

TICKING BOMBS AND TORTURE WARRANTS

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[The 'ticking bomb' argument is frequently advanced to justify the use of torture. But its terms can be taken either as setting the bar too high to justify any actual torture or alternatively as opening the door to torture in other cases as well. The paper explores both uses of the argument but suggests that any official sanctioning of torture is likely to erode moral constraints on its use. There are reasons why torture is special and, even if it will continue to occur, it should not be officially countenanced. This includes the use of torture warrants, supposedly intended to limit the frequency and severity of torture.]

There is a familiar argument that goes somewhat as follows:

An evil scientist, Dr Doom, has planted a nuclear device capable of devastating the whole of the Melbourne metropolitan area. However, he and his devilish plot are discovered only after the device has been activated, and it will explode within an hour. There is no way to evacuate the area in time. In such circumstances, would we not be justified in using whatever means necessary – including torture – to get Dr Doom to reveal the whereabouts of the device so that it can be deactivated?¹

* This paper began its life as a public lecture and still retains much of that format. I am, however, grateful for the efforts of a colloquium at the Centre for Applied Philosophy and Public Ethics in Canberra to improve its rigour.

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¹ There are many versions of the argument. The earliest version of which I am aware is found in Jeremy Bentham's essay *On Torture* (written during the period 1777-79, but unpublished during his lifetime). An edited version is published in W.L. & P.E. Twining, *Bentham on Torture*, 24 NORTHERN IRELAND

Expecting our assent – even if grudging – proponents of the argument then go on to suggest that this shows the issue of torture to be less than cut-and-dried; it is not something to be absolutely prohibited, but a matter of circumstances. It is not whether but when. So, where and how shall we draw the line?

We have seen a lot of this kind of argument – most recently in *The Age*² but especially since 9/11 – though in fact it was heard, and was even used to form public policy, well before that as others sought to address the challenges of terrorism. From 1987, when the Israeli government accepted the Landau Commission Report, until 1999 when its High Court finally ruled against it,³ what was euphemistically called “moderate physical pressure” was standardly employed by the General Security Service in Israel when interrogating those suspected of having terrorist connections. (It goes back further, of course, to British policies and practices in Northern Ireland.⁴)

Some people use the ‘ticking bomb’ argument to justify the expanded use of torture. That was the way it was used in the Landau Report: the ticking bomb was used to sanction an almost routine use of torture in the Israeli war on terrorism. For others, though, the ‘ticking bomb’ argument is appealed to in order to rule out such a resort. It is said to set the bar for its use impossibly high.

How *should* we understand it?

If faced with the situation I initially described, I guess that most of us, whatever we might think of torturing Dr Doom, would be somewhat relieved to have the bomb-defusing information tortured out of him. Perhaps, as Max Weber famously put it in his 1918 essay, ‘Politics as a Vocation’, we would prefer to have people in power who were not so concerned about their personal purity that they would give it priority over their commitment to the public good.⁵ Taking on a political role

LEGAL QUARTERLY 307 (1973). Bentham treats torture as a neutral category, its justifiability or otherwise being a function of its overall utility.

² See THE AGE (MELBOURNE), May 17, 18, and 21, 2005.

³ H CJ 5100/94 *Public Committee Against Torture in Israel vs. Government of Israel et al.*, Tak-EI 458 (3) 99 <<http://www.stoptorture.org.il/eng/images/uploaded/publications/18.pdf>>.

⁴ On which the Israelis drew in supporting their position. In the British case as well, a distinction was made between the harsh interrogation practices used against suspected IRA terrorists and torture. Although an early British Parliamentary Report distinguished ‘physical ill-treatment’ from torture, a later investigation (in 1977, by the European Court of Human Rights) was somewhat less accommodating, referring to what was done as ‘inhuman and degrading treatment,’ which, although it said did not rise to the level of torture, was nevertheless to be outlawed as resolutely as torture. Almost all the international treaties that outlaw torture absolutely also absolutely outlaw the infliction of ‘inhuman and degrading treatment’. See: REPORT OF THE ENQUIRY INTO ALLEGATIONS AGAINST THE SECURITY FORCES OF PHYSICAL BRUTALITY IN NORTHERN IRELAND ARISING OUT OF EVENTS ON 9 AUGUST 1971 [COMPTON REPORT]; AMNESTY INTERNATIONAL, A REPORT ON ALLEGATIONS OF ILL-TREATMENT MADE BY PERSONS ARRESTED UNDER THE SPECIAL POWERS ACT AFTER 8TH AUGUST 1971 (1971); and JOHN CONROY, UNSPEAKABLE ACTS, ORDINARY PEOPLE: THE DYNAMICS OF TORTURE (2000).

⁵ Max Weber, *Politics as a Vocation* <<http://www2.pfeiffer.edu/~lridener/DSS/Weber/polvoc.html>>. Weber distinguishes an ethic of responsibility from an ethic of ultimate ends – preferring, *for the most part*, the former. This position has recently been reiterated by Richard Posner: *The Best Offense*, review

requires that we give a certain preference to the public weal, one that we might not otherwise accord it.⁶

Nevertheless, if it takes the ticking bomb argument to justify torture, we might wonder whether it ever justifies any *actual* torture that we might encounter. For, consider what gives the ticking bomb argument such persuasiveness as it has:

First, it posits a *known* – and not merely a possible or even probable – threat. Second, there is a *pressing* need for action. Third, the threatened evil is of *enormous magnitude*. Fourth, *only* torture is likely to succeed in getting the information needed to avert the evil. Fifth, the person to be tortured is *the perpetrator* of the threat. And finally, as a result of the torture, the evil is *very likely* to be averted.

The first assumption requires that we can, if you will, ‘hear’ the ‘ticking bomb’, *know* it to be such, and *know* that unless deactivated it will go off. *If* torture is ever to be justified, it will have to be justified for the strongest possible reasons, and not simply because of a conjecture or hunch or even prima facie case that some evil will occur. Rarely, if ever, will we be as well placed as the argument supposes.⁷ Yet it is the *known fact* of there being a ‘ticking bomb’ that gives us the urgency and epistemic warrant required by the argument.

The second assumption focuses on the imminence of the danger – or at least on the need for immediate action if the evil is to be averted.⁸ This is not a situation in which one has the luxury of exploring too many – or any – alternatives. The bomb *will* go off in an hour. *Any* delay *will* be costly.

The third assumption envisions a catastrophe of such *magnitude* that only an upholder of the maxim, ‘let justice be done, though the heavens fall’, could be expected to cavil at the overriding of principle. Although not originally intended as such,⁹ the maxim might be considered a *reductio ad absurdum*. Any hesitation on

of ALAN DERSHOWITZ: WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE, NEW REPUBLIC (2002): <<http://www.law.uchicago.edu/news/posner-r-terrorism.html>>. See also: POSNER, CATASTROPHE: RISK AND RESPONSE 239-41(2004). A politician’s supposed commitment to the public interest is one of the things that distinguishes these cases from that of Jim in Bernard Williams’s story about Jim and the Indians. See BERNARD WILLIAMS & J.J.C. SMART, UTILITARIANISM: FOR AND AGAINST 98-100 (1973). It should be noted that my paper is focused on torture inflicted by those who might credibly be regarded as government agents, and does not address torture that, say, a private citizen may inflict to avert some disaster. The latter issue – which does not have the symbolic significance or the coercive apparatus of state power behind it – deserves its own discussion.

⁶ Such a commitment is at the core of MACHIAVELLI’S THE PRINCE, where it is expressed in fairly pragmatic terms (Ch. 15). At this juncture, however, I leave aside the ethical implications of such a step, though they are suggestively developed in Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 PHILOSOPHY & PUBLIC AFFAIRS 160 (1973).

⁷ Bentham suggests that we need to have the degree of certainty that we would have in the case of a criminal trial – that is, proof beyond a reasonable doubt. In real-life situations, so-called ticking bomb cases would be unlikely to provide the conditions for that level of *certainty* (not to be confused with *certitude*, which is abundantly available).

⁸ The imminence condition may refer to a ‘point of no return’ rather than some immediate danger.

⁹ “Fiat justitia et ruat coeli” (William Watson, 1559-1603) or in Lord Mansfield’s much quoted version: “fiat justitia, ruat caelum” (sometimes ascribed to Lucius Calpurnius Piso Caesoninus [d. 43

the grounds of principle – a refusal to do what is necessary – will smack of a type of rule worship, moral self-indulgence,¹⁰ or a narcissistic concern with one's own virtue, though the exact moral status of any such overriding is left unclear. Even so, we might wonder whether this is a case in which torture would be *justified*, or *excusable*, or merely *regrettable*, or sanctioned by a necessity that nevertheless *leaves one's hands dirty*? Nevertheless, whatever we might want to say, in the ticking bomb argument there is some proportionality between the action to be taken and the end that is sought.

The fourth assumption is that we have good – or good enough – reasons to believe that other ways of getting this essential information (within the available time frame) will fail. Perhaps the device *could* be located using some other means – but not to our knowledge and almost certainly not within the present time frame. Torture is not resorted to simply as a convenient short cut or as something that will do the job. Here it answers the demands implicit in what is known as the principle of 'the least restrictive alternative', namely, that we should use the least costly means to the achievement of our ends.

The fifth assumption is that the person tortured is not an innocent conduit but the very one who has initiated the threat. The argument will not work nearly as well if Dr Doom is 'encouraged' to talk by torturing his baby daughter before his eyes – or even by torturing his ageing mother, should she just happen to know (but be unwilling to disclose) where the bomb has been hidden. It is not that Dr Doom has fewer rights than others, but that if those rights can be overridden, they can be more easily overridden in *his* case. *If* torture can be justified or rationalised at all, torture of the guilty for all-important ends whose endangerment they have initiated will provide the most plausible context.

The sixth and final assumption is that what is learned will – or will very likely – enable the threat to be averted. If the information that is sought will not enable the bomb to be deactivated, or if getting it will leave too little time for it to be deactivated, the justificatory story loses much of its momentum (as it does when Clint Eastwood's Dirty Harry tortures the psychopathic Scorpio).¹¹ If the bomb will go off anyway, what good and presumably 'justifying' end will be secured? Are good

B.C.E.J. Mansfield invoked it to counter consequentialist considerations: *R v Wilkes* (1770) 4 Burr 2527 at 2561-62 (98 ER 327 at 346-47). An alternative rendering is: "fiat justitia et perea mundus".

¹⁰ For a discussion of this possibility, see Bernard Williams, *Utilitarianism and Moral Self-Indulgence*, in MORAL LUCK: PHILOSOPHICAL PAPERS 1973-1980, 40-53 (1981).

¹¹ This was also at issue in the kidnapping/ransoming of 11 year-old Jakob von Metzler and the threatened torture of his kidnapper. In that case, at least, there was somewhat better reason to think that the boy was alive. The Regional Court subsequently convicted Wolfgang Daschner, who – as the Vice-President of the Frankfurt Police – ordered the torture (though it was not actually inflicted), of inducing the misuse of authority and coercion and subjected him to a conditional fine and probation. Although Daschner had powerful support, it was thought symbolically important to show formal disapproval. See *Police Threat Fuels Debate on Torture*, at <<http://www.dw-world.de/dw/article/0,,785751,00.html>>; BBC News: *German Officer Guilty of Threats*, at <<http://news.bbc.co.uk/2/hi/europe/4111483.stm>>. An extended description of the case is provided in Paul Nieuwenburg, *Is There Such a Thing as Government Ethics? Or: A Machiavellian Plea for Excuses*, at: <http://soc.kuleuven.be/io/ethics/paper/Paper%20WS1_pdf/Paul%20Nieuwenburg.pdf>.

– and even reasonably well-grounded – intentions enough? Or do we, perhaps, as Kant seemed to think, still produce a morally better world by ‘punishing’ the miscreant in advance?¹²

These are very strong assumptions, and in the form in which I have stated them they are unlikely to be replicated in the real world. Even so, how necessary they are, how interdependent they are, and whether they may be modified, still remain to be seen. But because the assumptions are so strong in the argument’s primary version, it does not immediately provide the kind of moral warrant sought by our current crop of users of the third degree or torture. For them, *raisons d’état* tend to constitute their own warrant, unconstrained by moral niceties.¹³

Nevertheless, a defender of the argument’s secondary application might seek to rationalize its expansion as follows. The important thing about the primary argument is its *heuristic* value: it provides a set of considerations under which torture will be justified.¹⁴ But once we have allowed this, the real question will not: Is torture ever justified? but: *In what situations* is torture justified? Where is the line to be drawn? Once we have freed ourselves from the shackles of absolute prohibitions, we can consider less stringent circumstances, in order to determine whether under these circumstances, too, torture might be justified. Do we need to be talking about 3 million lives or will 1 million do, 100 thousand, 100, 10, or even 1? We can also talk about probabilities – whether one needs to *know* (in some especially strong sense – *sub specie aeternitatis*) that there is a bomb, that Dr Doom will talk, that he will tell the truth, that we can find the bomb in time, that it can be deactivated, and

¹² ‘Even if a civil society were to be dissolved by the consent of all its members (e.g., if a people inhabiting an island decided to separate and disperse throughout the world), the last murderer remaining in prison would first have to be executed, so that each has done to him what his deeds deserve and blood guilt does not cling to the people for not having insisted upon this punishment; for otherwise the people can be regarded as collaborators in this public violation of justice’. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 106 (trans. & ed. Mary Gregor, 1996).

¹³ That may seem unwarranted. After all, reasons of state pose as *morally* overriding. Often, however, those who appeal to such do not seem morally troubled about what they require. Remarks from (anonymous) US government officials such as: ‘If you’re not violating someone’s rights some of the time, you’re probably not doing your job,’ and ‘We don’t kick the shit out of them. We send them to other countries so they can kick the shit out of them,’ don’t inspire much confidence. I suspect they reflect a common attitude to the tasks of state. See, *more generally*, LAWRENCE WESCHLER, *A MIRACLE, A UNIVERSE: SETTLING ACCOUNTS WITH TORTURERS* (1990); cf. PIERRE VIDAL-NAQUET, *LA RAISON D’ÉTAT* (1962). I shall return to this issue later, when discussing the appeal to national security.

¹⁴ This begs a large question about the use of artificial examples in philosophy. Do we say – with Henry Shue – that “artificial cases make bad ethics” or – with C.L. Ten – that “fantastic situations . . . help us decide whether a particular principle is subordinate or fundamental”? See Henry Shue, *Torture*, 7 *PHILOSOPHY & PUBLIC AFFAIRS* 141 (1978); and C.L. TEN, *CRIME, GUILT, AND PUNISHMENT* 21 (1987), at 21. On the use of examples, see G.E.M. Anscombe, *Does Oxford Moral Philosophy Corrupt the Youth?*, *THE LISTENER* 267 (14 February, 1957), reprinted in *HUMAN LIFE, ACTION AND ETHICS: ESSAYS BY G.E.M. ANSCOMBE* (Mary Geach & Luke Gormally, eds., 2005), 161-8; J.W. Roxbee Cox, *Utilitarians and the Use of Examples*, 95 *ETHICS* 268-73 (1985); Onora O’Neill, *The Power of Example*, 61 *PHILOSOPHY* 5-29 (1986); Béla Szabados & Eldon Soifer, *Hypocrisy, Change of Mind, and Weakness of Will: How to Do Moral Philosophy with Examples*, 30 *METAPHILOSOPHY* 60-78 (1999); and N. Ann Davis, *Fiddling Second: Reflections on “A Defense of Abortion”*, in *FACT AND VALUE: ESSAYS ON ETHICS AND METAPHYSICS FOR JUDITH JARVIS THOMSON* 81-96 (Alex Byrne, Robert Stalnaker, & Ralph Wedgwood, eds., 2001).

so on, or is it enough that we are only 99% certain or 90% or just have reason to believe it very likely? And so on. We can envisage a range of consequences, probabilities, and coercive measures, impacting on each other. Thus, a lesser degree of coercion might be compatible with a lower probability of evil occurring, provided the evil is serious enough.

How we respond to such possibilities will depend partly on what we see to be the specific evils associated with torture – with whether they go so fundamentally to what we take to be the constraints of morality and civilization that only – if at all – the most extreme circumstances could be allowed to override or compromise them, or whether, like most other moral considerations, those relating to torture must take their place with others in the competitive and uncertain jostle for a morally acceptable solution. And, if the latter, we need to have some sense of how the jostle is to be brought into some sort of order.¹⁵

If what makes torture wrong must compete with other considerations, we can see the slipperiness of the slope we're on – not just a theoretical slipperiness but also a practical one, for *wherever the ticking bomb argument has been wheeled in to justify torture, however defined, its actual scope has expanded*.¹⁶ This may appear to be a contingency, manageable through closer oversight, but before I consider that, let me first review some of the basic issues.

Why is torture such a problem? And why should we even be tempted to put it in a special moral category of its own? Further, what kind of a warrant does the ticking bomb argument give us for inflicting it?

Put summarily, as it has to be here, the torture of a human being represents the most invasive attack on his/her dignity of which we are capable. Not only does it represent what Henry Shue calls an “assault on the defenseless,”¹⁷ itself an act of presumptuous domination, but it threatens and undermines the very characteristics that constitute our human distinctiveness, and attacks them in a way that does not merely extinguish them – as killing does – but in a way that humiliates, degrades, and perverts. Even more than that (and this, perhaps, is what makes its evil distinctively repulsive, most obviously – though not only – in the case of interrogatory torture), it seeks to turn its victim against him- or herself. The pain that is suffered or the suffering that is undergone, most assuredly the victim's own pain or suffering, *betrays* him or at least seeks to betray him. His *resistance* – including that which is most individually and distinctively *him* – is captured and exploited by the

¹⁵ That might be easier for utilitarians or single-principle theorists than for others, though – Bentham notwithstanding – even utilitarian calculations can be notoriously difficult.

¹⁶ In the wake of the infamous White House memoranda, we have seen this in ‘the war against terror’ in Guantánamo Bay, Afghanistan, and Iraq; it was also the Israeli experience, and one of the factors that led to the 1999 High Court decision.

¹⁷ Shue., *supra* note 14, at 130. This helps to distinguish torture from a contest of two unevenly matched contenders. The person who is tortured is totally subjugated to the will of the other and is in no position to fight back. See, for example, the sickening story of the torture of ‘the defiant detainee’, Habibullah, at the Bagram Collection Point in Afghanistan: Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, NEW YORK TIMES, May 20, 2005.

torturer and turned against him; his tormentor commandeers him and – through his bodily and/or mental anguish – seeks to have him betray who he most deeply is.¹⁸ The torturer takes something that is central to a person's individuality – whether it is universally possessed, like his body (though it is *his* body), or more particularized, such as his loves or religious commitments, and uses them against him. Our deepest self is made to cry out to us to accede to the torturer's demands.¹⁹

Of course, torture also has other things to be said against it. Not only does it humiliate those who suffer it, it also brutalizes those who inflict it and those who tolerate it.²⁰ It signifies something about a society that is prepared to use it, and it formally sanctions its use by any who consider their cause important enough. It corrupts as well as diminishes.²¹ But its most distinctive horror is the way in which it turns the individual against himself, de-moralising him. That is one reason why the effects of torture can be so lasting. In a morally significant sense, torture represents a worse invasion of our humanity than killing or even murder.²²

Now, I am of course fudging on what many take to be a significant issue – the degrees or, if you like, kinds of torture. International documents are notoriously – though perhaps necessarily – vague when they characterise torture. They usually refer to 'the intentional infliction of severe and prolonged physical or mental pain and suffering'²³ without specifying how severe is severe enough, how prolonged is

¹⁸ This is why the threat to wipe menstrual blood on the face of a devout Muslim can constitute torture. For a development of this idea, see David Sussman, *What is Wrong With Torture?*, 33 *PHILOSOPHY & PUBLIC AFFAIRS* 1-33 (2005). Sussman intriguingly suggests that if we want to look at offenses somewhat analogous to torture we might look at rape. As with the person who has been raped, the person who has been tortured may feel permanently at unease with how she or he has become. It should be noted, however, that Sussman prescinds from the issue of the absoluteness of the wrong that is constituted by torture.

¹⁹ Tom Campbell has suggested to me that this is too narrow: were we to torture a thief in order to find out where he had hidden his loot, we would not be seeking to have him betray a fundamental conviction. Maybe we *should* distinguish between a core and a penumbra when talking about torture. But it might also be worth considering why the issue of torture would rarely arise in such cases: either there are other strategies for finding out or the mere threat of torture would be sufficient to extract the information (consider the Metzler case). Nevertheless, it might be worth considering, should the thief resist to the point that torture does appear to be 'necessary' to extracting the information, whether the resistance does in fact reflect some deeply-held conviction that is being subverted.

²⁰ At a certain level, that begs the question. It cannot be considered a fundamental argument against torture. Given, though that the more fundamental argument is sustainable, the torture has corrupting social effects.

²¹ There are in addition other problems with torture – mostly of a consequentialist kind. For example, information given by someone who is being tortured may not be reliable: interrogators may be told what they want to hear just so pain will no longer be inflicted.

²² This is why almost every international document outlaws torture – even in the most extreme circumstances – but allows that killing may sometimes be justified. Those who consider that torture can be defended in the same terms as killing in self-defence need to consider why torture is treated differently. Is it mere squeamishness or outdated prejudice? Or does it tap into considerations that are even more fundamental to our human standing?

²³ One of the few international documents to attempt to characterise torture, THE UNITED NATIONS CONVENTION AGAINST TORTURE, does so in the following terms: 'torture means 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

prolonged enough, and whether and if so what long-term detriment is involved. However, what was presented by the Israelis as a workable distinction between 'torture' and 'moderate physical pressure,' or by some post 9/11 commentators as one between 'torture' and 'torture lite', and by Donald Rumsfeld (commenting on the Abu Ghraib scandal) as a distinction between 'torture' and 'abuse' soon gets us into moral quicksand.²⁴ *Of course* there is a difference between depriving a person of sleep or subjecting him to constant loud music and some of the grotesque barbarisms that have characterised human history.²⁵ And there is generally a difference between the sadistic infliction of pain for the purpose of terrorising or punishing and the information-focused and more controlled infliction that is part of anti-terrorist initiatives. But in every case there is an attempt to turn a person's most intimate self – whether it is his body, his religious convictions, or his loves – against himself, to use them to betray who he is, either what he stands for or his standing as a human being.²⁶

Moreover, what we almost inevitably find, even when we penetrate the world of those who defend 'torture lite', is a cumulative conjunction and escalation. To a considerable extent that is inherent in the process: the Israelis never revealed how far they were willing to go, lest it fortify the resistance of terrorist suspects.²⁷ There is a similar reluctance on the part of US authorities. This essential lack of transparency renders its use largely unaccountable.²⁸ But since the name of the game is obtaining information (for the purpose of 'national security'), people are prepared to do what they (think they) need to do to get it. And if they aren't prepared to do it themselves, as the US sometimes claims, they are nevertheless willing to outsource it to those who are. Whatever formalistic moral patina is offered for the 'extraordinary rendition' of terrorist suspects to countries with records of torture, the reluc-

or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions' (Art. 1) <<http://www.hrweb.org/legal/cat.html>>.

²⁴ See Mark Bowden, *The Dark Art of Interrogation*, 292 THE ATLANTIC MONTHLY (3) (OCTOBER 2003), for a development of such distinctions. In Northern Ireland, a distinction was drawn between 'torture' and 'physical ill-treatment'.

²⁵ Described in grisly detail in RICHARD W. KROUSER, *PHYSICAL INTERROGATION TECHNIQUES* (PORT TOWNSEND, WA: LOOMPANICS UNLIMITED, 1985).

²⁶ I do not wish to be taken to imply that every interrogatory tactic that might lead a person to turn against or betray something deeply held would constitute torture. Consider interrogatory tactics that have the effect of scrambling a person's understanding of the object of commitment – say, tactics that lead a person to believe falsely that his country is, after all, vicious and oppressive. He now comes to think that his country no longer deserves his loyalty and so he provides information that he would not otherwise have given. This need not involve torture and does not constitute full-blown betrayal.

²⁷ THE LANDAU COMMISSION REPORT was published in two volumes, one of which – the one that detailed the techniques employed – was not made public.

²⁸ Word eventually gets out, of course, though authorities tend to exploit the advantages of deniability as long as they are able. Would we know much about what goes on were it not for the 'whistleblown' pictures from Abu Ghraib?

tance of US authorities to inquire into what happens to those who have been thus rendered makes a moral mockery of the distinctions that are drawn.²⁹

With respect to the ticking bomb argument, those who defend its primary version will normally want to claim that it shows how, *under certain special circumstances*, torture can be *justified* (and not merely *excused*). That is, they want to argue that it would be *right* to inflict torture in these circumstances, and not merely that those who inflict it should be held blameless. They argue, for example, that Dr Doom is not defenceless, but has in his control a device that places numerous others in grave peril.³⁰ What is done to him he brings on himself.

Is it reasonable to conclude that torture would be *justifiable* in Dr Doom's case?

Not obviously.

(a) One might attempt to avoid an affirmative response by claiming that the circumstances envisaged by the argument are so extraordinary that they would never be realised: the story takes a God's eye view of events that must ever remain unavailable to us mortals. That is, we could never be in the position of knowing what must be known were torture to be justified in any real-life situation – so that even were the argument to provide a theoretical framework for justifying torture, its conditions would never be instantiated.

However, although there is some plausibility to such an objection, I think it overreaches, particularly if the argument, as its secondary proponents claim, retains significant force even with weaker assumptions than those made by the 'model' ticking bomb argument.

(b) Nevertheless, admitting the factual possibilities will not necessarily settle the moral question. For even if we can know what we know in Dr Doom's case, it can be argued that such torture, though plausibly claimed to be 'necessary', still cannot be *justified*. A defense of necessity, though it often functions as a justification, is much more problematic when used in relation to homicide.³¹ How much more problematic when used to justify torture? At best, the primary argument trades on *the uncertain and conflicting intuitions associated with an extreme case* and –

²⁹ The outsourcing does not need to take the form of rendition. From the 1960s to the 1980s, the CIA provided training in interrogation techniques for Latin American military officers. Some of the manuals used were later to become an embarrassment. See:

<<http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/>>.

³⁰ An important issue, from which I shall here prescind, is whether and, if so, how the number of victims should count in any moral judgment. See the discussion initiated by John M. Taurek, 'Should the Numbers Count?' 6 *PHILOSOPHY & PUBLIC AFFAIRS* (4) (1977): 293-316.

³¹ There is a much debated issue here, because in legal contexts the defence of 'necessity' is often treated as a justification and not an excuse. See Miriam Gur-Arye, 'Should the Law Distinguish between Necessity as a Justification and Necessity as an Excuse?' 102 *LAW QUARTERLY REVIEW* 71-89 (1986); Claire Oakes Finkelstein, 'Two Men and a Plank', 7 *LEGAL THEORY* 279-306 (2001):. Even the distinction between justification and excuse is contested. See Kent Greenawalt, 'The Perplexing Borders of Justification and Excuse', 84 *COLUMBIA LAW REVIEW* 1897-1927 (1984).

should someone wish to claim that even these circumstances would not *justify* torture – we could hardly accuse that person of holding an unreasonable position.³² For it might be asserted that some human values or principles are so central to our moral agency that any compromise would dirty hands. Those who inflict torture in such cases would still be guilty of wrongdoing.³³

Even this would not settle the issue, however, for it has become common in the contemporary debate to claim that one is sometimes *justified* in dirtying one's hands – that is, in doing what it would be wrong to do.³⁴ That might be seen as the possible moral price one accepts for taking up certain public roles – the sacrifice of one's soul or integrity for a greater good.³⁵ And *if* that is so, there is then the difficult social question, influentially addressed by Michael Walzer and Dennis Thompson, of how we are to deal with those who have made such decisions *on our behalf*. Here I shall leave that question aside.³⁶

(c) Even were we to allow that it might sometimes be justifiable to dirty one's hands, this would *not* provide the basis for a *social policy* that sanctioned it. No case in which torture was inflicted could find refuge in some *general* 'permission' that allowed it to escape the severest and most searching scrutiny. Those who feel that torture is the only option available to them in a particular case (such as Dr Doom's) will have to answer for such in a public forum (such as a court) and hope that the circumstances will be such as to secure general support or at least sympathy ('There but for the grace of God go I').³⁷ The doctrine of necessity cannot be invoked to support a policy; it can be appealed to only in particular cases.³⁸

The problems, I believe, are made more critical by the difficulty we have in matching the certainty and magnitude of the harm in the ticking bomb case with the putative grounds for its use in real-life situations. They generally *exploit* the argument from necessity.

³² The problem here is that the more artificial or "fantastic" an example becomes, the less certain are our 'intuitions'.

³³ In presenting its case to the Landau Commission, the GSS argued that "interrogation work for uncovering Hostile Terrorist Activity and its prevention is a sacred mission which justifies the means, any means . . . One cannot clean sewers without dirtying oneself", LANDAU COMMISSION REPORT, 31 (at 162, *in excerpt printed in* 23 ISRAEL LAW REVIEW [1989]).

³⁴ See, for example, Walzer, *supra* note 6 or, more recently, CRUELTY AND DECEPTION: THE CONTROVERSY OVER DIRTY HANDS IN POLITICS (Paul Rynard & David Shugarman, eds., 1999).

³⁵ Weber writes: 'He who seeks the salvation of the soul, of his own and of others, should not seek it along the avenue of politics, for the quite different tasks of politics can only be solved by violence.'

³⁶ Walzer, *supra* note 6; Dennis F. Thompson, *Democratic Dirty Hands*, in POLITICAL ETHICS AND PUBLIC OFFICE Ch 2 (1990).

³⁷ Would that create a kind of torture warrant? Not if sympathy was reflected in the penalty exacted rather than in the conviction.

³⁸ Something of this kind is suggested by Itzhak Zamir, *Human Rights and National Security*, 23 ISRAEL LAW REVIEW 395 n 43 (1989). Even if necessity is accepted as a defence it is a problematic defence where deliberate killing is involved. How much more problematic when the issue is torture which, unlike killing, cannot be an unintended side-effect of an act of self-defence.

(d) Those who employ the ticking bomb argument often do so in terms of some grand idea like ‘national security’ – a value seemingly important enough to carry the weight of problematic means. But appeals to national security are themselves deeply problematic. I do not of course want to underestimate the damage that terrorism can and does do. But invocations of national security can be greatly overdone. The Landau Commission spoke of PLO terrorists as threatening ‘the very existence of society and the State’.³⁹ Whatever may have been the ambitions of those involved, that was hardly an accurate depiction of their acts. And, with all due respect, and appalling as they were, I do not think that US national security was deeply threatened by the events of 9/11. This was not the bombing of Pearl Harbor. No doubt American *interests* were damaged on 9/11 – as they were earlier when the US embassies were bombed in Nairobi and Dar es Salaam, and even when the World Trade Center was bombed in 1993. But these events fell significantly short of the kind of threat that is conjured up by appeals to national security.

One of the difficulties here is that the idea of national security – never entirely clear-cut – has undergone considerable expansion, to the point, I think, at which it can no longer bear the moral weight that it is accorded. Whereas it was once seen primarily in terms of the security of borders – in which an attempt at conquest constituted a threat to national security – it has now been expanded to cover almost any threat to national *interests*. National security interests may be challenged by contagious disease and economic events overseas no less than by North Korean nuclear capability. Moreover, as we know all-too-well from the ‘stockpiles of weapons of mass destruction’ in Iraq, even traditional threats to national security may be grossly inflated. Indeed, one of the great problems with invocations of national security is their frequent lack of transparency – the need to trust the judgment of those who are credited with being its guardians. Not only do they appeal to an idea with very uncertain borders, but even when border issues are not in question, their application of it to particular cases is often tendentious.

These are not, I think, just the luxuriations of a philosopher with too much time on his hands, but a frequent feature of recent history. Although, as our intellectual forebears recognised, humans are not capable of managing their social existence merely by dint of their moral capacity and without the coercive presence of governmental authority, those institutions of governmental authority are also prone to exacting more than they can morally justify. To the extent that we support liberal democratic institutions, we do so because we believe that they hold out the best chance we have for accountable authority; yet those institutions are not themselves invulnerable to corruption and excess.

That is just the way things are – at least, that is how we find them. States, including liberal democracies, or, perhaps more specifically, those with power in such states, will – should it appear to suit the ‘national interest’ as they construe it (often in some partisan way) – do what it takes to secure it. And that, as we have increasingly

³⁹ LANDAU COMMISSION REPORT, *supra* note 33, at 157.

had publicly revealed, may include recourse to torture. It may of course be inflicted 'judiciously' lest public opinion be marshaled against it, but inflicted it will be.

This climate of *Realpolitik* has prompted some commentators, most notably Alan Dershowitz, to advocate the issuing of 'torture warrants'. As Dershowitz puts it: torture is going to occur anyway, and it is better that it occur above rather than below the radar screen so that we may know what is being done *in our name*. To the extent that torture occurs, it should occur under court and medical supervision. And that, he believes, will minimize both its occurrence and severity.⁴⁰

The 'torture warrants' that Dershowitz advocates are not without precedent. He notes that some form of warrant was used by the British in the sixteenth and seventeenth centuries. However, there has been a reemergence of the demand post-9/11, partly as a recognition that torture is going to be inflicted by 'our side', and maybe also to avoid the embarrassment of the clandestine support that the US gave it in Latin America.

The idea of a torture warrant is that a judge – or perhaps a panel of judges – would be presented with a case for torturing a particular person and would decide whether, on the basis of considerations such as those invoked in ticking bomb cases, the person should be subjected to medically supervised torture.⁴¹ There would be certain parallels to surveillance and entry warrants, except that in such cases the governmentally mandated activity would be torture. Although any torture approved of would be extremely painful,⁴² it would be designed not to cause permanent physical damage. Dershowitz suggests that the insertion of a sterilized needle under the fingernail might qualify.

In defence of such, it might be tempting to offer analogies with condom distribution (to teenagers) and needle distribution programs. Since people are going to have sex or use drugs, whether we like it or not, we should therefore do what we can to ensure that when this occurs bad fallouts will be minimized.

Not everyone, of course, will accept such arguments, since they consider that constraints on the behaviour in question will thereby be loosened. Nevertheless, leaving

⁴⁰ ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 158-59 (2003).

⁴¹ There are probably insuperable issues of medical ethics that need to be dealt with here. Almost every professional association opposes medical "assistance" with or oversight of torture, even though there has been an unfortunate history of medical involvement. See, for example, British Medical Association, *The Medical Profession and Human Rights: Handbook for a Changing Agenda* (BMA), partially available at <<http://www.bma.org.uk/ap.nsf/Content/The+Medical+Profession+and+Human+Rights+-+Recommendations>>; also R.S. Downie, *The Ethics of Medical Involvement in Torture*, 19 JOURNAL OF MEDICAL ETHICS 135-7 (1993); also Giovanni Maio, *History of Medical Involvement in Torture – Then and Now*, 357 THE LANCET 1609-11 (May 19, 2001).

⁴² Its advocates sometimes claim that the fear of torture may be as effective as, if not more so than, its infliction, so that approval would not necessarily mean its infliction. Such an argument, however, will take one only so far.

aside the empirical questions raised by such cases, the analogy fails in certain other respects – quite apart from the controversial status of the underlying behaviours.

Do we have any reason to think that judges will be appropriately discriminating in such cases, especially as – given the nature of the case – arguments for torture will be structured to favour the government that wants it? That has almost certainly been so in other cases. In the United States, formally similar warrants are already required under the Foreign Intelligence Surveillance Act (FISA). In 2002, all 1228 applications were approved by the appointed judges (albeit two of them only after appeal), in 2003; 1724 out of 1727 applications were approved in whole or part, and in 2004; 1754 of 1758 applications were approved (and none denied).⁴³ The pattern is clear. One could of course argue that this shows how having such a system in place informally serves to weed out unworthy cases. That is a conclusion we might be able to draw were we privy to the cases actually reviewed. But they are sealed, and that no doubt would also be the fate of torture warrants.⁴⁴ We would be asked to take on trust that the judges appointed to the reviewing role would not be ideologically motivated or otherwise compromised. Although I am skeptical of such independence and impartiality, I suspect that what FISA did was simply deter those who wished to engage in problematic surveillance tactics from seeking approval, conducting them instead under the radar screen. And so it would be with torture warrants. We are dealing here with ‘practical necessities’ that governments will secure no matter what. The mechanisms of accountability are ‘futurised’. If that sounds cynical, it probably is. In recent years and months and days there has not been a lot to encourage one to think that those who claim the high moral ground have taken it themselves.

But might one not argue that torture warrants would diminish the amount of torture carried out – either by limiting its occasions or, more to the point, by placing curbs on its severity? Apart from the unfortunate implication that supervised and sanitized torture is morally better than its unsupervised bedfellow, I do not believe that we have good reason to think any such thing. Although we do not know exactly how many Palestinians were subject to torture when it was subject to government sanction and “oversight,” the numbers were very high and, if anything, increased over time. What is more, even after the High Court more or less forbade it, torture has

⁴³ See, for 2002, <<http://www.fas.org/irp/agency/doj/fisa/2002rept.html>>, for 2003, <<http://www.fas.org/irp/agency/doj/fisa/2003rept.pdf>>, and for 2004, <<http://www.fas.org/irp/agency/doj/fisa/2004rept.pdf>>. The scope of the Act (originally passed in 1978) was broadened by the USA PATRIOT ACT. The federally appointed judges who sit on the FIS Court individually hear applications in secret, and hear only the government’s side. Moreover, for ‘national security’ reasons, it is not possible to challenge the basis for an application should information gathered subsequently be used in court.

⁴⁴ Sanford Levinson, who supports Dershowitz’s general position, argues that both the cases and the identity of the judge who decides them should be made public. Though this would help, I suspect that for ‘national security’ reasons the former would be unlikely to occur. See Sanford Levinson, *The Debate on Torture: War against Virtual States*, 50 DISSENT (2003): <<http://www.dissentmagazine.org/menutest/articles/su03/levinson.htm>>.

continued.⁴⁵ Torture for reasons of state does not stop; it just moves under the radar screen. And if not *under* the radar screen, then *off* it by means of extraordinary rendition: we outsource it.⁴⁶ If we are determined to minimize the use of torture, we must resolutely oppose it rather than offer it moral refuge.

The problem with torture warrants is that they do very little beyond pasting a veneer of moral respectability over practices that do not deserve it. But I still hear someone saying: ‘These are terrorists, aren’t they?’ – ‘the worst of the worst’, as we were assured about those taken to Guantánamo Bay. Well even if they were – and we now have increasingly good reason to believe they were not – we shake loose one of our most deeply held principles when we start down that track – there is the deeply embedded view that there are some things that, because they pervert a central element of moral agency, are beyond the pale.

The language of moral psychopathy often used in relation to terrorists is nothing more than a modernized version of the bestialisation of ‘the other’ that has characterised too much of our moral history.⁴⁷ Although I am as strong a holder as any of the view that anger at the corruption of one’s religious traditions, or the humiliation of one’s people, or even anger at those whom one sees as one’s oppressors, cannot be invoked to justify the terrible carnage that terrorism may cause, I also think that sanctioned torture erodes the legitimacy of the very societies that it is intended to secure. Whatever may be the short term benefits of torture – and there is some question about those⁴⁸ – there are longer-term social consequences that are much more difficult to manage.⁴⁹

We should maintain an absolute ban on torture, as a matter of policy. If something like a Dr Doom situation arises we should prosecute it as the serious breach it is. In the event that conviction results, we might then take cognizance of the multitude of particularized considerations that might reasonably bear on sentencing.⁵⁰

⁴⁵ See, for example, PUBLIC COMMITTEE AGAINST TORTURE IN ISRAEL, *BACK TO A ROUTINE OF TORTURE: TORTURE AND ILL-TREATMENT OF PALESTINIAN DETAINEES DURING ARREST, DETENTION AND INTERROGATION, SEPTEMBER 2001–APRIL 2003*, <<http://www.stoptorture.org.il>>.

⁴⁶ One might wonder whether the outsourcing itself – or even the threat of it – might constitute torture.

⁴⁷ To a considerable degree, the proscription of torture – and certainly its absolute proscription – reflects the success of enlightenment values – particularly those that relate to human dignity and equality. Our public perception of the wrongness of torture – to the extent that we do perceive it to be wrong – is largely a product of our recent history, even if it has roots in ancient values.

⁴⁸ Some would argue that tortured information cannot be relied upon: people will eventually ‘say what they need to’ in order to get it to stop. There is some truth in that and it is notable that the benefits of torture tend to be vaguely expressed by those who advocate it. Nevertheless, I am not so sceptical as to think that it is never effective.

⁴⁹ See, for example, Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, available at: <<http://www.columbia.edu/cu/law/fed-soc/otherfiles/waldron.pdf>>; revised: <<http://www.law.berkeley.edu/cenpro/kadish/gala/J%20Waldron%20093004%20tortureNew.pdf>>.

Waldron speaks of the prohibition of torture as an ‘archetype’.

⁵⁰ For example, what were the torturer’s operative motives? Did he give due consideration to alternatives? Did he subsequently report what he had done or rather seek to cover it up? Did he take the responsibility upon himself or seek to have others act on his behalf? How does he now feel about what he did? And so on.