

DAVID LUBAN

## LIBERALISM, TORTURE, AND THE TICKING BOMB

Torture used to be incompatible with American values. Our Bill of Rights forbids cruel and unusual punishment, and that has come to include all forms of corporal punishment except prison and death by methods purported to be painless. Americans and our government condemn states that torture; we grant asylum or refuge to those who fear it. The Senate ratified the Convention Against Torture, Congress enacted antitorture legislation, and judicial opinions spoke of “the dastardly and totally inhuman act of torture.”<sup>1</sup>

Then came September 11. Less than a week later, a feature story reported that a quiz in a university ethics class “gave four choices for the proper U.S. response to the terrorist attacks: A.) execute the perpetrators on sight; B.) bring them back for trial in the U.S.; C.) subject the perpetrators to an international tribunal; or D.) torture and interrogate those involved.” Most students chose A and D – execute them on sight and torture them.<sup>2</sup> Six weeks after September 11, the *New York Times* reported that torture had become a topic of conversation “in bars, on commuter trains, and at dinner tables.”<sup>3</sup> By mid-November 2001, the *Christian Science Monitor* found that one in three surveyed Americans favored torturing terror suspects.<sup>4</sup> American abhorrence to torture now appears to have extraordinarily shallow roots.

To an important extent, one’s stance on torture runs independent of progressive or conservative ideology. Alan Dershowitz would permit torture, provided it is regulated by a judicial warrant requirement;<sup>5</sup> and liberal senator Charles Schumer has publicly poo-poo-ed the idea “that torture should never, ever be used.”<sup>6</sup> He argues that every US senator would back torture to find out where a ticking time bomb is planted. On the other hand, William Safire, a self-described “conservative and card-carrying hard-liner,” expresses revulsion at “phony-tough” protorture arguments, and forthrightly labels torture “barbarism.”<sup>7</sup> Examples like these illustrate how vital it is to avoid a simple left-right reductionism. For the most part, American conservatives belong no less than progressives to liberal culture, broadly understood. Here, when I speak of “liberalism,” I mean it in the broad sense used by political philosophers

from John Stuart Mill on – a sense that includes conservatives as well as progressives, so long as they believe in limited government and the importance of human dignity and individual rights.

It is an important fact about us – us modern liberals, that is – that we find scenes such as the Abu Ghraib photographs, to say nothing of worse forms of abuse and torture, almost viscerally revolting (and I am convinced that this is just as true for those who believe that torture may be acceptable as for those who do not). That is unusual, because through most of human history there was no taboo on torture in military and juridical contexts. On the contrary, torture was an accepted practice as a means for terrorizing civilian populations, as a form of criminal punishment, as a method of extracting confessions in legal systems that put a premium on confession as the form proof should take in criminal cases, and – above all – as the prerogative of military victors over their vanquished enemies.

Indeed, Judith Shklar notes a remarkable fact, namely that cruelty did not seem to figure in classical moral thought as an important vice.

[O]ne looks in vain for a Platonic dialogue on cruelty. Aristotle discusses only pathological bestiality, not cruelty. Cruelty is not one of the seven deadly sins. . . . The many manifestations of cupidity seem, to Saint Augustine, more important than cruelty.<sup>8</sup>

It is only in relatively modern times, Shklar thinks, that we have come to “put cruelty first,” that is, to regard it as the most vicious of all vices. She thinks that Montaigne and Montesquieu, both of them protoliberals, were the first political philosophers to think this way; and, more generally, she holds that “hating cruelty, and putting it first [among vices], remain a powerful part of the liberal consciousness.”<sup>9</sup>

What makes torture, the deliberate infliction of suffering and pain, specially abhorrent to liberals? This may seem like a bizarre question, because the answer seems self-evident: making people suffer is a horrible thing. Pain hurts, and bad pain hurts badly. But let me pose the question in different terms. Realistically, the abuses of detainees at Abu Ghraib, the Afghan Salt Pit, and Guantanamo pale by comparison with the death, maiming, and suffering in collateral damage during the Afghan and Iraq wars. Bombs crush limbs and burn people’s faces off; nothing even remotely as horrifying has been reported in American prisoner abuse. Yet, much as we may regret or in some cases denounce the wartime suffering of innocents, we do not seem to regard it with the special abhorrence that we do torture. This seems hypocritical and irrational, almost fetishistic, and it raises the question of what makes torture more illiberal than bombing and killing.

The answer lies in the relationship between torturer and victim. Torture self-consciously aims to turn its victim into someone who is isolated, overwhelmed, terrorized, and humiliated. In other words, torture aims to strip away from its victim all the qualities of human dignity that liberalism prizes. It does this by the deliberate actions of a torturer, who inflicts pain one-on-one, up close and personal, in order to break the spirit of the victim – in other words, to tyrannize and dominate the victim.

Torture, in short, is a microcosm, raised to the highest level of intensity, of the tyrannical political relationships that liberalism hates the most. Liberalism incorporates a vision of engaged, active human beings possessing an inherent dignity regardless of their social station. The victim of torture is in every respect the opposite of this vision. The torture victim is isolated and reduced instead of engaged and enlarged, terrified instead of active, humiliated instead of dignified. And, in the paradigm case of torture, the victor's torment of defeated captives, liberals perceive the living embodiment of their nightmare – tyrannical rulers who take their pleasure from the degradation of those unfortunate enough to be subject to their will.

In other words, liberals rank cruelty first among vices not because liberals are more compassionate than anyone else, but because of the close connection between cruelty and tyranny. The history of torture reinforces this horror, because torture has always been bound up with military conquest, royal revenge, dictatorial terror, forced confessions, and the repression of dissident belief – a veritable catalogue of the evils of absolutist government that liberalism abhors. It should hardly surprise us that liberals wish to ban torture absolutely, a wish that became legislative reality in the Torture Convention's insistence that nothing can justify torture.<sup>10</sup>

But there remains one reason for torture that I have not mentioned, and which alone bears no essential connection with tyranny. This is torture as intelligence gathering, torture to forestall greater evils. The liberal rationale for the state, namely to secure the safety and liberty of its citizens, may make it particularly important to obtain time-sensitive security information by whatever means are necessary. For that reason, it will dawn on reluctant liberals that the interrogator's goal of forestalling greater evils, by torture if that is the only way, is one that liberals share. It seems like a rational motivation, far removed from cruelty and power-lust.

Thus, even though absolute prohibition remains liberalism's primary teaching about torture, and the basic liberal stance is empathy for the torture victim, a more permissive stance remains as an unspoken possibility, the Achilles heel of absolute prohibitions. As long as the intelligence needs

of a liberal society are slight, this possibility within liberalism remains dormant, perhaps even unnoticed. But when a catastrophe like 9/11 happens, liberals may cautiously conclude that, in the words of a well-known *Newsweek* article, it is “Time to Think About Torture.”<sup>11</sup>

But the pressure of liberalism will compel them to think about it in a highly stylized and artificial way, what I will call the “liberal ideology of torture.” The liberal ideology insists that the sole purpose of torture must be intelligence gathering to prevent a catastrophe; that torture is necessary to prevent the catastrophe; that torturing is the exception, not the rule, so that it has nothing to do with state tyranny; that those who inflict the torture are motivated solely by the looming catastrophe, with no tincture of cruelty; and that torture in such circumstances is, in fact, little more than self-defense.

And the liberal ideology will crystalize all of these ideas in a single, mesmerizing example: the ticking time bomb.

Suppose the bomb is planted somewhere in the crowded heart of an American city, and you have custody of the man who planted it. He won’t talk. Surely, the hypothetical suggests, we should not be too squeamish to torture the information out of him and save hundreds of lives. Consequences count, and abstract moral prohibitions must yield to the calculus of consequences.

It is a remarkable fact that everyone argues the pros and cons of torture through the ticking time bomb. Senator Schumer and Professor Dershowitz, the Israeli Supreme Court, indeed every journalist devoting a think-piece to the unpleasant question of torture, begins with the ticking time bomb and ends there as well. The Schlesinger Report on Abu Ghraib notes that “[f]or the U.S., most cases for permitting harsh treatment of detainees on moral grounds begin with variants of the ‘ticking time bomb’ scenario.”<sup>12</sup> In the remainder of this chapter, I mean to disarm the ticking time bomb and argue that it is the wrong thing to think about. And, if so, the liberal ideology of torture begins to unravel.

But before beginning these arguments, I want to pause and ask why this jejune example has become the alpha and omega of our thinking about torture. I believe the answer is this. The ticking time bomb is an argumentative move against liberals who support an absolute prohibition of torture. The idea is to force the liberal prohibitionist to admit that yes, even he or she would agree to torture in at least this one situation. Once the prohibitionist admits that, then he or she has conceded that his or her opposition to torture is not based on principle. Now that the prohibitionist has admitted that his or her moral principles can be breached, all

that is left is haggling about the price. No longer can the prohibitionist claim the moral high ground; no longer can he or she put the burden of proof on his or her opponent. He or she is down in the mud with them, and the only question left is how much further down he or she will go. Dialectically, getting the prohibitionist to address the ticking time bomb is like getting the vegetarian to eat just one little oyster because it has no nervous system. Once he or she does that – *gotcha!*

The ticking time bomb scenario serves a second rhetorical goal, one that is equally important to the proponent of torture. It makes us see the torturer in a different light, one of the essential points in the liberal ideology of torture because it is the way that liberals can reconcile themselves to torture even while continuing to “put cruelty first.” Now, the torturer is not a cruel man or a sadistic man or a coarse, insensitive brutish man. Now, the torturer is a conscientious public servant, heroic the way that New York firefighters were heroic, willing to do desperate things only because the plight is desperate and so many innocent lives are weighing on the suffering servant’s conscience. The time bomb clinches the great divorce between torture and cruelty; it placates liberals, who put cruelty first. But, I wish to argue, it placates them with fiction.

I do not mean by this that the time bomb is completely unreal. To take a real-life counterpart: in 1995, an al-Qaeda plot to bomb eleven US airliners was thwarted by information tortured out of a Pakistani suspect by the Philippine police. According to two journalists, “For weeks, agents hit him with a chair and a long piece of wood, forced water into his mouth, and crushed lighted cigarettes into his private parts. His ribs were almost totally broken and his captors were surprised he survived.”<sup>13</sup> Grisly, to be sure – but if they had not done it, thousands of innocent travelers might have died horrible deaths.

But look at the example one more time. The Philippine agents were surprised he survived – in other words, they came close to torturing him to death *before* he talked. And they tortured him *for weeks*, during which time they presumably didn’t know about the al-Qaeda plot. What if he too didn’t know? Or what if there had been no al-Qaeda plot? Then they would have tortured him for weeks, possibly tortured him to death, for nothing. For all they knew at the time, that is exactly what they were doing. You cannot use the argument that preventing the al-Qaeda attack justified the decision to torture, because *at the moment the decision was made* no one knew about the al-Qaeda attack.

The ticking bomb scenario cheats its way around these difficulties by stipulating that the bomb is there, ticking away, and that officials know it and know they have the man who planted it. Those conditions will

seldom be met.<sup>14</sup> Let us try some more honest hypotheticals and the questions they raise:

1. The authorities know there may be a bomb plot in the offing, and they have captured a man who may know something about it, but may not. Torture him? How much? For weeks? For months? The chances are considerable that you are torturing a man with nothing to tell you. If he does not talk, does that mean it is time to stop, or time to ramp up the level of torture? How likely does it have to be that he knows something important? 50:50? 30:70? Will one out of a hundred suffice to land him on the water board?
2. Do you really want to make the torture decision by running the numbers? A 1% chance of saving a thousand lives yields ten statistical lives. Does that mean that you can torture up to nine people on a 1% chance of finding crucial information?
3. The authorities think that one out of a group of 50 captives in Guantanamo might know where Osama bin Laden is hiding – but they do not know which captive. Torture them all? That is: torture 49 captives with nothing to tell you on the uncertain chance of capturing Osama?
4. For that matter, would capturing Osama bin Laden demonstrably save a single human life? The Bush administration has downplayed the importance of capturing Osama because US strategy has succeeded in marginalizing him. Maybe capturing him would save lives – but how certain do you have to be? Or doesn't it matter whether torture is intended to save human lives from a specific threat, as long as it furthers some goal in the War on Terror?

This question is especially important once we realize that the interrogation of al-Qaeda suspects will almost never be to find out where the ticking bomb is hidden. We do not know in advance when al-Qaeda has launched an operation. Instead, interrogation is a more general fishing expedition for any intelligence that might be used to help “unwind” the terrorist organization. Now one might reply that al-Qaeda is itself the ticking time bomb, so that unwinding the organization meets the formal conditions of the ticking bomb hypothetical. This is equivalent to asserting that any intelligence which promotes victory in the War on Terror justifies torture, precisely because we understand that the enemy in the War on Terror aims to kill American civilians. Presumably, on this argument Japan would have been justified in torturing American captives in World War II on the chance of finding intelligence that would help them shoot down the *Enola Gay*; and I assume that a ticking bomb hard-liner

will not flinch from this conclusion. But at this point, we verge on declaring all military threats and adversaries that menace American civilians to be ticking bombs, whose defeat justifies torture. The limitation of torture to emergency exceptions, implicit in the ticking bomb story, now threatens to unravel, making torture a legitimate instrument of military policy. And then the question becomes inevitable: Why not torture in pursuit of any worthwhile goal?

The point of these examples is that in a world of uncertainty and imperfect knowledge, the ticking bomb scenario should not form the point of reference. The ticking bomb is a picture that bewitches us. The real debate is not between one guilty man's pain and hundreds of innocent lives. It is the debate between the certainty of anguish and the mere possibility of learning something vital and saving lives. And, above all, it is the question about whether a responsible citizen must unblinkingly think the unthinkable, and accept that the morality of torture should be decided purely by toting up expected costs and benefits.<sup>15</sup> Once you accept that only the numbers count, then anything, no matter how gruesome, becomes possible.

I am inclined to think that the path of wisdom instead lies in Holocaust survivor David Rousset's famous caution that normal human beings do *not* know that everything is possible.<sup>16</sup> As Bernard Williams says, "there are certain situations so monstrous that the idea that the processes of moral rationality could yield an answer in them is insane," and "to spend time thinking what one would decide if one were in such a situation is also insane, if not merely frivolous."<sup>17</sup>

There is a second, even more important, error built into the ticking bomb hypothetical. It assumes a single, ad hoc decision about whether to torture, by officials who ordinarily would do no such thing except in a desperate emergency. But in the real world of interrogations, decisions are not made one-off. The real world is a world of policies, guidelines, and directives. It is a world of *practices*, not of ad hoc emergency measures. Any responsible discussion of torture therefore needs to address the practice of torture, not the ticking bomb hypothetical. Somehow, we always manage to talk about the ticking bomb instead of about torture as an organized social practice.

Treating torture as a practice rather than as a desperate improvisation in an emergency means changing the subject from the ticking bomb to other issues – issues like these:

Should we create a professional cadre of trained torturers? For instance, should universities offer undergraduate instruction in torture, as the Georgia-based School of the Americas did in the 1980s? Do we

want federal grants for research to devise new and better torture techniques? Patents issued on high-tech torture devices? Companies competing to manufacture them? How about trade conventions in Las Vegas? Should there be a medical subspecialty of torture doctors, who ensure that captives do not die before they talk? Consider the chilling words of Sgt. Ivan Fredericks, one of the Abu Ghraib perpetrators, who recalled a death by interrogation that he witnessed: “They stressed the man out so bad that he passed away.”<sup>18</sup> Real pros would not let that happen. Who should teach torture-doctoring in medical school?<sup>19</sup>

The questions amount to this: Do we really want to create a torture culture and the kind of people who inhabit it? The ticking time bomb distracts us from the real issue, which is not about emergencies, but about the normalization of torture.

Perhaps the solution is to keep the practice of torture secret in order to avoid the moral corruption that comes from creating a public culture of torture. But this so-called “solution” does not reject the normalization of torture. It accepts it, but layers on top of it the normalization of state secrecy. The result would be a shadow culture of torturers and those who train and support them, operating outside the public eye and accountable only to other insiders of the torture culture.

Just as importantly: who guarantees that case-hardened torturers, inured to levels of violence and pain that would make ordinary people vomit at the sight, will know where to draw the line on when torture should be used? They never have in the past. They did not in Algeria.<sup>20</sup> They did not in Israel, where in 1999 the Supreme Court backpedaled from an earlier permission to engage in “torture lite” in emergencies because the interrogators were torturing two-thirds of their Palestinian captives.<sup>21</sup> In the Argentinian Dirty War, the tortures began because terrorist cells had a policy of fleeing when one of their members had disappeared for 48 hours.<sup>22</sup> Authorities who captured a militant had just two days to wring the information out of the captive. One scholar who has studied the Dirty War reports that at first many of the officers carrying it out had qualms about what they were doing, until their priests reassured them that they were fighting God’s fight. By the end of the Dirty War, the qualms were gone, and hardened young officers were placing bets on who could kidnap the prettiest girl to rape and torture.<sup>23</sup> Escalation is the rule, not the aberration.<sup>24</sup>

Interrogators do not inhabit a world of loving kindness, or of equal concern and respect for all human beings. Interrogating resistant prisoners, even nonviolently and nonabusively, still requires a relationship that in any other context would be morally abhorrent. It requires tricking



information out of the subject, and the interrogator does this by setting up elaborate scenarios to disorient the subject and propel him into an alternative reality. The subject must be gotten to believe that his high-value intelligence has already been discovered from someone else, so that there's no point in keeping it secret any longer. He must be fooled into thinking that his friends have betrayed him, or that the interrogator is really his friend. The interrogator disrupts his sense of time and place, disorients him with sessions that never occur at predictable times or intervals, and manipulates his emotions. The very names of interrogation techniques show this: "Emotional Love," "Emotional Hate," "Fear Up Harsh," "Fear Up Mild," "Reduced Fear," "Pride and Ego Up," "Pride and Ego Down," "Futility."<sup>25</sup> The interrogator may set up a scenario to make the subject think he is in the clutches of a much-feared secret police organization from a different country. Every bit of the subject's environment is fair game for manipulation and deception, as the interrogator aims to create the total lie that gets the subject talking.<sup>26</sup>

Let me be clear that I am not objecting to these deceptions. None of them rises to the level of abuse or torture lite, let alone torture heavy, and surely tricking the subject into talking is legitimate if the goals of the interrogation are legitimate. But what I have described is a relationship of totalitarian mind-control more profound than the world of Orwell's *1984*. The interrogator is like Descartes's Evil Deceiver, and the subject lives in a false reality as profound as *The Matrix*. The liberal fiction that interrogation can be done by people who are neither cruel nor tyrannical runs aground on the fact that regardless of the interrogator's character off the job, on the job every fiber of his concentration is devoted to dominating the mind of the subject.<sup>27</sup>

Only one thing prevents mind-control games from crossing the line into abuse and torture, and that is a clear set of bright-line rules, drummed into the interrogator with the intensity of a religious indoctrination. American interrogator Chris Mackey reports that warnings about the dire consequences of violating the Geneva Conventions "were repeated so often that by the end of our time at [training school] the three syllables 'Lea-ven-worth' were ringing in our ears."<sup>28</sup>

But what happens when the line is breached? When, as in Afghanistan, the interrogator gets mixed messages about whether Geneva applies, or hears rumors of ghost detainees, or of high-value captives held for years of interrogation in the top-secret facility known as "Hotel California," located in some nation somewhere? What happens when the interrogator observes around him the move from deception to abuse, from abuse to torture lite, from torture lite to beatings and waterboarding? With the

clear lines smudged fuzzy, the tyranny innate in the interrogator's job has nothing to hold it in check.<sup>29</sup> Perhaps someone, somewhere in the chain of command, is a morally pure soul, wringing hands over whether this interrogation qualifies as a ticking bomb case. But the interrogator knows only that the rules of the road have changed and the posted speed limits no longer apply. The liberal myth of the conscience-stricken interrogator overlooks a division of moral labor in which the person with the fastidious conscience and the person doing the interrogation are not the same.

The myth must presume, therefore, that the interrogator operates only under the strictest supervision, in a chain of command where his every move gets vetted and controlled by the superiors who are actually doing the deliberating. The trouble is that this assumption flies in the face of everything that we know about how organizations work. The basic rule in every bureaucratic organization is that operational details and the guilty knowledge that goes with them gets pushed down the chain of command as far as possible.

We saw this phenomenon at Abu Ghraib, where military intelligence officers gave MPs vague directives like “‘Loosen this guy up for us.’ ‘Make sure he has a bad night.’ ‘Make sure he gets the treatment.’”<sup>30</sup> Strictly speaking, that is not an order to abuse. But what is it? Suppose that the 18-year-old guard interprets “Make sure he has a bad night” to mean, simply, “keep him awake all night.” How do you do that without physical abuse?<sup>31</sup> Personnel at Abu Ghraib witnessed far harsher treatment of prisoners by “other governmental agencies” – OGA, a euphemism for the Central Intelligence Agency.<sup>32</sup> They saw OGA spirit away the dead body of an interrogation subject, and allegedly witnessed contract employees and Iraqi police raping prisoners.<sup>33</sup> When that is what you see, abuses like those in the Abu Ghraib photos will not look outrageous. Outrageous compared with what?

This brings me to a point of social psychology. Simply stated, it is this: we judge right and wrong against the baseline of whatever we have come to consider “normal” behavior, and if the norm shifts in the direction of violence, we will come to tolerate and accept violence as a normal response. The psychological mechanisms for this renormalization have been studied for more than half a century, and by now they are well understood. Rather than detour into psychological theory, however, I will illustrate the point with the most salient example – one that seems so obviously applicable to Abu Ghraib that the Schlesinger Commission discussed it at length in an appendix to their report. This is the Stanford Prison Experiment. Male volunteers were divided randomly into two

groups, who would simulate the guards and inmates in a mock prison. Within a matter of days, the inmates began acting like actual prison inmates – depressed, enraged, and anxious. And the guards began to abuse the inmates to such an alarming degree that the researchers had to halt the two-week experiment after just seven days. In the words of the experimenters:

The use of power was self-aggrandizing and self-perpetuating. The guard power, derived initially from an arbitrary label, was intensified whenever there was any perceived threat by the prisoners and this new level subsequently became the baseline from which further hostility and harassment would begin. . . . [T]he absolute level of aggression as well as the more subtle and “creative” forms of aggression manifested, increased in a spiraling fashion.<sup>34</sup>

It took only five days before a guard who prior to the experiment described himself as a pacifist was forcing greasy sausages down the throat of a prisoner who refused to eat; and in less than a week, the guards were placing bags over prisoners’ heads, making them strip, and sexually humiliating them in ways reminiscent of Abu Ghraib.<sup>35</sup>

My conclusion is very simple. Abu Ghraib is the fully predictable image of what a torture culture looks like. Abu Ghraib is not a few bad apples. It is the apple tree. And you cannot reasonably expect that interrogators in a torture culture will be the fastidious and well-meaning torturers that the liberal ideology fantasizes.

That is why Alan Dershowitz has argued that judges, not torturers, should oversee the permission to torture, which must be regulated by warrants. The irony is that Jay S. Bybee, who signed the Justice Department’s highly permissive torture memo, is now a federal judge. Politicians pick judges, and if the politicians accept torture the judges will as well. Once we create a torture culture, only the naive would suppose that judges will provide a safeguard. Judges do not fight their culture. They reflect it.

For all these reasons, the ticking bomb scenario is an intellectual fraud. In its place, we must address the real questions about torture – questions about uncertainty, questions about the morality of consequences, questions about what it does to a culture to introduce the practice of torture, questions about what torturers are like and whether we really want them walking proudly among us. Once we do so, I suspect that few Americans will be willing to conclude that everything is possible.<sup>36</sup>

## NOTES

1. *Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (2nd Cir. 1980).
2. Amy Argetsinger, “At Colleges, Students are Facing a Big Test,” *Washington Post*, September 17, 2001, p. B1.

3. Jim Rutenberg, "Torture Seeps into Discussion by News Media," *New York Times* (November 5, 2001), p. C1.
4. Andrew McLaughlin, "How far Americans would go to fight terror," *Christian Science Monitor*, November 14, 2001, p. 1.
5. Alan M. Dershowitz, *Why Terrorism Works* (New Haven, CT: Yale University Press, 2002), pp. 158–161.
6. Senate Judiciary Subcommittee, "U.S. Senator Orrin G. Hatch (R-UT) Holds a Hearing on the Federal Government's Counterterrorism Efforts," FDCH Political Transcripts, June 8, 2004.
7. William Safire, "Seizing Dictatorial Power," *New York Times*, November 15, 2001, p. A31.
8. Judith Shklar, "Putting Cruelty First," in *Ordinary Vices* (Cambridge, MA: Harvard University Press, 1984), p. 7.
9. Shklar, "Putting Cruelty First," p. 43.
10. "No exceptional circumstances whatsoever, 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." Convention Against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment, Article 2 Sect. 2.
11. Jonathan Alter, "Time to Think About Torture," *Newsweek* (November 5, 2001).
12. The Schlesinger Report, reprinted in Karen J. Greenberg and Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005), p. 974.
13. Marites Danguilan Vitug and Glenda M. Gloria, *Under the Crescent Moon: Rebellion in Mindanao* (Manila: Institute for Popular Democracy, 2000), p. 223, quoted in Doug Struck et al., "Borderless Network Of Terror; Bin Laden Followers Reach Across Globe," *Washington Post*, September 23, 2001, p. A1.
14. See Oren Gross, "Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience," *Minnesota Law Review* 88 (2004): 1501–1503. Gross reminds us, however, that the catastrophic case can actually occur. *Ibid.*, pp. 1503–1504. The ticking bomb case might occur if a government has extremely good intelligence about a terrorist group – good enough to know that it has dispatched operatives to carry out an operation, and good enough to identify and capture someone in the group that knows the details – but not good enough to know the details without getting them from the captive. Israel seems like a setting in which cases like this might arise; and indeed, Mark Bowden reports on just such a case. Mark Bowden, "The Dark Art of Interrogation," *The Atlantic Monthly* (October, 2003), pp. 65–68. Importantly, however, the Israeli interrogator got the information through trickery, not torture. (For that matter, the Philippine police who tortured the al-Qaeda bomber eventually got their information not from the torture but from the threat to turn him over to Israel.)
15. For a powerful version of the consequentialist argument, which acknowledges these consequences and accepts them (at least for dialectical purposes), see Michael Seidman, "Torture's Truth," forthcoming in the *University of Chicago Law Review*.
16. David Rousset, *The Other Kingdom*, trans. Ramon Guthrie (New York: Howard Fertig, Inc., 1982) (1947), p. 168.
17. Bernard Williams, "A Critique of Utilitarianism," in J.J.C. Smart and Bernard Williams, *Utilitarianism: For and Against* (Cambridge: Cambridge University Press, 1973), p. 93. Williams suggests "that the *unthinkable* was itself a moral category. . . ." *Ibid.*, p. 92.

18. Quoted in Seymour M. Hersh, *Chain of Command: The Road from 9/11 to Abu Ghraib* (New York: HarperCollins, 2004), p. 45. The man was later identified as Manadel Al-Jamadi. According to various news accounts, Navy SEALs beat him with rifle muzzles and broke his ribs; he was then turned over to the CIA, who placed him in a stress position known as “Palestinian hanging” or the “Palestinian neck-lace” – suspended by the arms from a grate, a position that places great stress on internal organs. Al-Jamadi died that night, after which CIA operatives packed his body in ice in a shower stall before smuggling it out. One of the Abu Ghraib scandal perpetrators, Army Specialist Sabrina Harman, was photographed leaning over Al-Jamadi’s corpse, grinning and flipping a hearty thumbs-up. The SEAL commander was tried and acquitted. According to Associated Press reports, after his acquittal he said, “I think that what makes this country great is that there is a system in place and it works.” Seth Hettena, Associated Press, May 28, 2005, <http://www.sfgate.com/cgi-bin/article.cgi?file=/news/archive/2005/05/27/state/n171730D65.DTL>.
19. This is hardly far-fetched. Summarizing extensive studies by researchers, Jean Maria Arrigo notes medical participation in 20–40% of torture cases. One study, a random survey of 4,000 members of the Indian Medical Association (of whom 743 responded), revealed that “58% believed torture interrogation permissible; 71% had come across a case of probable torture; 18% knew of health professionals who had participated in torture; 16% had witnessed torture themselves; and 10% agreed that false medical and autopsy reports were sometimes justified.” Jean Maria Arrigo, “A Utilitarian Argument Against Torture Interrogation of Terrorists,” *Science and Engineering Ethics* 10 (3) (2004), p. 6. at <http://www.atlas.usafa.af.mil/jscope/JSCOPE03/Arrigo03.html>. Evidence has emerged of participation of medical personnel in abusive U.S. interrogations. M. Gregg Bloche and Jonathan H. Marks, “When Doctors Go To War,” *New England Journal of Medicine* 354 (January 6, 2005), pp. 3–6.
20. This is the conclusion Michael Ignatieff draws from the memoirs of French torturer Paul Aussaresses, *The Battle of the Casbah: Terrorism and Counter-Terrorism in Algeria, 1955–1957* (New York: Enigma Books, 2002), who remains completely unapologetic for torturing and killing numerous Algerian terrorists. Michael Ignatieff, “The Torture Wars,” *The New Republic*, April 22, 2002, p. 42.
21. Bowden, “The Dark Art of Interrogation,” pp. 74–76.
22. Mark Osiel, *Mass Atrocity, Ordinary Evil, and Hannah Arendt: Criminal Consciousness in Argentina’s Dirty War* (New Haven, CT: Yale University Press, 2002), p. 40.
23. Osiel, *Mass Atrocity*, p. 120.
24. This is a principal theme in Ignatieff.
25. These are tabulated in the Schlesinger Report, *The Torture Papers*, pp. 965–67. See also Chris Mackey and Greg Miller, *The Interrogators: Inside the Secret War Against Al Qaeda* (Boston: Little, Brown, 2004), pp. 479–83; see also US Army Field Manual FM 34–52.
26. See the discussion in Bowden, “The Dark Art of Interrogation.”
27. Given my earlier argument that liberal revulsion at torture is grounded in its similarity to tyranny, the question arises why I am willing to accept the forms of tyranny involved in tricking information out of detainees. The answer, though theoretically untidy, is straightforward: pain matters, and the pain of torture makes it a more devastating assault on the dignity and personhood of the victim. I thank Steven Lee for calling this question to my attention.
28. Mackey and Miller, *The Interrogators*, p. 31.

29. This point is forcefully made in the Jones/Fay Report on Abu Ghraib, reprinted in *The Torture Papers*. After noting that conflicting directives about stripping prisoners and using dogs were floating around simultaneously, the Report adds, “Furthermore, some military intelligence personnel executing their interrogation duties at Abu Ghraib had previously served as interrogators in other theaters of operation, primarily Afghanistan and GTMO. These prior interrogation experiences complicated understanding at the interrogator level. The extent of ‘word of mouth’ techniques that were passed to the interrogators in Abu Ghraib by assistance teams from Guantanamo, Fort Huachuca, or amongst themselves due to prior assignments is unclear and likely impossible to definitively determine. The clear thread in the CJTF-7 policy memos and published doctrine is the humane treatment of detainees and the applicability of the Geneva Conventions. Experienced interrogators will confirm that interrogation is an art, not a science, and knowing the limits of authority is crucial. Therefore, the existence of confusing and inconsistent interrogation technique policies contributed to the belief that additional interrogation techniques were condoned in order to gain intelligence.” LTG Anthony R. Jones and MG George R. Fay, “Investigation of Intelligence Activities at Abu Ghraib,” in *The Torture Papers*, p. 1004.
30. Hersh, *Chain of Command*, p. 30.
31. As a military police captain told Hersh, “when you ask an eighteen-year-old kid to keep someone awake, and he doesn’t know how to do it, he’s going to get creative.” Hersh, *Chain of Command*, p. 34.
32. “Working alongside non-DOD organizations/agencies in detention facilities proved complex and demanding. The perception that non-DOD agencies had different rules regarding interrogation and detention operations was evident. . . . The appointing authority and investigating officers made a specific finding regarding the issue of ‘ghost detainees’ within Abu Ghraib. It is clear that the interrogation practices of other government agencies led to a loss of accountability at Abu Ghraib.” Jones/Fay Report, *The Torture Papers*, p. 990.
33. Hersh, *Chain of Command*, pp. 44–45.
34. Craig Haney et al., “Interpersonal Dynamics of a Simulated Prison,” *International Journal of Criminology and Penology* 1 (1973), p. 94, quoted in the Schlesinger Report, *The Torture Papers*, p. 971. See also Philip Zimbardo et al., “The Mind is a Formidable Jailer: A Pirandellian Prison,” *New York Times*, April 8, 1973, §6 (Magazine), p. 41; and the remarkable internet slide-show of the experiment, Zimbardo, Stanford Prison Experiment: A Simulation Study of the Psychology of Imprisonment Conducted at Stanford University (1999), at <<http://www.prisonexp.org>>.
35. See John Schwartz, “Simulated Prison in ’71 Showed a Fine Line Between ‘Normal’ and ‘Monster,’” *New York Times*, May 6, 2004, p. A20.
36. This chapter is based on a longer essay with the same title appearing in the *Virginia Law Review* 91 (6) (October 2005), pp. 1425–1461, and it appears here with the permission of that journal.