron notes that even as early as 1911, the Encyclopedia Britannica noted that “the whole subject [of torture] is now one of only historical interest as far as Europe is concerned,” thereby absolving the entire continent of the “sin” of torture.³⁹

This notion of the impermissibility of torture as an indicator of modern, civilized societies makes an appearance each time practices of torture appear. In fact, immediately after September 11, 2001, when FBI officials appeared on talk shows and gave statements in the newspapers about the possibility of using torture, one FBI agent who had been involved in the 9/11 investigation was quoted as saying, “We are known for humanitarian treatment, so basically we are stuck.”⁴⁰ Legal scholar Edward Greer rightly characterizes this inherent belief in the absence of torture in the following way: “In the hegemonic legal ideology of the United States, torturing people is taboo.”⁴¹ Thus, the United States cannot appear to be condoning an “uncivilized” and “medieval” practice such as torture. Echoing a similar sentiment, in *D. K. Basu v. State of West Bengal*, the Indian Supreme Court stated the following:

The word torture today has become synonymous with the *darker side of human civilization*. . . . It is a calculated assault on human dignity and *whenever human dignity is wounded, civilisation takes a step backward—[the] flag of humanity must on each such occasion fly half-mast.*⁴²

Thus, theoretically, rhetorically, and historically, the standard narratives on the history of torture have created a discourse of impermissibility of torture in modern liberal democracies and indeed deemphasized the role of violence in the very functioning of the state and law. In such a framework, any reappearance of torture in image or in policy is considered an exception, and it is this assumption that I unravel in the course of this study.

Debates on Law and Violence in Legal and Political Theory

In *Discipline and Punish: The Birth of a Prison*, Michel Foucault describes the transformation in the nature of power from the use of torture that marked the body of the condemned to a power based on control through discipline in modern society.⁴³ Foucault notes that one of the major changes in eighteenth – and nineteenth-century Europe is the “disappearance of torture as a public spectacle,” as had been the case in the execution of Damiens.⁴⁴ In the classical age, according to Foucault, the sovereign’s body and power were directly threatened by any criminal act and had to be avenged by reasserting the difference—“dissymmetry of relations”—between the criminal and the sovereign power. The point was not so much deterrence by example but was rather an “exercise in terror.” The torture inherent in that kind of punishment highlighted the enormity of the crime (called “atrocities”) and functioned by means of an “excess.”⁴⁵ The excessive aspect of the power is best illustrated in an example in which a corpse is cut into pieces.⁴⁶

Foucault did concede that even in modern times, suffering was considered desirable for the condemned due to the wrongs committed by him or her and, thus, there was always a certain amount of physical pain involved in punishment. Foucault writes, “There remains, therefore, a trace of ‘torture’ in the modern mechanisms of criminal justice—a trace that has not been entirely overcome, but which is enveloped, increasingly, by the noncorporeal nature of the penal system.”⁴⁷ However, this trace of torture, according to Foucault, is a far cry from the fifteenth to the eighteenth centuries, when every penalty included some amount of torture or *supplice* that involved a certain amount of “horrible” pain.

Despite acknowledging the continuation of some amount of pain in modern societies, for the most part Foucault emphasizes an emergence of “micro systems of power” that transformed individuals from free, independent subjects to disciplined ones. In the course of this transformation in the system of social control, there is no longer “recourse, in principle at least, to excess, force or violence. It is a power that seems all the less ‘corporeal’ in that it is more subtly ‘physical.’”⁴⁸ The “economy of power” thus required that disciplinary practices take over from the use of excess violence. In his famous essay on governmentality (which I explore in chapter 2), Foucault further introduced the notion of an art of government as a form of social control that actually channelizes the productive power of individuals, and once again deemphasizes the role of “excess” violence. In

contrast, in my work, I argue that even while “excess” of the kind that Foucault noted in the era of Damians may no longer be compatible with liberal democracies, the current debates on torture point to the possibility of accommodation of other forms of “excess violence.”⁴⁹ In order to further understand the nature of the excess violence accommodated, one has to briefly revisit the debates on the relationship between law and violence that led to the deemphasis on the role of violence in law in mainstream liberal legal and political theory.

As noted earlier, the debate within legal and political theory centered on whether law is primarily based on coercion or on rules and principles. John Austin, for instance, argued that law is based on the “sovereign’s” coercive commands. Austin writes that “law is a command which obliges a person or persons to a *course* of conduct.”⁵⁰ The command is backed by “*might*: the power of affecting others with evil or pain.”⁵¹ Both H. L. A. Hart and Ronald Dworkin critique Austin’s idea of a sovereign by questioning how one could define a single sovereign in the present legal system. Hart and Dworkin further point out that Austin’s definition fails to account for the difference between the orders of the sovereign and those of an outlaw since he defines “obligation as subjection to the threat of force.”⁵² Notwithstanding the critique of the limited definition, Austin’s attempt to link law to violence is a crucial one that is not addressed by the positivistic Hartian notion of rules or by Dworkin’s principles.

Indeed, within liberal theory, the relationship between law and violence exists at several levels. First, law emerges because there is the danger of violence becoming the dominant feature in society. Thomas Hobbes, for instance, points out that it is due to the fear of the “state of nature” becoming a “state of war” that “men” decide to give themselves to the Leviathan.⁵³ They agree to give up their rights to the “brute beast” in order to preserve the one basic right they want for themselves: namely, the right to self-preservation. Hobbes writes,

This done, the Multitude so united in One person, is called a COMMON-WEALTH in latine CIVITAS. This is the Generation of that great LEVIATHAN, or rather (to speak more reverently) of that *Mortall God*, to which wee owe under the *Immortall God*, our peace and defence. For by this Authoritie, given him by every particular man in the Common-Wealth, *he hath the use of so much Power and Strength conferred on him, that by terror thereof, he is inabled to (con) forme the wills of them all, to Peace at home, and mutual ayd against their enemies abroad.*⁵⁴

The fear of anarchy and an imagined state of war is the source of social order. As Austin Sarat and Thomas Kearns point out, “what brings us to law, and holds us, is fear—not just fear of law but fear of life without law.”⁵⁵ Or, as a prominent legal theorist, lawyer, and human rights activist, K. G. Kannabiran, writes, “None of us seem [sic] to feel free without restraint.”⁵⁶ Hence, the need to check anarchy of any kind leads to the emergence of law, which is necessarily backed by violence.

Second, since law originates in order to check violence, it cannot legitimize itself only on the basis of violence. This is the basis of the criticism of Hobbes and Austin by subsequent theorists. According to Hart and Dworkin, what is missing in the narratives of Hobbes and Austin is the link between law, norms, and justice, and the importance of consent. Hart adds a normative component to the rules by emphasizing the distinction between “being obliged” and “being obligated.” The latter may be followed because of a normativity, which goes beyond just being coerced to obey. Hence, what distinguishes the gunman from the legally sanctioned officer for Hart is that the latter has authority, which is not based on just sheer force.⁵⁷ Dworkin notes that while for Austin the basis of legitimacy lay in “their [sovereigns’] monopoly of power,” for Hart, it lay in the “constitutional standards,” which were accepted by the community as the “rule of recognition.”⁵⁸ Instead of relying on the coercive sanctions of the sovereign, as Austin suggests, law comes to be based on certain rules, norms, and principles that create obligations for individuals.

As a result, law then becomes focused on legal interpretation—the process rather than the force. For Dworkin, law is neither the “will” of the judges nor the “power to back it up with force” nor “chiseled rules”—it is about legal interpretation based on the principles of justice. Here “law and philosophy tend to merge.”⁵⁹ As Sarat and Kearns point out, the need to have normative principles in legal theory required the “forgetting of violence.”⁶⁰ Recovering the link between law and justice is an extremely important project, which explains Hart’s and Dworkin’s preoccupation with dissociating themselves from Austin and Hobbes.

Austin Sarat explains that law’s relationship to violence—violence as the basis of “founding the legal order,” “law as regulator of force” and, finally, violence as “a means through which law acts”—is constantly denied.⁶¹ One could, of course, argue that while the violence involved in the founding of the legal order is generally recognized, the emphasis is on the emergence of an alternative basis for law thereafter, whether the basis is rules or principles. The overall assumption is that the modern legal systems have moved away from their reliance on force. Here, I give two examples of the way this denial

of the significance of violence in law appears as a dominant frame of reference. In the context of the torture debate, one observes the influence of this approach in Jeremy Waldron's essay on legal archetypes, an archetype being defined "as a rule which has significance not just in and of itself, but also as the embodiment of a pervasive principle."⁶² Waldron notes,

The rule against torture is archetypal of a certain policy having to do with the relation between law and force, and the force with which law rules. The prohibition on torture is expressive of an important underlying policy of the law, which we might try to capture in the following way: Law is not brutal in its operation. Law is not savage. Law does not rule through abject fear and terror, or by breaking the will of those whom it confronts. *If law is forceful or coercive, it gets its way by nonbrutal methods which respect rather than mutilate the dignity and agency of those who are its subjects.*⁶³

Since Waldron's intervention is intended to provide a reference point for post-9/11 torture debates in the United States that attempted to push against the prohibition of torture, he focuses on a complete separation between law and brutality. However, in the process, he fails to specify the actual nature of the relationship between law and violence, indeed overemphasizing the role of respect for the dignity and agency of subjects in law.

Another example of understanding the relationship between law and violence is Phillippe Nonet and Philip Selznick's effort to explain the transition of law and society from "repressive law" (where the coercion is "extensive" and "weakly restrained") to "autonomous law" (where coercion is "controlled by legal constraints").⁶⁴ From there Nonet and Selznick see a move towards a "responsive law," wherein the coercive aspects of law are replaced by a "positive search for alternatives, e.g., incentives and self-sustaining systems of obligations."⁶⁵ While the basis of legitimacy in the repressive legal regime is coercion, force, and violence, especially of the direct kind, one observes an emergence of the legitimacy of law as no longer based on coercion or force but rather on the autonomous rule of law. The basis of law's legitimacy, thus, moves from force to rules and consent based on reason. If this is the case, then what is the role of violence? This theory of the legitimacy of law suggests that violence plays a more secondary role and is the result of the action of agents, who are only instruments, enforcing the results of bureaucratic judicial decision making.⁶⁶ The question for the critics of "norm-" and "consensus-building" notions of law, such as Robert Cover, is whether the legal interpretation by the judges is completely divorced from violence.

Cover, in his seminal essay “Violence and the Word,” pointed toward this integral connection between legal interpretation and *physical* violence.⁶⁷ Cover’s contribution was that he looked at the role of the very judges seen as providing justice as being involved in violence. One of his most famous statements is, “Legal interpretation takes place in a field of pain and death.”⁶⁸ A judge may interpret a text in such a way that it has a violent impact on the victims—the victim may lose his or her freedom, property, children, and life as a result of the judgment. Yet there continues to be an emphasis on the commonality of meaning that law seeks to create through its association with justice. Cover’s focus on violence aims not at rejecting the interpretive enterprise but at reminding the judges of the responsibility of legal interpretation. “It reminds us that the interpretative commitments of officials are realized, indeed, in the flesh.”⁶⁹ This is to emphasize that the legal act is not a “mental and spiritual act” but one with physical implications that have been denied in mainstream legal theory.

Cover not only analyzed the violent impact of legal interpretation but also focused attention on how force used by law always appears to be legitimate by virtue of it being “law’s violence.” As Sarat explains, “What this claim to legitimacy implies, in this minimal answer, is that law’s violence is rational, controlled, and purposive, that law makes force the servant of the word.”⁷⁰ This contentious relationship between law and violence is best illustrated in some of the significant works on the death penalty in the United States by Sarat and Kaufman-Osborn. These theorists focus on the role played by judges in ensuring that law’s violence appears to be controlled and justified. At the same time, judges themselves have to appear to be removed from the violence that occurs at the level of enforcement. Timothy Kaufman-Osborn’s work on the death penalty, for instance, powerfully points to the apparent distancing of the act of execution from the courtroom where the death penalty is pronounced, and he illustrates how “words” and “deeds” are in fact integrally related.⁷¹ The judge not only announces the execution but also has to ensure a “structure of cooperation” in order for his or her sentence to be carried out by the state apparatus. In order to ensure compliance, the judge even has to justify the use of violence as necessary.

Furthermore, law’s violence has to appear controlled. Austin Sarat points to the change in the methods of execution as an example of the way law’s violence always has to project itself as humane, in contrast to the illegal violence of nonstate actors, in order to legitimize itself.⁷² Here law in general plays an important role in legitimizing state violence by delegitimizing the violence used by the nonstate actors. Upendra Baxi explains this point further:

The legal system draws the crucial distinction between prescribed and proscribed threat or uses of force. Apart from reasonable use of force in self-defence by subjects of the legal order, the legal system, always and everywhere, *seeks to delegitimise and criminalize violence by actors other than those authorized to use violence (normally, the agents of the State—the police, the para-military forces and the armed forces)* and provides a normative language which camouflages the core coercion underlying the law.⁷³

Thus, the need to deny its reliance on violence and simultaneously justify the use of some controlled violence for maintaining order creates a constant source of tension for law. It is this tension that law has with violence that I further explore in this project on torture in liberal democracies in the context of India and the United States.

Illustrations of Liberal Democracies: India and the United States

This project studies the jurisprudence of interrogations in the United States and India. I focus on the United States since some of the most significant public debates on torture in democracies have come up in the post-9/11 U.S. context. I take the case of India as my second illustration because focusing on a non-Western liberal democracy such as India squarely challenges the imaginary of liberal democracies as primarily Western. The study also draws from the tradition of recent comparative law scholarship that compares the legal systems in both these countries due to certain historical and contemporary similarities.⁷⁴ Both India and the United States have a common law history emerging from their colonial interaction with the British legal system. In addition, both countries have strong and independent supreme courts that have powers of judicial review and have played a key role in the development of civil liberties, especially in the context of torture and interrogations. Further, U.S. constitutional principles have had an impact on the Indian Constitution, there have been regular dialogues between the judges and other legal actors in the two countries, and in many cases the Indian Supreme Court has made a direct reference to American jurisprudence.⁷⁵ In fact, this has led influential legal scholars to debate whether Indian jurisprudence is completely determined by Anglo American jurisprudence.⁷⁶

To address this question, Upendra Baxi's differentiation among the three kinds of continuities between the BILS (British Indian legal system) and the ILS (Indian legal system) is useful.⁷⁷ First, Baxi argues, the ILS has deliberately adopted some of the features of the BILS as a result of a reflective pro-

cess of engagement, a good example being the embracing of an adversarial legal system. Second, the continuities are reflected in the many unchanged laws that remain on the books as the result of “sheer inertia.” Third, Baxi identifies certain continuities as “colonial” because they reflect a conscious preservation of the “status quo” by the Indian governing elites. Indeed, some of the copying of Anglo American features by the ILS comes close to what Baxi provocatively calls “juristic dependencia.”⁷⁸ This phenomenon is especially observed in the Indian system’s high reliance on Anglo American law for legislative and judicial initiatives, such that “the ILS became a subordinate, almost a vassal legal system, thereby only occasionally serving the needs of Indian society.”⁷⁹

True enough, in a number of Indian cases on the issue of interrogation, one finds Indian judges especially prone to quote U.S. justices and cases as precedents. Nonetheless, a close study of these cases suggests that sometimes Indian judges are conscious of the hegemonic influences, but they continue to refer to Western jurisprudence for very specific reasons such as the origins of many modern laws in the colonial period.⁸⁰ In other instances, the Indian justices borrowed certain principles from Western jurisprudence because they believed in the existence of some universal humanist principles. As Justice Iyer writes in the context of the Satpathy case inspired by the Miranda decision,

India is Indian, not alien, and jurisprudence is neither eternal nor universal but moulded by the national genius, life’s realities, culture and ethos of each country. Even so, humanist jurists will agree that in this indivisible human planet certain values, though divergently expressed, have cosmic status, spreading out with the march of civilization in space and time. To understand ourselves, we must listen to voices from afar, without forsaking our identity.⁸¹

As the above quotation indicates, the Indian justices believed that some humanist values could serve as guiding principles in decision making as long as there is a self-reflexive struggle to ensure the compatibility of the principles to the specific cultural and national context.

Thus, while there are formal continuities with and an extensive reliance on the Anglo American legal systems, there is no easy answer to the question whether this can be termed “juristic dependencia.” As Baxi himself points out, juristic dependencia is not an unproblematic concept, particularly because it does not look at the “demarcating line between ‘copycatism’ and cross cultural diffusion.”⁸² In addition, more importantly, calling a system

“colonial,” Baxi notes, prevents an analysis of the ILS on its own terms. Thus, in this study, I focus on the ways in which the jurisprudence of interrogation in both the Indian and the U.S. supreme courts speak to each other (directly or indirectly) and, more significantly, on how the courts in these two liberal democracies conceptualize law and excess violence.

While there has been some focus on the impact of the U.S. legal system on different legal institutions and practices around the world, there has been little study of the innovations and perspectives emerging from Indian jurisprudence that provide insights regarding the debates in the United States. For example, the concept of “custodial violence,” developed by the Indian Supreme Court to deal with torture and deaths in custody, provides a useful tool for analyzing the struggle of the United States with excess violence in similar contexts. Finally, I situate this project in a moment when legal scholars and the media have directly linked up the debates in India and the United States in the context of the “global war on terror,” prompting the need for new legislation in both the countries.⁸³

Although there appear to be several points of similarity between the two countries in terms of the jurisprudence of interrogations, I am conscious of the problems involved in comparing legal systems in very diverse social contexts. The particular political, economic, cultural, social, and historical contexts give different meanings to similar legal terms and institutions, and postcolonial theory has rightly pointed to the dangers of hegemonic universal definitions. Talal Asad, for example, points to this danger in the context of torture.⁸⁴ Asad criticizes the Universal Declaration of Human Rights for assuming certain definitions of torture and cruel, inhuman, or degrading treatment and punishment as universal when they may have actually emerged from a European liberal understanding of what is “human” and “inhuman.” Asad notes that while certain violent practices that are technologically advanced, such as war, are seen as acceptable, other “traditional” forms of violence are automatically considered more barbaric.⁸⁵

The attempt in this study is, thus, not to compare India and the United States in terms of their similarities and differences. The study uses the empirical analysis of their very particular jurisprudence of interrogations, primarily at the Supreme Court level, to make some generalizations about liberal democracies’ struggle with torture and excess violence. The limitations of these generalizations are accepted at the outset, but the attempt is to get to some “structural” patterns of understanding torture in liberal democracies. Here I use as the basis of my project David Garland’s justification for focusing on two distinct countries—the United Kingdom and the United States—

for his book *The Culture of Control*. Garland writes, “such an analysis allows me to get at structural patterns that are not otherwise available to inspection.”⁸⁶ In that sense, this project examines the relationship among law, violence, and state power in liberal democracies, focusing on torture, with India and the United States as particular illustrations. As a researcher interested in postcolonial and cultural studies, I have tried to be conscious of the particular distinctions and to analyze the jurisprudence in each of these countries on their own terms. Yet the impulse to compare and make some general observations does make it a constantly challenging task. In the next section, I put forth my own theoretical argument on torture in liberal democracies, but first it may be useful to identify some of the significant ways in which the torture debate has been approached in recent times.

Contours of the Torture Debate

There are three primary ways in which the torture debates have developed, particularly in the post-9/11 context but also more broadly in the context of “terrorism.” I discuss each of them before putting forward my own framework of analysis. First, I discuss what I call the “should we?” debates, or the philosophical and ethical debate on the use of torture that predates the 9/11 context but has been revisited more centrally in current times. Second, I analyze a framework that suggests that torture is an exception in contemporary liberal democracies. Finally, I focus on those studies that connect law to violence and put forward my own approach of analyzing torture as a manifestation of law’s struggle with excess violence.

The “Should We?” Approach to Torture

Around the seventh season of the U.S. television show *24*, Jack Bauer (played by Kiefer Sutherland, who was nominated for a Golden Globe award for being the “cop who saves the country 24 hours a day”) was subject to a Senate investigation for his use of torture in an episode aptly titled “Redemption.”⁸⁷ Ironically enough, the Senate hearing had to be stopped, since Jack Bauer was subpoenaed by the FBI and the hero of *24* once more was asked to save his country from a terrorist rebel group from Africa and their supporters within the United States. Torture once again constantly appeared in the series, though, interestingly, at this point used by precisely the same FBI agents who had previously condemned Bauer for using the illegal techniques. We see FBI agent Renee Walker, who started off being

completely dismissive of Bauer's tactics, gradually allowing him to use torture and even becoming the torturer herself in a desperate situation of necessity despite her boss's reminder that torture is illegal. Once again, Jack Bauer demonstrated to the world that *he* was not a cold-blooded torturer. Rather, he only used "whatever it takes" in situations where nothing else works and American lives are in danger. That the "converted" torturing agent in *24* is from the FBI is striking because many FBI personnel have been extremely critical of the CIA and OGA (other government agencies) for using torture in the post-9/11 U.S. "war on terror."⁸⁸ Thus, in popular culture, the dilemma emerging from what has been termed "the ticking bomb scenario" has often reappeared and been easily resolved by turning to torture. The show *24* has been particularly influential in creating a justificatory discourse in the post-9/11 context (as I discuss in chapter 3). But the "should we?" debate has been the subject of much more philosophical agonizing than one ever sees in popular culture, and I illustrate the framework of that debate in this section.

Just as there had been an assumption that torture as a practice no longer/never exists in a democracy, even the philosophical and ethical debates on torture had been considered a subject of the past. As Jean Elshtain notes in her essay "Reflection on the Problem of 'Dirty Hands,'" she had never imagined herself writing on the subject of torture in the context of the United States. She writes,

Before the watershed event of September 11, 2001, I had not reflected critically on the theme of torture. I was one of those who listed it in the category of "*never*." It did not seem to me possible that the United States would face some of the dilemmas favored by moral theorists in their *hypothetical musings* on whether torture could ever be morally permitted. Too, reprehensible regimes tortured. End of question. Not so, as it turns out.⁸⁹

Here, Elshtain articulates the emergence of a new paradigm of thinking about torture in terms of a complete break from all earlier times, almost seeming to assume that these debates on torture were taking place for the very first time. Here it is important to note that debates on the justification of torture had not been observed as openly prior to the 9/11 moment. However, the fact that philosophical "musings" had predated this moment, and not just musings about "reprehensible regimes," suggests that theorists and philosophers have always recognized the existence of these questions in all societies, democratic or authoritarian.

One of the dominant positions in the “should we?” debate is represented by those for whom torture is never permissible under any circumstances, such as Ariel Dorfman.⁹⁰ The UN Convention against Torture’s nonderogable prohibition of torture also personifies this sentiment.⁹¹ The primary emphasis is on the a priori commitment to human dignity and the assertion that torture cannot be allowed under any circumstances, not just because it is violence against the body, the mind, and the imagination but also because it destroys the entire normative world of the tortured. Dorfman articulates this position in the post-9/11 context, referring to the horrors of the past, recalling equally the history of torture in Chile and that of the Nazis in Germany: “I can only pray that humanity will have the courage to say no, no to torture, . . . under any circumstance whatsoever, . . . no matter who the enemy, what the accusation, what sort of fear we harbor; . . . no matter what kind of threat is posed to our safety; no to torture anytime, anywhere; no to torturing anyone; no to torture.”⁹² In some ways, Slavoj Žižek’s insistence on not even contemplating the question of torture signifies a position similar to Dorfman’s— that some things are beyond conversation or contemplation. As Lukes puts it, quoting Žižek, “essays . . . which do not advocate torture outright, [but] simply introduce it as a legitimate topic of debate, are even more dangerous than an explicit endorsement of torture,’ for we thereby legitimize torture and this ‘changes the background of ideological presuppositions and opinions much more radically than its outright advocacy.”⁹³ However, this position representing a moral condemnation of torture in a sense fails to acknowledge the legal and political pragmatics of torture and the discussions therein (as noted earlier).⁹⁴ As Baxi notes in another context, “absolutist stances lead to complacency: to regard torture as self-evidently bad prevents us from meeting the arguments of those to whom, for weal or woe, it is not so *manifestly* bad.”⁹⁵ Thus, even though an “absolute right against torture” is an important normative framework for this book, the working premise is that an absence of discussion on torture may not acknowledge the complexities and challenges of the current debate.

The opposing position to the absolutist prohibition is represented by those scholars who have philosophically and pragmatically addressed the question of torture. Even though many of them reject torture normatively, they do concede that it can be used in some rare instances. However, they disagree on two things: whether those rare circumstances ever really exist; and whether torture could ever be institutionalized. Henry Shue, in his classic essay of 1978, compares torture to killing in war and wonders whether accepting the latter (complete destruction) requires acceptance of torture

(only partial destruction).⁹⁶ However, Shue concludes that torture cannot be compared with killing in a “just war” because unlike in a declared war, torture takes place in a context of complete submission of a defenseless person. Shue also notes that it is not as if giving the information in interrogational torture can provide escape to the defenseless due to the difficulties of distinguishing between the “innocent bystander, ready collaborator or a dedicated enemy.”⁹⁷ However, even Shue in the 1978 essay agreed that torture could be used in a “ticking bomb scenario,” his version being “a hidden nuclear device to explode in the heart of Paris.”⁹⁸ In such a case, for Shue, torture is permissible and indeed necessary since absence of action in this situation would be irresponsible due to the large number of lives that are endangered. It is this particular example (in various forms) that has been used by many theorists and philosophers to argue that torture can be justified in certain rare circumstances that most also concede never actually occur.

The acceptance (even if rarely) of this “ticking bomb” scenario raises the question whether one can actually institutionalize torture or in effect remove the absolute legal prohibitions on torture. In recent years, Alan Dershowitz has suggested that since there are certain situations that have always warranted the use of force against terrorists, there should be an attempt to legalize the effort and ensure the accountability of the officers using torture. His proposal was the use of torture warrants that would be handed out by judges only if they were convinced that the person might have some information.⁹⁹ In terms of interrogation methods, he suggests the use of nonlethal methods such as a truth serum. He claims that for a judge to allow such an injection would be similar to a judge allowing involuntary withdrawal of blood from a defendant and asks why, if the latter process is not seen as attacking a person’s dignity, the former should be. As he puts it, “Certainly there can be no constitutional distinction between an injection that removes a liquid and one that injects a liquid.”¹⁰⁰ For Dershowitz, instituting torture warrants is a way to “reduce the use of torture to the smallest amount and degree possible, while creating public accountability for its rare use.”¹⁰¹

However, Dershowitz’s idea about institutionalizing torture has possibly been the most controversial one, and even those theorists who agonize about the possibility of using torture in the rarest of cases draw the line on this proposal. Apart from Shue’s cautionary statement that “hard case[s] make bad law” and “artificial case[s] make bad ethics,”¹⁰² Elaine Scarry argues that the rare instance should not lead to any dilution of the absolute safeguards against torture. Scarry holds this position because she believes that the “ticking bomb scenario” is never actually realized in practice since

it assumes a level of knowledge about the situation that is almost impossible for anyone to have. As Scarry puts it, “it assumed a population that is (against robust evidence) omniscient.”¹⁰³ She also argues that if such a situation were ever to occur, it should be left to the person in charge to make the decision about torture and then that person should be willing to explain the act to a jury of peers.¹⁰⁴ Scarry here comes close to Michael Walzer’s framework of dealing with what he terms “the problem of dirty hands.”¹⁰⁵ While acknowledging more readily than Shue that there are situations in which a politician has to dirty his or her hands, including the need to authorize torture to save lives, Walzer also rejects the idea that such an action taken by a “moral politician” (with however heavy a heart) to save lives can be excused. Neither is it adequate for the politician to suffer only internally. Rather, taking his cue from Albert Camus’ *Just Assassins*, Walzer argues that the politician who dirties his hands also has to be ready to pay for it by “doing penance or accepting punishment.”¹⁰⁶ Thus, in contrast to Dershowtiz, most of the other theorists/philosophers are against institutionalizing torture in any form.

Indeed, in light of the recent arguments that an exception for torture should be made (sometimes using his earlier essay), Henry Shue in a more recent article actually rejects his previous position. As Shue puts it, “To try to leave a constrained loophole for the competent ‘conscientious offender’ is in fact to leave an expanding loophole for a bureaucracy of routinized torture, as I misguidedly did in the 1978 article.”¹⁰⁷ Shue not only explains that the hypothetical is utterly unrealistic because it is so “idealized” and “abstract” as to become “superior to reality,” but he also very persuasively points out that there is a basic flaw in an argument that allows for exceptional instances of torture based on the ticking-bomb scenario. He explains that in order for a person to be an effective torturer in exceptional instances, he or she needs to be trained over time. As Shue writes,

Torture is not for amateurs—successful torturers need to be real “pros,” and no one becomes a “pro” overnight. At a minimum, one must practice—perhaps do research, be mentored by the still more experienced. In short, torture needs a bureaucracy, with apprentices and experts, of the kind that torture in fact always has. Torquemada was not an independent consultant. Torture is an institution.¹⁰⁸

Thus, Shue notes that even in terms of its practicality, it is not possible to have a “moderate position on torture.”

Dershowitz, however, gets more support from another set of scholars who intervene in this torture debate through a more pragmatic attempt to balance liberty and security while deemphasizing the normative implications of using torture. In this liberty versus security debate, some scholars and activists continue to reject the need for any special laws, while others propose an explicit suspension of laws.¹⁰⁹ However, I focus on the third strand, which advocates the enactment of new laws by accommodating expansion of state powers during emergencies, especially concerning torture and detention.

Embodying this third impulse is Bruce Ackerman's proposal of an Emergency Constitution that involves the short-term mass detention of suspects for up to forty-five days on the basis of "reasonable suspicion" before the normal criminal process sets in.¹¹⁰ Ackerman argues that terrorism is neither a war nor similar to a criminal activity, but rather represents a challenge to the "effective sovereignty" of the state that "destabilize[s] a foundational relationship between ordinary citizens and the modern state."¹¹¹ In order to recover the effective sovereignty of the state so that it can resume its normal functioning, a framework must be applied that Ackerman calls the "reassurance interest," which requires the state to reassure its citizenry in two primary ways: symbolic and functional. For him, symbolically, actions such as proclamation of an emergency will reassure the public that the state is prepared for a second attack, and, functionally, such a proclamation would mean preempting the second strike by taking certain extraordinary steps, such as short-term mass detention.¹¹²

Overall, Ackerman perhaps makes the most "reasonable" case for detention. He gives an analogy of a medical quarantine to show other contexts where the demands of public safety require a segment of the population to be cordoned off. In order to contain the president, Ackerman suggests the introduction of a "supermajoritarian escalator" that would allow the Congress to control the executive by forcing the otherwise unrestrained president to ensure a greater majority within Congress each time he wanted to extend the emergency. Ackerman also insists that the state should take all responsibility for these detention camps and ensure that compensation be given to those who turn out to be innocent. He puts the role of maintaining the integrity of the Emergency Constitution in the hand of the judges, especially in ascertaining whether the situation does indeed constitute an emergency.

David Cole, in response, opposes Ackerman's proposal rigorously: "Putting innocent people who pose no danger behind bars to reassure a panicked public is normatively unacceptable, no matter what 'supermajoritarian escalator' has been put in place, and no matter how much we 'compensate' them

after the fact.”¹¹³ While accepting that preventive detention could be used in some instances, Cole objects to the removal of two basic protections in this proposal: suspicion and judicial review. Cole also critiques the overemphasis on the supermajoritarian escalator, stating that the indefinite aspect of the detention is not the only problem in this framework. Rather, Cole rightly points out, the problem in past detentions was that “[t]housands of people who posed no danger were nonetheless rounded up, not based on objective, individualized suspicion, but often based in significant part on their perceived racial, ethnic, religious, or political identities.”¹¹⁴ Ackerman, of course, rejects any possibility of using torture but in the process fails to recognize the close relationship between detention and torture in many instances. For other scholars, the balancing of liberty and security does not actually stop at detentions and requires the accommodation of torture as well.

Adrian Vermuele and Eric Posner suggest that coercive interrogations (that within their framework overlap with torture and CIDT (cruel, inhuman, and degrading treatment) to some extent) “should be legalized and subjected to regulatory oversight.”¹¹⁵ Their proposal has to be understood within the framework of two theses. The first of these they term the “tradeoff thesis,” namely, that “during emergencies, when new threats appear, the balance shifts; government should and will reduce civil liberties in order to enhance security.” The second thesis is the “deference thesis,” which is that “the executive branch, not Congress or the judicial branch, should make the tradeoff between security and liberty.”¹¹⁶ They do acknowledge that coercive interrogation is a “grave evil.” However, they equate it to other grave evils that are allowed to exist in a liberal democracy, such as use of deadly force in law enforcement or in the context of war, stating that these actions by themselves are not rendered impermissible but rather are regulated by law.

In a similar vein, Richard Posner, in his book *Not a Suicide Pact: The Constitution in a Time of National Emergency*, writes that while the constitutional limitations of “brutal interrogation,” such as the “shock the conscience” test emerging from the Rochin case, are drawn for law enforcement purposes, similar limits may not be applicable if the purpose of the interrogation is to gain intelligence, especially if that intelligence is used to “ward off a great evil.” As he puts it, “Many consciences will not be shocked at the use of torture when it will ward off a great evil and no other method would work quickly enough to be effective.”¹¹⁷ At another point, acknowledging that torture may not always be effective, Posner notes, “But this is just to identify another cost of torture—the many false positives that it produces. It is not to say that there never are net benefits.”¹¹⁸

Here the authors reject the notion that there is something special about coercive interrogation or torture that prevents democracies from using these practices.¹¹⁹ As Richard Posner puts it, “the importance of revulsion as a factor in morality and law cannot be denied, but it should not be allowed to occlude consideration of instrumental considerations.”¹²⁰ Underlying these proposals for balancing security and liberty is the doctrine of “necessity” propounded to gain valuable information in the war on terror. These authors insist that the necessity doctrine is compatible with the U.S. Constitution and a liberal democracy, something completely rejected by scholars such as Thomas Crocker. One of the primary reasons Crocker rejects this particular balancing of liberty with security is that the very balance used in this context is skewed in favor of security. As Crocker puts it,

Recall that the image of balance imbedded in Justitia is that there is a single issue to be resolved, and the goddess must weigh the relative merits of arguments for each opposing side of that issue. The presumption is that there really are two robust sides to weigh. Balancing, in the hands of the apologists, has only one side—national security.¹²¹

The tradeoff, he suggests in contrast to the apologists, is made between the constitutional culture and institutional framework adopted by liberal democracies, on the one hand, and the challenges confronted by them during emergencies, on the other. As he puts it, “liberal democracies have committed to acting within certain broad constitutional constraints that respect human dignity and promote liberty, even if in so doing achieving some policy objectives is made more difficult. What liberal democracies really trade off is the easy resort to torture from the more difficult path of intelligence gathering free from such excuse.”¹²² Thus, Crocker rejects this favoring of security over liberty as incompatible with the constitutional culture of a liberal democracy.

Even though there is an obvious difference between the absolutist position against torture and the position in favor of using torture (however rarely) and institutionalizing it, the focus in this debate remains on the normative question of whether torture should or should not be used in liberal democracies. As noted earlier, the absolutist position leaves little space for addressing the legal and political pragmatics of torture. For our purpose, absolutist stances also tend to strengthen the assumption that torture is impermissible and to foreclose any in-depth analysis of this violence despite its presence in liberal democracies. In that sense, those analyzing the pragmatics of torture focus attention on the slipperiness of definitions and the significance of con-

texts and have to be squarely countered at those levels as well. Apart from the normative debate on torture, scholars in recent times have also studied the ways in which torture appears or reappears in a democracy. Central to that framework is the idea of torture as an exception.

Torture as an Exceptional Act

A number of scholars in both India and the United States have argued that the policies introduced in the “war on terror” constitute a “state of exception,” a state in which laws applicable under ordinary times are suspended. In this context, Giorgio Agamben’s work has been especially influential in conceptualizing state policies.¹²³ Agamben has argued that the post-9/11 context of the United States not only represents a state of exception but also reflects a process of an exception becoming a rule.¹²⁴ He considers the “unclassifiable and unnameable” status of the detainees in Guantánamo to be the perfect example of “bare life”—that is, a life reduced to being “subhuman,” in a state of exception.¹²⁵ Within Agamben’s framework, one could argue that torture only *now* has become a part of governing in a liberal democracy. Invoking an image similar to Agamben’s, Amy Kaplan states that “Guantánamo would become the story of our future, our world where this ‘floating colony will become the norm rather than the anomaly.’”¹²⁶ Similarly, Judith Butler put forward the concept of the “new war prison” to characterize the post-9/11 context.¹²⁷ This language of the state of exception is also reflected in the statements of U.S. government officials while characterizing the post-9/11 context. As President Bush stated in his memo in February 2002, the post-9/11 era is a “[n]ew paradigm” . . . that “requires a new thinking in the law of war.”¹²⁸ Similarly, Judge Gonzales wrote in January 2002, “In my judgment, this *new paradigm* renders *obsolete* Geneva’s strict limitations on questioning of enemy prisoners and renders *quaint* some of its provisions.”¹²⁹ Thus, the language of “exception,” “new paradigm,” or “legal black hole” has gained currency in recent times, suggesting that the post-9/11 policies on torture and interrogation were the result of the suspension of preexisting laws.

Agamben bases his ideas regarding the state of exception on Carl Schmitt’s conception that the “Sovereign is he who decides on the Exception.”¹³⁰ The sovereign is the one who decides on all important aspects of the emergency. The sovereign declares the emergency, decides when to declare it, and makes all the decisions in relation to that time. For Agamben, it is not just totalitarian systems that deal with the problem of the state of exception. Rather, the state of exception is increasingly becoming more visible as a technique

of government even in democracies. Within his framework, Guantánamo was a lawless exception where the sovereign (commander-in-chief) made a decision to suspend existing laws regarding detention and interrogation for the detainees. One could even add that since for Foucault, historically, the inscription of violence on the bodies of subjects was an integral part of the sovereign's power, the reemergence of torture inflicted on the bodies of enemy combatants as a direct result of the U.S. executive's orders is an indication of the reemergence of the all-powerful sovereign.

This framework of a state of exception in which all preexisting laws seem to be inapplicable is also the theoretical basis for the critique developed by human rights groups and scholars. For instance, Joseph Margulies, who has been a leading lawyer for the detainees at Guantánamo, explains that the very conceptualization of this space by the United States was that of a "lawless"¹³¹ prison or a "prison beyond the law,"¹³² thus representing abuse of power by the president. Explaining this dominant reading of Guantánamo, Fleur Johns notes, "By expressly disavowing the entitlement of detainees to certain due process guarantees enshrined in international law and US constitutional law, the US executive has, it is said, sought to create an abomination: a 'legal no man's land'; a place 'beyond the rule of law.'"¹³³ Thus, in popular conceptions, in national and international human rights critiques, and in the administration's own thinking, the dominant framework of analysis for Guantánamo has been that of the exception.¹³⁴

In the context of India, even though analyses and critiques of the long history of extraordinary legislations regarding antiterrorism have always existed, more recently these policies have been explicitly conceptualized as "exceptional." As Ujjwal Singh writes, "central to extraordinary laws is the idea of 'exception,' since extraordinary laws are manifestations of situations, which are not ordinary or 'normal,' but 'emergent' and 'temporal.'"¹³⁵ Similarly, Mayur Suresh, in his analysis of extraordinary laws, emphasizes that in the context of India, "Exceptional and emergency laws have not been created by sovereign prerogative or by lawless acts of the state, but instead have been duly enacted by parliament, and have even received the stamp of approval from the Supreme Court."¹³⁶ While discussing the case of S. A. R. Geelani, a university professor who was picked up as a suspect in the December 13, 2001, attack on the Indian Parliament, Ananya Vajpayi used Agamben's formulation of "bare life" in the following way: "Consider this startling fact: S. A. R Geelani is the *homo sacer* of the Indian state, which seeks to bolster its fragile sovereignty by *sequestering this man, chosen at random, from every discourse of law, justice, politics or religion, and killing him, plain and simple, because it can.*"¹³⁷

For Agamben, of course, the *homo sacer* is closely linked to the notion of the state of exception.¹³⁸ Thus, even in the context of India, scholars have used Agamben's framework to view as exceptional the extraordinary laws and the people impacted by them, thus reiterating Peter Fitzpatrick's point on the subject: "It has to be a puzzle how Giorgio Agamben's evocation of 'an obscure figure of archaic Roman law' has assumed such a purchase on recent political and philosophical thought."¹³⁹

Agamben in his own work does acknowledge the close relationship between the routine and the exception and the blurriness of deciding whether the exception is inside or outside of law, and many Indian and U.S. scholars using his work also recognize this to some extent. However, for our purposes, there are two notable points in this discussion. First, the language of exception as a complete break from the routine has become such a dominant frame of analysis that it has almost assumed a life of its own such that the complexities in the formulations of these authors are lost. Consequently, the exception framework appears to reassert the understanding that extraordinary laws are "temporal" and "bounded" events that are completely distinct from the routine. Second, even when scholars analyze the relationship between the routine and the exception, their focus is more on how the exception stays beyond its stipulated time/region/people and consequently transforms the routine. In contrast, in this study, I focus on how the tensions in the routine context help in constituting the exception in democracies. Furthermore, for the torture debates, the exception framework suggests a return of torture or excess violence only in this new, extraordinary phase, thereby assuming that the routine discourse had ensured the impermissibility of excess violence. In the process, the exception framework obfuscates the fact that the violence, claimed by the state to be unnecessary, is a constantly negotiated category not only in exceptional contexts but also in routine times.

Connecting Law to Violence in Modern Societies

In my study, as noted earlier, I draw upon those critical theorists who focus on the close relationship between law and violence. However, I depart from their work in two significant ways. First, theorists such as Robert Cover argue that violence is an ontological part of law. I, however, agree with Jonathan Simon's critique of Cover, which is that by considering violence as an ontological part of law, Cover fails to look at the manifestations of violence in specific communities.¹⁴⁰ In addition, while Cover recognizes the relationship of law to violence, he gives a very "ahistorical" picture of this relationship—it

becomes “essentialized,” and the changing role of the various state actors in the different phases of history is not understood in a dynamic way.¹⁴¹ Thus, while accepting that some coercion is inherent to law (as discussed in chapter 1), I argue that the relationship between law and excess violence is a constantly negotiated one and impacts different communities disparately. In that sense, I am somewhat sympathetic to Jeremy Waldron’s critique of Sarat and Kearns, which is that they appear to ignore the distinctions between the different kinds of violence when, using Cover’s work, they point to the inherent relation between law and violence. As Waldron puts it,

Those, like Sarat and Kearns, who maintain dogmatically that law is always violent and that the most important feature about it is that it works its will in “a field of pain and death,” . . . will be unimpressed by the distinctions I am making. For them, law’s complicity with torture in the cases I have discussed is just business as usual.¹⁴²

However, unlike Waldron, I also find Sarat and Kearns’s framework extremely useful because there is a deliberate attempt in their work to foreground the significance of violence in law, which tends to be less important for others.

Second, both Kaufman-Osborn and Sarat seem to accept the Foucauldian assumption that excess violence is no longer used in law, at least in the context of the death penalty, such that execution by lethal injection can be analyzed theoretically as a “painless,” “rationalized” procedure.¹⁴³ However, the change in the form of execution or torture may not necessarily lead to the complete disappearance of excess pain and suffering in liberal democracies.¹⁴⁴ As I explain in the next section, in both the democracies I study I illustrate that despite the claims made by liberal democracies, law is not able to contain excess violence entirely.

Connecting law to violence can be attempted in many ways, so it is important to clarify what I am not focusing on. In my study I focus on the jurisprudence of interrogations in the United States and India. Thus, I emphasize how the violence is connected to the law itself and not separate from it.¹⁴⁵ In other words, I do not just restrict my attention to the practices of torture at the sites of enforcement but rather find the connections between the enforcement and the legal decision making.

International institutions such as the United Nations and human rights groups such as Amnesty International are known for their path-breaking contributions on torture. Since their first major report on torture in 1975, Amnesty has emphasized that torture is a worldwide phenomenon and has

continued to highlight the issue.¹⁴⁶ Over the decades, the group has focused on information about the torturers and their sponsor institutions, the socio-economic, legal, and political factors affecting torture, and the impact of torture on the victims.¹⁴⁷ Their reports also suggest that torture is linked to discrimination against women, children, and sexual minorities since they are often the targets.¹⁴⁸ Impunity on the part of the state is also identified by the Amnesty reports as a problem in the eradication of torture.

Over the decades, efforts by human rights groups and individuals have contributed to several initiatives by the United Nations, which puts pressure on its member countries to prohibit torture in their own contexts. Some of the prominent initiatives in this area are the UN Declaration on Protection from Torture in 1975, the UN Convention against Torture in 1984, which came into force in 1987, the Committee against Torture (CAT), the Special Rapporteur on Torture, and several regional treaties.¹⁴⁹ The UN and human rights organizations have contributed significantly toward highlighting the issue of torture and attempts to deal with it. However, my project is distinct from their framework because these initiatives are primarily concerned with the sites of violence or the sites of enforcement, and do not focus as much on the jurisprudence or official legal and political discourse, especially in the context of liberal democracies. In such initiatives, as Sarat and Kearns note, “Force and coercion are disconnected from law.”¹⁵⁰ In liberal democracies, often the formal laws and legal safeguards against torture appear to have strong foundations. Only a careful examination of the legal discourse in relation to the practices of torture in these democracies allows for an analysis of the possible gaps therein, and that is the focus of my study.

Another way to connect law to violence would be to analyze the reasons underlying the persistence of torture in liberal democracies. Darius Rejali, in his monumental study, *Torture and Democracy*, notes that there are three different reasons for the continued persistence of torture in democracies that he explains through the following models: the national security model, the juridical model, and the civic discipline model. As Rejali explains, “In the National Security model . . . officers practice torture as part of a proactive strategy to combat an enemy in an emergency . . . [to gain] information.”¹⁵¹ The second model for the persistence of torture in democracy is the juridical model, in which the emphasis in the legal system itself is on confessions.¹⁵² The third model for Rejali is the civic discipline model, in which certain sections of society end up bearing torture as a marker of their status in society, whether it be the marginalized sections in India and the United States or the immigrant sections in France or Italy.¹⁵³

Rejali notes that more than one model can apply in one case and indeed strikingly writes that “in the study of torture, hell is in the details.”¹⁵⁴ But the difficulty emerging from this classification is that different countries get associated with one particular model more than the other. For example, in his discussion of the juridical model, Rejali focuses on Japan as a perfect example of a reliance on confessions. This framework suggests that other countries may not rely on confessions as much. In contrast, in both the United States and India, there is an overreliance on confessions, as has been pointed out by Peter Brooks and Ujjwal Singh (and as discussed in chapters 1 and 5). Similarly, while each of Rejali’s models focuses on the “political enemy,” the “criminal,” and the “marginal citizen,” respectively, in countries such as India, the confluences and overlapping among the three categories of people make the persistence of torture even more complex (as discussed in chapter 5).

More recently, John T. Parry, in a fascinating book, points to the role that torture and violence play in society. As Parry puts it,

My point is that torture sits on a continuum of violent state practices, where the use of these forms of violence by modern states as a *way of regulating populations* is far more significant than whether “torture” is the particular form of violence used. Indeed, one could say that violence or the threat of violence against any political subject is a basic aspect of governance.¹⁵⁵

In this study, however, I focus less on why torture persists in liberal democracies than on understanding how torture (which I consider to be a form of excess violence) continues to exist in liberal democracies. In other words, I study the ways in which the legal discourse itself addresses the question of torture to illustrate the ways in which law’s relationship with excess violence gets constantly negotiated.

Theorizing Torture in Liberal Democracies

Torture has been defined in many different ways over the years, such that there is difficulty in identifying one standard definition of torture. One of the more well-known definitions of torture is, of course, propounded by the UN Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, which defines torture as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.¹⁵⁶

The UN definition of torture is a culmination of intense discussions and deliberations and is definitely a point of reference for both international and national discussions on torture.¹⁵⁷ However, in this study, I do not adopt the UN definition of torture as the only point of reference by which to study the jurisprudence of interrogations in liberal democracies, for two reasons. First, both the countries that I am focusing on—India and the United States—have a very different relationship with the UN Convention. India has signed the Convention against Torture but has not ratified it, while the United States has both signed and ratified the treaty but with reservations, the implications and interpretations of which are discussed in chapter 2. Second, and more significantly, neither of the two countries has adopted the UN Convention’s definition of torture as the sole official definition in regards to its jurisprudence on interrogations, either historically or in contemporary times.

Thus, in the context of these two democracies, I focus on the legal discourses emerging from the constitutional, statutory, and/or judicial safeguards against the use of torture in interrogations. The starting point of my study is the claim by liberal democracies that torture is completely impermissible in a democracy—a claim made long before the UN initiatives. In the absence of a standard definition of torture, I focus on the gradual development of these safeguards in these two democracies and analyze whether the jurisprudence has unequivocally prohibited the acts of torture.¹⁵⁸

Although I focus on interrogations in this study, torture is obviously not an issue only in this context. Rather, as the UN Convention’s definition indicates, torture has been used in the context of punishment, discrimination, or intimidation, sometimes being used for more than one purpose. More broadly, torture can also be understood as a form of violence that “destroys the capacity to communicate,” as Robert Cover and Elaine Scarry point out,

or as a form of “complete domination,” as John Parry argues.¹⁵⁹ I focus on interrogations because, as discussed earlier, historically torture has been integrally related to confessions and the extraction of evidence and information within the legal system. And ironically, in the case of both India and the United States, one of the contexts in which the debates on torture have reemerged is the interrogation of “terrorists” in the “war on terror,” although the use of torture is, by no means, restricted to that site alone.

The main argument of my study is that the recent debates on torture have to be analyzed as a manifestation of the liberal state’s inability to contain excess violence. Regardless of whether there is a consensus that these acts of excess violence constitute torture in all instances, I argue that it is in fact the contentious definition of torture that allows the legal and political discourse to ignore, accommodate, or justify torture in some instances. In the study, I primarily use the term “excess violence” in my attempts to understand the debates on torture. “Excess violence” is a term I reclaim from Foucauldian literature and define as a constantly negotiated category that exists on a continuum of acts ranging from coercion to torture. Here the category of excess violence is conceptually distinct from coercion inherent in state action and the “necessary pain” allowed by the state. The latter is captured well in Jeremy Waldron’s reference to the coercion inherent in penalties and confinement. However, for Waldron, the inherent coercion in law suggests the importance of the prohibition of torture as a legal archetype. As he puts it,

So when I say that the prohibition on torture is an archetype of our determination to draw a line between law and savagery or brutality, I am not looking piously to some paradise of force-free law, but rather to the well-understood idea that law can be forceful without compromising the dignity of those whom it constrains and punishes.¹⁶⁰

However, what this kind of formulation does is to create a binary between torture on one hand and inherent coercion on the other, not recognizing both that there is a continuum between the two that is not explored in the process and that these are constantly negotiated categories—historically and empirically. While the difficulties in defining “inherent coercion” and “necessary pain” are significant for debates on law and violence, this study primarily focuses on the “excess pain and suffering” that the liberal states themselves claim to be “unnecessary” and yet, my study shows, continues to be allowed. The category of excess violence is used precisely to capture the constant difficulty of defining and distinguishing among different forms

of state violence: torture, cruel, inhuman, degrading, humiliating treatment, and coercion. The larger theoretical argument that I develop in the study (in chapter 2 as an illustration and in the conclusion more broadly) is that the Foucauldian analysis of state power has to be reconceptualized to acknowledge the role of excess violence as a feature of governmentality in contemporary liberal democracies.

In chapter 1, I analyze U.S. legal discourses by historically tracing the constitutional mechanisms that constitute protections against torture and note the ambiguities regarding excess violence expressed in routine discourses, particularly in situations of necessity. In chapter 2, I focus on the legal discourse on torture in the post-9/11 United States to analyze whether policies on interrogation and torture constitute a “state of exception” or represent a continuity in state policies. The main argument is to point to the continuities between the routine and the exception, and to suggest different modes through which the liberal state struggles to accommodate excess violence such as by the creation of the juridico-medical apparatus.

In chapter 3, I explore how the popular imagery of torture, such as in the U.S. TV show *24*, both informs the legal and political discourse on torture and is reconstituted by it. The significance of analyzing the popular imagery of torture is that it establishes legitimacy for narrow legal definitions of torture. Further, the official and popular discourses create space for apparently less severe forms of violence through the use of sanitized terms and comparison with routine activities. In chapter 4, I analyze the dominant explanations for the persistence of torture in India and in addition explore how the jurisprudence of interrogations in postcolonial India addresses the issue of torture and point to law’s continuing struggle to contain excess violence. In chapter 5, I focus on two major legal regimes that represent the extraordinary legislations on interrogations and confessions in contemporary India, namely, the Terrorism and Disruptive Activities (Prevention) Act (TADA) and the Prevention of Terrorism Act (POTA). In the chapter, I point to the ways in which the ambivalence in the jurisprudence of interrogations regarding torture and excess violence expressed in the routine discourse plays a constitutive role in the formation of exceptional laws. Finally, I conclude with some theoretical formulations on law, violence, and state power emerging from the transnational debates on torture.