

Tragic Choices: Reaffirming Absolutes in the Torture Debate

1. Introduction: Abu Ghraib and the ‘festival of cruelty’:

In the opening years of a new millennium, one buoyed on the accomplishments of the past and filled with promises for the future, torture is in the news. And it is an issue with an immediacy and urgency about it, as politicians and theorists confront attacks on the very structure of life in Western nations and perhaps as some believe on ‘civilization’ itself. News exposés report on “the darker reaches of intelligence gathering” at Guantánamo Bay¹ and documentation details the abuses at Abu Ghraib and the policies that led to them.² At the same time, concerns to uphold the United Nations’ Convention against Torture are seen in cases like that of Faryadi Zardad, the former Afghan warlord found guilty in Britain of conspiracy to torture. It is thought to be the first time torture offences committed in one country have been prosecuted in another.³

Yet the real urgency of the issue of torture is seen in the way something as significant as the Zardad case has been lost amidst discussions over the terrorist bombings in London. The capture of the principals involved in a failed attack on July 21, 2005 gives rise to questions of what information the accused possess and what means might be used to obtain that information. Are other attacks on innocent people imminent? The hypothetical ‘ticking bomb’ case that has proved so attractive to philosophers is starting to lose its abstractness.⁴ And we suddenly find ourselves riding on buses and in subways in threatened cities conscious that someone’s decision to torture or not could have a direct impact on our own welfare. And we further find ourselves scrutinizing our fellow passengers, as they in turn watch us, looking at them as we have never looked at others before. Seeing them as potentially threatening, wondering of what

they might be capable. In such a climate of suspicion and fear how solid are the arguments and intuitions that have brought us so far? How firm is our conviction that no circumstances can warrant the torture of another human being? As Michael Davis points out,⁵ a subject that had little interest to philosophers suddenly has immediacy, and we must test our arguments again.

Alan M. Dershowitz questions whether an absolute opposition to torture rests not on moral or logical considerations but on ones that are historical and aesthetic,⁶ and considers that only the most doctrinaire civil libertarians deny that torture is permissible when the stakes are high.⁷ And Oren Gross echoes this sentiment in stating that the untenability of an absolutist position with respect to the ban on torture can be seen by the fact that all but unabashed Kantians recognize the difficulties for an absolutist position presented by extreme cases.⁸ While never considering myself a Kantian, unabashed or otherwise, I remain committed to the absolutist position on this issue, even in the face of extreme cases, even while riding the subway registering the gazes of my fellow riders, and I will argue for this in what follows. In any such extreme choice like the ones that torture presents, we must weigh what we might gain against what we might lose, and we always lose too much.

Of course, none of this is to suggest that torture is not already being used. Part of Dershowitz's argument that we shall explore below is in reluctant recognition that it is going on, and if it is going on it needs to be monitored. Even the Convention against Torture, adopted by the United Nations in 1984, may have had the ironic result of actually increasing torture in countries that ratify treaties outlawing it. Empirical studies show that some of the earliest ratifiers of the Convention against Torture were among the

worst offenders well into the 1990s. This may be because ratifying means a boost in reputation with a relaxation of vigilance or no incentive to improve.⁹

Jonathan Glover is more exercised over the continued presence of torture, calling it the “festival of cruelty.”¹⁰ He looks to explain how such acts are still possible, suggesting “There is a love of cruelty. Also, emotionally inadequate people assert themselves by dominance and cruelty. And the moral resources which restrain cruelty can be neutralized.”¹¹ We might dismiss such remarks as tending to the speculative if they were not so clearly borne out by the recent events at Abu Ghraib. In the aftermath of the revelations there, a psychological assessment attached to one of the investigations (“AR 15-6 Investigation – Allegations of Detainee Abuse at Abu Ghraib”) notes “the worst human qualities and behaviors came to the fore and a perversive dominance came to prevail, especially at Abu Ghraib. Inadequate and immoral men and women desiring dominance may be drawn to fields such as corrections and interrogation, where they can be in absolute control over others.”¹² As we continue to debate the prospects for permitting interrogational torture, we should not ignore the implications of such comments.

Before we proceed to review the arguments that favor such prospects, we need to consider how we should understand the key concept at stake: ‘interrogational torture’. Interrogational torture can be distinguished from other types in terms of the ends to be achieved. The goal of the process is information of some description. It may be specific information, or it may be more of a ‘fact-gathering’ mission, but information is what is required. This sets interrogational torture aside from acts intended to punish, deter, or dehumanize, although nothing precludes one act from aiming at more than one such goal.

More difficult is how we are to understand torture itself. Institutional definitions, like that endorsed by the United Nations,¹³ tend to a certain vagueness that allows states to abuse the idea with disregard for the intent behind it. The central stress is placed on “severe pain or suffering, whether physical or mental, [being] intentionally inflicted on a person.” But consider in this regard the Bush Administration’s request for legal advice with respect to Section 2340A of title 18 of the United States Code (which implements the Convention against Torture).¹⁴ The requested advice reports that, on review, the Convention against Torture and Section 2340A reach “only the most heinous acts” that are on “the extreme end of the spectrum of acts” causing pain and suffering.¹⁵ The stress here is on what should count as “severe,” and the judgment allows a wide range of pain and suffering that would fall short of being “severe.” The judgment further proceeds to offer that even though interrogation methods may cross the line drawn in Section 2340A, under the circumstances then current, certain justification defenses could eliminate criminal liability. Chief among these are the Necessity defense, where the actor believes certain acts to be necessary to avoid harm or evil to himself or another, and the Self-Defense defense, which permits the use of force to prevent harm to another. We will look at both of these defenses below. The author of the report, Assistant Attorney General Jay S. Bybee, concludes:

[T]orture as defined in and proscribed by Sections 2340-2340A, covers only extreme acts. Severe pain is generally of the kind difficult for the victim to endure. Where pain is physical, it must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure. Severe mental pain requires suffering not just at the moment of infliction but it also requires

lasting psychological harm...Because the acts inflicting torture are extreme, there is significant range of acts that though they might constitute cruel, inhuman, or degrading treatment or punishment, fail to rise to the level of torture.

Further...under the circumstances of the current war against al Qaeda and its allies, application of Section 2340A to interrogations undertaken pursuant to the President's Commander-in-Chief powers may be unconstitutional. Finally, even if an interrogation method might violate Section 2340A, necessity or self-defense could provide justifications that would eliminate any criminal liability.¹⁶

Such legal advice as this indicates just how difficult it is to determine that torture has taken place, and even where it has, to successfully prosecute it. Still, in what follows, I will stand by the core of the UN definition, noting only that even acts that fall short of torture may still be cruel, inhuman or degrading, and so have a natural prohibition against them.

2. A Lesser Evil: Supporting the Use of Torture:

The legal advice noted above that proposes the use of defenses based on Necessity and Self-Defense is couched in hypotheticals and vagueness. We will look at both of these, taking that of Self-Defense first.

Self-Defense:

The doctrine of self-defense permits the use of force to prevent harm to others, and it is thought that this doctrine could be extended to justify torture in certain circumstances.

The US Department of Justice memo suggests such circumstances *could* include the threat of an impending terrorist attack that would jeopardize the lives of hundreds, even

thousands, of Americans. Crucial to the justification, though, would be the degree of certainty attached to the threat.¹⁷ Some commentators see here an analogy with self-defense under a just war scenario where the defense of a collective is at stake.¹⁸ But others have expressed a notable reluctance to see the two situations as sufficiently analogous.¹⁹ Unlike the threatening enemy combatant in the unpredictable circumstances of just war, the torture victim is unarmed and has lost the autonomy which made the situation unpredictable. Larry May's "shackled boxer" metaphor aptly captures the torture victim's vulnerability.²⁰ The Justice Department ruling is alert to such dissimilarity, but argues that if the detained individual has aided in creating the threat, then this culpability allows them to be harmed. Again, though, these requirements are characterized by a high degree of vagueness insofar as they assume knowledge and confidence on the part of the interrogators. The requirements will likely be known only in retrospect, and the interrogators will be under pressure to act quickly. The suggested justifying circumstances are characteristically hypothetical.

The justification of self-defense also involves other specific criteria as detailed by Stephen Kershnar. These include the requirement that the harm used to extract information is proportional to the harm risked and that the agent involved believes the harm to the detainee to be "necessary" to prevent other harm. The first idea, proportionality, involves the difficulty of identifying and then weighing the competing harms involved. If we believe, as many do, that permitting interrogational torture would cause deep and lasting harm to the society that does so, then a much different calculus is involved than that recognized by the proponents of justified torture. The first idea,

necessity, acknowledges how the self-defense defense effectively reduces to the necessity defense in most imagined circumstances.

Necessity:

Like self-defense, but more overtly, the necessity defense focuses on the beliefs of the agent who would act. In this case, the agent must believe that certain actions, in this case the torture of a detainee, are necessary in order to prevent harm to that agent or another person. Again, the legal judgment requested by the Bush Administration advises that “certain circumstances could support such a defense.”²¹ Such circumstances are conceived in this instance in the form of a narrative wherein sleeper cells planted in the United States by al Qaeda are planning other attacks similar to or worse than September 11 and a detainee may possess information that could prevent those attacks. The more likely an attack and the greater the expected damage, then the greater the necessity.

What is clear about this defense is that it can only be used after the fact, after the torturer has been criminally indicted. This is evident in the judgment of the Supreme Court of Israel, asked to pronounce on the General Security Service’s interrogation methods. They found that while the necessity defense might be available to an investigator in certain ‘ticking bomb’ scenarios, neither the government nor the security service could authorize “liberty infringing physical means” *during* the interrogation of suspects.²²

The key problem with this defense, as others have noted, is that it rests with what a person believed rather than what was actually the case. In climates of heightened fear and suspicion we might imagine a rather elastic range of incidents that could fall under

this defense. The very fact, though, that such extreme and exceptional justifications must be imagined emphasizes how great our natural prohibition against torture is.

Dershowitz is one of the commentators who have raised concerns about the subjectivity of the necessity defense and decisions like that of the Supreme Court of Israel.²³ In response, Dershowitz has proposed the very controversial and widely misunderstood idea of torture warrants. Dershowitz's position is that since torture is going on, or might be expected to occur, in an unregulated fashion (and we see this variously in the abuses of Abu Ghraib and the promptings of the Bush Administration), then it would be normatively better to have such practices regulated in a way that required accountability, justifications and records. While his preference is for no torture,²⁴ he believes, under the circumstances, that this is unrealistic and that arguments resisting proposals like his are irresponsible. Only if a detainee refused to provide the information required would he be "subjected to judicially monitored physical measures designed to cause excruciating pain without leaving any lasting damage."²⁵ Dershowitz marshals pragmatic, utilitarian and historical evidence to support his proposal.

Pragmatically, he refers to the difficulties involved in getting warrants for wiretaps. Early frivolous cases that would never have received judicial approval and more recent cases where lawyers felt the evidence was too weak to seek a warrant indicate that there may well be "less torture with a warrant requirement than without one."²⁶ Moreover, he appeals to Bentham's "compelling" hypothetical argument (which we will review below) for torturing one guilty person to prevent the torture of a hundred innocent people.²⁷ And he further cites the sixteenth- and seventeenth-century English legal system, under which torture warrants existed to protect the state. Because it was

legal and hence centralized, it was easier to abolish and left no lasting effects.²⁸ Again, we will return to this question of lasting effects.

In spite of the furor it seems to have created, Dershowitz's position is balanced and clear. Confronted with a choice of evils, he chooses what he takes to be the lesser of those involved. It is a tragic choice, but the dilemmas involved recommend it:

If we do not torture, we compromise the security and safety of our citizens. If we tolerate torture, but keep it off the books and below the radar screen, we compromise principles of democratic accountability. If we create a legal structure for limiting and controlling torture, we compromise our principled opposition to torture in all circumstances and create a potentially dangerous and expandable situation.²⁹

Dershowitz's proposal is not the only pro-torture argument currently fashionable, but it has dominated the literature and subsumes both self-defense and necessity defense arguments. Any argument against the use of torture should consider whether torture warrants are viable. What reasons, for example, do we have to believe things will change if, as Dershowitz insists, torture is being conducted under the radar screen *and* his proposed warrants will be hard to get? Richard Posner goes so far as to recommend against Dershowitz's warrants because officials are bound to want to push the rules beyond the boundaries and so the practice would simply become regular.³⁰ In their stead, he prefers something more akin to Walzer's "dirty hands" proposal,³¹ where officials break the rules when the stakes are high and face the consequences afterwards, hoping in the circumstances to receive absolution.

The forgoing review gives something of the current state of strong argumentation favoring torture in extraordinary circumstances, and provides some of the key points to be challenged below.

3. Proposed Exceptions to a General Prohibition:

There is something suspicious about allowing torture through legal warrants in order to prevent its excesses. As Slavoj Žižek points out, doing so cannot fail but to legitimize torture “and thus opens up the space for more illicit torture.”³² Indeed, from a strictly Aristotelian viewpoint, we might be alarmed by the apparent contradiction implied in using torture to avoid excesses. Because the torture of a human being would seem to be already an excess and there can be no excess, or deficiency, of an excess.³³ Yet Žižek himself falls into a contradiction that many opponents to torture seem unable to resist when he proceeds to allow that situations of “desperate choice” like those that characterize ‘ticking bomb’ scenarios would force us to “simply do it.” It is then only by refusing to raise this act to a universal principle that we retain the awareness of “the inadmissibility of what we have done.”³⁴

Another opponent of Dershowitz’s torture warrants is led onto even more problematic ground. Jean Bethke Elshtain calls the torture warrant “a stunningly bad idea”³⁵ because it distorts the moral universe and shields political and military officials from the demands of necessity. But it is those demands that stand out and require action. While she balks at torture, she advocates coercion, or moderate physical pressure, to save lives. We should avoid extreme forms of physical torment, what she calls Torture 1, but she then proposes that “Torture 2, for which we surely need a different name, like

coercive interrogation, may, with regret, be used.”³⁶ The regret stems from the reluctance to follow necessity, but the need to do so. She writes:

Were I the parent or grandparent of a child whose life might be spared, I confess, with regret, that I would want officials to rank their moral purity as far less important in the overall scheme of things than eliciting information that might spare my child or grandchild and all those other children and grandchildren.³⁷

While we might initially share this sentiment, we should quickly resist it. Good ethical decision-making requires objectivity and obscuring matters with questions like ‘What if it were your family?’ creates the kind of moral distortion that leads to bad decisions and policies. Acting in a fog of emotion gets us nowhere but into murky thinking like the proposal for ‘Torture 2’. The difficulties we have seen associated with the definition of torture itself and the Bush Administration’s attempts to blur the line between torture and coercion seen in the “torture memos” cited earlier, have already raised sufficient alarms. Weakening that definition with another whose boundaries are anything but clear is unhelpful. If we are to hold absolute prohibitions, we need to stand by them and not try to introduce the untenable position of absolutism with exceptions.

There is something of this tendency also in Larry May’s contribution to the debate.³⁸ While he argues that principles of humane treatment should protect even suspected terrorists from torture, there is an apparently pragmatic “normally” in his position. The exceptions, when they are introduced, are specific and rigorously circumscribed, but they are still exceptions to a general prohibition against torture. The key concept in his discussion is that of proportionality, since it is this that opens the door to the possibility of torturing suspects in extreme cases. But as May has argued

elsewhere,³⁹ for proportionality to make sense in matters of law there must be some way to decide what is reasonable. And this is exactly what we seem to lack here. As we saw earlier, much hangs on *what* harms we choose to weigh against each other. Our focus is naturally fixed on the lives of many innocent potential victims and the torturing of a detainee, but there is a definite myopia to this focus if it prevents us from looking outside this scenario to the larger question. To a certain extent, May does have this wider purview, drawing attention to the principles of humanity at stake, but this does not deter him from a reluctant review of the exceptions. May considers the case of the abuses at Abu Ghraib and concludes that the very high bar which needs to be crossed before torture is justified was not crossed here. But in principle, it could be crossed if the right conditions of significant harm, imminent harm, no less problematical recourse, and no greater harm being caused were met.

4. Kant's Lie and Winston's Dilemma: Defending the Absolutist's Position

Justifications for torture like those for the necessity defense gain their currency from a certain way of looking at consequences. Expected outcomes with values attached to them may be weighed against each other. In cases like those of 'ticking bomb' scenarios the expected significant and imminent loss of life persuades many commentators that unusual means are justified. We might worry both about the value of weighing outcomes in such cases and, if we are moved to do so, whether we are weighing the right outcomes.

Oren Gross argues that "Moral absolutists must maintain their support for the absolute ban on torture even when the outcome of abstaining from the use of torture in any given case is truly catastrophic...one must support a ban on torture no matter

what.”⁴⁰ Part of the problem, to his mind, lies with the Kantian perspective, and he does not think we should be brazen Kantians.

Recall Kant’s celebrated example of an unconditional duty, that is, the duty to tell the truth. According to Kant, the duty to tell the truth is not suspended even when an assassin (A) asks a person (B) whether a friend of B whom A wishes to murder is hiding in B’s house...Very few people would want to have as a friend someone who tells the assassin the truth rather than lie and save her friend. Similarly, few would want a leader who follows Kant’s absolutist view to its extreme rather than act to save the lives of innocent civilians.⁴¹

The example itself is widely ridiculed and seen as a symptom of Kant’s declining powers. Presented in “On the Supposed Right to Lie because of Philanthropic Concerns” (1797),⁴² the full example has something of the burlesque about it. Not only does Kant insist that the friend tell the assassin the truth, but he presents the scenario that if the person lies and says her friend is elsewhere, the assassin may leave the house only to run into the friend who has escaped through a window. But what exactly is Kant’s point in using this example? It does not seem to be that we should act *regardless of the consequences*. His point seems rather that we have no control over the consequences and we should not act in the moral realm with the false confidence that we do. Kant suggests through this example that moral acts have value in and of themselves and not in relation to other acts. The refusal to lie bears no *predictable* relation to the subsequent fate of the friend, either in the cellar or on the street, because we cannot predict what causal consequences will follow. Thus it is a mistake to tie the morality of the act to any consequences. We

cannot control what will happen. But we *can* control our intentions and therein rests the morality of our act, not in any unpredictable outcomes.⁴³

This false confidence is seen particularly in the way people approach the ‘ticking bomb’ examples, treating them with the retrospective benefit of knowing how many people have been saved as a consequence of torturing a detainee. But the examples themselves are so hypothetical and vague that it is only in light of such successful outcomes that they can be justified. Often overlooked is whether we have any grounds for expecting such success. Kant effectively challenges the causal link between the torture and its successful outcome, forcing us to focus on the act of torture itself and its justification *irrespective* of any imagined consequences which are completely unpredictable.

We do not know that the detainee really has the information we need; we do not know whether what he says under torture can be trusted; we do not know whether torture would be successful on fanatics; we do not know what thresholds of pain a particular individual can tolerate and still provide coherent information. And so our outcomes are unpredictable, even if we ignore what Kant may mean by this. All we know is that we are subjecting another human being to excruciating pain.⁴⁴

Nor can we assume that information derived would be used to save lives. That is, the ‘guarantees’ are weaker than is imagined. Consider the hypothetical example of a political leader who I will call Winston. Through torturing a detainee authorities have discovered significant information relating to the war with al Qaeda including the presence of a ticking bomb which is an imminent threat to a large population of innocent people. But the information also includes extensive details on the al Qaeda network,

including the possible whereabouts of its leaders. There is no time to act on both sets of information, that is, *both* locate the bomb and move on the whereabouts of the al Qaeda network. In fact, doing the first will seriously undermine the prospects of success with the second because removing the bomb will alert the enemy to the leak in information. Breaking the al Qaeda network would significantly reduce if not end the war against that enemy and save an unknown number of innocent lives who might be hurt in future attacks. Presented with this scenario, Winston faces a dilemma: should he act to save the innocent lives facing imminent danger; or should he conceal his knowledge of this attack and act for the long-term success of the war against al Qaeda? This is a difficult dilemma, exacerbated by the lack of guarantees. But we cannot be sure that he will decide to save the first group. That is, we cannot be sure in ticking bomb scenarios that even the desired information would be acted upon, as is so obviously assumed in treatments of this case. Like all hypothetical cases,⁴⁵ this example is open to a range of objections. But it serves its point: even the best consequences attached to the ticking bomb scenarios are not certain.

Beyond this, as I have suggested several times above, any serious review of the consequences of permitting torture should consider its impact on society as a whole. Whether torture is a lesser evil is relative to what it is measured against. One party seriously implicated in the practice of torture is those who are required to perpetrate the acts. There may be those, as the events at Abu Ghraib indicate, who possess the worst human qualities and engage in the worst human behaviors,⁴⁶ but do we seriously want such people acting on our behalf? And if we do, can we believe that we are not in some ways implicated in such actions? As Michael Ignatieff suggests, “Any liberal democratic

citizen who supports the physical torture of terrorist suspects in ticking bomb cases is required to accept responsibility for the psychological damage done, not only to a foreign victim, but to a fellow citizen, the interrogator.”⁴⁷ Mark Osiel details the mental struggles of torturers during Argentina’s ‘Dirty War’,⁴⁸ noting how aware they were of the enormity of their actions. In contrast to the reports from Abu Ghraib, many of the Argentine torturers struggled with a belief that they were still good Christians, and sought absolution from bishops who used arguments drawn from medieval thought to console them.⁴⁹ These men, Osiel insists, did not inhabit a separate moral universe. They were being asked to do things that put them in real moral anguish.

From the torturers themselves, we can move to the institutions that legitimize them, political or otherwise. It is the case, as noted earlier, that Bentham offered a utilitarian justification for torture. He imagines applying equal or superior torture to an individual in order to rescue a hundred innocents from torture. And he sets down provisional guidelines that anticipate modern proposals for regulation: that the prisoner be able to comply with what is requested; that the case involve imminent danger; that the harm to be averted be great; that the torture be regulated and limited by law; and that there should be minimal long-term effects of the torture.⁵⁰ Being so similar to contemporary suggestions, the proposals fall subject to the problems we have with those modern proposals. In particular, Bentham assumes the certainty governing the knowledge and intentions of the accused that characterizes other accounts. While Bentham’s account is flawed and historically limited in what it addresses, Rod Morgan notes a larger utilitarian objection to torture: it deligitimizes the state.⁵¹ The very practices of law on which the authority of the state is established are undermined by

permitted actions that stray outside the law or for which the law is stretched to accommodate. We see the latter in some of the responses to Dewrshowitz's proposed torture warrants, responses that indicate such warrants would undermine the law that authorizes them.

Beyond the state, and perhaps most poignantly, there is the structure of society itself and the civilization it professes. Torture relaxes the constraints that reinforce civilized behavior. The deliberate infliction of pain upon a helpless human being challenges the moral authority of the society which allows it and the principles which justify that society. This is what is put most at risk by anything other than an absolute ban on torture. Moreover, "Torture is also "world-destroying" in its ability to invert and degrade the ideas of agency, consent, and responsibility that help shape our ideas of self and self-government."⁵² As abstract as this sounds, it has real manifestation. The victim who complies under torture complies against his or her will. The victim who refuses to comply becomes "responsible" for the further treatment that is inflicted. This behavior perverts our ideas of agency and responsibility, ideas central to moral understanding.⁵³ Again, the argument for this is seen most clearly in the Kantian position that stresses an obligation to treat others as moral agents, with the full autonomy we assign to them. To not do so, to judge that some are candidates for treatment that strips them of their agency as well as their integrity as human beings, that reduces them to physical bearers of pain and suffering, is a Kantian contradiction of the greatest magnitude. Hence, torture is more than an attack on our intuitions; it also undermines our moral groundings.

Posner thinks he responds to this argument when he deals with several objections he anticipates from civil libertarians.⁵⁴ As he reads the objection, "recourse to torture so

degrades a society that it should be forsworn even if death of many innocents is an assured consequence.”⁵⁵ But this, he insists, is falsified by history, since states like France in Algeria and the U.K. in Northern Ireland have used torture without sinking into barbarism. Moreover civilized nations can employ uncivilized means without becoming uncivilized. On the contrary, our actions are an extension of what we are; we are what we do; and what we do should not contradict the principles that give clarity to our moral lives. A society can be degraded without falling into “barbarism” if it becomes a false advocate of its own principles. And we could match Posner’s examples with others that are far more problematic. In the Third Reich we saw a moral depravity directly related to a view of human beings as expendable, as essentially “non-human.” And this observation, as Ignatieff has shown,⁵⁶ could be extended to a range of other states like Hussein’s Iraq. What after all is the difference between civilized and uncivilized nations if not the means they use to express their civilized nature and the acts they refuse to do in maintaining it?

5. Conclusion.

It is by no means clear that torture is an effective way of obtaining information. On this question we have “only anecdotes and counter anecdotes.”⁵⁷ Skilled interrogators do not need to resort to such means and the fanatic will be immune to them anyway.⁵⁸ Reports from Guantánamo Bay suggest disclosures come when pressure is removed.⁵⁹ We see cases of interrogators using a detainee’s own belief set to address him, exploring his situation from his premises, asking the detainee what Allah’s plan may be for him and why he has been spared,⁶⁰ and, perhaps more problematic, we learn of instances where

the Koran has been destroyed. Destroying the Koran is not shocking (in Michael Davis' terms) for us, but it is for the adherent. It causes mental anguish, and if this is not torture, then like torture it causes hatred in the victim. On the other hand, as Posner notes, if it is ineffectual, then the issue is moot since it will always fail a cost-benefit calculation.⁶¹ And Dershowitz, among others, cites several cases where torture has been successful in scenarios like that of the ticking bomb.⁶²

Of course, that torture is being practiced as Dershowitz says "under the radar" has never really been in dispute. The issue is more how we could measure success of something that is so clearly contrary to our intuitions and arguments, and how we respond to the practices, like those coming to light from Abu Ghraib. The almost universal condemnation of what has been revealed there confirms our intuitions and refreshes our faith in basic human responses. But there will still be those like Dershowitz who earnestly believe that the more responsible response is to bring such practices into the open through something like his torture warrants. One of Dershowitz's critics offers a counter- hypothetical case, where the suspect in a ticking bomb scenario sees his four-year-old son tortured, and charges that a nation which permits such torture has lost its moral moorings.⁶³ Dershowitz replies that, on the contrary, a nation loses its moral moorings when decisions of this kind are left to those whose jobs are to protect against terrorism at any cost.⁶⁴ But surely the two nations are not analogous? The one which allows warrants is not like the one which opposes them even though torture happens. Because the nation that resists this measure has not crossed the line between expediency and morality, and has not made the more tragic of the choices confronting it, one which once made, cannot be unmade.

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- ¹ Adam Zagorin and Michael Duffy, "Inside the Interrogation of Detainee 063," *Time*, June 20, 2005.
- ² See, Karen J. Greenberg and Joshua L. Dratel (eds.) *The Torture Papers: The Road to Abu Ghraib*. New York: Cambridge University Press, 2005.
- ³ Zardad, who had sought asylum in the UK, was found guilty in July 2005 and sentenced to two 20-year jail terms to run concurrently. See <http://news.bbc.co.uk/1/hi/uk/4695353.stm>
- ⁴ For discussion of this case, see Henry Shue, "Torture," *Philosophy and Public Affairs* 7 (Spring 1978):124-143; Christopher W. Tindale, "The Logic of Torture," *Social Theory and Practice* 22 (Fall 1996):349-374; and Oren Gross, "The Prohibition on Torture and the Limits of the Law," *Torture: A Collection*, Sanford Levinson (Ed). New York: Oxford University Press, 2004, 229-253:237-39.
- ⁵ Michael Davis, "The Moral Justifiability of Torture and Other Cruel, Inhuman or Degrading Treatment," (this volume).
- ⁶ Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge*. New Haven & London: Yale University Press, 2002:148.
- ⁷ Dershowitz cited in Richard A. Posner, "Torture, Terrorism, and Interrogation," *Torture: A Collection*, Sanford Levinson (Ed): 291-298:295. Posner goes on to offer: "No one who doubts that should be in a position of responsibility."
- ⁸ Gross, 231.
- ⁹ See the research and data reported in Oona A. Hathaway, "Do Human Rights Treaties make a Difference?" *Yale Law Journal* 111 (2002):1935-2042; and "The Cost of Commitment," *Stanford Law Review* 55 (2003):1821-1863.
- ¹⁰ Jonathan Glover, *Humanity: A Moral History of the Twentieth Century*. London: Jonathan Cape, 1999.
- ¹¹ *Ibid*, p.33.
- ¹² *The Torture Papers*, p.448.
- ¹³ For the UN definition and more detailed discussions see Michael Davis' paper in this volume and my discussion in 1996.
- ¹⁴ See "Memo 14" from the U.S Department of Justice, Office of Legal Counsel in *The Torture Papers*, p.172ff.
- ¹⁵ *Ibid*, p.191.
- ¹⁶ *Ibid.*, pp.213-14.
- ¹⁷ *Ibid.*, p.211.
- ¹⁸ See Stephen Kershnar's use of self-defense, "For Interrogational Torture" (this volume).
- ¹⁹ See Shue and Tindale.
- ²⁰ Larry May, "Torturing Detainees During Interrogation," (this volume).
- ²¹ "Memo 14", *The Torture Papers*, p.209.
- ²² Supreme Court of Israel, "Judgment Concerning the Legality of the General Security Service's Interrogation Methods (September 6, 1999)" *Torture: A Collection*.:165-181, p.180.
- ²³ Dershowitz (2002); "The Torture Warrant: A Response to Professor Strauss," *New York Law School Law Review*. Vol. 48 (2004a):275-294; "Tortured Reasoning," (2004b) *Torture: A Collection*.:257-280.
- ²⁴ Dershowitz, (2004a):277.
- ²⁵ Dershowitz (2002):159.
- ²⁶ *Ibid.*, p.159.
- ²⁷ *Ibid.*, pp.142-43.
- ²⁸ *Ibid.*, pp. 157-58.
- ²⁹ *Ibid.*, p.153.
- ³⁰ Posner, p. 296.
- ³¹ Michael Walzer, "Political Action: The Problem of Dirty Hands," *Philosophy and Public Affairs*, 1973:160-180. Miller (this volume) seems to share Posner's preference for seeing public officials accept the consequences of committing illegal acts.
- ³² Slavoj Žižek, *Welcome to the Desert of the Real*. London: Verso. 2002, p.103.
- ³³ Aristotle writes, "just as there is no excess or deficiency of temperance or of bravery, since the intermediate is a sort of extreme, so also there is no mean of these [vices] either, but whatever way anyone does them, he is in error. For in general, there is no mean of excess or of deficiency, and no excess or

deficiency of a mean.” *Nicomachean Ethics*, Bk II, Chapter 7, 11107a23-25. Terence Irwin and Gail Fine (Trans.), Indianapolis: Hackett Publishing Company, Inc. 1996.

³⁴ Zizek, p.103.

³⁵ Jean Bethke Elshtain, “Reflection on the Problem of “Dirty Hands””, in *Torture: A Collection*:77-89, p.83.

³⁶ Ibid., p.87.

³⁷ Ibid.

³⁸ Larry May, “Torturing Detainees During Interrogation,” (this volume).

³⁹ Larry May, *Crime against Humanity: A Normative Account*, New York: Cambridge University Press, 2005:215.

⁴⁰ Gross, p. 233.

⁴¹ Ibid., p.238.

⁴² I. Kant, *Grounding for the Metaphysics of Moral*, with *On a Supposed Right to Lie because of Philanthropic Concerns*. Indianapolis: Hackett Publishing Company Inc., 1993.

⁴³ My thinking about Kant’s example has benefited from Susan Neiman’s discussion of it in *Evil in Modern Thought: An Alternative History of Philosophy*. Princeton, New Jersey: Princeton University Press, 2002:73-74.

⁴⁴ For a typical case of ignoring these problems see Seumas Miller, “Is Torture Morally Justifiable?” (this volume), particularly the paragraph which follows his version of the ‘ticking bomb’ scenario (“Case Study 2”). Note that in spite of the confidence that Miller extends to what is *known* in such cases, one of his later objections to Dershowitz’s torture warrants is that the information gained by torture is not reliable: “torture victims typically tell the torturer whatever they think he wants to hear.”

⁴⁵ Readers should recognize in this case an intentional allusion to Winston Churchill’s apparent dilemma prior to the German bombing of Coventry, an attack that he may well have been aware of but the consequences of which he could have avoided only by alerting the enemy to the fact that the Allies had broken the German code. Given the debate among historians as to exactly what the historical Winston did know prior to the bombing, I have chosen to simply stress the hypothetical nature of the case. Depending where readers stand with regard to the historical case, they may be more persuaded by the point I am making.

⁴⁶ *The Torture Papers*, p.448.

⁴⁷ Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror*. Edinburgh: Edinburgh University Press, 2004:142.

⁴⁸ Mark Osiel, “The Mental State of Torturers: Argentina’s Dirty War,” in *Torture: A Collection*:129-141.

⁴⁹ Ibid., p.132.

⁵⁰ Jeremy Bentham, “Of Torture,” (previously unpublished manuscript) in “Bentham on Torture” Twining & Twining (Eds.) *Northern Ireland Legal Quarterly* (1973) 24(3):307-56:313-5.

⁵¹ Rod Morgan, “The Utilitarian Justification of Torture: Denial, Desert and Disinformation,” *Punishment & Society* (2000) 2(2):181-196. See Morgan for a full discussion of the problems in Bentham’s paper.

⁵² John T. Parry, “Escalation and Necessity: Defining Torture at Home and Abroad,” in *Torture: A Collection*:145-164.: p.153.

⁵³ Nor should the victim lose his right to autonomy as Stephen Kershnar suggests (this volume). At issue is whether a person can choose the degree to which they can continue to be autonomous. It is contentious as to whether someone can choose to give up such autonomy (I incline to the Millian argument that they cannot); but more significantly, what is being denied to victims in the kinds of torture we are discussing is any real control, narrative or otherwise, over their lives. The control the torturer permits is merely artificial. On the way torture targets autonomy itself see also Miller (this volume).

⁵⁴ Posner, pp.294-95.

⁵⁵ Ibid, p.294.

⁵⁶ Ignatieff, p.143.

⁵⁷ Sanford Levinson, “The Debate on Torture: War against Virtual States,” *Dissent* (Summer 2003):79-90, p.84.

⁵⁸ Ignatieff, p.140; Tindale, p.368.

⁵⁹ Zagorin and Duffy, p. 19.

⁶⁰ Ibid., p.16.

⁶¹ Posner, p.294.

⁶² May refers to an Israeli case where a ticking time bomb was thwarted (this volume); and Dershowitz (2002):137, refers particularly to a 1995 case in the Philippines. There, it is believed, authorities tortured a terrorist into disclosing information that may have prevented the assassination of the Pope and attacks on eleven commercial airlines.

⁶³ Mary Strauss, "Torture," *New York Law School Law Review* 48 (2004):201-274.:pp.273-74.

⁶⁴ Dershowitz (2004a): p.291.