

## Torture's Discourse and the Liberal State in Crisis

*The American torture discourse has been defined by torture proponents. It posits the possibility and necessity of regulated torture against a nihilistic enemy to protect ourselves. Many torture opponents situate their arguments within this dominant discourse, allowing their arguments to be driven by the same logical and moral constructions as pro-torture arguments. The culmination of the pro-torture discourse is the ticking time bomb scenario, a hypothetical widely critiqued by torture opponents but, I argue, misunderstood – rather than an unlikely hypothetical, I show that it quickly becomes a banal standard, legitimating torture to prevent a wide range of potential attacks. I demonstrate how each component of the ticking time bomb scenario can be used as a mechanism to expand the range of cases that torture may be legitimated for.*

### **Introduction: The Problem of Torture in the new Millennium**

In 2004, a collection of digital photographs taken at Abu Ghraib prison clearly showing various forms of torture and other abuses was leaked to the press. The photos did not show torture during interrogation – they showed MP guards (not intelligence officers) “softening up” detainees in advance of interrogation. Whether or not this was the form of harsh treatment authorized by “higher ups” – officers, the CIA, the president – this was the reality of torture in one of the largest detainee facilities in the center of the Global War on Terror (GWOT). And yet, this did not end America’s torture debate.

At the same time the Abu Ghraib photos were released, one of the most popular shows on television was a drama that imagined terror threats to the American homeland, requiring the protagonist to torture terror suspects to obtain information vital to defusing a bomb somewhere in a major American city. This scenario of torture was not new – known as a “ticking time bomb” (TTB) scenario, it poses the question of whether torture

is permissible if a suspect is in custody and refuses to give information about a known, imminent attack that will kill a large number of people. The attack can only be prevented by getting information from the suspect, and no other methods of interrogation or investigation can yield the information because of the suspect's refusal to cooperate and the short time frame. Each aspect of this scenario is highly unlikely on its own; however, put together, they have captured the imagination of the American public, appearing eerily real. In 2008, in both Republican and Democratic presidential primary debates candidates were asked about whether they would order torture in a "ticking time bomb scenario."

How could the reality of Abu Ghraib be dismissed as an aberration, the work of a few "bad apples," while presidential candidates were required to address the scenario of a popular TV show? This is symptomatic of a battle over how torture is represented to the American public – the photos of Abu Ghraib versus the breathless heroism of TV dramas. Visual representation is no doubt an important aspect of how Americans understand and remember incidents. Susan Sontag notes:

Photographs that everyone recognizes are now a constituent part what a society chooses to think about, or declares that it has chosen to think about. It calls these 'memories,' and that is, over the long run, a fiction. Strictly speaking, there is no such thing as collective memory...But there is collective instruction. (Sontag 2003, 85)

The images that define cultural memory, especially of war time, are sometimes gritty and authentic – who can forget the images from Vietnam of children running from a napalm attack, or the suspected Viet Cong executed in the middle of a street? But as often the images are sanitized re-enactments: the famous photograph that appeared in Life magazine of US Marines raising the flag at Iwo Jima is, in fact, a re-enactment. Most images of the storming of the Winter Palace during the Russian Revolution are actually

stills from Sergei Eisenstein's film made 7 years later (which was already the second full-scale re-enactment of the event). "The problem is not that people remember through photographs, but that they remember only the photographs." (Sontag 2003, 89) Will the images of torture that America remembers be those captured at Abu Ghraib, or will they be snippets from "24"?

One need not an appropriate Jean Baudrillard's theory of simulacra in post-modernity to investigate the problem of representation and authenticity: there is nothing inherent in our historical condition that causes us to jettison reality in favor of a representation of it far removed from the original historical moment. Rather, there is a normative concern about representation and discourse's role in defining what is represented. The dominant discourse in the culture surrounding a phenomenon both determines and is determined by the images used to represent it. Thus, in Vietnam, despite a plethora of positive images, the photos we feel are most representative of the conflict are those that show the war's brutality and hint at its futility. World War II, on the other hand, is a war regarded as marked by heroism and necessity – thus, the images are those of heroic flag raising and triumphant soldiers returned home. Because of the dominance of a pro-torture discourse, we risk the post-9/11 period memorialized by '24' rather than Abu Ghraib.

The ticking time bomb scenario is a prominent way we as a culture talk about torture. Underlying this scenario is a discourse of torture, defined by photographs, art, movies and television shows, as well as political rhetoric, legal arguments and academic theories. This discourse frames the way we talk and think about not only torture's aims

and uses, but torture's practitioners and specific practices of torture, and is responsible for a remarkable public transformation of torture – once a hallmark of dictators and police brutality, it is now a controversial subject in a society that previously defined itself in opposition to torture. I examine how academic and legal debates are framed by this discourse, paying special attention to the recent writings of Richard Posner, Eric Posner and Adrian Vermeule, Michael Gross, Jean Elshtain, Michael Ignatieff, Marnia Lazreg, David Luban and Jeremy Waldron.

At the heart of the pro-torture discourse is an intense distrust of law-oriented liberal governance: declaring that, in times of emergency and violent threat, liberal governments cannot defend themselves. This, in turn, demands alternately “tragic” or “heroic” choices to “do what must be done.” Torture, in this discourse, is such a tool for extracting information that will save the populace from the murderous and nihilistic plans of terrorists.

Why are current normative condemnations of torture an insufficient response to the myriad pro-torture arguments? Why isn't a general normative commitment against torture *in toto* enough? The contemporary debate over torture has focused almost exclusively on torture in relation to international terrorism; even discussions of “home grown” terrorists neglect discussions of non-immigrant, White terrorists. Terrorism against American targets is posited to be constitutive of a larger Global War on Terror. In war, different ethical standards apply – killing is illegal and immoral normally, but may be just in war. Restrictions against fighting in certain ways still apply (*jus in bello*), such

as the prohibition against targeting civilians and using banned weapons. Traditionally, torture was banned under these standards, being regarded as supremely inhumane.

The recent proliferation of defenses of torture demonstrates that the inhumane nature of torture is not, in itself, enough to dissuade its defenders from arguing that it may be necessary in a low-intensity conflict against non-traditional opponents who see the entire nation and its citizens as potential targets. For some torture proponents, this is because they envision the GWOT as an extended crisis, not subject to the laws of war but characterized by the suspension of traditional rules. For other proponents, however, GWOT represents a new type of conflict which requires a revision of traditional military ethics and guidelines. In both cases, the theses of utility and tragic necessity override moral outrage at torture used to serve American ends. The pro-torture arguments are dually grounded in both a belief that important information may be gleaned through torture (demonstrating its usefulness) and the belief that torture can be restricted to simply information gathering – and thus may be necessary for liberal societies to utilize in times of emergency.

It is important to critique the pro-torture discourse, rather than simply engaging specific pro-torture arguments.<sup>1</sup> Failure to address the discursive structure is not simply a sin of omission – I do not suggest that anti-torture theorists have been wrong because they did not make the same case I make. Arguments are only plausible and granted

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<sup>1</sup> The importance of discourse has been demonstrated in other fields – Edward Said, following a Foucauldian conception of discourse, wrote about “Orientalism,” a professionalized discourse which categorized and made “knowable” cultures of the East. Said argued that it was not the arguments put forth individual orientalist that were notable, rather the discursive power of Orientalism. Throughout all Orientalist accounts there is a vision of the Orient as static which can be understood and systematized by historical observation. This systemization was central to the project colonial governance.

legitimacy within a given structure of premises and assumptions. While most torture opponents have focused on the arguments made by specific torture proponents, that is ultimately a poor strategy – first, one gets lost in the sheer number and diversity of arguments and proponents, but, more importantly, such a strategy fails to challenge the underlying discursive logic of these arguments, allowing the arguments themselves to be modestly reformulated and re-presented. The power of the pro-torture discourse – which posits the possibility and necessity of regulated torture against a nihilistic enemy to protect ourselves – makes the straight normative argument against torture insufficient. By identifying a general discursive structure running through virtually all torture proponents' arguments, one avoids simply discrediting one or another theorist's arguments while leaving the larger discourse and its implications intact.

I find that several torture opponents situate their arguments within the pro-torture discourse. David Luban presses for an absolute ban on torture; however, his description of the world of torture is problematic. While he ultimately locates torture's expansive nature in social psychology and organizational theory,<sup>2</sup> he allows too much of a distinction between purposes of torture pursued by modern liberal democratic states and both ancient and contemporary authoritarian or ritualistic societies. Further, rather than taking a critical eye to contemporary torture methods, he accepts that – while still torture – they are less “brutal” than classic techniques. In doing so, he reaffirms the pro-torture discourse's insistence on a democratic exceptionalism and insistence that modern tortures are not comparable to what many think of as “torture.”

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<sup>2</sup> Luban, David. “Liberalism, Torture and the Ticking Time Bomb.” *Virginia Law Review*, Vol. 91 No. 6 (2005) pp. 1425-1461

While I sometimes employ the terms “coercive interrogation” and “torture lite” when examining aspects of the pro-torture discourse, it is a central premise of this essay that those categories are composed of standard torture techniques. There are very good studies of these torture techniques, however, an in-depth study of all relevant techniques is beyond the scope of this paper.

### **The Modern Discourse of Torture**

How do modern proponents of torture structure their arguments? This question is necessary, yet too broad to analyze the discursive structure of the American torture debate. To begin, one must disaggregate the category of “torture proponents.” To speak generally of a unified “torture argument” is to invite heated reaction. Many of the torture proponents define their positions in opposition to other proponents; Elshtain refers to Alan Dershowitz’s proposal of torture warrants as a “stunningly bad idea,”<sup>3</sup> while simultaneously advancing a reading of Dietrich Bonhoeffer that makes room for torture. Richard Posner, too, is critical of Dershowitz, while Eric Posner and Adrian Vermeule advocate a legal space for “coercive interrogation” that is in the same spirit, if not the same methods, as Dershowitz’s “torture warrants.”

While there are significant distinctions between torture proponents, arguments in favor of torture share a series of premises and one primary conclusion; that means of physical and psychological duress (which constitute torture by most international and domestic legal standards) are permissible interrogation methods (either legally or extra-

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<sup>3</sup> Elshtain, Jean Bethke. “Reflection on the Problem of ‘Dirty Hands.’” In ed. Levinson, *Torture: A Collection*. Oxford University Press, 2005. Revised Edition.

legally) in liberal democracies during moments of emergency. Additionally, these arguments are characterized by a paradox, in which torture proponents simultaneously assert a severe lack of knowledge with regard to where or when a terrorist attack may occur, but a borderline omniscience about the identities of who will carry it out. These premises, conclusion, and fundamental paradox, when put together, form a discursive structure within which much of the contemporary torture debate takes place.

I follow Richard Jackson's formulation that "discourses are never neutral or objective; rather they are always an exercise in social power – the power to ascribe right and wrong, reasonable and unreasonable, knowledge and falsehood, and the limits of commonsense. They set the parameters of debate and establish the boundaries for possible action."<sup>4</sup> Torture, in this discourse, can be utilized because of how much we *already* know, and *must* be used to find out we do not. When opponents of torture engage in debate on the subject within the discursive structure largely defined by torture proponents, rather than seeking to undermine it wholesale, their arguments have limited purchase.

The first premise within this modern discourse of torture is that torture is carried out on "our" behalf. The assumed audience can always be referred to in the first person plural, and refers to either The United States or liberal democracies generally. The only references to torture by non-democracies are to torture as a tactic of state repression and cruelty. Proponents claim that in liberal democracies torture can be limited in both scope and technique. Because torture may be limited in scope, it may be used solely for

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<sup>4</sup> Jackson, Richard. "Language, Policy, and the Construction of a Torture Culture in the War on Terrorism." *Review of International Studies*, Vol. 33 No. 3 (2007) pp. 353-371

information gathering. To gather information, torture is used in the moment of interrogation – once a suspect “breaks” and reveals information, the torture ends. Torture committed as a method to gain information in crisis scenarios is posited as directly responsible for saving lives, which can be summarized as torture → information → safety, *ergo* torture → safety. Torture is envisioned as a method of “getting tough” with reluctant suspects. This results in imagining a direct opposition between the physical integrity of a terror suspect and the safety of the nation or community. Physical harm and discomfort are hypothesized to exist on a continuum, and that it is possible to accurately limit and regulate the use of intentional physical harm along that continuum. Because it may be limited in technique (harm hypothesized as varying according to technique, though not within), one can posit either that the forms one advocates do not constitute “torture” as such, but rather “coercive interrogation” and as such will be limited to that, or that a milder form of torture – “torture lite” – can be utilized without necessarily becoming “full” torture. When referring to those who carry out or order torture on behalf of the liberal state, a dual emphasis is placed on the “tragic necessity” of torture as well as the responsibility of the interrogator to the nation.

Within the larger discursive structure of the torture debate there are a plethora of pro-torture arguments, such as: terrorists have forfeited their rights as human beings against gross mistreatment because they threaten harm;<sup>5</sup> judges should not second-guess the intelligence community about the danger terrorists in captivity pose;<sup>6</sup> and “reliability

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<sup>5</sup> Gross, Michael L. “Regulating Torture in a Democracy: Death and Indignity in Israel.” *Polity*, Vol. 36 No. 3 (2004) pp. 367-388

<sup>6</sup> Posner, Eric A and Vermeule, Adrian. *Terror in the Balance: Security, Liberty, and the Courts*. Oxford University Press, 2007.

is not the critical issue when torture is used to obtain national security intelligence.”<sup>7</sup>

These arguments are not part of the discursive structure, but made plausible within it.

This structure is, unfortunately, also the space in which many anti-torture arguments take place. David Luban hypothesizes five aims of torture: victor’s pleasure, terror, punishment, extracting confessions, and intelligence gathering.<sup>8</sup> After quickly dispatching the first four as obviously incompatible with liberal society, he then critiques approaches that would permit torture for intelligence gathering purposes. While his critique is excellent, it does perpetuate the idea that one can neatly separate purposes of torture. My critique of these approaches will be made more explicit below.

A first important distinction between torture proponents is the recognition that some theorists embrace the term “torture,” whereas others make a rhetorical distinction between their preferred interrogational methods (which are often just as painful and traumatic as other methods but simply less familiar to us) and another category of interrogative methods they categorically reject. For example, Eric Posner and Adrian Vermeule defend “coercive interrogation,” while Jean Elsthain defends “torture 2,” which is based on others’ descriptions of “torture lite.” Those who advocate something they understand as substantively different than “torture” accept that “torture” as a signifier cannot be divorced from “cruelty,” its most prominent signified. Creating a new sign, their chosen signifier instead signifies “security” or “information,” rather than “cruelty” or “barbarism.” Those who retain the term “torture” attempt to imbue it with surplus meaning, such that it immediately signifies a whole host of ideas; “cruelty,” “security,”

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<sup>7</sup> Posner, Richard. *Not a Suicide Pact: The Constitution in Time of National Emergency*. Oxford University Press. 2006

<sup>8</sup> Luban 2005.

“tragic necessity” the most prominent – “security” and “tragic necessity” when “we” torture, “cruelty” when others torture.

A second division can be made with reference to the profession of the defender and his intended audience. The first are legal theorists, such as Adrian Vermeule, Eric Posner and Richard Posner. I classify anyone who writes primarily about torture’s relation to legal structures as part of this category. The second category is ethical theorists, including academics like Michael Gross and Elsthain. While the bulk of both Gross and Elsthain’s ethical interventions have regarded just cause and ethics on the battlefield, both have drawn upon these earlier ethical frameworks in supporting torture. A third category can be characterized as ambivalent liberals, such as Michael Ignatieff. Ambivalent liberals generally oppose torture, but may not endorse an absolute prohibition against it, leaving open the possibility of TTB scenarios and techniques which can be described as “coercive interrogation.” Ignatieff struggles with the ethical meaning of torture, but in making space for some torture,<sup>9</sup> does not draw strongly upon an ethical framework which guided his earlier work. Indeed, his invocation of a secularized notion of evil creates great ethical and ideological contradictions between his ideas in *Human Rights as Politics and Idolatry* – in which he critiques the universal claims of secularized Western theological ethics – and his post-September 11<sup>th</sup> *The Lesser Evil*.

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<sup>9</sup> Ignatieff states that he does not endorse torture in any scenario. However, to hold such an opinion while simultaneously making space for “coercive interrogation” is problematic. “The interrogation methods of which the Americans have been accused since 9/11 are held to include nothing worse than sleep deprivation, disorienting noise, and isolation. If this were true...it would amount to coercion, rather than torture, and there might be a lesser evil justification for it.” (Ignatieff 2004, 138) Ignatieff’s idea of an absolute ban on torture is one that excludes the very techniques which brought the question of torture to the fore in the GWOT.

Arguments within each of these categories are not identical. Legal theorists generally focus on both the authority to torture as well as what legal and procedural limitations may apply. Ethical theorists argue both in the abstract and the present about torture, contemplating both the individual who tortures and the state that orders torture, while ambivalent liberals reserve their condemnations for authoritarian regimes that torture, then perceive the threat of terrorism as existential and find loopholes that allow *some* torture without sanctioning a general introduction of the practice. While each category writes within torture's discursive structure, their arguments tend to differentiate most clearly between these categories, rather than within. Thus, without a close reading, one may interpret Ignatieff or Elshaint's arguments as only thematically related to Dershowitz or Posner and Vermeule – both write about torture, but they are really writing about different aspects and have many apparently significant disagreements. By focusing on the pro-torture discourse, however, we can examine the important common underpinnings of their arguments and then understand precisely how they are similar.

### *Assumed Audience*

Contemporary pro-torture arguments are based primarily on the notion that torture will save lives if utilized to prevent or intercept a terrorist attack. Adding urgency to the scenarios which might permit torture, the hypothetical attacks are discussed as either against "us" or against liberal democracies. While Ignatieff and Elshaint make this explicit in their writings, this premise lurks in other torture proponents' writings as well.

The first manner in which this distinction between "us" and those who threaten harm is made is by identifying the threat as originating in evil, either evil actors or the

evil inherent in an anarchic world. Michael Ignatieff recognizes that “we” too might do evil – that is the implication of his choice of lesser evils – however, he is not clear as to whether he believes those who would do “us” harm are evil themselves, or will simply carry out evil actions if they are not stopped. In this sense, “we” – liberal democracies – have the agency to choose evil, whereas the enemy will simply be evil (whether by nature or through actions he assumes they will undertake). For Ignatieff, the choice to commit evil implies that one is neither inherently evil nor is one bound to evil choices. Thus, only “we” – not our enemies – are morally endowed agents. If by definition torture (“enhanced interrogation techniques” being the term he uses) is to be used against evil people, then this is an explicit rejection of any promise of universal consideration or right.

A basic test of whether behavior is “just” or “permissible” is generalizability; that others in a similar situation would be permitted or justified to engage in the same actions. If torture can be utilized to protect civilian life in advance of a bombing, to test this hypothesis one might re-imagine the scenario in which “we” are not the ones torturing, and in which (people America considers) terrorists may in fact have the opportunity to save civilian life. Consider: Hezbollah agents capture an Israeli intelligence officer in the summer of 2006, just before Israel's offensive against Lebanon. They know that Israel will be unleashing a torrent of air attacks against Lebanon, but no one yet knows what the targets will be. Would the Hezbollah agents be justified in torturing the Israeli officer if, upon learning Israel's planned targets, Hezbollah evacuated civilians from the targeted areas (in addition to their own munitions and agents, but that is irrelevant if the standard is civilian protection). The 2006 incursion resulted in more than 1,000 civilian deaths – more than laid out in numerous TTB scenarios.

Even if Hezbollah does not constitute a legitimate military force, the duty to protect civilian life and the legitimacy of preemptive action so emphasized in TTB scenarios should outweigh the question of whether Hezbollah, as a non-state actor, can engage in intimate violence against an Israeli who possesses information that could save so many civilian lives. If, however, this is an unacceptable instance of torture not because of a general prohibition against torture but because of a problem located in the identity of the potential torturers, then either this is an instance of barring those who are “not like us” from torturing, or there is an implicit requirement of “right authority.” If it is a requirement of right authority, then romantic notions of “tragic necessity” and heroic decision on the part of the individual who tortures to save civilian life are irrelevant. If torture is in some manner permissible for states because of their right authority, then torture is something that *states* do, and the individual practitioners are not the locus of moral agency. Either way, if Hezbollah would not be permitted to torture in this hypothetical, then pro-torture discourse establishes a two-tiered moral justification, in which torture by nominally liberal democratic governments can be justified while none others may.

Further, if torture is permissible with right authority, then torture becomes simply something states *do*, like war and criminal punishment. This would shift the moral argument dramatically by presuming torture to be a part of the standard arsenal of behaviors by a morally justified construct, the state. Assuming the moral authority of the state extends to include torture as a standard tool prompts the question: what are states *not* morally permitted to do? States may kill or imprison their own citizens, but that right over life is checked by the individual’s right of due process. States may kill citizens of

other states and ask its own citizens to give up their lives, but only within the context of war – which, as noted in the introduction, has its own limitations. Torture for information against opponents in an informal conflict, on the other hand, escapes protections of due process as well as war time protections – in effect, allowing states to torture creates an *absolute* right over the life and freedom of its victims, which should bring into question whether one could think of the state as a morally endowed agent.

For those pro-torture theorists who advocate legally sanctioned torture, staring into the abyss of absolute power itself reaffirms the moral agency of liberal democracies. Rather than prohibiting torture, being a liberal democracy qualifies a state to engage in it. For Posner and Vermeule, the public revulsion attending brutal techniques reaffirms this right: “Far from desensitizing the public to violence and pain, the use of coercive interrogation and similar measures can inspire revulsion and a renewal of a commitment not to use them except in extreme circumstances.”<sup>10</sup> Jeanne Morefield characterizes Ignatieff’s approach thus: “the very act of confronting the tragic choice in the name of what is right...reconfirms the imperial state’s identity as liberal.”<sup>11</sup>

Arguments about regime type and governments, though utilizing the first person plural, are separate from arguments about individual responsibility and moral choice. A state’s right of action is separate from an individual’s right of action or duty to have regard for others.

### *Torture as an Individual’s Moral Choice*

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<sup>10</sup> Posner and Vermeule 2007, 202.

<sup>11</sup> Morefield, Jeanne. “Empire, Tragedy, and the Liberal State in the Writings of Niall Ferguson and Michael Ignatieff.” *Theory and Event*, 11.3 (2008)

The history of moral reasoning is littered with paradoxes which appear to justify normally immoral behavior. “It is kind to be cruel,” and “the ends justify the means,” are only two of the trite phrases offered as resolutions to such apparent paradoxes. Torture proponents, insisting that in the absence of some degree torture great calamity will befall the nation, argue that torture against terror suspects also presents a moral paradox. Because torture may be necessary to avert catastrophe, torture becomes a moral imperative. Insistence to the contrary is a failure to seriously consider the consequences of one’s non-actions and derided as absolutist. The decision to torture is a tragic one, for to prevent a grave injustice one must commit a (supposedly smaller) injustice.

The torture advocates, especially the ethical theorists, utilize a decisionism of moral reasoning. This is no doubt why Elstain gestures to Bonhoeffer’s decision to disobey the commandment against killing and participate in the July assassination plot against Hitler.<sup>12</sup> The animating question for Bonhoeffer was “What is to come?” – a question that pushed him to decision and action. An emphasis on the necessity of decision in the face of evil is central to the pro-torture discourse. Posner and Vermeule are representative: “The absolutist deontological view fails to come to grips with the inevitability of tragic choices.”<sup>13</sup>

This aspect of the pro-torture discourse, however, is well critiqued by torture opponents. Morefield, Marnia Lazreg, and Luban all quickly recognize the technique as egocentric reflection, concealing the consequences of one’s actions against others. Both Morefield and Lazreg note that the motif of tragedy is recast as self-justifying, rather than

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<sup>12</sup> Elstain 2004, 84

<sup>13</sup> Posner and Vermeule 2007, 187

self-defeating (as a traditional definition of tragedy would imply). Further, Lazreg argues that the “scenario [of tragic necessity] is constructed in a way that foregrounds the impact of torture on the man who orders it. It has no room for the effect of torture, or its meaning for the man who is tortured...the scenario is predicated on the humanity of the man ordering torture, but denies, by omission, that of the man being tortured.”<sup>14</sup> This sort of moral accounting only works if the only “cost” associated with torture is the guilt of the torturer and excludes the effects on the tortured. Luban notes that by casting the gaze at the torturer, the spectator can view the situation through the torturer’s eyes in hypothetical accounts of torture.

It should be of little surprise that the justificatory, self-reflective gaze should garner the most thorough critiques by torture opponents. Justification of an individual’s extreme action has long been a topic for philosophers and political thinkers. Thus, Lazreg deploys Hegel and Kierkegaard to critique this formulation, and Morefield draws on Rawls. One could also draw upon Arendt (with reference to Eichmann and the notion of duty) or any number of other major figures in the history of political thought to guide one’s reaction. This flawed form of moral reasoning is immediately recognizable to us, and we have easy theoretical referents to explain precisely why such reasoning and self-justification is perverse. Focusing on the ease with which one may counter this component of the pro-torture discourse, however, may distract one from addressing its place as only one component of a larger discourse.

### *Defining Something Else*

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<sup>14</sup> Lazreg, Marnia. *Torture and the Twilight of Empire*. Princeton University Press, 2008. p. 242

Those who advocate employing methods of “enhanced interrogation” or “torture lite” insist that definitions of torture included in treaties, international law, and many domestic laws are too broad to be meaningful, that torture needs to be more “accurately” defined. The premise of Elstain’s argument is that torture as a category has grown to the point that it unfairly demonizes certain practices while failing to convey the horror of others. “If everything from a shout to the severing of a body part is ‘torture,’ the category is so indiscriminate as to not permit of those distinctions on which the law and moral philosophy rest...At the same time, we deprive law enforcement, domestic and international, of some of its necessary tools in an often violent and dangerous world.”<sup>15</sup> Richard Posner argues that torture “must not be defined so broadly that it prohibits all methods of coercion used in an investigation; the risk to national security would be too great.”<sup>16</sup>

In differentiating between abuses that constitute unacceptable levels of torture and abuses that constitute either acceptable levels of torture or do not qualify as torture (in these theorists’ minds), a common thread is the distinction between treatments that cause lasting harm (such as maiming, mutilating, or severe psychological effects) and treatments whose effects are believed to end as soon as the treatment itself ends.<sup>17</sup> While this standard is most notoriously endorsed in the Yoo-Bybee memo, it also finds a home

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<sup>15</sup> Elstain 2004, 79

<sup>16</sup> Posner 2006, 84

<sup>17</sup> These analyses generally under-appreciate the nature of post-traumatic stress disorder (PTSD), which is associated not only with violent events of which one is the victim, such as rape, but may also be caused by witnessing harms committed. Furthermore, PTSD is not associated with a defined set of scenarios: when exposed to different abuses some victims may develop PTSD while others will not. As a result, arguments that say that techniques that may result in PTSD or severe psychological trauma cannot be used *should* be read as a near universal ban, not as a permissive limit. Most torture proponents, however, are skeptical of the idea of “psychological torture,” and include a proscription against *severe* psychological trauma in not as a serious consideration but as a way to delegitimize *expected* levels of trauma after torture.

in the work of Posner and Vermeule, Elshaint, and Ignatieff, amongst others. Gross' summary is representative: "Those techniques we consider repugnant are usually the most brutal...and cause extreme suffering, particularly long-term future suffering." Compared to this, "the pain and stress of hooding and stress techniques is transient and of limited duration. It does not extend much, if at all, beyond the time needed to elicit information. Once the hood comes off or the suspect may stretch his limbs, the detainee's body returns to normal functioning."<sup>18</sup>

Defining torture as limited to treatments that have lasting effects on its victims, however, is not simply a difficult position morally and empirically, it is a troubling discursive strategy. It creates a temporal schism, in which the moment of the abuse is irrelevant – only the time after a victim's confinement and abuse can be judged. Put differently, it is a refusal to define torture with reference to the thing in itself – the actual techniques and experience of abuse – but only with regard to its lasting effects. Thus, any technique that does not kill, maim, or mutilate is legitimated by such a definition. As torture techniques in the past century have become "cleaner," leaving fewer marks and evidence,<sup>19</sup> what this standard effectively does is endorse the project of "cleaning" torture. "Cleaning" torture, it must be emphasized, is not synonymous with making torture less cruel, painful, psychologically harmful, or more 'civilized,' but simply removing evidence of its use.

A second manner of refusing to define torture with reference to the thing in itself is to abstract the method via analogy. An illustration of this dynamic is the contrast

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<sup>18</sup> Gross, Michael L. *Moral Dilemmas of Modern War*. Cambridge University Press, 2010. pp. 128-129

<sup>19</sup> Rejali, Darius. *Torture and Democracy*. Princeton University Press, 2007. p. 12

between Elshtain and Marnia Lazreg's discussions of techniques that involve slapping. Elshtain, seeking to delineate how torture is too broad a category, challenges her reader: "let's turn to...a slap in the face. [Does this] belong in the same torture category as bodily amputations and sexual assaults?...Slapping a child can lead to charges of child abuse and, whether the child is physically harmed or not, slapping demeans...A slap is meant to frighten and...to remind someone of who is in the driver's seat."<sup>20</sup> To understand slapping, Elshtain does not look at torture techniques that involve slapping, but looks at slapping as seen sometimes in domestic life. She takes the root idea of a torture method (in this case, a slap), and examines that root rather than its application as torture method. In examining only the root idea of the torture method, this examination embodies the fallacy that pain is variable between torture methods, but not within – one can inquire about one form of slapping, and an answer will be sufficient to cover all variations of the technique. By contrast (and in direct response to Elshtain), Lazreg writes, "slapping, an apparently banal form of punishment, damages hearing when done by powerful torturers using the victim as a slapping bag."<sup>21</sup> By examining the actual torture technique, Lazreg eliminates doubt about its severity, whereas Elshtain obfuscates that quality by explaining it with reference to something that is not the technique itself. This same rhetorical strategy has been employed to deny that waterboarding and stress positions are torture, and is a key component to denying that medical techniques can be used as torture.

### *Professionalism as Legitimation*

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<sup>20</sup> Elshtain 2004, 79

<sup>21</sup> Lazreg 2008, 245

“Coercive interrogation” and “torture lite” are techniques that do not leave obvious clues on the body of the victim. Stress positions cause excruciating pain, and may even break bones and tear muscles, but there is little to no bruising, and thus little evidence to directly connect the injuries suffered to the technique. Sleep deprivation and extreme temperatures are also extremely painful and disorienting, but leave no physical evidence on the body. Darius Rejali argues that techniques such as these became dominant in the 20<sup>th</sup> century not because of increased accuracy or a precise science of torture, but because torture became antithetical to ideas of legitimacy. In order to avoid detection by either domestic or international human rights groups, which might lead to a crisis of legitimacy, police forces, dictatorships, and occupying powers resorted to techniques that would make proving accusations of torture much more difficult.<sup>22</sup>

Given that “lite” techniques were developed as means to avoid detection and thus grant interrogators a degree of plausible deniability while still allowing them the ability to engage in the same tactics for which scarring techniques were used, it is ironic that defenders of “torture lite” or “coercive interrogation” would now argue that such techniques do not even properly count as torture. However, torture proponents imagine torturers as professionals, trained in the scientific methods of applying sufficient pressure to “break” a suspect.

Once coercive interrogation is authorized, officials will, over time, become more and more expert in using it accurately, bureaucratic structures of control will become more fine-tuned and effective...As this happens, one of the main objections to coercive interrogation – that it is ineffective in general, or that it is often used even when it is ineffective – will disappear, and thus...according to the cost-benefit calculus, will be more beneficial.<sup>23</sup>

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<sup>22</sup> Rejali 2007, 8

<sup>23</sup> Posner and Vermeule 2007, 202-203

Discomfort is measured and meted out on an “as necessary” basis, and because physical pressure techniques never truly harm the body, this is not simply an expression of sovereignty over bare life.

Torture embodies an obsession with the body of the victim. Even in the techniques where permanent damage to the body is not threatened – as in simulated drowning – the goal is to overwhelm the body’s ability to endure pain and extreme discomfort. Dershowitz’s exact prescription is most telling: the goal should be to “produce unbearable pain without any threat to health or life.”<sup>24</sup> This is no petty notion of discomfort, but a recognition that the goal of torture is to overwhelm. The corporeality of torture is immutable. Modern torture discourse imagines the security of the nation as being *on* the body of the terror suspect; torture is the means required to physically extract the nation’s security from a discrete body. This extraction is not a measured process; it may come all at once, as it does during simulated drowning (there is no way to simulate different “levels” of drowning), or it may slowly increase in intensity, as do sleep deprivation and stress positions. But gradual onset is not a sign of an interrogator professionally measuring a degree of pain – once the interrogator initiates the technique, it is the victim himself who defines the amount of pain endured. If, though, the torture is not a part of an interrogation but prior to it, with the aim of “softening up detainees” (as happened in Abu Ghraib), the victim has no way of limiting pain, and it will continue to build until an unspecified point (since no information is actively sought in this moment) at which the torturer believes the victim will be more cooperative in interrogation.

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<sup>24</sup> Waldron, Jeremy. *Terror, Torture and Trade-Offs: Philosophy for the White House*. Oxford University Press, 2010. p. 188

An approach of the professionalization rhetoric is to specifically associate certain methods of torture with medical procedures. Medicine, with its connotations of combating harm, may bring the illusion of limiting harm, protecting the victim from unnecessary or undue levels of harm (harm not necessarily synonymous with pain), thus making his treatment less cruel. The most prominent example of this is Alan Dershowitz's assertion that the form of torture that should be employed by American officials in terrorism cases is "a sterilized needle inserted under the fingernails to produce unbearable pain without any threat to health or life."<sup>25</sup> Inserting needles underneath the fingernails (as well as the closely related torture of removing fingernails) is, in fact, a method of torture with a long history, utilized by many unsavory practitioners. Dershowitz's inclusion of the modifier "sterilized" is an attempt to draw a distinction between what he advocates and the practices of the method's traditional practitioners. By medicalizing the procedure (not that it actually requires a medical professional to sterilize a needle, but the term conjures images of medicine), he associates it with medical precision, a notion of minimized harm (after all, if the needles are sterilized there will be no possibility of infection), and, importantly, it limits torture to the physical extremities of the body. While there are many torture techniques that focus on the extremities, including the *falaka* and certain electrical tortures, by moving the location of torture away from the "center" of the body – the torso and the head – torturers, politicians and we as citizens are allowed to minimize the procedure's impact on our consciences. While undoubtedly painful, needles underneath the fingernails do not conjure the fear of imminent death, as dunking or smothering do, nor does it place itself in close proximity

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<sup>25</sup> Waldron 2010, 188

to the face, which allows us to imagine the technique as not overwhelming, that there remains some distance between the victim's very consciousness and the locus of pain.

Richard Posner relies on medicalization to falsely differentiate preferred techniques of physical interrogation from torture. He introduces Felix Frankfurter's opinion from *Rochim v. California* (1952), in which the justice held that using a doctor to pump a suspect's stomach to retrieve evidence (in this case, the suspect was suspected of swallowing two morphine tablets to avoid arrest for possession of narcotics) clearly "shocked the conscience," and was "too close to the rack and the screw to permit of constitutional differentiation."<sup>26</sup> Posner finds this reasoning weak, arguing that stomach pumping is a standard part of the medical profession, and that the procedure was carried out by a doctor in a hospital, thus any claim that this should shock the conscience is dubious.

Posner's counterargument overlooks several important details. First, stomach pumping is an acutely painful procedure, used primarily as a method to save someone's life because he or she has ingested (wittingly or unwittingly) poison or toxic levels of a substance. A torture method known as "the water cure," utilized by American troops in the Philippines at the turn of the 20<sup>th</sup> century, is similar to stomach pumping.<sup>27</sup> Further, while there are intricate legal and ethical debates about non-consensual medical procedures,<sup>28</sup> it is difficult to fathom a constitutionally acceptable argument that denies a

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<sup>26</sup> Posner 2006, 79

<sup>27</sup> Paul Kramer's excellent brief history of the water cure in *The New Yorker*, February 2008 is available at: [http://www.newyorker.com/reporting/2008/02/25/080225fa\\_fact\\_kramer](http://www.newyorker.com/reporting/2008/02/25/080225fa_fact_kramer)

<sup>28</sup> The Supreme Court's refusal to hear *McKown v. Lundman*, which awarded civil damages to the father of a boy who died when his mother – who had full custody – relied on Christian Scientist faith healers to treat the son rather than calling a doctor, might be read as a limit case, indicating that consent to save the

competent adult the right to refuse non-life saving treatment. As criminality does not qualify as mental incompetence, terrorists and criminals retain the right to refuse medical treatment.

Rather, Posner's argument seeks to legitimize any procedure carried out by a medical professional that could be considered part of his normal repertoire and does not cause permanent physical harm. Under such a standard, methods like amputation would remain unacceptable, but administering drugs that may disorient a suspect, running repeated batteries of medical tests meant to wear down the suspect mentally or physically, or any number of other aids of coercion would be legitimized by mere association with medical procedures.

The use of medical personnel in torture is already common – between 20 and 40% of torture cases where information is available included participation by medical personnel.<sup>29</sup> To legitimate the medicalization of torture – whether by imagining it as mitigating harm or imagining that it is not torture – simply serves to legitimate a broad swath of existing torture practices. The project of professionalization follows the same path – it is a method of reimagining and redescribing existing techniques for the specific purpose of legitimating them.

### *The Ticking Time Bomb Scenario*

The ticking time bomb scenario is the culmination of the pro-torture discourse. The moral good of saving civilian life is understood as mutually exclusive to respecting

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life of a minor whose guardian refuses treatment is irrelevant. In no way did Rochim fit these requirements to negate his consent, nor would terror suspects.

<sup>29</sup> Luban 2005, 1446n55

the physical integrity of a terror suspect. The TTB scenario is the perfect embodiment of all aspects of the pro-torture discourse – “we” are under attack, and a suspect is in custody who will divulge life-saving information only if subjected to varying degrees of physical pressure. It is a tragic situation for the torturer, who, as a duty to the civilians whose lives will be forfeit if he refrains, must torture. What he is doing may be ugly, disturbing those who can only see the immediate injustice (some form of torture) but refuse to recognize the larger injustice he is preventing (the killing of civilians). Elshstain, for example, scolds those who would only have regard for the former, stating “To condemn outright torture [lite]...is to lapse into a legalistic version of pietistic rigorism in which one’s own moral purity is ranked above other goods. This is also a form of moral laziness.”<sup>30</sup> For such a condemnation to have purchase, however, TTB scenarios must be both rare and threaten mass destruction. Unfortunately, and unnoticed by many torture opponents, TTB scenarios may, in fact, be more banal events, threatening far less violence.

In its most common form, the TTB scenario rests on a fantasy that severe injustice against one individual can ensure justice for a multitude of others.<sup>31</sup> It is telling that, in their opening remarks on torture, Posner and Vermeule note that “it is permissible to kill an innocent person to save a whole nation from annihilation.”<sup>32</sup> If an innocent may be

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<sup>30</sup> Elshstain 2004, 87-88

<sup>31</sup> There are real world situations that require a decision between lives – complicated pregnancies sometimes require losing the baby to save the mother, a rock climber may have to detach his climbing partner(s) if he/they have fallen and risk pulling down the entire climbing party. While these are situations that oppose lives against each other, there are definite mechanisms (conditions like preemclampsia, gravity’s pull versus an unstable rock face) which may require these decisions. Torture to save lives mimics the logical structure of these scenarios but rests on a fantastical opposition between a suspect’s physical integrity and the safety of the nation.

<sup>32</sup> Posner and Vermeule 2007, 187

killed to save a nation, cannot a terrorist be tortured to save a city, a school, or some other number of innocents? Of course, this is a fantasy – what single innocent individual could be killed to stop such an act? These are the lines, though, by which many torture opponents critique the TTB. While these critiques usually challenge the possible existence of such a scenario, they fail to address a far greater concern associated with the TTB. Even Darius Rejali notes that, as unlikely as it may be, were there to be a TTB scenario “You wouldn’t want to [authorize] a torture policy. This is why we have jury nullification.”<sup>33</sup> Jury nullification – a unilateral refusal on the part of a jury to render a verdict consonant with the evidence and law – would retain statutes against torture but allow juries to refuse to convict an interrogator who tortured in a true TTB scenario.

Rejali’s suggestion of jury nullification demonstrates a common way for torture opponents to escape dealing with the TTB scenario; first by dismissing its likelihood, then relying on a variation of “extreme cases make bad law” argument. By resorting to the latter argument, torture opponents essentially cede what they see as an unrealistic extreme case in order to preserve the norm or rule against torture. However, this fails to recognize how expansive TTB scenarios potentially are. Usually their expansiveness is theorized as a transformation from TTB scenarios to general information fishing – torturing suspects for information about organizational structures and details of terrorist groups, torturing suspected terrorists to see if they know about *any* attacks, etc. Luban notes that “interrogation of al Qaeda suspects will almost never be employed to find out where the ticking bomb is hidden. Instead, interrogation is a more general fishing

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<sup>33</sup> Talk given at the Carnegie Council, March 13, 2008. Transcript available at: <http://www.carnegiecouncil.org/resources/transcripts/0031.html>

expedition for any intelligence that might be used to help ‘unwind’ the terrorist organization.”<sup>34</sup> Thus, the issue would be that TTB scenarios give way to torture for more routine information – that it is the start of a “slippery slope.” While this is undoubtedly a serious concern, what has gone largely unrecognized (with the partial exception of Posner and Vermeule’s analysis, which comes at the problem from a very different perspective) is that there are many ways to expand the circumstances that are acceptable for torture *while maintaining a strict adherence to the rule or norm that torture can only be carried out in TTB scenarios.*

TTB scenarios have four primary components – potential loss of life due to attack, imminence of attack, method of attack, and how much information authorities have indicating the suspect knows the relevant information. The boundaries of each of these components are, in fact, completely arbitrary, and there is no unifying logic to the TTB that prevents exploitation of this arbitrariness. Thus, anyone who does not press for a strict definition of TTB is in fact permitting a very broad range of potential torture situations to be justified. Pushing against broad definitions such as the TTB scenario is ultimately important to crisis scenarios more generally – because the animating logic of many theories of emergency governance is the freedom to do “what needs to be done,” pushing back against what appears by definition to be a narrow exception but in reality may be very broad calls into question broader aspects of the state of emergency. The ambiguity of its limitations, as demonstrated below, is the mechanism by which TTB scenarios may greatly expand the legitimate use of torture.

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<sup>34</sup> Luban 2005, 1442

How many people will die? Posner and Vermeule note several problems introduced by an arbitrary decision on this front, but towards different ends than mine. “The catastrophe exception builds in an arbitrary threshold below which the harms are of insufficient weight to override deontological restrictions and above which they are sufficiently weighty to do so.”<sup>35</sup> As this passage suggests, after the principle of a catastrophe exception has been established, torture proponents may then argue that smaller and smaller potential casualties permit, perhaps even *require*, torture. Elshain, first noting that “the leader who demurs in the name of living up to a moral code we probably share with him... becomes directly complicit in the deaths of hundreds of innocents,” concludes that a “certain asceticism is required of those who may be *required*, in a dangerous and extreme situation, to temporarily override a general prohibition.”<sup>36</sup> (emphasis added). In this formulation, torture is not one option available to authorities, but a *positive obligation*.

Some TTB scenarios are about a nuke in New York City, but some are about a bomb in a school. That’s a difference of millions of casualties – Manhattan houses more than five million people in a very small space, whereas the school example put forward by Elshain posits 400 potential casualties. While the fact that they are children appeals to us emotionally, it is not at all clear that it is the children’s innocence that makes their targeting worthy of torture, even if their numbers are fewer. The Israeli Supreme Court, in its 1999 decision barring harsh interrogation techniques (but permitting “necessity” arguments to mitigate punishment for torturers), referred to the TTB scenario as

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<sup>35</sup> Posner and Vermeule 2007, 188

<sup>36</sup> Elshain 2004, 83-84

potentially resulting in “scores of killed and maimed.” Under such a standard, would a bomb on a bus in busy city traffic also qualify? There might be dozens of casualties on the bus, and combined with damage to surrounding cars the casualties could reach even higher. Indeed, Gross’ conception of the TTB is maximally expansive – his example is simply that of an averted suicide bombing. He cites a Ha’aretz news item reporting that “A suicide bombing was narrowly averted in Haifa (Israel) yesterday morning when the would-be perpetrator was arrested shortly before carrying it out.” This situation, a plan with an undescribed potential for lethality, is, according to Gross, “probably about as close to a real-life ticking bomb as one might find.”<sup>37</sup> However, most suicide bombing attacks kill fewer than 10 people.<sup>38</sup> We have no way of knowing how many people would have been killed had the Israeli authorities not intercepted the would-be bomber, if any – in about 25% of suicide attacks, the only death is the bomber him or herself.<sup>39</sup> So the odds of a successful suicide attack killing many people are slim. However, for Gross this case remains as realistic a TTB scenario as possible simply because of the potential for loss of life combined with the fact that the plan was imminently actionable. With only an arbitrary rule that “a lot of people may die” without information extracted by coercive interrogational techniques, this boundary becomes quite porous.

What method of attack? Usually the assumption is a bomb, but two of the deadliest terror attacks in the past decade – Al-Qaeda’s attack on 9/11 and Lashkar e Taiba’s attack on Mumbai in 2008 – either did not involve bombs at all, or as minor

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<sup>37</sup> Gross 2004, 30

<sup>38</sup> Pape, Robert. *Dying to Win: The Strategic Logic of Suicide Terrorism*. Random House 2005. Appendix I.

<sup>39</sup> O’Rourke, Lindsey. “What’s Special About Female Suicide Terrorism?” *Security Studies*, 18:681-718. 2009

supplements to another form of attack. These were no doubt terror attacks, but if one understands “ticking time bomb” as a metaphorical reference to threats of imminent mass violence, then we are moving more towards a broader application and not the proverbial “terrorist bomber.” School shooters certainly plan mass violence. What about planned gang wars that will involve coordinated drive-by shootings? By recognizing that terrorists do not always operate with bombs, defining a legal boundary for the TTB may in fact legitimate its use in broader criminal matters. Proponents of the TTB scenario might respond that torture would be limited to terror suspects, and not applied to criminal activity on a larger scale. If a restriction were made such that, regardless of type of attack, torture can only be used against designated groups, or groups designated as terrorist organizations, a whole new host of problems would arise.

Posner and Vermeule, in an attempt to prevent the proliferation of torture beyond anti-terror purposes, suggest that “coercive interrogation could be limited to cases where...the subjects are known to be members of al Qaeda or another group that has proved its hostility and lethality.”<sup>40</sup> It is important to note that this proposal is distinct from permitting torture against members of groups listed by the US State Department as terrorist organizations – this is a proposal to authorize torture against specific individual groups. The immediate problem with this proposal is that permitting individual groups to be singled out for such a treatment would most certainly violate the constitutional ban on laws of attainder.

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<sup>40</sup> Posner and Vermeule 2007, 197

On the other hand, if torture were authorized against all groups listed as terrorist organizations by the US State Department, this could significantly complicate relations throughout the globe, especially in cases where we consider an organization to be a terrorist organization but an ally of ours does not. England does not consider the New People's Army of The Philippines or the AUC of Colombia to be terrorist organizations. Were any of their members to seek protection at a British embassy, claiming they had been targeted by US agents for torture, a decision to grant them safe haven could strain Anglo-American relations, while a decision to deny them protection could spark domestic political conflict in England. More problematic, however, is that the US often de-lists organizations and deals with them when it is in US interests to push for a change in government in another country. The African National Congress, considered a foreign terrorist organization by the US State Department throughout most of the 1980s, was de-listed before Nelson Mandela became a presidential candidate. The Kosovo Liberation Army was delisted a year before the US bombed Serbia for its actions in Kosovo. In both of these cases, groups formerly considered terrorist organizations by the United States became important partners in American foreign policy. Had these groups previously been susceptible to *torture* at the hands of American agents, initiating any significant cooperation would have been significantly more difficult.

How soon is the planned attack? TTB requires that the attack be "imminent," but that is never defined. Does this imply an hour before the attack? 24 hours? 48 hours? A week? Popular images of the TTB scenario focus on mere hours; the pop culture phenomenon most associated with torture, the TV show "24," is perhaps most notable for its premise that, barring the protagonist's actions, an attack will occur within 24 hours

from the first receipt of information, and that information necessary to avert the attack can be acquired mere hours and minutes before planned detonation. But some arguments about torture imply a much broader understanding of “imminent.” A range of time, say, between 24 and 96 hours, could be very conducive to torture – if a legal boundary is hypothetically (and arbitrarily) drawn to allow torture within 72 hours of a suspected attack, if an attack is expected within a range of 24 to 96 hours one would presumably use the low end estimate to justify immediate coercive techniques. The longer the amount of time, the more likely traditional investigative work can find answers, but “imminent” is never well defined.

How much information do authorities already have which indicates the suspect has explicit knowledge about an impending attack? The TTB requires that authorities know that an attack is imminent, and that they know that the suspect has specific knowledge of the plans – but how specific? There is a lot of operational information one can obtain about an attack: its time, location, the identities of those who will carry it out, a safe haven or rendezvous from which the attacker(s) will retrieve the necessary equipment, etc. Given that terrorist organizations are often organized as cells, it is unlikely that many people would have all that information – so what to do with someone who has *some* of that information, perhaps *enough* of that information? Defining the threshold as *sufficient* information, rather than *total* information, again makes this boundary very porous. Indeed, this boundary is the most likely to expand the range of people susceptible to torture. *Sufficient* information need not be limited to those with *direct* knowledge of an attack – members of a terrorist organization who have no knowledge of a specific attack, but know the locations of safe houses and rendezvous

points might divulge enough information for government authorities to intercept an intended bombing. Further, political wings of terrorist organizations, such as Sinn Féin, have traditionally been protected because they (ostensibly) do not have *direct* knowledge of attacks or interaction with the militarized wing of their organization. If sufficient knowledge becomes the threshold for torture, members of political wings could be subject to the same harsh techniques.

Torturing those who are not directly responsible for violence is a question over which torture proponents are split. John Yoo insisted, based on the now infamous Yoo-Bybee OLC memo, that no act of congress or treaty could supersede executive authority, effectively allowing the president to order physical or sexual torture of the child of a terror suspect to coerce the suspect into divulging information if the president felt it were necessary.<sup>41</sup> Few other supporters of torture agree to such a hypothetical, arguing instead that only those who have knowledge of a specific attack (but are not simply bystanders who have overheard information) can be tortured. Against such expansiveness, Gross reformulates his necessity defense of torture as: “*Torture is permitted as a last resort to save innocent lives as long as the innocent are not tortured.* Even ticking bombs do not override the life of the innocent.”<sup>42</sup> However, if one understands the TTB as authorizing torture of those with only sufficient information to avert a specific attack, one can justify torturing a much broader range of potential subjects without running afoul of the impermissibility of torturing unaffiliated victims to coerce suspects into divulging

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<sup>41</sup> Audio of the relevant portion of debate between John Yoo and Doug Cassel, including Cassel’s pressing Yoo on this point, on Dec. 1, 2005 available at: <http://revcom.us/a/026/torture-victims-confront-advocate.htm>

<sup>42</sup> Gross 2010, 137

information. Thus, while not expanding to the level Yoo outlines, the range of potential targets can be greatly increased.

Each of these four categories rapidly expands once one recognizes the arbitrary nature of their limits. By delineating the ways in which such expansions can occur, one can avoid the vagueness of describing torture expansion in terms of a slippery slope. Adjusting the threshold for any of the four categories – how many people will die, how soon the attack, what type of attack, and how much information authorities believe a suspect has – is a defined mechanism to make TTB scenarios more inclusive.

### **Against Torture Opponents**

In this section I depart from the method I used to examine pro-torture discourse, and focus primarily on the arguments of one important torture opponent, David Luban, and how his arguments interact with the pro-torture discourse. I focus on his work both because of the prominence of his work on torture in the past decade and because the way his work subtly accepts some of the pro-torture discourse's premises is repeated by many other torture opponents. By engaging the torture defenders within the pro-torture discursive structure or by ignoring the role of the discourse, torture opponents either fail to refute or implicitly legitimate the pro-torture discourse.

The ways in which liberals critique torture by narrowing the discussion to “information” are actually complicit in furthering the narrative that torture is about information, thus inadvertently legitimizing the practice. Luban posits that there is a sense that one purpose of torture – information extraction – is the only type of torture potentially compatible with liberal society because sometimes it may be necessary for

liberal societies. He strongly critiques the idea that torture in a liberal society might be used only for extracting information, and references both organizational structure and social psychology for how torture escapes its initial limited cruelty in the liberal fantasy of torture. However, he begins the article by bracketing all other “types” of torture to pursue a critique of torture-for-information. But in doing so, he both elides the inability to keep torture’s purposes limited as well as presents other purposes of torture as anachronistic (and thus of less concern). Thus, though his essay is a critique of the use of torture, he furthers the discourse that views torture as limitable to information gathering.

Luban defines “victor’s pleasure” or “victor’s cruelty” as the “paradigm case” of torture. He cites Montesquieu’s revulsion towards it, and asserts that this typology most centrally captures Liberals’ abhorrence of torture. But his only example of torture as victor’s pleasure is based on ancient Mayan murals. This easily allows the reader to imagine an absolute division between barbaric torture and modern society – this is the old world of torture, practiced by the pre-civilized societies of the New World and condemned by Montesquieu. But victor’s pleasure was certainly a motivation for more recent tortures – the mass rape of women in Berlin by the triumphant Red Army in 1945 would certainly count. This brings victor’s pleasure into the 20<sup>th</sup> century, but what about Liberal society? Is it immune from such perversions? Certainly liberal principles cannot justify it, but that is a separate question. However, by only citing Mayan murals, Luban allows his reader to entertain the fantasy that that sort of thing doesn’t happen in liberal democracies – when liberal democracies step over the line with torture, at least it does not amount to *that*.

Luban reinforces this division between “older” methods of torture and less cruel, more modern methods by noting that “There is a vast difference... between the ancient world of torture, with its appalling world of mutilations, its roasting and flaying, and the tortures that liberals might accept... liberals generally draw the line at forms of torture that maim the victim’s body. This, like the limitation of torture to intelligence gathering, marks an undeniable moderation in torture. It’s almost enough to persuade us that torture lite is not torture at all.”<sup>43</sup> Of course, by noting that “it’s almost enough” Luban is confirming that these methods are indeed torture. But it is important to ask: are the differences in severity differences of the moment of torture, its lasting pain, or – problematic when comparing public spectacle tortures to “clean” tortures – the ability of another to imagine the pain?

Luban inadvertently repeats the liberal sin of defining horrors by their lasting effects. Simulating the pain and fear of death – whether through mutilation or simulated drowning – is extremely painful torture, and I am not convinced that ‘ranking’ tortures (and conceding that this most “immoderate practice” is now more moderate than in the past) does anything but legitimate parts of the pro-torture discourse. Certain stress positions have similar effects to stretching a body on the rack or wheel, but in the former the pain sets in more slowly and the torturer can deny direct agency – after all, the victim (by not giving up information) is prolonging and increasing the pain, rather than the torturer actively tightening a winch that translates directly into pain. Is this, then, really moderation? Just as randomly loading one rifle with blanks so that each member of a firing squad can imagine he did not fire the shot that killed the condemned man while no

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<sup>43</sup> Luban 2005, 1436

doubt taking part in his execution, so too do hands-off methods of torture like stress positions allow torturers to imagine themselves devoid of agency.

### **Conclusion – What can a new Torture Discourse Look Like?**

Every soldier court-martialled for abuse at Abu Ghraib was convicted. The Yoo-Bybee memo was repudiated by the Bush administration, and the Obama administration has made efforts to curb detainee abuse and harsh interrogation. On the domestic front, former Chicago police captain Jon Burge was sentenced to 4 ½ years in prison in relation to charges that he oversaw and led the torture of (largely minority) suspects for years. On the other hand, torture’s public defenders and those who ordered it have prospered as well. Marc Theissen and Cliff May – a Bush speechwriter and a Catholic public intellectual, respectively – both wrote best-selling books claiming that torture was decisive in America’s defense against further terrorist attacks after 2001. John Yoo and Jay Bybee were both cleared of wrongdoing (though chastised for “poor-lawyering”), with Yoo returning to his tenured position at Boalt Law School and Bybee receiving a lifetime appointment to the 7<sup>th</sup> circuit court as a federal judge. Former President Bush proudly admitted to ordering torture – “Damn right” he responded when asked if he had ordered that Khalid Sheikh Mohammed be water-boarded.<sup>44</sup>

The GWOT will not be the last time torture is practiced by American officials, nor will it be the last time it is defended by American officials and intellectuals. An important question confronts us: What could the torture debate look like after dismantling the pro-torture discourse?

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<sup>44</sup> <http://www.cbsnews.com/stories/2010/11/04/politics/washingtonpost/main7021644.shtml>

Certain aspects of the argument I presented will remain tied to a specific historical moment – future torture debates may not be about torturing “terrorists,” “clean” torture techniques might not masquerade as “coercive interrogation” – but certain structures will likely remain the same. Torture – whether as a tool of aggressive policing or aggressive foreign policy – will be defended as a necessary means for keeping “us” safe.

The pro-torture position will still exist, just as triumphant photos of American soldiers in Vietnam exist, but it must be stripped of the discursive power – and thus the pseudo-moral justification – that it wields today. Without this power, the fictional images of heroic torture will not represent torture in the eyes of the public.

A new discourse within which torture opponents make their case must not cede arguments about torture being narrowly applied, about ourselves as inherently morally justified actors, or any of our contemporary torture proponents’ claims. In this new discourse, torture proponents cannot fall back on a “tragic necessity” argument that exculpates. Undoubtedly though, there will still be a pro-torture position. It will be important to immediately and uncategorically reject the enlistment of the state – whether through pardons of torturers, torture warrants or legally redefining torture narrowly – in their project. For those who cling to the notion of torture as an emergency response, they must be made to accept a position outlined by Camus in *Les Justes*. Camus’ assassins recognize their actions are wrong, and willingly accept consequences for evil actions (the assassination of the czar) they believe will bring justice for their people. The assassin cannot proclaim himself immune from the executioner. If the torture proponents insist that the security of the state necessitates torture, and that only an act as abominable as torture can save lives, then the torturer must be willing to forfeit his own freedom to test

this hypothesis. Such an assertion of necessity must, first and foremost, be treated as a hypothesis, not a statement of fact about a suspect in custody. However, more importantly, the state cannot exculpate those who torture *even if helpful information is gleaned from the torture*. If the acquisition of information is grounds for pardon, then this would perversely incentivize extreme torture to the point of using it to obtain false confessions – for if an interrogator begins to torture a suspect and his only way of avoiding prison is for the suspect to give up information, the interrogator will do anything and everything in his power to get the suspect to give up some morsel which can be cited as exculpatory evidence for the torturer’s good faith or instincts.

Most importantly, though, in a new discourse we must constantly explore other methods of gathering information and dealing with emergency situations. The torture debate causes us to overlook existing executive powers for dealing with emergency situations. In one of the 2008 presidential primary debates, Joe Biden (mistakenly answering the wrong question) said he would pardon a terror suspect in custody were he to reveal information that led to the dismantling of a weapon of mass destruction set to destroy a major American city. The pardon is a power already vested in the executive branch and is non-reviewable, subject to only the president’s discretion. Torture as a solution relies on the notion that pain extracts information – it conceals the fact that there are methods of non-coercive information gathering (beyond investigation) as well. To move beyond the pro-torture discourse we need to explore options such as this (in addition to reaffirming the important role of investigation and maintaining a commitment to an absolute ban on torture) and present them as solutions, while refusing to accept that torture may represent our last, best hope against destruction.