

## ■ ARTICLES

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### **Learning From Others: The Scalia-Breyer Debate and the Benefits of Foreign Sources of Law to U.S. Constitutional Interpretation of Counter-Terrorism Initiatives**

"If here I have a human being, called a judge, in a different country, dealing with a similar problem, why don't I read what he [or she] says if it's similar enough? Maybe I'll learn something."<sup>1</sup>

*Justice Breyer*

#### **ABSTRACT**

The article discusses the importance of using foreign sources in the constitutional interpretation of counter-terrorism initiatives. By reviewing the *Arar* case, the author underlines the value of Canadian jurisprudence to evaluating extraordinary rendition. The similarities between the *Arar* and *El Masri* cases underscore the weakness of the current standard adopted by American judiciary in evaluating extraordinary rendition. The article further draws on the Israeli experience in dealing with torture. American jurisprudence will be greatly improved if it directly discusses the strengths and weaknesses of the Israeli debate in its own constitutional interpretation. In totality, American jurisprudence has an incredible untapped resource in the experiences of other countries on addressing problems that Americans would likely see as unique.

#### **INTRODUCTION**

On 11 September 2001, global terrorism struck and left its mark on the United States. Since then, American counter-terrorism measures, with penetrating global effects, remain to be evaluated using domestic norms.<sup>2</sup> Technological advances enable terrorists to operate efficiently across borders prompting nations such as the United States to adjust its enforcement measures to operate globally in the fight against global terror. Living in a global community, the United States

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1 Justices Antonin Scalia & Stephen Breyer, Discussion at the American University Washington College of Law: Constitutional Relevance of Foreign Court Decisions (Jan. 13, 2005) [hereinafter Scalia & Breyer Debate] (transcript available at <http://domino.american.edu/AU/media/mediarel.nsf/0/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument>).

2 See generally National Commission on Terrorist Attacks upon the U.S., *The 9/11 Commission Report*, (2004) ch. 13.

is subject to international obligations. As related to extraordinary rendition and the use of torture, foreign law is useful to determine the constitutional validity of global counter-terrorism initiatives.

Since the inception of the American republic, the Supreme Court has applied foreign law to constitutional interpretation of domestic legislation.<sup>3</sup> How helpful, however, are the experiences of those countries that have also confronted terrorism? In relation to terrorism, where available data is limited, the experiences of other countries are not only useful but necessary to reach an informed judicial decision. It is very tempting to view global terrorism in this new age as a unique experience faced only by the American hegemon. Just as U.S. states serve as experimental grounds for effective legislation, other countries provide much-needed laboratories to evaluate the challenges of counter-terrorism initiatives. A swift inquiry into the experiences of other legal systems and how they tackled the problem would enable judges – whether at a district level or through corrective action at an appellate level – to make an informed decision based on tested practices.

This article lays down the Scalia-Breyer debate on the use of foreign sources in constitutional interpretation by drawing on the specific issues affecting national security. Because Canada and Israel serve as ideal laboratories of justice for observing timely initiatives in the "War on Terrorism", the article reviews the lessons drawn these two countries. The *Arar* case in Canada illustrates the weaknesses of the *Reynolds* standard currently relied on by the Court in shielding governmental liability for extraordinary rendition.<sup>4</sup> The article further discusses the lessons learned from the Israeli Supreme Court, which underlined that torture is not necessary even as a last resort. The article concludes that the United States judiciary would benefit from listening to the findings of other courts when conducting its own constitutional review.

### THE SCALIA-BREYER DEBATE

In *Roper v. Simmons*, Justice Kennedy wrote: "the United States now stands alone in a world that has turned its face against the juvenile death penalty."<sup>5</sup> The statement may have been lifted *verbatim* from the Inter-American Commission on Human Rights (IACHR) decision in *The Michael Domingues Case*. In the *Michael Domingues* decision, IACHR condemned the execution of minors in the United States writing, "[I]n the Commission's view, by persisting in the practice of executing offenders under age 18, the U.S. stands alone amongst the traditional

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3 The early court frequently used the term "law of the nations" in the early decisions to refer to both international law and the law of other nations. See *e.g.*, *Chisolm v. Georgia*, 2 U.S. 419, 473 (1793).

4 See generally *United States v. Reynolds*, 345 U.S. 1 (1953). See also *El-Masri v. U.S.* 479 F.3d. 296 (4th Cir. 2007) and Complaint. *Mohamed v. Jeppesen Dataplan, Inc.*, Civ. No. 5:07-cv-02798 (JW) (N.D. Cal. 2007)

5 Gerald Neuman, 'International Law as a Source of International Law', (2006) 30 Harvard J. L. & Public Policy 177, 189.

developed nations ... and has also become increasingly isolated within the entire global system."<sup>6</sup> Before the Supreme Court decided *Roper*, the global community assembled a highly-publicized stand against juvenile death penalty, prompting the Court to reconsider the constitutionality of death penalty for minors.<sup>7</sup>

In anticipation of *Roper*, Justices Scalia and Breyer entertained questions about the use of foreign sources at the American University.<sup>8</sup> Predictably, Justice Scalia took a stand against the use of foreign sources in constitutional interpretation. Justice Breyer underscored the importance for American judges to refer to foreign law when interpreting the U.S. Constitution.<sup>9</sup> Both Justice Scalia and Justice Breyer agree that foreign law is useful to interpret treaty obligations, but they diverge on the use of foreign sources in constitutional interpretation.<sup>10</sup>

The divide on the use of foreign sources is not a debate among conservatives and liberals as Scalia purports to say.<sup>11</sup> Chief Justice Rehnquist, a staunch conservative, discussed in *Washington v. Glucksburg* how the practice of assisted suicide has led to abuses in the Netherlands.<sup>12</sup> The debate on the use of foreign law seems to divide originalists and non-originalists. As Judge Easterbrook points out, foreign law sources are superior to other sources that judges cite freely.<sup>13</sup> Why not "pick the best" sources? Judges rely on student notes or district court opinions that are all too often ghost-written by "fourth year law students"?<sup>14</sup>

As early as 1804, Chief Justice Marshall incorporated foreign law in his constitutional interpretation.<sup>15</sup> In *Rose v. Himley*,<sup>16</sup> Chief Justice Marshall relied on several post-1776 British opinions to decide an American admiralty case.<sup>17</sup> The Court's reliance on foreign sources of law continued for the next two hundred

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- 6 The Michael Domingues Case: Report of the Inter-American Commission on Human Rights. Report No. 62/02, Merits, Case 12.285.
  - 7 President Carter, President Gorbachev, and other Nobel-prize winners, submitted an *amici curiae* briefs for the respondents (opposing the execution). Brief of Amici Curiae President James E. Carter, Jr., President Frederick Willem De Klerk, President Mikhail S. Gorbachev, President Oscar Sanchez, et. al., in *Roper v. Simmons*, 543 U.S. 551 (2005) (2004 WL 1636446).
  - 8 See *Scalia-Breyer Debate* (n. 1).
  - 9 Justice Scalia said, "Now, I will use it [foreign law] in the interpretation of a treaty... But apart from that, if you talk about using it in constitutional law ... it's nice to know that we are on the right track, that we have we have the same moral and legal framework as the rest of the world. But we don't have the same moral and legal framework as the rest of the world, and never have." *Scalia-Breyer Debate*, *op. cit.* note 1. Justice Breyer, "At bottom, there is reflected a very strong American belief that all power has to flow from the people and we have to maintain a check. That's a good thing. But, of course, I don't think that stops me from looking at foreign opinions ... and even citing them." *Ibid.*
  - 10 *Scalia-Breyer Debate* (n. 1).
  - 11 Steven Calabresi and Stephanie Zimdahl, 'The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision,' (2005) 47 *William and Mary L. Rev.* 743, 753-55.
  - 12 *Washington v. Glucksburg*, 521 U.S. 702, 734-35 (1997). See also *Calabresi & Zimdahl* (n. 11) 751-52.
  - 13 Frank Easterbrook, 'Foreign Sources and the American Constitution' (2006) 30 *Harvard J. L. & Public Policy*, 223.
  - 14 See *Ibid.*
  - 15 See *Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804).
  - 16 *Rose v. Himley*, 8 U.S. 241 (1808).
  - 17 *Ibid* 270. See also *Calabresi & Zimdahl* (n. 11) 767-69.

years.<sup>18</sup> But the recent practice of the Court to cite foreign law in constitutional interpretation marks a shift in the exposure of the Court to a global, highly-integrated legal environment.

Justice Scalia, an originalist, will not dispute the importance of foreign law for interpreting treaty obligations, but he objects to using foreign law to interpret the constitutional validity of a domestic statute. As he pointedly stated, Justice Scalia encouraged Justice Breyer to read all about foreign law; he just did not want him to cite it.<sup>19</sup> Does Justice Scalia then favor plagiarism?

Certainly not. Justice Scalia argues that the U.S. Constitution is the only clear restraint on American judicial action. The originalist position holds that U.S. judges should not refer to foreign law for constitutional interpretation when the American people have not voted and did not evaluate the laws of other nations, the framework of which is being evaluated by a foreign judge without any connection to the American people. Many members of the Congress seem to adopt the originalist position.<sup>20</sup> Where judges use foreign law – law that the American people have not voted on – to interpret, expand, restrict or modify the American Constitution, then the American judge will no longer be constrained by law.

The moral eccentricity of the Scalia position is dangerous. It erodes American credibility before other legal traditions which share the same high standards for freedom and human rights. Often, other countries have already confronted the constitutional challenges faced by the American judiciary. The Founding Fathers, on the other hand, could not anticipate the challenges raised by the current globally-functional network of terrorism.<sup>21</sup> That is why the internationalist position is more persuasive. The internationalist position on the use of foreign sources focuses on the usefulness of an integrated legal interpretation of counter-terrorism measures with global reach.

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18 *Calabresi & Zimdahl* (n. 11) 753-755.

19 *Scalia-Breyer Debate* (note 1).

20 See e.g., H.R. Res. 568, 108<sup>th</sup> Cong. (2004). Tom Feeney introduced a House Resolution that prohibited judges in federal courts to use foreign material in constitutional interpretation. The bill stated that "judicial determinations regarding the meaning of the laws of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements are incorporated into the legislative history of laws passed by the elected legislative branches of the United States or otherwise inform an understanding of the original meaning of the laws of the United States." *Ibid.* Two similar bills were introduced in the Senate. See S. Res. 2082, 108<sup>th</sup> Cong. (2004); S. Res. 2323, 108<sup>th</sup> Cong. (2004). All these bills died in committees. See generally Lisa Sofio, 'Recent Developments in the Debate Concerning the Use of Foreign Law in Constitutional Interpretation' (2006) 30 *Hastings Intl & Comparative L. Rev.* 131, 133-34.

21 See generally Steven Calabresi, 'A Shining City on a Hill: American Exceptionalism and the Supreme Court's practice on Relying on Foreign Law' (2006) 86 *Boston University L. Rev.* 1335. See also Laurence H. Tribe, 'Trial by Fury: Why Congress Must Curb Bush's Military Courts' *New Republic* 18 (December 10, 2001)

## LEARNING FROM OTHERS WHEN OTHERS HAVE SPOKEN

Justice Scalia asks the quintessential originalist question, "[F]ounders used a lot of foreign law ... but why is it useful in interpreting [the U.S. Constitution]?"<sup>22</sup> Foreign law from countries with legal norms that are not antithetical to American values and that have faced similar challenges would broaden the legal inquiry into the challenges faced by American jurisprudence. Nothing prevents an American court to distinguish its position from the legal traditions of other nations. Courts may explicitly refer to historical and cultural to differentiate their findings. Ignoring, however, the experiences of other countries is appalling.

Terrorism has grown into a global phenomenon not limited to a specific religion or region.<sup>23</sup> A marginalized approach prohibits the United States to assess the risks and dangers of erring in its judicial interpretation. This section draws on two invaluable experiences: 1) the Canadian example, which may eloquently remind the U.S. judiciary of the international obligations pertaining to extraordinary rendition, and 2) the Israeli example, which reviewed the "ticking time-bomb" scenario justifying torture.

### A. THE CANADIAN PERSPECTIVE CLARIFIES THE LIMITS OF EXTRAORDINARY RENDITION

Foreign law persuasively alerts the U.S. Supreme Court to review the international obligations of the nation. Countries may generally bring action against the United States; however, the remedies available to foreign citizens are rather limited. At a minimum, in allowing litigants to plead foreign law, courts would draw on the broader experiences of other nations. In turn, litigants may correct judicial silence in the constitutional review of domestic legislation. The inquiry of the Canadian Parliamentary Arar Commission, a quasi-judicial decision, clarified for U.S. judiciary the trouble with over-relying on the state secrets doctrine to shield the state against liability for extraordinary rendition.

#### a. Maher Arar – a Canadian Alert to the Troubles with Extraordinary Rendition

Extraordinary rendition is the practice where "persons suspected of having al Qaeda ties have been abducted by American officials and then transferred in secret to countries that routinely engage in torture as part of their interrogation techniques."<sup>24</sup> In delivering a suspect to a country where he or she is likely to be

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22 *Scalia-Breyer Debate* (n. 1).

23 Jamal Nassar, *Globalization & Terrorism – the Migration of Dreams and Nightmare* (Maryland: Rowman, 2005) 31. Although McVeigh thought he was defending the Constitution against a federal government "out of control," he reasoned that abortion is against fundamental Christian beliefs. Similarly, "Yigal Amir assassinated Yitzhak Rabin because he thought that Rabin satisfied the Talmudic criteria of an 'aggressor' against the Jewish people." George P. Fletcher, 'The Indefinable Concept of Terrorism' (2006) 4 *J. Intl Criminal Justice* 894, 907-11.

24 Owen Fiss, 'Law is Everywhere' (2007) 117 *Yale L. J.* 256, 261.

tortured, the government is "as culpable as it would be had it engaged in torture itself."<sup>25</sup> Extraordinary rendition applies to any alien who is detained by unusual means and transported to another country. The rendition of the subject occurs without formal diplomatic extradition and without judicial supervision thus violating international law.<sup>26</sup> One prominent example of extraordinary rendition is the case of the Canadian and Syrian dual-citizen, Maher Arar.

Maher Arar was returning to Canada from a trip to Tunisia with layovers in Switzerland and New York. American authorities detained him in New York's JFK Airport after his name showed up on a terrorist watch list. The INS Regional Director issued an order finding Arar a member of Al-Qaeda. Immigration authorities subsequently detained Arar without providing him access to an attorney, further denying him the right to phone his family. After interrogation, American authorities flew him over to Syria following a brief stop in Washington D.C. For ten months, Syrian authorities subjected Arar to torture and harsh physical treatment.<sup>27</sup>

Upon his return to Canada, Maher Arar commenced a full "battle to clear his name."<sup>28</sup> Arar sought a parliamentary investigation into allegations of wrongdoing by the United States and Canadian governments. The Commission cleared Arar of any allegations of terrorism and chastised the enforcement agencies (RCMP and Project A-O Canada) for providing unclear and misleading information that overly-dramatized the importance of Arar to Al-Qaeda.

Although the Commission's report does not discourage sharing information with another country, the report squarely recommends that the Canadian Department of Foreign Affairs and International Trade (DFAIT) shall provide human rights assessments of various countries to enforcement agencies dealing with terrorism.<sup>29</sup> Further, the report specified "[I]nformation should never be provided to a foreign country where there is a credible risk that it will cause or contribute to the use of torture."<sup>30</sup>

In light of the *Arar* case, it is unlikely that Canada will continue cooperating with the United States when the well-being of Canadian citizens is endangered. Signs point to Canada being more cautious in its cooperation with the United

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25 *Ibid.*

26 Extraordinary Rendition violates The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, International Convention on Civil and Political Rights 1966; Convention relating to the Status of Refugees 1951 (1951 Refugee Convention) and its Protocol; and Geneva Convention Relative to the Prisoners of War 1949 (Geneva III), Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949. See generally NYU Center for Human Rights and Global Justice. Torture by Proxy: International Law Applicable to "Extraordinary Rendition". Briefing for United Kingdom's All Party Parliamentary Group on Extraordinary Rendition. (Dec. 2005); available at <http://www.chrgj.org/docs/APPG-NYU%20Briefing%20Paper.pdf>.

27 Government of Canada. Report of the Events Relating to Maher Arar, *Analysis and Recommendation*, 27 (2006); available at <http://www.ararcommission.ca/eng/26.htm>. See also Richard Pious, *The War on Terrorism and the Rule of Law*, (Los Angeles: Roxbury Pub., 2006) 217.

28 *Ibid.*

29 See *Ibid* 344-45 (Recommendation 13).

30 See *Ibid* 345 (Recommendation 14).

States, especially in instances where there is a credible threat that Canadian citizens will be tortured. The Parliamentary inquiry properly reminded Canada, and indirectly alerted the United States, of the international obligations against torture. Overall, the *Arar* case brought more attention to the issue of extraordinary rendition prompting other individuals to seek relief in alternative forums.

### b. El Masri, or the Arar-case in a US courtroom

While individuals such as Maher Arar sought relief through diplomatic channels, Khaled El-Masri unsuccessfully argued against the legality of the U.S. government's conduct before the Fourth Circuit. A German citizen of Lebanese descent, Khaled El-Masri was detained while on holiday in Macedonia. He was detained *incommunicado*, handed over to the United States, beaten, drugged and transported to a secret prison in Afghanistan.<sup>31</sup> Five months later, he was released without an explanation by being dropped on a mountain-top in Albania. El-Masri argued: 1) the U.S. government violated his due process right because while he was held in captivity he was protected by the Fifth Amendment, 2) the government violated the Aliens Torture Statute in his detention, and 3) that the government's prolonged detention and nurture was deemed actionable. The Fourth Circuit affirmed. Relying on *Sterling* and *Reynolds* it held that information related to El Masri's detention was covered by the state secrets doctrine, barring *El-Masri* access to CIA confidential information.

In *El-Masri*, the Court failed to clarify the extent of protection afforded to the federal government under the state secrets doctrine when a lower Court decided not to give any redress to victims of extraordinary rendition.<sup>32</sup> The Supreme Court denied *certiorari*, further failing to clarify the standards for the state secrets doctrine during "the War on Terror."

While relying on *Reynolds*, the Fourth Circuit rejected *El-Masri's* claim of having the judge review the state secret evidence *in camera* and under seal, on grounds that when "the occasion for the privilege is appropriate ... the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers."<sup>33</sup> The Fourth Circuit further reasoned that the state secrets doctrine "does not represent a surrender of judicial control over access to the courts ... [I]t is the court, not the executive[,] that determines whether the state secrets privilege has been properly invoked."<sup>34</sup> The Fourth Circuit stressed that the executive carries the burden of proof and can satisfy by burden "that disclosure of the information sought to be protected would expose matters that, in the interest of national security, ought to remain secret ... the Executive must persuade the court that state secrets are so central to the action that it cannot be fairly litigated without threatening their disclosure."<sup>35</sup> The Fourth Circuit found

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31 *Ibid* 300.

32 *El-Masri v. U.S.*, 479 F.3d. 296 (4th Cir. 2007).

33 *Ibid* 303-04.

34 *Ibid*.

35 *Ibid* 304.

that the government met the burden. In denying *cert*, the Supreme Court refused to review the appropriateness of the *Reynolds* standard in the current debate.

### c. Drawing on the Canadian Experience to Review Constitutional Challenges

Extraordinary rendition remains a pressing issue after the ACLU filed a complaint in 2007 against the private company, Jeppesen Dataplan, a subsidiary of Boeing Company for its role in the "extraordinary rendition" program.<sup>36</sup> ACLU challenged the state secrets defense to a private corporation. The issue is currently on appeal to the Ninth Circuit<sup>37</sup> from the San Jose district court dismissing the lawsuit. The Court remains silent on whether international law obligations permit the "piercing of the state secret doctrine,"<sup>38</sup> implying that it will come close to giving a blanket deference to the executive on grave abuses of international law.

The U.S. Supreme Court held for blank deference to the executive on matters related to extraordinary rendition, ignoring the rights of other citizens. The *El Masri* decision has clearly elucidated that the *Reynolds*-standard is antiquated. Rather than being an evidentiary rule, the state secret doctrine, as exemplified by the Fourth Circuit, permits the government to terminate litigation and takes the form of a categorical bar that precludes judicial inquiry altogether.<sup>39</sup> Foreign law may shed some light on the implications of a broad state secrets doctrine, considering that the Court issued the *Reynolds* decision at the height of the Cold War before the threat of nuclear showdown subsided.

The Court is in dire need to review the state secret doctrine, and the *El-Masri's* petition for *certiorari* correctly points out that "the government's reliance on the evidentiary state secrets privilege to preclude any judicial inquiry into serious allegations of grave executive misconduct presents an issue of national significance."<sup>40</sup> Consequently, the *El-Masri* decision underlines the importance for U.S. Courts to reevaluate the states secret doctrine. In recent years, the International Law Council has reinforced the rights of foreign citizens *erga omnes*. Consider only the draft articles on diplomatic protection: "Any State of which a dual or multiple national is a national may exercise diplomatic protection in

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36 Complaint, *Mohamed v. Jeppesen Dataplan, Inc.*, Civ. No. 5:07-cv-02798 (JW) (N.D. Cal. 2007). See also ACLU Sues Boeing Subsidiary for Participation in CIA Kidnapping (May 30, 2007), at <http://www.aclu.org/safefree/torture/29920prs20070530.html>.

37 [http://www.mercurynews.com/politics/ci\\_8583174](http://www.mercurynews.com/politics/ci_8583174). As of January 2010, the case has not been decided. The parties argued before a *en banc* 9th Circuit in December 2009. See ACLU, *Mohamed et al. v. Jeppesen Dataplan, Inc.* (Last visit 6 January 2010), <http://www.aclu.org/national-security/mohamed-et-al-v-jeppesen-dataplan-inc>.

38 See *Tenet v. Doe*, 544 U.S. 1 (2005) re-affirming the *Totten* rule from *Totten v. United States*, 92 U.S. 105 (1875), which requires outright dismissal at the pleading stage of cases involving unacknowledged espionage agreements.

39 *Ibid.*

40 Petition for Certiorari, *El-Masri v. U.S.*, 128 S.Ct. 373, *cert denied*. 2007 WL 1624819 (U.S.) at 10.

respect of that national against a State of which that individual is not a national."<sup>41</sup> To prevent public shame, Canada and Germany will certainly invoke diplomatic protection over its dual citizens next time questionable conduct on behalf of the United States government will ensue.

In *Roper*, the Supreme Court underlined the Court's sensibility to being singled out in the developing world. But no other governmental practice suggests greater inaction by the American judiciary than extraordinary rendition and the application of state secrets doctrine. Both the *Arar* and the *El-Masri* cases have alerted the United States to its international obligation. *Arar* pursued its case through political channels where *El-Masri* brought suit in the United States Court. While both methods achieved little result, the United States is coming under increased pressure from the international community on extraordinary rendition.

In light of 11 September, the U.S. judiciary gave large deference to the executive branch on counter-terrorism measures during the Bush Administration. By failing to address the abuse of power in the case of extraordinary rendition and by failing to revisit the state secret doctrine, the United States Supreme Court granted blanket deference to the executive on the conduct of foreign intelligence surveillance. Other courts around the world do not feel comfortable with such deference. The Italian Court issued a warrant for the arrest of nineteen CIA Agents who removed Osama Mustafa Nassan Nasr, a radical cleric from Italy to Egypt for interrogation. Reliance on foreign law and meaningful judicial rationale enables the American judiciary to reassert a middle ground between a judiciary isolated from its international obligations and a judiciary that is cognizant of international obligations without comprising judicial independence. The international legal community has alerted the United States on the wrongfulness of extraordinary rendition. The Supreme Court should heed its warnings.

The *Arar* case alerted the Canadian courts, if not the American courts, of the illegality of extraordinary rendition. Even if the United States claims that it obtains assurances from detaining countries that they will not torture, these promises are empty. The United States does not seek the enforcement of these assurances; the torturing of detainees continued with the knowledge of American operatives.<sup>42</sup> At the bare minimum, the United States Supreme Court ought to review the state secrets doctrine as applicable to torture and extraordinary rendition in relation to recent developments in international law and such conduct that affects other nations.

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41 International Law Commission, *Diplomatic Protection: Titles and Texts of Draft Articles adopted by the Drafting Committee*, A/CN.4/L.613/Rev.1, 7 June 2002 Art. 5[7]. See also Craig Forcese, 'The Capacity to Protect: Diplomatic Protection of Dual Nationals in the "War on Terrorism"', (2006) 17 *European J. Intl. L.* 369, 390.

42 Naureen Shah, 'Knocking on the Torturer's Door: Confronting International Complicity in the US Rendition Program' (2007) 38 *Columbia Human Rights L. Rev.* 581, 620-632. In other contexts, assurances effectuated upon extradition have a binding international effect. European countries do not extradite eligible suspects for the death penalty without an assurance that the prosecuting state will forego death penalty. *Ibid* 606.

## B. FOREIGN COURTS ARE IDEAL LABORATORIES OF JUSTICE – THE ISRAELI PERSPECTIVE ON TORTURE

### a. Departing from American Exceptionalism

"It is one of the happy accidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country."<sup>43</sup> The erosion of national boundaries prompts a reader to substitute "international" for "federal" and "foreign nation" for "state" to reveal the importance of the quote to a rapidly-integrating world. In the current global fight against terror, other nations serve as ideal laboratories of justice.

The fifty states that serve as laboratories of justice share an American cultural and national identity today. The modern level of American homogeneity has not been in existence for long. At the time when the principle of state sovereignty was memorialized in the American Constitution, the thirteen states differed significantly in culture.<sup>44</sup> Until *Wicker*, individual states enjoyed significant legal autonomy, which permitted the states to develop a considerably independent body of law. That is still the case today but in a more limited fashion – although the United States sought to limit the scope of the Commerce Clause in *Lopez* and *Morrison*, affording greater autonomy to the states to develop mechanisms pertaining to criminal law, family law, and education.<sup>45</sup>

Similarly, when Justice Brandeis interpreted the Constitution to permit laboratories of justice, forty-eight states shared significant differences in their legal cultures and traditions.<sup>46</sup> Where a state legislature adopts a particular initiative, the diversity of jurisdiction will permit higher courts to evaluate the progress of a particular law without causing too much damage to other jurisdictions. Judicial decisions must go forward and predict the legality of enforcement mechanisms effectively, with little room for error.

Today, terrorism presents challenges of similar nature for all countries.<sup>47</sup> Anthony Aust correctly points out that the fight against international terrorism has been going on long before President Bush was elected.<sup>48</sup> The executive branch in crafting counter-terrorism measures, and the Court evaluating these

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43 *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

44 See generally Ann Althouse, 'Vanguard States, Laggard States: Federalism and Constitutional Rights' (2004) 152 *University of Pennsylvania L. Rev.* 1745, 1747-48 (categorizing states in serving their constitutional obligations).

45 See *United States v. Morrison*, 529 U.S. 598, 615-16 (2000). See also *U.S. v. Lopez*, 514 U.S. 549, 561-579 (1995).

46 Justice Brandeis' statement on laboratories of justice came at a time when the American Court struggled with embracing federalism through its interpretation of the Commerce Clause before *Wicker v. Filburn* and other cases were decided giving the federal government broad powers under the Commerce Clause.

47 See Amos Guiora, *Global Perspectives on Counterterrorism*, (New York: Aspen Publishers, 2007) 9-10.

48 Anthony Aust. 'Comment on the Presentation by Volker Röben on the Role of International Conventions and General International Law' in Christian Walter et al. (eds.), *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (Springer-Verlag: Heidelberg, 2004) 824.

measures, must draw upon a wealth of data. Mass casualties prompt government officials to take immediate action. Mass casualties also prompt officials to interpret the experience as unique.

Although other nations, even if they are liberal democracies, may not share the same cultural and national identity as did the 13, 48, or 50 American states, the American Supreme Court will be better informed if it understands how national courts confronted similar issues arising in terrorist-related cases. As appealing and instinctive as such governmental initiatives are in times of crisis, the Court will be better suited to evaluate the constitutionality of counter-terrorism measures objectively. Relying on the experiences of other countries will ensure that the Court takes a panoramic review of a pressing issue.

### **b. The "Ticking Time Bomb" Scenario and the Usefulness of the Israeli Experience**

Israel has reviewed the legality of torture and other similar issues confronted by the U.S. in the "War on Terrorism." On the matter of torture, the Israeli Supreme Court, under Chief Justice Aharon Barak, rejected the blanket deference to the executive authority as a "dereliction of what he understands to be the duty of a judge."<sup>49</sup> In developing a "proportionality test," Chief Justice Barak has identified with greater clarity than any other American jurist the appropriate inquiries for determining when a government action, which affects fundamental values, is justified.<sup>50</sup> Where the debate in the United States has been defined in academic terms, the Israeli Court has confronted the "doomsday" or the "ticking time bomb" scenario.

#### *i. Reviewing Torture: The Limitations of the Domestic Debate*

American legal jurists have addressed the "doomsday" scenario purely in an academic setting. The hypothetical scenario goes as follows: The police capture a terrorist that has set to a bomb to detonate shortly. The bomb will kill X amount of people, and the terrorist refuses to answer any questions in an interrogation, while invoking his/her right to an attorney. Are police justified to torture the suspect? The international community and the holding of the Israeli Supreme Court say no. American academics say otherwise.<sup>51</sup>

Shortly after September 11, Laurence Tribe wrote, "the old adage that it is better to free 100 guilty men than to imprison one innocent describes a calculus that our Constitution – which is no suicide pact – does not impose on government when the 100 who are freed belong to terrorist cells that slaughter innocent civilians, and may well have access to chemical, biological, or nuclear

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49 *Fiss* (n. 24) 276.

50 *Ibid.*

51 Alan Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (Yale University Press: New Haven, 2002) 148. Cf Markus Wagner, "The Justification of Torture. Some Remarks on Alan M. Dershowitz's "Why Terrorism Works" (2003) 4 *German L.J.* 5.

weapons."<sup>52</sup> The academic debate on the justification of torture centers around the argument for necessity, where Professor Dershowitz and Professor Tribe opined in favor of torture to obtain life-saving information in emergency situations arising in times of terrorist activity.<sup>53</sup>

Torture in times of national emergency – prompted by terrorist activity – will disproportionately affect non-citizens. The minimum standard set by the Paris Convention forbids torture even in times of emergency. During a state of emergency, Article 6 states "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."<sup>54</sup> The Paris Minimum Standards clearly hold that a state "may not derogate from internationally prescribed rights which are by their own terms 'non-suspendable' and not subject to derogation."<sup>55</sup> Torture and inhumane treatment is one of those non-suspendable rights, where the UN Declaration on Protection of Torture defines torture as an "act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official for such purposes as obtaining from him or a third person information or confession."<sup>56</sup>

The Paris Convention holds that even in case of emergency, every state shall respect the principle that "the fundamental functions of the legislature shall remain intact despite the relative expansion of the authority of the executive. Thus, the legislature shall provide general guidelines to regulate executive discretion in respect of permissible measures."<sup>57</sup> In the aftermath of September 11, the executive branch does not have authority to derogate from the strict obligations against torture. The legislative branch derives its authority from the Authorization for Use of Military Force (AUMF) passed on September 18, 2001, which authorized the executive to use "all necessary and appropriate force" against those bodies that planned the terrorist attack on September 11 or harbored those who masterminded the attack.<sup>58</sup> On its face, the AUMF is faulty in not specifying any general guidelines to regulate the discretion afforded to the executive branch; where Congress was silent on what constitutes "appropriate" force, the Court has not evaluated which counter-terrorism measures are unlawful and thus deemed inappropriate.

Tribe correctly observes that counter-terrorism measures require vigilance from the part of the government; however, the government has little room for

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52 See also Laurence H. Tribe, 'Trial by Fury: Why Congress Must Curb Bush's Military Courts' *New Republic* 18 (December 10, 2001). See also Stuart Taylor, Jr., 'Rights, Liberties, and Security' (2003) 21 *Brookings Rev.* 25 (advocating steps such as preventive detention).

53 See generally Jeffrey Addicott, *Terrorism Law, The Rule of Law and the War on Terror* (2nd ed., Tucson, AZ: Lawyers & Judges Pub., 2004) 215 – 225.

54 International Law Association. Report of the Committee on the Enforcement of Human Rights Law, Sixty-First Conference of the International Law Association. Paris Minimum Standards of Human Rights Norms in a State of Emergency (1984).

55 *Ibid* Art. 6.

56 United Nations Declaration on the Protection of All Persons from Being Subject to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. G.A. Res. 3542 (Dec. 9, 1975).

57 *Paris Minimum Standard* (n. 54) art. 6.

58 Authorization for Use of Military Force (AUMF). Public Law 107-40 107<sup>th</sup> Congress (September 18, 2001).

error when executing counter-terrorism measures because torture often produces false evidence and endangers the lives of wrongfully-accused suspects.<sup>59</sup> The Court has not spoken on whether the same rights are extended to detainees in U.S. custody outside of the United States. While the Court may be undecided on whether to extend the same liberties to detainees, international law suggests that a minimum standard of treatment applies to all detainees.

*ii. The Israeli Experience*

The Israeli Supreme Court reviewed the legality of torture in interrogation techniques, and it struck down interrogation techniques that amounted to torture or physical pressure even in "doomsday" scenarios. Israel has a long history with domestic and international terrorism, which is of great service to the American judiciary. General Security Services (GSS) is the arm of the Israeli government responsible for investigating terrorist activity.<sup>60</sup> In late 1980s, the Israeli government appointed retired Justice Moshe Landau to head the Commission that investigated the GSS's interrogation techniques for coercion.<sup>61</sup> The Commission focused on the threat of terrorism to the State of Israel in relation to the attendant necessity of GSS to obtain relevant information under time restrictions. The report condoned the use of "moderate measure of physical pressure" during interrogations, and in a classified section, the Report set out limits to the physical pressure that GSS may employ.<sup>62</sup>

In *The Interrogation Case*,<sup>63</sup> the Israeli High Court came to review GSS's interrogation techniques, most prominently that of "shaking," which under the Landau Commission was legal. Shaking was the method "defined as the forceful shaking of the suspect's upper torso, back and forth, repeatedly, in a manner which causes the neck and head to dangle and vacillate rapidly."<sup>64</sup> The Israeli High Court concluded that "shaking" was not a legitimate method of interrogation even in "ticking time-bomb" scenarios. The Court rejected the State's argument that "shaking" is proper when government officials face a cataclysmic event. Although the Court was "prepared to accept that in the appropriate circumstances, GSS investigators may avail themselves of the 'necessity' defence, if criminally indicted,"<sup>65</sup> the Court clearly struck down investigation measures that induced

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59 Human Rights Watch, World Report 2002—2007; available at <http://www.hrw.org>. See generally D. Cassel, 'International Human Rights and the United States Response to 11 September' in *Legal Instruments in the Fight Against International Terrorism: a Transatlantic Dialogue*, C. Fijnaut, J. Wouters & F. Naert (eds.) (Leiden: Martinus Nijhoff, 2004) 274.

60 See generally Addicott (n. 53) 216-219. See also Gershon Gontovnik, 'Country Report on Israel' in *Terrorism as a Challenge for National and International Law: Security Versus Liberty?* Christian Walter et al. (eds.) (Springer-Verlag: Heidelberg, 2004) 382-97.

61 Commission of Inquiry Into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity, 23 ISR.I.R. 146 (1989).

62 Addicott (n. 53) 216.

63 HCJ 5100/94 *Public Committee against Torture in Israel v. Government of Israel* P.D. 53(4) 817, 835.

64 *Ibid* 826.

65 *Ibid* 842.

physical pressure. Furthermore, the Court has held that any subsequent legislation from the Knesset on the GSS's use of means of interrogation would require constitutional review under the Basic Law: Human Dignity and Freedom.<sup>66</sup>

At this point, the United States Supreme Court has not spoken on whether some interrogation techniques adopted by the executive branch, which would violate international conventions, are unconstitutional. In fact, the Court has not defined the principles of torture – at least not clearly in times of emergency. Consider the Israeli High Court of Justice's ruling

"This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties."<sup>67</sup>

A legislative inquiry would be more determinative than a judicial inquiry of the effects of a foreign nation supreme court's ruling restricting torture in interrogation techniques. The Israeli Supreme Court decided *The Torture Case* in late 1994, a year with the highest casualties in Israel between the end of the Six-day war and the beginning of the second *intifada*. The highest rate of Israeli casualties from terrorist attacks between 1967 and 1997 were: 1996 with 87 casualties, 1994 with 73, 1993 with 62, and 1995 with 52.<sup>68</sup> However, few will argue that the increase in casualties resulted from stricter judicial restraints of interrogation techniques. In fact, terrorist casualties nearly doubled in 1993 from the previous year, 1992, when 39 Israelis were killed in terrorist attacks. The rate of terrorist attacks spiked on the eve of the Oslo Accords.<sup>69</sup>

Many causes prompted the rise in Israeli casualties from terrorist attacks between 1993 and 1996. Public criticism of the Oslo Accords – from both the Israelis and the Palestinians – has had the most determinative impact on the rise in terrorist attacks, including one taking the life of Prime Minister Yitzak Rabin. The effect of the decision in *The Terrorist Case* on the number of casualties is inconclusive, but circumstantially 1995 had a drop in casualties from 1994. Admirable, however, is the proposition that the Court did not seek to justify questionable measures of interrogation in times of increasing terrorist attacks.

### CONCLUSION: LISTENING TO THE WORLD'S EXPERIENCES

The United States judiciary – although superb in its own right – has much to learn from other countries. Israeli Chief Justice Aharon Barak observed that while

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66 *Gontovnik* (n. 60) 396.

67 HCJ 5100/94 *Public Committee against Torture in Israel v. Government of Israel* P.D. 53(4) 817, 835.

68 Yoram Peri, *The Israeli Military and Israel's Palestinian Policy – from Oslo to the Al Aqsa Intifada*, Peace Watch – United Institute of Peace (2002). See also Eretz Yisroel.org., *Israelis Killed in Terror Attacks*, at <http://www.eretzyisroel.org/~jkatz/oslo.html> (last accessed 6 January 2010).

69 Barry A. Feinstein and Justus R. Weiner, 'Israel's Security Barrier: an International Comparative Analysis and Legal Evaluation' (2005) 37 *George Washington Intl. L. Rev.* 309, 374-76.

terrorism poses difficult challenges for many countries, it strikes at the core of democratic nations.<sup>70</sup> For once, terrorism creates tensions between the essential components of democracy. Terrorism may prompt one pillar of democracy – the elected body – to take all effective steps in fighting terrorism, even at the cost of violating human rights. The judiciary, the other pillar of an effective democracy, may encourage protecting the human rights of every individual including those of terrorists. Judges in modern democracies are responsible for "protecting democracy both from terrorism and from the means the state wants to use to fight terrorism."<sup>71</sup>

The United States may review its international obligations in relation to other countries; it may also use the finding of other judges to anticipate further consequences resulting from a judicial decision. Extraordinary rendition violates international law. Other countries including Canada explicitly condone the practice. In reviewing the state secrets doctrine, the U.S. Court should address its decision in relation to the position of other nations especially when there is a questionable issue of international law. The experiences of other countries are critical when foreign courts have reached the correct legal analysis. The American Supreme Court would be best advised to take note of the Israeli experience. The Israeli High Court of Justice held against torture, even in "ticking time bomb" scenarios, and the decision yielded no negative results,

No longer can the United States afford to be the sluggish power of the bipolar world of the 20<sup>th</sup> Century or the experimental democracy of the 19<sup>th</sup> century. Domestically, state courts have proven to be infallible "laboratories of justice". Similarly, other countries are ideal environments for time-tested practices of interpreting the legality of counter-terrorism measures. It is time for the U.S. judiciary to operate in a global framework, fully realizing that some of the issues it faces are not all that unique.

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70 Aharon Barak, 'Foreword: A Judge on Judging – The Role of a Supreme Court in a Democracy by Aharon Barak – President of the Israel Supreme Court' (2002) 116 Harvard L. Rev. 16, 153.

71 *Ibid* 149.