Torture, Terrorism and the State: a Refutation of the Ticking-Bomb Argument

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ABSTRACT   *Much of the literature on torture in recent years takes the position of denouncing the barbarity of torture, while allowing for exceptions to this veto in extreme circumstances. The ticking-bomb argument, where a terrorist is tortured in order to extract information of a primed bomb located in a civilian area, is often invoked as one of those extreme circumstances where torture becomes justified. As the War on Terrorism intensifies, the ticking-bomb argument has become the dominant line of reasoning used by both academics and policy advisers to justify a legalized, state-sponsored program of torture.*

This paper argues for the unconditional refutation of any attempt to justify torture, without exceptions. We argue against the consequentialist reasoning of the ticking-bomb argument not from a deontological position, but on consequentialist grounds. Empirical evidence suggests that the institutionalization of torture practices creates serious problems. Torture interrogation fails to fulfil its initial purpose as a low-cost life saver, while its long-term potential is the devastation of democratic institutions.

It should not come as a surprise that human rights are among the first casualties in the War on Terrorism.[1] Yet recent policy proposals in the fight against terrorism are threatening to take human rights violations to a level until recently unimaginable. In the corridors of the White House, and perhaps behind the doors in Downing Street, arguments have begun to surface that in certain extreme cases the use of torture may be justified, and therefore ought to be legalized.

This paper argues for the unconditional refutation of any attempt to justify torture, under any circumstances.[2] After giving a brief account of the concept of torture in Part I, and the standard deontological arguments against torture in Part II, in Part III the best-known argument in favour of the legitimate use of state-sponsored torture on terrorists will be put forward — the ticking-bomb argument. This will be followed in Part IV by a classification of different types of torture. Parts V, and VI will expose two major fallacies in the ticking-bomb argument: the Deductive Fallacy highlights the problems with the premises used by the ticking-bomb argument to infer its conclusion regarding the justified use of torture interrogations; the Consequentialist Fallacy points to the empirical evidence suggesting that the negative consequences of implementing a policy of torture interrogation outweigh any possible positive consequences; therefore arguments for torture interrogation of terrorists can be refuted on consequentialist grounds. Part VII will reject the moral calculus of torture endorsed by the ticking-bomb argument.

I. Definition of Torture

Torture is universally condemned in international law. The English Declaration of Rights barred cruel and unusual punishments 300 years ago, while in the United States the prohibition of cruel and unusual punishment was incorporated into the US Constitution more than 200 years ago. In the 20th century, torture was outlawed by the Universal Declaration of Human Rights in 1948, and the United Nations passed the Declaration against Torture in 1975. In 1984 the UN General Assembly adopted the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter Torture Convention), which was ratified in 1987.[3]

The Torture Convention gives the following definition of torture (Article 1):

> 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.

There are a few aspects of this definition worth accentuating. First of all, torture can be both physical and/or psychological, and it need not result in death. That is to say, torture is still torture even if its victims are not on the brink of death. Secondly, torture is a form of political violence, being administered by people acting in an official capacity. Finally, Article 2.2 states that there can be no exceptions to the ban on torture ('No exceptional circumstances whatever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture'), and Article 3.1 states that outsourcing torture is illegal ('No State shall expel, return or extradite a person to another State where there are grounds for believing that he would be in danger of being subjected to torture').

The United States, Britain, and all other liberal democracies are signatories to this Convention; indeed the international legal definition of torture is universally recognized and accepted. Yet, in 2002 Amnesty International reported state-sponsored torture or severe abuse in over 100 countries.[4] Furthermore not all of the countries that practice torture are totalitarian regimes, or enemies of liberal democracies. It is a well known fact that in the past, and most probably the present too, the United States used torture, but in a sinister way, by sending suspects they wanted to interrogate to other countries where torture is practiced.[5]

Although methods of torture are so varied as to defy easy definitions,[6] there seem to be certain commonalities in the stratagems and techniques used by torturers.[7] In contemporary, politically motivated torture, it appears that the essence of the practice is degradation of the subject. Standard methods are sexual violations and humiliations; exposure to filth, especially excrement;[8] desecration of religious objects and rituals; and corruption of relationships with family members, compatriots, or military comrades.

II. A Deontological Refutation of Torture

From a deontological perspective, there are two ways of explaining why torture is wrong. First, if we assume a moral duty to treat each and every human being with due concern and respect, torture is wrong to the extent that it is cruel and degrading, and it constitutes a violation of fundamental rights. Secondly, as David Sussman (2005)[9] argues in a recent article, the wrongness of torture cannot be fully grasped by understanding torture as just an extreme instance of other kinds of violence, cruelty, or degrading treatment. Instead, Sussman believes that there is a core concept of what constitutes torture that corresponds to a distinctive, special kind of wrong. What makes torture more morally offensive that other ways of inflicting great physical or psychological harm is the element of self-betrayal, to the extent that torture forces its victims into a position of colluding against themselves, making the victim an active participant in his or her own abuse.

Whichever line one takes on the nature of the wrongness of torture, there are some aspects of torture that any adversary of this practice agrees on, for example, the moral prohibition to humiliate another human being. The literature of testimonial evidence from different parts of the world, including Algeria, Latin America, Iraq, Ireland, Korea, Vietnam, Tibet, Soviet Union and South Africa, suggests that the essence of torture is humiliation. This would in part explain why some male prisoners are sodomized, and as Deborah Blatt (1992)[10] points out, it also explains why torturers often rape women. Many women endure further degrading and humiliating treatment that accompanies rape, for example being stripped naked in front of their community prior to being raped, or being raped in the presence of their family.[11] Rape as torture reflects everything that is wrong with torture: no-one has a right to undermine the dignity of another person,[12] nor to violate their integrity, diminishing their sense of personhood, depriving them of their self-respect and self-esteem.[13]

We suspect many would be convinced by the deontological argument, yet consequentialist defences of state-sponsored torture interrogation practices could object that this argument is valid for the vast majority of cases, but it does not extend as far as to cover exceptional circumstances. In other words, one can be in agreement with the deontological argument, and still argue that extraordinary behaviour is necessary under extraordinary circumstances; there are times when torture is the only option, a lesser evil compared to the greater evil of innocent people being killed.

III. The Ticking-bomb Argument

Much of the literature on torture in recent years takes the position of denouncing torture as a basic rule, while allowing for exceptions to the rule in extreme circumstances.[14] In what follows we will refer to this as the Rule-and-Exception Argument. Following in the footsteps of Jeremy Bentham,[15] this type of argument has been embraced by both moral philosophers and legal experts in recent years.

Amongst the philosophers, two notable examples stand out. Although it would appear that he has since revised his views on the question, in a famous article published almost thirty years ago, after doing a very thorough job of discrediting the standard arguments behind the justification of torture, Henry Shue (1977–78, p. 57)[16]

allows for the possibility that, at least in theory, in certain extreme scenarios interrogational torture can be permitted: 'Nevertheless, it cannot be denied that there are imaginable cases in which the harm that could be prevented by a rare instance of . . . torture would be so enormous as to outweigh the cruelty of the torture itself'.[17] Similarly Bernard Gert (1969, p. 623)[18] is prepared to argue that while all killing and torturing for pleasure or profit is clearly immoral, 'killing and torturing to prevent greater killing and torturing may sometimes be allowed by public reason'.

One finds the same line of reasoning in the works of legal theorists. In postulating a situation where killing an innocent person may save a whole nation, Charles Fried (1978, p. 10)[19] is adamant in his view that 'it seems fanatical to maintain the absoluteness of the judgment, to do right even if the heavens will in fact fall'. Similarly Richard Posner (2004, p. 294)[20] argues that 'there is such a thing as a lesser wrong committed to avoid a greater one. There is such a thing as fighting fire with fire, and it is an apt metaphor for the use of torture and other extreme measures when nothing else will avert catastrophe'.

Here we are confronted with justifications, initially of a legal nature but ultimately also moral, for torturing terrorists in extreme circumstances. We believe this is the correct interpretative key not only in the case of Posner and Fried, but also of two other influential legal experts, namely John Parry and Alan Dershowitz.[21] Thus, after denouncing torture as a violation of international and domestic law, legal theorist John Parry (2004, p. 160)[22] says, 'Torture may be a legitimate option — the lesser of two evils — in rare circumstances. In theory, we can admit an exception to an otherwise universal prohibition'. Similarly after declaring that he is opposed to torture on normative grounds, Alan Dershowitz (2004)[23] argues that in a ticking-bomb argument it may be permissible to allow terrorists to be tortured, a radical solution offered on pragmatic grounds as a way of reducing or eliminating the widespread but illicit use of torture in the United States today.

The positions advocated by Parry and Dershowitz are radically different, and should not be amalgamated. Parry argues that while torture should not be legitimate, if torture provides the last remaining chance to save innocent lives in imminent peril, after the event the 'necessity defence' should be available to justify the interrogators' conduct in a court of law.[24] On the other hand Dershowitz famously puts forward the idea of a 'torture warrant', which legalizes the use of torture prior to its use. Parry and Dershowitz present different reasons for justifying torture interrogations of terrorists, indeed Parry is very critical of Dershowitz' proposal, yet both authors have no qualms about using the ticking-bomb argument in order to justify their conclusions.

Descriptions of the ticking-bomb argument vary,[25] yet all the different accounts of this hypothetical scenario have three common elements: (1) the lives of a large number of innocent civilians are in danger; (2) the catastrophe is imminent, therefore time is of the essence; (3) a terrorist has been captured who holds information that could prevent the catastrophe from occurring. Under these extreme circumstances, Parry and Dershowitz argue that torturing the terrorist who has the information needed to save the lives of the innocent civilians can be justified, either because the torturer can appeal to a necessary defence argument (Parry), or because the interrogators were issued with a valid torture warrant (Dershowitz).

Drawing conclusions from thought-experiments is not as easy at it may seem. The ticking-bomb argument is so hyperbolical to have more affinities with science fiction

than political science. As Shue (2003) rightly says, justifications for torture thrive in fantasy, and as every moral philosopher knows only too well, fantasy makes for bad ethical theory. Utilitarian philosopher Russell Hardin (1988, pp. 22–23)[26] also reminds us that the use of hypothetical examples in consequentialist moral reasoning, especially peculiar examples, may be subject to various distortions, overburdening our limited reasoning capacities: 'once the value of entertainment enters discussion, it too often drives out other values, especially reasonableness, relevance, and even understanding'.

In the hypothetical ticking-bomb argument, it is simply assumed that torture is the only way of extracting information from a terrorist, not merely an accompanying condition. But in the real world, torture may not be the cause of success. The following case history, provided by a former US interrogator in the Middle East, illustrates this point.[27]

> Five foreign terrorists were captured by the local [counterterrorist police team]. All were found under arms with explosives and maps of targets. . . . The question of how many [terrorist] cells were to be sent to the country to other targets was of interest. The first three terrorists were not even questioned, only shot. The next two were asked the question separately. One shot was heard. The officer said to the last terrorist, 'Do you also want to remain silent?' The guy began to lay out the entire operation, the training the cells had received, where they were to meet, where the weapons depots were located, and the route that the terrorists were to take to exfiltrate the country. . . . The other cells were picked up along with in-country support personnel.

A hypothetical case admits no probes. But in this actual case, we were able to ask how the fifth man was chosen.

> The group was searched and then fed and given tea as per the *Shariat* law of the Koran. Those who refused to eat or drink and made intense hostile eye contact were selected as the first three. The body posture decided who went fourth. The youngest, who ate the bread, drank tea, and thanked his captors was determined to be the least experienced. His AK rifle was not even clean . . . and he did not appear committed to the *jihad.*[28]

From the elaboration of the scenario arise other possible explanations for the co-operation of the fifth terrorist, such as his liberation from the coercion by the elder terrorists or his susceptibility to bribery or good care. The narrative certainly does not support the interpretation that shooting any four of the terrorists was a necessary or sufficient condition for the fifth terrorist to reveal the terrorist operation. As for most ticking-bomb success stories, the efficacy of torture interrogation is demonstrated only if the case is framed on that premise.

Notwithstanding its extreme hypothetical nature and often circular reasoning, the ticking-bomb argument is being taken very seriously, not only by legal theorists and experts, but also (more worryingly) in the corridors of power.

IV. A Classification of Torture

In the rest of this paper we are going to argue that torture cannot be justified, not even in theory, or under the most exceptional circumstances of the ticking-bomb scenario.

But before we put forward reasons why the ticking-bomb argument cannot justify the use of torture, in an effort to make the strongest case for torture interrogation of terrorists, it is necessary to be clear on the type of torture being discussed in this paper. First of all, it is important to distinguish between Terroristic Torture and Interrogational Torture.[29] Terroristic Torture refers to torture used as a deterrent, a statement of intent by the State. Terroristic Torture is meant as a signal to those who defy the legitimacy of State authorities. During the civil war in Guatemala (1960–1996), for example, the Guatemalan army made extensive use of Terroristic Torture, leaving the bodies of torture victims on the side of the roads for everyone to see.[30] Interrogational Torture on the other hand is used exclusively with the intent of extracting information from the terrorists. It is Interrogational Torture rather than Terroristic Torture that will be the topic of our analysis in this paper.

It is also important to distinguish between Backward-Looking and Forward-Looking Interrogational Torture. Backward-Looking Interrogational Torture occurs when torture is used to extract confessions from terrorists regarding past terrorist actions; Forward-Looking Interrogational Torture occurs when torture is used to extract information regarding future terrorist plots. In what follows, by torture we mean exclusively Forward-Looking Interrogational Torture. It is this type of torture that Parry and Dershowitz believe can be justified. Contrary to the views of Parry and Dershowitz, in what follows we are going to argue that not even Forward-Looking Interrogational Torture presents an exception to the unconditional veto on torture by a democratic state. In particular we are going to argue that the ticking-bomb argument falls prey to two fallacies: the Deductive Fallacy and the Consequentialist Fallacy.

V. The Deductive Fallacy

The Deductive Fallacy occurs when a certain argument infers invalid conclusions from certain premises, either because the conclusions rest on a different set of premises, and/or because the premises don't support the conclusions. The ticking-bomb argument follows a deductive line of reasoning concerning the efficacy of torture interrogation.

> (P1): Terrorist is captured.
> (P2): If the terrorist is tortured, he/she will reveal information regarding the location of the primed bomb before the bomb detonates.
> Therefore (C1): Terrorist ought to be tortured.
> Therefore (C2): The information regarding the location of the primed bomb is retrieved.
> Therefore (C3): The bomb is found and disconnected before it explodes, saving the lives of many innocent people.

There are two sets of problems with this argument. The first problem is that the Conclusions C1, C2 and C3 do not follow from Premises P1 and P2. In order to draw these conclusions, other 'invisible' premises must be in place. The second problem is that the premises (both visible and invisible) from which the ticking-bomb argument deduces its conclusions are illegitimate, being questionable from an empirical point of view.

In order to deduce Conclusions C1, C2 and C3, all the above premises are required:

(P1): Terrorist is captured.
(P1*): It is almost certain that this is the terrorist holding information regarding a primed bomb.
(P2): If the terrorist is tortured, he/she will reveal information regarding the location of the primed bomb before the bomb detonates.
Therefore (C1): Terrorist ought to be tortured.
Therefore (C2): The information regarding the location of the primed bomb is retrieved.
(P3): It is almost certain that the terrorist will reveal the correct information.
Therefore (C3): The bomb is found and disconnected before it explodes, saving the lives of many innocent people.

All the premises in the argument are contentious from an empirical point of view. First, 'intelligence' is never infallible, as the fiasco regarding the weapons of mass destruction in Iraq clearly demonstrates; therefore the assumption that the terrorist captured is 'almost certainly' the terrorist holding the information is problematic. There is no guarantee that the suspects being interrogated are in fact terrorists, or, even if they are involved with a terrorist group, that they in fact have the information that we seek.

Second, torture is not guaranteed to work, and the assumption that torture will make terrorists collaborate is both over-simplistic and over-optimistic. The French General Paul Aussaresses (2002),[31] chief intelligence officer in the Battle for Algiers (1955–1957), in his memoir, described terrorists dying under torture with their secrets or exasperating him to the point of murdering them himself. Between 1987 and 1994, the Israeli General Security Service officially interrogated 23,000 Palestinians, torturing the great majority, yet terrorism flourished.[32]

Third, there is very little evidence suggesting that torture obtains the results within a short time period. Indeed counterinterrogation training of operators may prescribe resistance for 24 hours, so as to allow colleagues to alter plans before exposure.[33] The extreme urgency of the ticking-bomb argument also works against the strength of torture interrogation, which is not quick coercion but degradation of the subject's resistance over months rather than minutes. Al Qaeda suspect Mohamed al-Kahtani, reputedly the missing twentieth hijacker, was turned away by a customs agent at Orlando International Airport on August 4, 2001. He returned to Afghanistan and was captured in December, fighting for Osama bin Laden. It was only after months of imprisonment, under harsh interrogation assisted by military doctors, that he divulged information on his meetings with Osama bin Laden.[34]

Fourth, even if an interrogator can torture some information out of a suspected terrorist, there is no guarantee that the information given under duress is in fact the correct information. Therefore, the assumption that the terrorist will 'almost certainly' reveal the correct information is questionable. Torture increases physiological and psychological variability in subjects and hence unpredictability. Empirical evidence indicates that more times than not the information gathered under torture is the wrong information, being the result of a false confession.[35] Terrorists may say anything for the sake of temporarily stopping the torture, but the information they reveal may be the wrong information, as has been found common in criminal confessions under coercive

interrogation. Interrogation further creates opportunities for deception by savvy captives. In a famous World War II incident, American fighter pilot Marcus McDilda, captured by the Japanese on August 8, 1945, 'revealed' under rough interrogation that the US would drop atomic bombs on Kyoto and Tokyo within a few days.[36] Commander James Stockdale (2001, p. 328)[37] ordered his fellow American POWs in Vietnam to 'resist to the point of permanent injury or loss of mental faculty, and then fall back on deceit and distortion'.

Finally, captives may reveal what they wrongly believe is the correct information, for handlers may feed false information to 'expendable agents' and send them into situations of certain capture to reveal the lies under torture. The Chinese military theorist Sun Tzu recommended this strategy in the 6th century BC.[38]

Apart from the fact that the ticking-bomb argument draws its conclusions from a set of empirically questionable premises, there is also another problem, of a different nature, with the logic of the ticking-bomb argument. In (P2) we seem to be presented with a very simple factual premise, namely, that if the terrorist is tortured, he/she will reveal information regarding the location of the primed bomb. This premise is then used as the main grounds for a deductive argument. In what follows we will show that this premise is standing-in for a more complex thesis, one about the best method for maximizing welfare. In other words, a consequentialist argument is being made without its being presented as such. Yet, once spelled out, the consequentialist nature of this premise can be seen to be false.

VI. The Consequentialist Fallacy[39]

From a moral point of view the appeal of the ticking-bomb argument depends on a consequentialist intuition, whereby the costs of allowing the practice of torture interrogation are counterbalanced and outweighed by the gains of the practice. In what follows, we are going to adopt a consequentialist argument to undermine the consequentialist reasoning used to justify torture interrogations. We believe the ticking-bomb argument ultimately fails as a consequentialist argument because it ignores the intensive preparation and larger social consequences of state-sponsored torture. The validity of any consequentialist argument rests on a costs and benefit analysis. We argue that empirical evidence clearly suggests that institutionalizing torture interrogation of terrorists has detrimental consequences on civil, military and legal institutions, making the costs higher than the benefits. As an indication of the devastation to key social institutions, we examine potential consequences of making torture interrogations legitimate on the medical establishment, the scientific establishment, the police, the military establishment, and the legal establishment.

The Medical Establishment

If the terrorist dies under torture, crucial information may be lost. Merely hooding a suspect who has asthma, for example, can cause death. In Afghanistan, US military police accidentally killed two detainees in 2002 by beating their legs. The beatings unexpectedly complicated pre-existing coronary artery disease in one detainee and created a pulmonary embolism in the other.[40] To prevent such losses of information,

state sponsors of torture routinely employ medical professionals to determine the types of torture the subject can endure, monitor the subject for endurance under torture, resuscitate the unconscious subject, and treat the subject in preparation for further torture. Afterwards, physicians are used to falsify health certificates, autopsy reports, and death certificates.[41]

Medical professionals thus become privy to sensitive information and must be monitored, perhaps coerced. In Turkey, for example, government authorities have harassed, arrested, and tortured physicians who resisted.[42] Physicians can also take the lead. Former US Navy Chief of Neuropsychiatry at Guantanamo Bay, William Henry Anderson (2004, p. 55)[43] wrote that 'There are about 1.4 billion Muslims in the world. Embedded within this healthy body are, perhaps, 100,000 people who are eager and active in their pursuit of killing us. Just as successful treatment of cancer requires killing of the malignant cells, we will need to kill this small minority,' whom he identified as having 'brains that are structurally and functionally different from ours'. American military medical personnel have at least tolerated torture of prisoners in Iraq, Afghanistan, and Guantanamo Bay. Meanwhile, in numerous medical journals, physicians have expressed outrage at the complicity of US military medical personnel.[44] Thus deep schisms arise within medical communities and between medical communities and their governments.

The Scientific Establishment

Torture interrogation techniques evolve in competition with counter-interrogation techniques (for spies, combat pilots, and terrorists) and with the torture detection techniques of human rights monitors. As a Palestinian released from an Israeli prison explained: 'We learned about all the types of ill-treatment and the techniques that the secret police use, and we learned to observe the behavior of enemy officers during our interrogation'[45] — thereby strengthening their resistance under torture. When the European Union Commission postponed Turkey's admission into the European Union because of the stream of refugee torture victims arriving in Europe, Turkish scientists attempted to develop torture techniques that leave no medical trace. In response, European forensic experts employed successively more refined methods of detection, such as ultrasonography and CAT scans.[46] Thus develops the scientific race between techniques of torture and techniques of resistance and detection.

Scientists working on military projects are often ignorant of the applications of their work, and may later find themselves compromised. In 1980, the medical engineer Eldon Byrd developed electromagnetic resonance as a non-lethal, humanitarian weapon for the US Navy in lieu of bullets 'that punch holes in people and have their blood leak out'. He later discovered the weapon applied to 'human experimentations on non-compliant individuals' and devoted much effort to helping victims.[47] Other scientists welcome the opportunity for secret, illegal research on human subjects to advance their own careers. In the 1950s, under CIA cover, the eminent Ewen Cameron, a president of the American Psychiatric Association, conducted criminal mind control experiments on psychiatric inpatients, then published sanitized reports of his research on 'psychic driving' in academic journals.[48] Scientific pursuit of successful techniques of torture interrogation would require a vast program of criminal experimentation. As a guide to the possible extent of scientific involvement, a 1977 Senate investigation determined

that 80 major civilian universities and hospitals had covertly participated in the illegal CIA behavioural modification program MKULTRA.[49]

The Police

As the War on Terror moves into the homeland, police will be at the forefront of terrorist detentions simply because of their numbers: as of October 2002 there were 800,000 police officers in the US, compared to 27,000 FBI agents.[50] A program of torture interrogation of terrorists would generate the impossible task of discriminating between terrorist and non-terrorist criminal suspects, because of many overlapping criminal activities (e.g. forgery, money laundering, illegal immigration). Counterterrorist units could not maintain a monopoly on the use of torture because investigators of other serious crimes would demand the privilege. Already the October 2002 *USA Patriot Act*, which suspends important civil liberties in pursuit of terrorists, has been applied broadly to serial murder, corporate fraud, blackmail, and child pornography.[51] Police departments have struggled for decades with the overwhelming bad consequences of coercive interrogation, including high rates of false confessions and false testimony; police deception and manipulation of courts; failure of systems of oversight; and involvement of organized crime.[52] Legalization of torture interrogation may be expected to revive all these problems.

The Military Establishment

For the military, the most grievous consequences of a torture interrogation program are demoralization of personnel, destabilization of the institutional structure, and loss of honour. Military training programs have been studied through interviews with former torturers in Greece,[53] Argentina, Brazil, Chile, Uruguay,[54] Nicaragua,[55] and Israel.[56] Often the young, the poor, or the uneducated are recruited. Brutal training at the outset desensitizes trainees to their own pain, suffering, and humiliation. Confinement and initiation rites isolate them from prior relationships. They usually experience moral tension in their new roles and variously resort to denial, psychological compartmentalization, alcohol, or drugs. The efficacy of shame tactics in disorienting subjects tends to lead to sexual tortures that in turn contribute to stigmatization and corruption of torturers. Haritos-Fatouros, who has deeply researched the training of torturers, observed that 'the perpetrators of evil in the Abu Ghraib prison have also become its victims who will suffer disgrace, imprisonment, and mental disorders in the years to come'. 'Who is responsible for so many ruined lives?' she asks.[57] A study of 'violence workers' in Brazil's suppression of 'communist insurgents' showed that torturers experienced even greater job-related stress than members of death squads.[58] The moral rationale for ruination of torturers cannot be the same as sending soldiers into combat to defend their countries because the torturers and their families will not be honoured but disdained. Statements of military necessity and legalization of torture cannot remove revulsion and stigmatization.

Torture programs have been very disruptive of military organization. To save itself as an institution, the Brazilian military gradually eliminated torture practices between 1975 and 1986, under the leadership of several generals. With counterterrorist agencies working outside the law, torturers doubled as smugglers, blackmailers, and

extortionists. Torturers scorned and controverted the chain of command, creating two factions and destabilizing the army.[59] Generally, torturers win not gratitude or admiration from their military colleagues but contempt. After the fall of the Pinochet regime in Chile, the navy and air force did not take back officers who had worked in the secret service but considered them to be 'defiled'.[60] After almost a half century, the torture of Algerian terrorists under General Aussaresses' still stains the honour of the French army, especially in France itself.[61]

The Legal Establishment

Many legal experts have taken issue with Alan Dershowitz regarding his suggestion that, in very extreme circumstances, interrogators must be issued with 'torture warrants' by the judges before indulging in practices of torture. Dershowitz explains the concept of a torture warrant as follows:

> I have no doubt that if an actual ticking-bomb situation were to arise, our law enforcement authorities would torture. The real debate is whether such torture should take place outside of our legal system or within it. The answer to this seems clear: If we are to have torture, it should be authorized by the law. Judges should have to issue a 'torture warrant' in each case. Thus we would not be winking an eye of quiet approval at torture while publicly condemning it. Democracy requires accountability and transparency, especially when extraordinary steps are taken. Most important, it requires compliance with the rule of law. And such compliance is impossible when an extraordinary technique, such as torture, operates outside of the law.[62]

The problems with the idea of a torture warrant are well known, and often recited in legal journals, so it will suffice to list them here in summary terms: that a torture warrant would be seen as an invitation to increase the use of torture, both in the US and abroad;[63] that no rule can cover the many different aspects of a ticking-bomb argument;[64] torturing the ticking-bomb terrorists would be prohibited by the due process standard of the Fifth and Fourteenth Amendments;[65] having judges issue torture warrants may compromise judicial integrity and the rule of law.[66]

More generally, a legalized program of torture could lead to the degeneration of the core values on which the liberal democratic state rests. A detailed legal analysis of Israeli torture in the Occupied Territories concluded that torture subverts the rule of law in a liberal democracy and erodes other democratic ideals supported by the rule of law.[67] There are also important lessons that should be learned from the war in Algeria, where torture was institutionalized as a wider, integrated system of repression. In Algeria torture contributed to a fatal corruption or erosion of the judiciary and the rule of law. As MacMaster (2004, p. 9) explains, in Algeria the use of torture had constituted an unspeakable catastrophe:

> Torture, widely referred to as 'la gangrene', was seen as a form of cancer that inexorably led to the degeneration of the liberal democratic state, its institutions (particularly the army and the judiciary), its core values and fundamental respect for human rights and dignity. The centrality of torture to the debate on the Algerian war lay not in the grim horrors of the practice as taken

in isolation, but rather in the extent to which it served as a symbol of a deeper corruption, both of the state and of the structures of military, administrative and judicial power that had made it possible.[68]

Any State that sets up torture interrogation units will lose its moral legitimacy, and therefore undermine the political obligation of its citizens.

To his credit Dershowitz (2003–4) has tried to address some of the above criticisms, suggesting that these accusations are fundamentally empirical claims, even though his critics have failed to produce the empirical evidence — one of the aims of this article is to present the empirical evidence Dershowitz is calling for. As for some of the other accusations, those who support the institutionalization of torture could maintain that since torture would only be used in the most extreme circumstances, we shouldn't worry about such practice undermining the values of democratic society. Furthermore, his proposal is meant to bring accountability and transparency to torture practices that are already taking place 'under the radar'.

Yet Dershowitz fails to appreciate that the time constraints of the ticking-bomb argument work against the accountability envisioned by legalizing torture interrogation and requiring prior 'torture warrants' from judges. Because destruction is imminent, the captors of the terrorists will not want to lose time obtaining a search warrant. As explained by a former Brazilian police officer: 'It is necessary to get the information now because from now on to the future it might be too late. And to save time, everything is valid'.[69] Since capture of the ticking-bomb terrorist is entangled with ongoing operations, where lives of agents and future counterterrorist operations are at risk, intelligence officers will not submit evidence of guilt to judges, whom they consider naïve and poor security risks. The Argentine General Acdel Vilas, who was active in counterinsurgency operations in the early 1970s, later described how he circumvented judicial constraints on interrogation. He sent out plainclothesmen instead of uniformed officers to pick up suspects, then passed only the insignificant suspects into the justice system.[70] In Israel, interrogators from the General Security Service (GSS) routinely gave false testimony to the Israeli Supreme Court to conceal its methods from the enemy and to secure convictions where evidence was lacking.[71] The present US administration sought to authorize torture interrogation secretly within the judiciary, as revealed in memoranda from White House Legal Counsel Alberto Gonzales and others.[72] Judges and legal consultants selected for compatibility with the torture interrogation program do not provide accountability but cover.

Very little of current torture interrogation in the 'war on terrorism' falls into the category of the ticking-bomb argument. Legalization of torture creates no mechanism for monitoring such interrogation. At the same time it provides an institutional mandate for torture research and for recruitment and training of torturers.

Finally, there is also a problem with the moral calculus of the ticking-bomb argument. The captured terrorist and his/her intended victims are the principal parties whose welfare is at stake. This may be called the Principal Parties Premise. The ticking-bomb argument simply assumes that torturing the terrorist is the right thing to do because many innocent lives were saved with the sacrifice of one guilty person. This characterization of the principal parties though is an artifice of the stripped-down moral reasoning of the ticking-bomb argument. Under practical consideration,

the very elements adduced to limit the damages of torture interrogation — only of knowledgeable terrorists, only when innocent lives are at risk, only when destruction is imminent — actually expand the scope of damages. The accuracy and speed of virtuoso torture interrogation dictate long advance preparation and coordination, and ultimately corruption, of many key social institutions. The principal parties actually include the medical establishment, the scientific establishment, the police, the military establishment, the judicial establishment, and a great many innocents falsely tortured.

It may appear that damages to democratic institutions are negligible compared to deaths of innocents because institutions can be repaired but the dead cannot be re-surrected. Yet in country after country where alleged national security threats have resulted in the torture of domestic enemies — including Algeria, South Africa, Chile, Argentina, Uruguay, El Salvador, Guatemala, Ireland — human rights researchers have shown the failures of various programs of social repair. Criminal trials, truth commissions, reparations to victims, and community mourning rituals have all proved inadequate.[73] Part of the difficulty of social repair is the high proportion of innocents who are tortured. Realistically, the moral calculus of the ticking-bomb argument should weigh (a) the evil of the murders of innocent victims of the bomb against (b) the corruption of key social institutions, the evil of torture of many innocents mistakenly tortured, and the ruination of many torturers. The guilty terrorist himself might even be omitted from the equation as a minor item. It was easy to compare harm to the terrorist to harm to his intended victims. But a much grander moral theory than the ticking-boom argument is needed to weigh damages to some innocent individuals against damages to key democratic institutions and other innocent individuals.

VII. Alternatives to State-Sponsored Torture Interrogation

In the ticking-bomb scenario, the brief period until detonation is a proxy for the premise that there are no alternative courses of action. Torture interrogation is pre-sented as a quick fix. Any alternative would have to promise a quicker fix. Since no one has yet proposed a quicker fix, torture interrogation is considered the winning method-ology by default. As we argued in Part VI above, the problem here is that the goal of swift and accurate torture interrogation requires extensive preparation and resources. Therefore other techniques that require extensive preparation and resources may com-pete with virtuoso torture interrogation, for example, techniques that require cultural awareness, linguistic competence, and self-mastery on the part of interrogators. For behavioural control of an unwilling subject, there is no reason to suppose one method would apply to all cases. The cultural background, motivation, counter-interrogation training, and physiology of terrorists are too diverse. Here is a sample of alternative interrogation techniques that have proved fruitful on occasion.

Many expert interrogators aspire to the elegant 'social skills method' of Hans Scharff. Scharff was the master interrogator of the German *Luftwaffe* in World War II. His cordial style drew military secrets from unwitting Allied pilots. He elicited seemingly unimportant pieces of information from many subjects and then assembled the puzzle pieces.[74] For sharp interrogators, it may not be necessary to compel the terrorist to betray the location of the bomb explicitly; apparently innocuous information may suffice. Among other examples of social skills methods, Islamic clerics have replaced

official interrogators by reformulating the religious commitments of some terrorists.[75] Terrorists duped by their colleagues have cooperated with their captors when their exploitation was made evident to them. Chronically ill terrorists and badly wounded suicide bombers have become cooperative following successful medical treatment.[76] Of course, such methods are difficult to pursue after a captive has already been treated badly.

Torture interrogation of terrorists may actually defeat other counterterrorist methods, just as government conduct in one hostage situation has implications for other hostage situations. Innovative military strategists have recently stressed the need for an 'effective counter-narrative' to Al Qaeda's 'foundational myth' of 'the warriors of God' against the 'infidel West'. They decry our failure 'to come to grips with the narrative dimensions of the war on terrorism,' noting that, 'a grand narrative that was perfectly plausible before Abu Ghraib may be rendered perfectly inert afterwards'.[77]

Conclusion

We live in an age when even some liberal democracies have no qualms about using torture to fight their enemies. The standard justification for legalizing the use of torture is on consequentialist grounds, of the ticking-bomb variety. In this article, we have argued against the frivolous consequentialism of the ticking-bomb argument, not from a deontological perspective but from a consequentialist one.

The empirical evidence clearly suggests that when it comes to torturing suspects, the record of epistemic success is, at best, unpromising.[78] From a moral and political point of view, fallibilism must be a serious concern for any argument based on consequentialist reasoning. The human and political costs of torturing the wrong person cannot be dismissed as necessary evils. Counterintuitively, actual innocence does not protect suspects against confession in interrogation but rather puts them at high risk of false confession, as has been conclusively demonstrated in criminological studies and psychological experiments. As Kassin (2005) explains, their naïve belief that truth and justice will prevail, for instance, leads them to waive precautions, and their denials of guilt evoke much more rigorous efforts from interrogators. Moreover, there is no formula for compensation or rehabilitation. Psychiatric studies show that torture survivors are plagued by self-destructiveness, failure to reintegrate with their families, and incapacity to take charge of their lives again.[79] Those who were not politically engaged against their captors — the completely innocent — tend to even greater devastation.

Furthermore the narrative simplicity of the ticking-bomb argument conceals the tremendous institutional support required for any rational hope of extracting the terrorist's plan under torture. The demands (and effects) of institutionalizing a state-sponsored program of precision torture interrogation on civilian, military and legal institutions are conveniently neglected by those who support the legalization of torture interrogations. A skilled torturer is like a skilled surgeon, requiring frequent practice. Yet proponents of legalized torture like Dershowitz fail to specify how and where these torturers will learn and maintain their trade, not to mention the risk that highly trained torturers may use their skills outside of official parameters. Institutionalizing torture will also mean that torturing will become a legitimate profession, or as Twining and Twining (1973, p. 352)[80] suggest, 'institutionalized torture may lead to the creation of

a guild of professional torturers whose continued existence will constitute a serious threat to society'.

The bureaucratization of torture interrogation presents a serious problem. Holocaust historian Christopher Browning attributed the long-term Nazi success in persecution of despised ethnic groups to bureaucratization of anti-Semitism. After the Nazis revoked the policy of killing handicapped German citizens in August 1941, the scores of doctors and nurses — 'euthanasia experts' — who had killed 70,000 handicapped became available for killing Jews, Roma, and Poles.[81] The current proposals for torture interrogation do not contain any mechanism for terminating the program. This is the point at which to heed the military maxim that the long-term potential of a weapon or tactic is more important than its initial purpose.[82] Torture interrogation cannot fulfil its initial purpose as a low-cost life saver in the ticking-bomb argument, and its long-term potential is the devastation of democratic institutions and torture of many innocent victims.

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Acknowledgements

NOTES

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6 E. Peters, *Torture* (Philadelphia, PA: University of Pennsylvania Press, 1996).

7 On Algeria see R. Maran, *Torture: The Role of Ideology in the French-Algerian War* (New York: Praeger, 1989); P. Aussaresses, *The Battle of the Casbah: Terrorism and Counter-terrorism in Algeria 1955–1957* (New York: Enigma Books, 2002); A. Shatz, 'The torture of Algiers', *New York Review* 21 November 2002. On Guatemala see V. Sanford, *Buried Secrets: Truth and Human Rights in Guatemala* (Basingstoke: Palgrave-Macmillan, 2003). On Argentina see G. Rogers, 'Argentina's obligation to prosecute military officials for torture', *Columbia Human Rights Law Review* 20 (1988–89): 259–308. On the responsibility of the USA for tortures in Latin America, see T. Kepner, 'Torture 101: The case against the United States for atrocities committed by School of the Americas alumni', *Dickinson Journal of International Law* 19 (2000–01): 475–529; On Iraq see M. Danner, *Torture and Truth: America, Abu Ghraib and the War on Terror* (London: Granta, 2005).

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9 D. Sussman, 'What's wrong with torture?', *Philosophy & Public Affairs* 33, 1 (2005): 1–33.

10 D. Blatt, 'Recognizing rape as a method of torture', *New York University Review of Law and Social Change* 19 (1992): 821–865.

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12 C. Sung, 'Torturing the ticking-bomb terrorist: an analysis of judicially sanctioned torture in the context of terrorism', *Boston College Third World Law Journal* 23 (2003): 193–212.

13 On rape as a form of torture, it is worth mentioning that still today the international community does not recognize rape by a public official as an act of torture, even though rape has all the characteristics of the definition of torture given by the UN Torture Convention; See Blatt op. cit.

14 A. M. Dershowitz, 'The torture warrant: a response to Professor Strauss', *New York Law School Law Review* 48 (275) (2003–4) at 227: 'Let me once again — for perhaps the dozenth time — state my actual view on torture, so that no one can any longer feign confusion about where I stand, though I am certain the "confusion" will persist among some who are determined to argue that I am a disciple of Torquemada. I am generally against torture as a *normative* matter, and I would like to see its use minimalized'.

15 For Bentham's writings on torture, as well as a detailed commentary on Bentham's justification of the use of torture, see W. L. Twining and P. E. Twining, 'Bentham on torture', *Northern Ireland Law Quarterly* 24, 3 (1973): 305–356.

16 H. Shue, 'Torture', *Philosophy and Public Affairs* 7 (1977–8): 124–143. Reprinted in S. Levinson (ed.) *Torture: A Collection* (Oxford: Oxford University Press, 2004).

17 In a more recent piece, after discrediting the thought-experiment of the ticking-bomb argument, Shue (2003) makes the point that if asked to decide what to do with a terrorist who allegedly has information of a ticking-bomb, he would say 'Let's risk it — let's gamble that we can honor our principles and that the children (and old men) will not only not die but will live in civilized countries': H. Shue, 'Response to Sanford Levinson', *Dissent* 50, 3 (2003).

18 B. Gert, 'Justifying violence', *The Journal of Philosophy* 66, 19 (1969).

19 C. Fried, *Right and Wrong* (Cambridge, MA: Cambridge University Press, 1978).

20 R. Posner, 'Torture, terrorism, and interrogation', in S. Levinson (ed.) *Torture: A Collection* (Oxford: Oxford University Press, 2004).

21 There are of course many others who defend a similar line, for example, Gross (2003–4) argues that we should consider the possibility that truly exceptional cases may give rise to official disobedience, whereby public officials may act extralegally and be ready to accept the legal ramifications of their actions: O. Gross, 'Are torture warrants warranted — pragmatic absolutism and official disobedience', *Minnesota Law Review* 88 (1481) (2003–4). See also B. Hoffman, 'A nasty business', *The Atlantic Monthly* January (2002): 49–52; A. Moher, 'The lesser of two evils? An argument for judicially sanctioned torture in a post-9/11 world', *Thomas Jefferson Law Review* 46 (2003–04): 469–489.

22 J. Parry, 'Escalation and Necessity: Defining Torture at Home and Abroad', in S. Levinson (ed.) *Torture: A Collection* (Oxford: Oxford University Press, 2004).

23 A. M. Dershowitz, 'Tortured reasoning', in S. Levinson (ed.) *Torture: A Collection* (Oxford: Oxford University Press, 2004).

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26 R. Hardin, *Morality Within the Limits of Reason* (Chicago, IL: University of Chicago Press, 1988).

27 J. M. Arrigo, *Correspondence between a U.S. Counterintelligence Liaison Officer and Jean Maria Arrigo, September 2002 — August 2005* (Intelligence Ethics Collection, Hoover Institution Archives, Stanford University, Stanford, CA, 2005).

28 *Ibid.*

29 This distinction can be found in Shue (1977–8) op. cit.

30 Sanford (op. cit., pp. 166–7) recounts what happened in the town of Nebaj in 1981 after the army interrogated more than 300 Maya men: 'After the massive interrogation, there were daily disappearances as well as the discovery of mutilated bodies along the street each morning. "They were everywhere" says Don Leonel, "in the streets and hanging in the parks. The only thing that was certain was that each day there were more dead"'.

31 Aussaresses op. cit.

32 See A. Biletzki, 'The judicial rhetoric of morality: Israel's High Court of Justice on the legality of torture'. Electronic version. Unpublished paper. Occasional Papers of the School of Social Science, No. 9 (Tel Aviv: Tel Aviv University, 2001). That terrorism flourished in spite of the extensive resort to torture is of course a counterfactual claim that is virtually impossible to prove or disprove on empirical grounds; on this specific question see B. Cohen, 'Democracy and the mis-rule of law: the Israeli legal system's failure to prevent torture in the occupied territories', *Indiana International and Comparative Law Review* 12 (2001): 75.

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61 See W. Schrepel, 'Paras and centurions: lessons learned from the Battle of Algiers', *Peace and Conflict* 11, 1 (2005): 71–90. It is also not clear how the torture interrogation program will be terminated when the War on Terrorism has been won. Military wisdom cautions that the long-term potential of a weapon or tactic is more important than its initial purpose. See T. M. Kane, 'Strategic analysis', *Military Intelligence Professional Bulletin* February-March (2002): 4–7.

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