

The Torture Debate in America

Karen J. Greenberg (Editor), Cambridge University Press, 2005, 432 pp.

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There is an old Jewish joke about two Yeshiva students who go to the rabbi to settle a heated legal dispute over which they have been arguing all day. Max, the first student, offers cogent theoretical and pragmatic arguments that forcefully make his point. The rabbi listens carefully and declares, 'Max you are surely right!' Next the second student, Joshua, presents his side with vigour. He makes clear and concise counter-arguments and demonstrates how his position is supported by precedent. He argues with such passion and persuasion that the Rabbi, after listening closely, says, 'Brilliant arguments Joshua – you are clearly correct!' After the students leave, the rabbi's wife, who was listening in on the exchange, says to her husband, 'Are you crazy? Max and Joshua had conflicting arguments, how can you say both of them are right? When one is right the other must be wrong!' The rabbi thinks long and hard on this and finally says to his wife, 'You know what? You too are right!'

In a nutshell, this joke sums up how I responded to Greenberg's 'The Torture Debate in America.' This book offers a panel discussion, twenty articles and a number of relevant documents and memos relating to the legal debate on whether it is possible, necessary or desirable to legally and morally justify the State's use of torture. Readers who approach this book with no predetermined agenda will find persuasive and forceful arguments for a total and unconditional ban. They will also find convincing arguments for the use of torture in exceptional circumstances as an 'unpleasant means to a necessary end'(p. 2). [1] What is more, both sides of the argument are largely persuasive even though they arrive at mutually exclusive conclusions. But how can this be? Surely there must be an error here requiring more careful attention to the arguments on both sides, one that will reveal the right perspective and highlight the critical flaws in the other. However, to think along these lines is to misunderstand the nature of the problem facing a discussion on the permissibility or otherwise of torture. To insist on one view at the expense of the other is necessarily to violate deeply held moral intuitions and to take refuge in either a form of moral callousness or one of moral vanity, both of which do no justice to our difficult moral reality. When debating the problem of whether or not to use torture in the face of 9/11 style terrorism (and in some other rare cases), any proper decision is bound to leave those who decide, whichever way they do,

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with dirty hands. They are damned if they do and damned if they don't. Both sides of the argument are right and both sides are wrong. What is more, pointing out that this is a situation of ambiguity, uncertainty and legal and moral muddle is also right. It might be the best we can do under the circumstances. I shall return to this intriguing moral (and legal) conundrum later since it is first necessary to lay out what motivates it, the general concerns of the book, the main arguments offered, with the opposing conclusions reached. This accomplished, the claims I have made above will become less puzzling – at least that is my hope.

The torture debate in the USA post 9/11

Greenberg's anthology seeks to address an issue that, since the terrible events of 9/11, has become part of the public debate in the US: namely, what are the legal and moral implications of the State's use of torture to combat terrorism? This is a good collection of essays and documents which offer the arguments and views of, as she puts it, 'intellectuals, policymakers, lawyers, journalists, and others in the wake of the revelations of the "Torture Memos" [2] (p. 1). The recent revelations of prisoner abuse in US military prisons (Abu Ghraib being the most notorious), the practice of rendition [3], and the Presidential declaration that the Geneva Convention was inapplicable to al-Qaeda and Taliban prisoners, broke a longstanding consensus among the political elites concerning a taboo on state-directed torture. One can feel Greenberg's anguish in her introduction concerning this change in policy by the Bush Administration.[4] This reintroduction of justified torture (albeit in a limited way for very specific circumstances) feels like the opening of an old wound which was thought to have been healed for good. Now it is infected again, a suppurating sore, and Greenberg feels that it is necessary to clean this wound so that it can heal once more. Failure to do this, continuing the analogy, will lead to the infection of the entire body with all the deleterious consequences that this entails.

Greenberg seeks a remedy in an informed and serious public debate on whether such policies could indeed be legally and morally justified in a liberal democracy such as the United States, and if so, under what circumstances. Greenberg's central aim in compiling this collection of papers and memos is to bring the debate that until now has 'taken place largely outside of public view' into 'the public consciousness, to open up to a wider audience learned considerations on what it means for a nation to know that torture is being conducted in its name' (pp. 1-2). This claim is slightly puzzling since it is hard to have missed the robust public discussion in the United States and other liberal democracies on the permissibility and implications of the

State's use of torture. Although this collection of essays reflects the views of eminent persons well placed to comment on this topic, the arguments and perspectives offered are not new or unfamiliar to the American public. An effortless search for similar materials will turn up articles in philosophy and politics journals, Op-Eds and debates in leading magazines and quality newspapers[5], as well as heated and vigorous debates on news and television social issues programmes between respected public intellectuals such as Harvard legal scholar Alan Dershowitz and Human Rights Watch director Kenneth Roth.[6] Entertainment networks also frequently use the moral and legal dilemmas of whether or not to torture to underlie some of their most successful and popular programmes.[7]

However, Greenberg insists that the public response has been apathetic and the reason, she surmises, has less to do with a lack of concern than with 'confusion about how to address the issue' (p. 1). What is more, the practice of torture by the US authorities post 9/11, Greenberg tells us, is not due to the potential evil within all human beings but rather to a failure of liberal democratic citizens to trust that the law can do the job of combating this new threat from fundamentalist terrorism without breaking the taboo on torture. Greenberg clearly thinks torture is unjustifiable for any reason and she hopes that this collection of essays will play a small but important part in employing legal reasoning to nip in the bud any reintroduction of legal torture. She points out that the legal process (rather than a liberal ideology or philosophical and moral argument) made the use of torture unnecessary. There was a widespread realisation that the proper gathering of evidence, combined with the specific roles of prosecutors and juries, enabled a reasonable (and often more trustworthy) judgment on the guilt or innocence of those accused, and allowed the 'law to trump torture' (p. 6). Torture rightly came to be seen as not only cruel and immoral but also as a hindrance to achieving truth and justice. Hence Greenberg's choice of contributors, who are (bar one, a journalist who covers security issues for the Washington Post) legally trained and currently practising as lawyers and/or as academics attached to prestigious law schools. She hopes that contemporary legal minds 'can move us forward to rediscovering a comfort with nuance, with uncertainty, and with those abilities of men to determine, without torture, the facts surrounding those who would endanger us as individuals and as a nation.' (p. 8)

I am deeply sceptical that this (or any other) collection of essays can actually achieve such a goal in the way that Greenberg contends the process happened in the past. The reason is simply that we face a very different problem. While the legal process may have contributed to the prohibition of torture practices in the past, it did so

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within a context of offering a better process of dealing with commonplace and routine cases of criminal justice. What the United States and all liberal democracies face post 9/11 is a situation of extremity, where all the available options open to Governments in the face of horrific terrorism pose terrible moral and legal dilemmas. Perhaps, then, it is more accurate to say that this collection of essays rehearses arguments (in some cases rather well) from a largely legal perspective that both endorse and add to the recent parallel philosophical and political debates. [8] Certainly, the essays taken collectively do provide the sense of uncertainty and nuance sought by Greenberg as arguments flow back and forth, for and against (limited) torture, leaving the reader with the sense of an insoluble legal and moral conundrum if they eschew dogmatism or absolutism. This rightly reflects what I take to be the core problem. There can be no definitive answer to the question of whether torture could ever be justified, since our intuitions coupled to careful reasoning tell us both that torture is a terrible evil never to be used, and that it must be employed in a very small number of terrible situations as an abhorrent yet necessary means to a worthwhile end. In short, some situations make dirty hands unavoidable, and the post 9/11 fundamentalist terrorist threat may be one of them.

Three themes

As Greenberg's title for her anthology makes clear, the book is concerned with the debate on torture in the United States. The collection does not engage directly with the 'nuts and bolts' of moral or legal arguments for or against torture per se. The authors in the book have no interest in debating why exactly torture is so terrible and is rejected by all civilised persons. This position is taken as given even though there are many puzzling moral and philosophical points to contemplate on this topic. [9] Together with the horrors of genocide and slavery, the use of torture falls under the doctrine of *jus cogens*, practices to be prohibited by principles of international law which are so fundamental that no derogation from them is permitted even in times of war or national emergency. Torture, then, is a practice that is (or should be) anathema to any civilised person and remains utterly unthinkable as an accepted legal tool of any liberal democracy to further its goals, no matter how noble and worthwhile. This undertaking is confirmed in United States domestic law (such as the Eighth Amendment to the constitution which prohibits cruel and unusual punishment), and in several international conventions to which the United States is a signatory. [10] So strong is the taboo on torture that in a liberal democracy prohibition of torture under any circumstances rightly stands as the default position against which any deviation faces the heavy onus of justification. What

worries Greenberg (and some of the other contributors in this collection) is that the justifications against the default position are now being made, not by philosophers, social commentators, and journalists, but by (what Luban and others refer to as) 'torture lawyers' (p. 52) – effectively constructing a justified torture culture within the United States when they, in particular as practitioners of the law, should be vigorously arguing for the opposite.

Consequently, Greenberg's collection of essays investigates three inter-related general themes. Some of the authors focus on one aspect to the exclusion of others but most either allude to or directly address all three. Firstly, there is the question of whether it could ever be justifiable for a liberal democratic society governed by a rule of law to use torture to obtain information to protect itself from terrorist attacks. Luban directly tackles this question when he examines the issue of whether there could ever be a legitimate 'liberal ideology of torture' (p. 36ff). The focus here is on the one rather rare set of circumstances where the application of torture could be justifiable, namely, cases of 'Forward Looking Interrogational Torture'[11] exemplified by the 'Ticking Bomb Scenario.' Many of the contributors spend considerable time and space examining the merits of this scenario since its success or otherwise in justifying Forward Looking Interrogational Torture is seen as crucial to both advocates and critics alike.

Secondly, there is the theme of whether the existing international protocols and laws prohibiting torture apply to detainees who are members of failed states or sub-national terrorist organisations with international reach. Although the phenomenon of brutal terrorisms is not new, there is great concern that the particular kind of menace represented by militant Islam is significantly different. Certainly this asymmetric conflict between nations and sub-national terrorist groups was not envisaged by the standing international protocols such as The Hague and Geneva conventions, or the more recent United Nations Convention Against Torture. These protocols sought to institutionalise the humane treatment of captured soldiers, reduce civilian casualties, and rely on a beneficial principle of reciprocity between warring nations such that these conventions would be rational and efficacious for combatants on all sides of the conflict. However, the tactics, motivation, and aims of terrorist groups such as al-Qaeda necessitate a re-examination of the international protocols. Organisations that intentionally seek to target and cause thousands of civilian deaths, randomly torture and kill prisoners for propaganda and other purposes, and wilfully violate every constraint of humanitarian law present a new and terrible threat to liberal democracies. When

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this type of organisation could obtain and use weapons of mass destruction, the need to obtain information from captured operatives or sympathisers takes on a new and urgent perspective. This deep concern, some of the authors in this collection argue, ‘compels us to ask rationally whether torture is ever permissible’ (McCarthy, p. 99). However, those who support the status quo remain unconvinced and vigorously argue that any legal space for state torture, whatever the circumstances, is counter-productive, dangerous, and morally and legally unjustifiable.

The third theme focuses more directly on the required role and responsibility of lawyers themselves in developing arguments for the use of torture post 9/11. Several authors question whether the government lawyers who wrote the ‘Torture Memos,’ specifically Assistant Attorney General Jay Bybee and White House Council Alberto Gonzales, acted appropriately, and argue that they should be subject to professional sanction. These ‘Torture Lawyers’ are accused of reneging on their primary responsibility of analysing the legal and policy issues for the Government by offering arguments to ‘protect those involved in coercive interrogation from potential prosecution under US law.’[12] Government lawyers, they insist, ‘now know sin’ since they used their ‘creative energy to legitimate previously illegitimate forms of interrogation and captive treatment’ (p. 241). Needless to say, this rather strong and emotive position is robustly contested by others within the anthology, who insist that the job of Office of Legal Council (OLC) which produced the ‘Torture Memos’ is to answer legal questions as posed by the executive. They did just this and the criticism of these lawyers’ legal ethics is ‘demonstrably ill-informed and without merit’ (p. 229).

These three themes are, of course, inter-connected. The contributors to this volume tend to take one of two possible positions. Firstly, there are those who flatly reject the possibility of a ‘liberal ideology of torture,’ and so, ipso facto, they also reject the abrogation of domestic laws and international conventions concerning the treatment of prisoners, even if using torture might prevent future massive civilian casualties. What is more, this position sees the task of lawyers as primarily to support and defend the complete prohibition of torture. Any attempt to develop or suggest arguments that provide loopholes in this total ban is at best irresponsible, and also carries the risk of violating legal ethics by providing cover for immoral and illegal actions by state actors. The second position seeks to re-evaluate the legal and moral status quo due to a serious concern about national security. It raises the pressing question of how far combating this threat allows for actions such as (limited) torture of captives who may have vital information that could avoid a repeat of the

events of 9/11. If there is a legal space for some form of torture then the question of whether to adjust domestic law and violate international protocols becomes apt. Furthermore, the role of the OLC is quite properly to advise the President of the United States to what extent and under what circumstances and to whom it would be legal to engage in Forward Looking Interrogational Torture.

What both general lines of argument miss, it seems to me, is that neither position is persuasive or ultimately realisable in practice. A total taboo, under any circumstances, is simply unrealistic and in some circumstances a dereliction of duty by those in power with the duty to protect citizens from harm. On the other hand, arguing for an ideology of torture opens up a Pandora's Box which is better kept tightly closed. Torture is an unequivocal evil which good persons must reject, and the effect of legalising even a limited version (by for example 'torture warrants') is sufficiently corrosive of the legal and moral fabric of liberal societies that doing so is a 'stunningly bad idea.' [13] Consequently, no neat or untainted path is possible, leaving us with messy compromises that are difficult and less than satisfactory, but perhaps the best that one can do when all is said and done. I shall return to this point later when I elaborate this dirty hands position, but first it is necessary to examine the arguments for and against developing a 'liberal ideology of torture,' which essentially means evaluating the now (in)famous 'Ticking Bomb Scenario.'

Liberal Torture and the Ticking Bomb Scenario

A liberal democratic state ought to be entirely incompatible with torture of any kind. Domestic anti-torture laws and membership of international protocols against torture ensure that no individuals or organisations (least of all the state itself) can practice torture without prosecution and severe punishment. What is more, liberal democracies such as the United States are right to strongly condemn those states that practice torture, and to offer asylum and protection to foreign individuals who are subject to or threatened with torture in their own countries. Given this, what could possibly bring the question of whether to torture back onto the agenda, and prompt respectable lawyers, academics, and politicians to call for a rethinking of this taboo? The answer, in short, is a deep concern about a new form of terrorism which potentially threatens the lives of thousands of citizens and even national security itself. [14] The lesson post 9/11 is that a form of militant Islam, one that has 'defined deviancy right down to the bottom' (p. 99), seeks to kill indiscriminately as many civilians as possible and by any means available. [15] The sub-national shadowy world of this kind of terrorism leaves the state's conventional

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armed forces and police at a distinct disadvantage. For example, al-Qaeda doesn't operate openly from a particular country (at least not since the Taliban were defeated in Afghanistan), and melts into the local population (often recruiting those disaffected members within it). They are skilled at using the protections of criminal law to prevent prosecution while they continue to plan mass murder to further their cause. In the battle against such groups, the most important asset to obtain is not 'territory or treasure but intelligence' (p. 99). What is more, this intelligence may be all that stands between catastrophic attacks with hitherto unimaginable destructive weapons and the mass casualties, fear and terror that would result. It is very hard to obtain this vital information, the argument goes, through the standard criminal investigations if your enemy is fanatical, cares little if he lives or dies, and is protected by laws that are designed for situations where there is no need to get information quickly to prevent the deaths of many innocent people.[16]

If one accepts that the above concern is immediate and real then those charged with protecting the lives of US citizens are compelled to question the taboo about torture and, if necessary, ask under what circumstances, to what degree, and on whom could the security establishment utilise such methods to prevent terrorist attacks and save civilian lives. In short, it becomes necessary to begin 'thinking about the unthinkable'[17] and developing a 'liberal ideology of torture' – despite the initial observation that liberal democracies ought to be incompatible with any form of legalised torture. The key argument that is standardly used by the proponents of some form of necessary state torture is the now (in)famous 'Ticking Bomb Scenario' (TBS). This example neatly brings together 'in a single, mesmerising example' (p. 44) the key arguments for developing justified torture in a liberal democratic society. David Luban (who is vehemently opposed to any change in the *status quo* and thinks the TBS is based on assumptions that amount to intellectual fraud) insists that this 'jejune example has become the alpha and omega of our thinking about torture' (p. 44). If the TBS fails to persuade or is shown to be faulty, this leaves the status quo intact and those who oppose it without any persuasive arguments to the contrary. This accounts for why the TBS has been so passionately argued over by philosophers, legal theorists, social commentators and in the blogosphere. [18]

The TBS is usually presented in the following way. Consider the case where a President or Prime Minister of a liberal democratic country is asked to authorise the torture of a suspected terrorist in order to make him reveal the location of a powerful bomb. This bomb is hidden in a heavily populated area such as downtown New

York or London, and the police have strong credible intelligence that its detonation is imminent and that it would cause mass civilian casualties. This example can be tweaked in a number of ways to up the ante, so to speak, to make the example yet more dramatic. For example, the bomb could be a nuclear device and the person to be tortured is not the terrorist himself (he is inured to such treatment) but the terrorist's child. These modifications seek, firstly, to forestall those who might argue that accepting some casualties from a bombing is the cost of civilised and moral behaviour and always preferable to engaging in torture. It requires a rather fanatical devotion to moral principles to insist that no violation is permitted even at the cost of tens of thousands of lives. Secondly, by making the terrorist's child rather than the terrorist himself the torture victim, this example removes any concern that the victims of torture may be deserving of such treatment due to their previous or intended actions. However whatever the modifications, the core argument adopts the following formula. 1. The security forces have captured a terrorist who knows of a bomb which will detonate in the very near future 2. If the terrorist can be forced to reveal the whereabouts of the bomb the detonation can be prevented 3. The only way to achieve (2) is to use torture and thereby save many innocent civilian lives.

Consequently, the TBS reveals a situation where the absolute prohibition against torture is shown to be wrong and opens the way to developing the conditions under which torture can be legally and morally justified in a liberal democratic society.

The appeal of the TBS for advocates of (limited) torture arises for two important reasons. Firstly, it challenges the powerful intuitive revulsion to torture by situating it in the context which evokes another equally strong intuition: the need to protect the innocent from harm. Secondly, the TBS highlights the cost of a total ban and challenges those who want to maintain the *status quo* to justify the possibly catastrophic consequences of not torturing in some situations. It is all well and good to prohibit torture when there are alternative methods of protecting the public but what if there is no alternative available? Do the prohibitionists have credible arguments to justify doing nothing effective to prevent the suffering and death of innocents? What is more, if opponents of torture admit that the TBS does justify torture in some terrible situations, then the absolutist position is broken and a debate about a 'liberal ideology of torture' becomes necessary and appropriate. There surely will be disagreements about when and how much and who to torture, but the taboo against torture will effectively have been defeated. The TBS begins to look even more like a 'no-brainer' when the prohibition on torture covers almost all forms of physical and psychological pressure. The United

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Nation's 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' maintains that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.' It continues in Part 1, Article 1, to define torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. [19]

This article is interpreted by Human Rights Watch (HRW) (and this is not atypical) as prohibiting all forms of physical coercion 'even if it is slight or moderate' as well as acts 'that cause mental suffering – e.g. through threats against family or loved ones.' [20] Even the painless but forcible administration of a 'truth serum,' such as sodium pentothal, is prohibited because it would constitute inhuman and degrading treatment by diminishing the terrorist's mental capacities. HRW continues by insisting that there are no circumstances where these prohibitions can be justifiably broken, not even in cases of extreme danger to national security, or during public emergencies. However, for most reasonable people facing a TBS these wide-ranging restrictions seem at best overblown, at worst a form of legal suicide. It seems perverse that a person's right not to be caused mental or physical pain (even if only for a brief period) really trumps the right of hundreds, perhaps thousands, to be protected from death and injury. What is more, the kind of torture that is argued for by those who advocate its use is of a very specific kind, namely Forward Looking Interrogational Torture. There is no truck with torture for sadistic pleasure or punishment or for the purpose of terrorising an individual and his supporters for their particular views or possible future actions. Forward Looking Interrogational Torture is exclusively applied for obtaining information vital for saving lives. Torture remains an evil to be loathed and avoided but, in the face of a TBS, it becomes necessary, even morally obligatory, in order to prevent an even greater evil from obtaining.

Arguments against liberal torture based on the TBS

There can be no doubt that the TBS poses a considerable challenge to those who advocate a total ban on torture. This is well recognised among abolitionists so it is no surprise that the TBS comes under considerable scrutiny in Greenberg's collection. Two essays in particular, David Luban's 'Liberalism, Torture, and the Ticking Bomb' (pp. 35-83) and Stephen Holmes's 'Is the Defiance of Law a Proof of Success? Magical Thinking in the War on Terror' (pp. 118-35), devote considerable space to undermining the TBS by insisting 'that it is the wrong thing to think about' (p. 44). Both Luban and Holmes are adamant that to decide policy or legislation to accommodate such imaginary 'far-fetched scenarios' (p. 128) would be misguided and foolhardy. Luban's and Holmes's absolutist claim that 'torture admits of no justification' is generally backed by four different arguments which are worth examining more closely. Just as with the arguments for Forward Looking Interrogational Torture, the arguments against tend to be persuasive at first glance but on closer scrutiny fail to land a knock out blow for the abolitionists.

The deontological argument

The first sort of argument, let us call it the 'deontological argument,' points out that torture, as with murder, assault, rape etc., violates a person's integrity and dignity, and fails to treat him/her as an end in themselves. This right to be treated with respect remains in force even if a person has done (or is about to do) terrible things. However this argument is rather weak, especially when facing a TBS, unless one is prepared to accept that certain rights are inviolable no matter what the circumstances. Most reasonable persons rightly do not hold this view since it requires, among other things, a rigid formulaic account of morality that sits uncomfortably with our moral reality. [21] After all, most reasonable persons do think that it is morally and legally justified to kill in self-defence, and killing is surely worse than a few hours of, for example, non-lethal torture. In short, the deontological view, if it takes the absolutist stance *that fiat justitia, pereat mundus*, ignores the need to mediate between conflicting rights and to take into account the possible catastrophic consequences of certain actions (or failures to act). Most sophisticated deontological moral theories do acknowledge that consequences matter and once this is accepted then TBS becomes a situation where torture might be justified.

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The ticking bomb as misleading hypothetical scenario

The second argument is more subtle and *prima facie* persuasive. It doesn't deny that in the case of TBS torture might be justified, but it strongly denies that such a scenario could ever obtain in the real world in the way it needs to be set up in order to justify torture. Either the TBS is an interesting thought experiment for the delectation of philosophers and their ilk with no practical application, or it conforms to reality and immediately sacrifices its ability to justify torture under such circumstances. Here is the genesis of Luban's and Holmes's (among many others) [22] contention that the TBS is neither realistic nor representative of what actually faces authorities in the real world. However, this criticism doesn't hold up under scrutiny. Firstly, there is no question that real life examples of TBS do occur. Perhaps, and thankfully, not as frequently as advocates of justified torture tend to suggest, but that they do arise is undeniable. Consider the following case reported in the Israeli newspaper Ha'aretz.

A suicide bombing was narrowly averted in Haifa (Israel) yesterday morning when the would-be perpetrator was arrested shortly before carrying it out. The drama ... began when police, acting on specific intelligence information about a planned attack in Haifa, arrested a number of Palestinians who had been staying in the city illegally. One 18-year-old from Samaria was arrested ... and when questioned, he admitted that he had hidden explosives for use in a suicide attack [and] directed [police] to an abandoned building where they found a belt containing several bombs that the Palestinian had planned to strap to his body and set off.... [23]

It is not clear from the newspaper report what techniques or form of questioning was used to elicit the information that prevented a suicide attack, but given the time scale and possible disastrous consequences of not obtaining this information, here we have a genuine actual example of a TBS. [24] What is more, a TBS need not occur only in cases of terrorism where the lives and safety of hundreds are at stake. The 'Dirty Harry' scenario [25] is another situation where the use of torture may be justified. Consider this example raised by Richard Posner:

Suppose your child has been kidnapped. The kidnapper is caught, reveals that the child is locked in an underground vault, explains that the supply of oxygen in the vault is limited, and refuses to indicate the whereabouts of the vault. [26]

It is important to make two observations here. The scenario above may be very rare but it is certainly not unrealistic or impossible. Recall that the abolitionists reject the use of torture under any circumstances, even those that are rare and extraordinary. As Luban points out (p. 44), once the prohibitionist admits to torture in at least one situation, then 'she has conceded that her opposition ... is not based on principle.' And once this principle can be breached 'all that is left is the haggling about the price.' 'She's down in the mud with them, and the only question left is how much further down she will go.' [27] What is more, it seems to me that no reasonable person would consider the use of torture under these circumstances unacceptable if there were no other method of extracting the whereabouts of the vault from the kidnapper. This is not due to a callous disregard for the rights of the kidnapper (or a sudden new conviction that torture isn't so bad after all) but rather the result of circumstances where it is just and fair that the rights of the kidnapped child take precedence. This is analogous to the well-known and accepted situation of self-defence where the attacker's right not to be harmed weighs less than the rights of the attacked person. [28]

It is at this point that the prohibitionist changes tack. Luban, for example, explains that he doesn't think that the TBS is 'completely unreal' but rather that 'in a world of uncertainty and imperfect knowledge, the ticking bomb scenario should not form the point of reference' (p. 46). The TBS offers a picture that 'bewitches us' when the real debate isn't choosing between the torture of a terrorist and the lives of innocents but rather 'between the certainty of anguish and the mere possibility of learning something vital and saving lives' (pp. 46-47). It is certainly true that the TBS is very often framed in what seem to be unrealistic certainties: the authorities know that there is an explosive device whose detonation is imminent; that the captured person (terrorist?) can reveal its whereabouts; that torture will be *effective in forcing the captive to speak* the truth (rather than mislead and delay by spinning a plausible story long enough for the bomb to detonate); that the situation necessitates torture since *there are no alternative ways of obtaining* this vital information and so on. What is more, the TBS says nothing about who to torture (the terrorist, his family, all possible suspects etc.), for how long (hours, days, months), or the kind of torture to be used (non-lethal torture-lite or medieval practices that result in irreversible physical and psychological damage) [29]. In short, since the TBS relies on claims about the situation which are tentative, problematic, and often impossible to verify it is far too easy to slide down the slippery slope where torture becomes widely sanctioned and commonplace. [30]

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However this shift in tactic, from denying the reality of the TBS to one of claiming that it cannot be a point of reference is also not persuasive. Firstly, the sanctioning of torture in the TBS does not necessarily lead to either the acceptance of torture in general or its widespread practice. Killing in war is permitted (albeit in specified contexts and within certain rules) without accepting that killing in general is permitted. As Richard Posner points out, in liberal democratic societies that have used torture in the past, Britain against the IRA, France in the Algerian War of Independence, and Israel against the Palestinians, there has not been a descent 'into barbarism.' 'Civilised nations are able to employ uncivilised means ...without becoming uncivilised in the process.' [31] This doesn't justify the use of torture but it does indicate that its limited use need not undermine the liberal democratic nature of the society. Secondly, different cases of TBS give different levels of conviction about whether the threat is sufficiently serious to necessitate torture. The requirement that the TBS only justifies torture if there is complete certainty about the existence of a bomb, or that the person captured is the right person etc., is too strong. If it were never permitted to cause harm to others unless their intentions or guilt were known one hundred percent, then there would no legitimate acts of self-defence that harmed others or even punishment of those who are erroneously judged to have broken the law. In all these cases the relevant criterion is reasonable certainty or reasonable doubt. So it is with the TBS. The authorities need to have a reasonable belief, formed in good faith, that a ticking bomb does exist, that the prisoner has knowledge of its whereabouts, that there is no other method of extracting this information in the time available, and so on. And the question of by whom, how much and for how long torture needs to be employed depends, again, on a judgment about the seriousness of the threat being faced. If the reasonable belief is that the bomb is a nuclear device that could kill and injure tens of thousands, this will elicit a different judgment from a belief that the bomb or threat is on a far lesser scale. The devil is in the detail and consequently there can be no clear general rule for how to make this judgment. This is one of the reasons (which I return to later) why torture even if necessary and justifiable should never be legalised even in extreme and rare cases such as the TBS.

The consequentialist argument

Abolitionists employ a third kind of approach, a consequentialist argument, to show that torture can never be sanctioned under any circumstances. It is a simple but powerful argument that seeks to show that the gains of torturing cannot outweigh the costs. Proponents of this argument can take different tacks to support their

claims that costs always outweigh the benefits. The first approach is to claim that torture confers no benefits because it is a manifestly ineffective way of obtaining the required information in the TBS. In short, torture doesn't work, especially given the short period available to get the information on the ticking bomb's location. If the terrorist is sufficiently fanatical and determined he could either delay or provide plausible but false information to mislead his interrogators for enough time to allow the bomb to detonate. Consequently, since the rationale for using torture, as the only effective way of obtaining vital information that will save countless lives, turns out to be false, the TBS loses its value as the situation where Forward Looking Interrogational Torture can be justified.

However, the question of whether torture works is an empirical question and it is far from certain that it is ineffective in every case. If it were, and even the most ardent abolitionists don't make this claim, then the moral and legal debate on whether to allow torture would be otiose. There could never be, by definition, a genuine case of Forward Looking Interrogational Torture, as torture would always be for the other uses (terroristic, punishment etc.) that everyone agrees are taboo. What is more, even if it were true that Forward Looking Interrogational Torture is generally unreliable for obtaining useful actionable information in real time, this does not provide a telling blow against the use of torture itself. It is possible (indeed very likely given their rarity and extremity) that the cost/benefit analysis in a particular case of TBS still favours using even unreliable Forward Looking Interrogational Torture as better than doing nothing. If faced by a possible nuclear Armageddon, even a vanishingly small chance of stopping this catastrophe by using torture may be justified.

At any rate, there is much evidence to suggest that the blanket claim that torture is largely ineffective and unnecessary is simply false. [32] The testimony of the former Israeli chief interrogator, Michael Koubi, in an interview with Bowden seems to be the more accurate assessment.

'People change when they get to prison,' Koubi says. 'They may be heroes outside, but inside they change. The conditions are different. People are afraid of the unknown. They are afraid of being tortured, of being held for a long time. Try to see what it is like to sit with a hood over your head for four hours, when you are hungry and tired and afraid, when you are isolated from everything and have no clue what is going on.' When the captive believes that

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anything could happen – torture, execution, indefinite imprisonment, even the persecution of his loved ones – the interrogator can go to work...

Religious extremists are the hardest cases. They ponder in their own private space, performing a kind of self-hypnosis. They are usually well educated. Their lives are financially and emotionally tidy. They tend to live in an ascetic manner, and to look down on non-believers. They tend to be physically and mentally strong, and not to be influenced by material things – by either the incentives or the disincentives available in prison. Often the rightness of their cause trumps all else, so they can commit any outrage – lie, cheat, steal, betray, kill – without remorse. Yet under sufficient duress, Koubi says, most men of even this kind will eventually break – most, but not all. Some cannot be broken. [33]

The consequentialist argument, however, need not rest with a cost/benefit analysis that confines itself to the specific events of a particular TBS. Abolitionists insist on adding the long-term deleterious effects on the moral and legal fabric of the society to any cost/benefit calculations. The true cost of allowing torture, even in limited cases, must balance the possible murder of innocent victims should the bomb detonate, against i) the possibility of torturing innocent persons, ii) the moral coarsening of the torturer and iii) the possible corruption of key social institutions that are inevitably complicit with this practice. The medical profession, police, legal authorities, scientific community all begin to contribute in important ways to ensure the effective use of torture; and they do this at a high cost to their professional principles and image within the society. [34] The long-term system consequences of practicing torture do indeed change the cost benefit calculus but, again, this is not a persuasive argument in the face of a TBS. The assumption driving those who advocate the long-term consequentialist argument is that the moral calculus will always end in a repudiation of torture. But this need not be the case, especially if a terrorist intends exploding a nuclear device or using some other weapon of mass destruction.

Again, the attempt by abolitionists to deliver an unanswerable argument prohibiting torture under any circumstances is unpersuasive especially if the torture is used only in rare and exceptional cases where no effective alternative is available. But can torture be limited to one-off very rare cases once the taboo is broken and the door opened? This leads to the fourth and final type of argument against the use of torture even in the face of TBS.

Torture as practice

Luban argues that among its other faults, there is an insidious error built into the very idea of TBS: namely, that it assumes a rare situation where the authorities use torture as a one-off last desperate attempt to prevent a terrible catastrophe. However, 'in the real world of interrogations, decisions are not made one-off' (p. 47). It is a world of 'policies, guidelines and directives,' 'a world of *practices*, not of ad hoc emergency measures' (p. 47). This means that if torture were to be legalised for use in a TBS, then it would require an official 'culture of torture.' This in turn entails the creation of a cadre of trained torturers (with the appropriate support group) and a set of bureaucratic rules and regulations for delimiting the boundaries of when, how and on whom they can practice their skills. Dershowitz's call for 'torture warrants' to be granted only by judges seeks to provide some protection from the possibility that brutalised case-hardened torturers do not overstep the line. [35] As Luban correctly points out, the nature of bureaucracy and our knowledge of social psychology ought to make us very suspicious of any claims that the legal practice will not be abused (pp. 48-51). All systems are open to misuse and, as history has amply demonstrated, when a society lifts the taboo on torture, ordinary people begin to act in cruel and horrifying ways especially if they believe, or are told, that the end justifies the means. [36]

Against legalisation

It is important to reiterate that none of the arguments above categorically excludes the justifiability of torture in a TBS, at least not from a moral point of view. I return to this point below in the discussion of 'dirty hands,' but it seems to me that the 'torture as practice' argument does show that the legalisation of torture in cases of the TBS, with or without 'torture warrants,' is a bad mistake. The reasons are twofold. Firstly, it isn't necessary to institutionalise the use of torture for what are, in the end, very rare and extreme cases. The torture that was revealed at Abu Ghraib had nothing to do with the TBS. Such behaviour occurs, as many contributors to Greenberg's collection rightly point out, when the authorities are not unequivocal about the prohibition of abuses and allow a permissive environment where low-ranking soldiers are able to fulfil cruel and horrifying fantasies. It is for this reason that the blame for what occurred in Abu Ghraib ought to have reached the highest levels of the US military – the Secretary of Defence himself. Similarly, any torture that took place or is still occurring at Guantanamo cannot be excused or justified as cases of the TBS. Secondly, institutionalising torture by legalising it has two very adverse effects: it brutalises the law and it undermines the message that torture

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is an unmitigated evil that needs to be eradicated everywhere and for all time. In liberal democratic societies the law must not be perceived as cruel or arbitrary, but rather as a guarantee of human dignity for everyone. This must be so even when the state employs violence to enforce legislation or apprehend criminals. The law must uphold human dignity even when the state faces danger and uncertainty since it stands as the central bulwark between civilisation and barbarism. Torture, by contrast, always aims to destroy a person's dignity and sense of self and to this extent it is forever incompatible with just laws. What is more, if torture is legally sanctioned, even if for very rare cases, this becomes an important symbolic setback in the recent worldwide battle to eradicate human rights abuses. In short, legalising torture under any circumstances is folly and this message rightly comes through loud and clear in Greenberg's collection.

Yet even these strong reasons never to legalise torture do not sit comfortably in 'the real world of war and national interest' (p. 276). The TBS, rare and extraordinary as it is, is the one situation where the state cannot refuse to torture if the cost of doing so would be catastrophic. This is why McCarthy, a contributor to Greenberg's collection, endorses Dershowitz's idea of 'torture warrants.' While both men deplore torture and wish for its eradication, they also acknowledge that it will go on, and needs to go on, in a world where authorities faced with protecting citizens must sometimes choose between terrible evils. To deny this is hypocritical, dangerous and ironically increases the use of torture. The task of lawyers and moral theorists is to deal with 'real-world outcomes rather than with proclaimed outcomes, whether cynical or pure-hearted' (p. 108). As McCarthy puts it:

By imposing an absolute ban on something we know is occurring we promote disrespect for the rule of law in general and abdicate our duty to enact tailored and meaningful regulations. Both of these failings have the juggernaut effect of increasing the total amount of unjustifiable and otherwise preventable torture. (p. 108) [37]

The role of the responsible lawyer, then, is to provide legal guidelines that will remove the hypocrisy by placing the practice of torture under strict judicial supervision which is transparent and accountable. From this perspective, the lawyers at the Office of Legal Council (OLC) were not being irresponsible, unethical, or acting unprofessionally, but were seeking to clarify the legal boundaries when faced with the real-world need to use torture to protect the citizenry.

Doing wrong to do right – the case for dirty hands

It is necessary to pause and take stock. By examining the question of whether it could ever be morally and legally justified to practise torture, we are left with a number of clear, strong, persuasive, yet contradictory claims.

1. Torture is a palpable evil and must be morally and legally taboo in all circumstances.
2. Torture can be morally justified in some rare and extreme situations – notably the TBS.
3. Torture must never be legally sanctioned under any circumstances.
4. Torture must be legally sanctioned in cases of TBS with suitable protections such as ‘torture warrants.’

This brings us full circle, back to the Jewish joke at the start of this review. All the claims are right (or at least highly plausible), but this is impossible since they are also mutually incompatible. My guess is that most readers will think either that (1) and (3) are true while (2) and (4) are false (or vice versa). If this is the case then what follows will seem not only dangerously wrong but incoherent and specious. Nevertheless, as I have tried to show, all four claims are plausible, defensible and offered with the laudable motive of seeking to eradicate or minimise the use of torture. It seems, then, worth examining a third, more nuanced, perspective, which is based on insights from a ‘dirty hands analysis’; one that I contend better accommodates the turmoil and difficulties with using torture in real-world situations.

A dirty hands situation arises for moral persons because of the immoral and evil acts (or projects) of others. In the TBS, for example, moral persons are faced with choosing between two evils; such that whatever they choose to do the result will be the violation of a much-cherished moral principle. The situation is such that moral persons find that they are stained or polluted by having to do wrong in order to do right. The key insight here is that it is possible for an action to be justified, even morally obligatory, yet nevertheless also wrong. [38] What appears to be incoherent and paradoxical occurs because, firstly, our moral reality includes a range of conflicting demands on our practical moral reasoning, each demand backed by credible independent claims which can sometimes pull in incompatible directions. Secondly, when reaching a judgment on how to act in a situation of severe moral conflict, the violated moral precept is merely overridden rather than negated. The action ‘remains as a disvalue even within that justified, perhaps obligatory whole – a disvalue which is still there to be noted and regretted.’ [39]

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The terrible dilemma of whether or not to use torture in the TBS is a classic 'dirty hands' scenario. Torture, considered in isolation, is an unmitigated evil to be avoided at all costs. However, when faced with a context where the choice is between appalling options, the least terrible may be torture. And sanctioning something as terrible as torture leaves a moral stain, one that is not easily erased and which affects what one has become and is perceived as by others. The responsibility and duties of political office, as Max Weber famously argued, require that they conduct themselves according to an 'Ethic of Responsibility' (rather than an 'Ethic of Ultimate Ends') and this comes at a price. [40] Consequently, the answer to the question of whether it is morally justified to use torture in the face of a TBS is both yes and no. The answer is paradoxical and unlikely to satisfy theorists who seek clear unambiguous answers to moral questions. However it seems to me that the dirty hands approach is the one that most reasonable people would endorse and that responsible politicians and security services ought to follow. It is always morally wrong to use torture but in some cases of the TBS it is also a moral duty to practise it – one must do wrong in order to do right! In these rare and extreme circumstances, there is no escaping getting dirty hands.

The issue of legalisation, though slightly different from the moral position, rejects both the neat and easy abolitionist position and Dershowitz's 'torture warrants.' Given the rarity and extreme circumstances of a TBS and the hugely deleterious consequences of institutionalising torture, the interrogator may act outside the legal framework and use torture but must then face legal charges and justify his actions ex post. He will need to convince a judge and jury that the situation was one that allowed for no other solution and that the torture used was the minimum required to obtain vital information that saved lives. Gross refers to these actions outside the law as 'official disobedience' which can be justified ex post by convincing the public (through the courts) that violating the law was the only appropriate way of effectively confronting an extremely grave national danger or threat. [41] This is a stringent and difficult argument to make and serves to ensure that the use of torture is very rare and only resorted to when really necessary. It also serves to reassure the public that the actions of the state are not above the law even when the agents of the state act to further the public good under extreme conditions. If those who use torture fail to make an adequate case for its necessary use, they will face criminal charges and an appropriate punishment for breaking the law. What is more, the need to justify each and every breach of the law will also prevent the setting of a precedent that may lead to the institutionalisation of torture in any form. The legal taboo on torture will remain intact but in certain extreme circumstances, breaking

the law can be retrospectively justified and excused as necessary for public safety. This is certainly not a new or novel perspective. A number of moral theorists have advocated this position as the only way to reconcile the fact that civilised nations do not engage in torture yet may have to do so *in extremis*. [42]

Final comments

A key motive for compiling this collection, Greenberg tells us, is that the American public is worryingly apathetic about engaging in a debate about torture despite the recent revelations from Abu Ghraib, and the publication of the ‘Torture Memos.’ But perhaps the public is more sophisticated than she realises and intuitively understands something she doesn’t. Torture, under any circumstances, is a terrible evil but if we are in grave danger from those who wish to destroy us we expect our politicians and security forces to protect us by whatever means are effective. From a moral point of view this results in politicians and security officials getting dirty hands, with all that entails for them and for us. And from the legal perspective, torture remains taboo and prohibited under all circumstances. The question then is how to ensure that the rule of law is preserved and respected while allowing for an extralegal breach in rare cases of dire emergency. The justification *ex post* offers a way of doing this. But the use of torture always remains a vexed and difficult dilemma for liberal democracies. The ambivalence and horror is rightly always present. Consequently, it seems to me that a very large majority of Americans (and citizens of other liberal democratic societies) would endorse the view expressed by Anthony Lewis, twice winner of the Pulitzer Prize and holder of the Presidential Citizen’s Medal. In a debate on the topic ‘Torture: The Road to Abu Ghraib’ that begins Greenberg’s collection of essays, the moderator of the debate asked him if he would authorise torture in a ‘Ticking Bomb Scenario’ despite his firm insistence that torture must be prohibited in all circumstances. He replied:

It is not an easy question ... I think it is not a fair question because most of the time when the government thinks it knows that people know something it is wrong... If I actually believed, if I had credible evidence and if I came to believe that somebody who was a prisoner under my control knew where there were weapons of mass destruction, nuclear weapons (that is what we are talking about) that were going to be used shortly, I might change my view. Yes I might. (p. 21) [43]

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Notes

- [1] Numbers in parentheses are from Greenberg's collection of essays.
- [2] The 'Torture Memos' refer to the Bybee-Gonzales Memo concerning the standards of conduct for interrogation. Briefly, this memo argued that the term 'torture' covered only extreme acts and that in the war against al-Qaeda, even if interrogations did amount to torture, they could be justified by a 'necessity' or 'self-defence' argument in order to eliminate criminal liability. The 'Torture Memo' is included in the book under the 'Relevant Documents' section. (pp. 317-60)
- [3] This is a practice where suspected terrorists or enemy combatants are deliberately sent to countries which practice torture in order to obtain information.
- [4] As I write this review, President Bush is engaged in defending new legislation against both Republican and Democrat critics which would give CIA operatives protection from the law when engaged in 'alternative' techniques of interrogation with suspected terrorists. For a flavour of this debate see Lithwick, Dahlia. 'Stream of Conscience': Why it matters what definition of torture we use' in *Slate*, Wednesday 13 September 2006 (<http://www.slate.com/id/2149564/>); and Baker, Peter. 'GOP Infighting on Detainees Intensifies,' *Washington Post*, 16 September, 2006 (<http://www.washingtonpost.com/wp-dyn/content/article/2006/09/15/AR2006091500483.html?referrer=email> accessed 17/09/2006).
- [5] For a good example of this kind of debate see Charles Krauthammer in the *The Weekly Standard* 12/05/2005, Volume 011, Issue 12 'The Truth about Torture: It's time to be honest about doing terrible things' and a reply by Michael Kinsley in *Slate*, 13/12/2005 'Torture for Dummies: Exploding the 'ticking bomb' argument.
- [6] See Dershowitz, Alan. (2002) 'The Case for Torture Warrants' <http://www.law.harvard.edu/faculty/dershowitz/Articles/torturewarrants.html> (accessed 27/07/06) Also see the exchange between Dershowitz and Roth on CNNACCESS, March 4, 2003 'Dershowitz: Torture could be justified.' <http://edition.cnn.com/2003/LAW/03/03/cnn.Dershowitz/> (accessed 27/07/06).
- [7] Perhaps the best known most recent example of this would be Fox Broadcasting Company's huge success with the TV show '24.' In this series Agent Jack Bauer, who heads a field operations unit for the Counter Terrorist Unit in Los Angeles, frequently uses torture and other illegal means to obtain vital information from terrorists in order to save thousands of innocent lives. See <http://www.fox.com/24/>.
- [8] For an excellent recent collection of essays on the philosophical, historical, and legal issues, see Levinson, Sanford. (ed.) 2004 *Torture – A Collection* (New York: OUP). Also see an overview on the question of torture by Seumas Miller in the *Stanford Encyclopedia of Philosophy*, (2006) (<http://plato.stanford.edu/entries/torture/index.html> accessed 17 /09/06).
- [9] Why, for example, is the revulsion to torture so very strong that it even trumps our horror and distress over murder and other forms of killing? Almost everyone, with the exception of committed pacifists, think that there are situations where killing is unavoidable, necessary, and morally justified – cases of self-defence or prosecuting a just war being cases in point. For a flavour of the recent philosophical and moral contributions, both for and against the justification of torture under special circumstances, see Sussman, D. (2005) 'What's Wrong with Torture?' in *Philosophy and Public Affairs*, 33, No.1: 1-33; Steinhoff, Uwe. (2006) 'Torture – The Case for Dirty Harry and against Alan Dershowitz,' in *Journal of Applied Philosophy*, Vol. 23, No.3: 337-353; and Bufacchi, V. and Arrigo, JM. (2006) 'Torture, Terrorism and the State: a Refutation of the Ticking-Bomb Argument' in *Journal of Applied Philosophy*, Vol.23, No.3: 354-373.

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- [10] The key international protocols are the Geneva Conventions (<http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions>) and the United Nations Convention Against Torture. (<http://www.hrweb.org/legal/cat.html>).
- [11] I borrow this descriptive term from Bufacchi and Arrigo (2006), p. 360, to distinguish torture for other reasons such as obtaining confessions ('Backward-Looking Interrogational Torture'), the victor's pleasure, the punishment of criminals and to terrorise those who pose a potential threat. (Others use the phrase 'preventative interrogational torture' to refer to the same aim of obtaining vital information.) See David Luban's article in the collection pp. 37-44 for an extended discussion of the different aims of torture.
- [12] This accusation was made in 'Lawyers' Statement on Bush Administration's Torture Memos' (August 4 2004.) They insisted that the senior lawyers responsible for the 'Torture Memos' 'have counselled individuals to ignore the law and offered arguments to minimise their exposure to sanction or liability for doing so.' (p. 157, note 13.)
- [13] This point is made by Jean Bethke Elshtain when referring to Alan Dershowitz's call for 'torture warrants' to legally sanction instances of 'legitimate torture.' See Elshtain, J.B. 'Reflections on the Problem of "Dirty Hands"' in Levinson (ed.): 2004: p. 83.
- [14] There is some scepticism about whether al-Qaeda does indeed represent a real threat to US state security to the same or greater extent than the Soviets and Nazis. It is clear that the danger is different from that of opposing nation states with conventional armies – in the case of the Soviets, a nation with nuclear weapons. However, should a terrorist group such as al-Qaeda manage to obtain and use a nuclear device, the damage done would be catastrophic both in terms of lives lost and the ensuing economic chaos.
- [15] The fight against enemies that 'define deviancy right down to the bottom' and 'wilfully violate the very premises of international law' (p. 99) is not new or original. The Nazis, among others, were entirely without scruples, engaging in mass murder, torture and more before and during World War II. What is new is the nature and aims of al-Qaeda coupled to its possible access to weapons that could cause catastrophic levels of civilian casualties. In addition, there is a willingness of these enemies to incur certain death in many of their operations – thereby rendering themselves impervious to standard methods of preventive deterrence.
- [16] This claim can also apply to the so-called 'Dirty Harry' scenario which is concerned with domestic criminal behaviour rather than terrorism. I return to this case when discussing the possible justification for torture even outside of the national security or supreme emergency arguments.
- [17] Andrew McCarthy contributes an essay to this volume that is entitled 'Torture: Thinking the Unthinkable' (p. 98-110).
- [18] A search on Google with the words 'Ticking Bomb Scenario' offers over 200 000 hits.
- [19] http://www.unhchr.ch/html/menu3/b/h_cat39.htm.
- [20] See Human Rights Watch – The Legal Prohibition Against Torture.' <http://www.hrw.org/press/2001/11/TortureQandA.htm>.
- [21] Few, for example, consider the absolutist position insisted upon by Kant in his essay 'On a Supposed Right to Tell Lies from Benevolent Motives' as a reasonable and practicable ethical position. Kant is adamant that there can be no justification for lying whatever the circumstances: 'Every man has not only a right, but the strictest duty to truthfulness in statements which he cannot avoid, whether they do harm to himself or others. He himself, properly speaking, does not do harm to him who suffers thereby; but this harm is *caused* by accident. For the man is not free to choose, since (if he must speak at all) veracity is an unconditional duty.' See *Kant's*

Critique of Practical Reason and other Works, (trans.) Thomas Kingsmill Abbott (Longmans, Green and Co.: 1898) p. 364.

- [22] This criticism appears to be the most prevalent both among academics and those who comment on the TBS in the blogosphere and media generally.
- [23] See *Ha'aretz*, July 23rd, 2003. This example is reported in Michael L Gross's article 'Regulating torture in a democracy: death and indignity in Israel' *Polity*, v36, i3, (2004), p. 379.
- [24] This claim will be rejected by those who insist that any genuine case of TBS requires that we must be *certain* that (a) the right person is tortured (i.e. the terrorist who knows of the bomb's location), and that (b) this torture will provide the needed vital information to prevent the bomb's detonation. However, Luban and others insist that these certainties can never exist in the real world of counter-terrorism, hence there can never be a realistic case of the TBS. These conditions are too strong. The Israeli example does cross the required threshold for a genuine TBS since what is needed in all such cases is a reasonable expectation rather than cast-iron certainties. (This principle rightly is adopted within the criminal justice system – where the guilt of those accused must be proved beyond reasonable doubt rather than with absolute certainty. If the latter was demanded then no one – or very few indeed – could be justly convicted of committing a crime.)
- [25] The 'Dirty Harry' scenario is named after the famous vigilante movie 'Dirty Harry' directed by Don Seigel in the early 1970s. The film primarily recounts the story of a police officer called 'Dirty' Harry Callahan whose nickname is due to his reputation for taking on the 'dirtiest' police cases and resolving them by ignoring the criminals' rights under the law.
- [26] See Posner, Richard A. 'Torture, Terrorism and Interrogation' in Levinson, S. (ed.) (2004): 293. Posner's example, although rare, is not fanciful. The recent horrific case in Belgium of Marc Dutroux, a psychopath who was finally convicted of murder, abduction, molestation, rape and other lesser charges, comes disturbingly close to the kind of situation depicted by Posner. While serving a prison sentence for car theft, Dutroux allowed two young girls that he had abducted to starve to death in a hidden room in which he had had them imprisoned. The police had been tipped off that Dutroux was responsible for the abductions but failed to find the girls in the secret room when they searched his house. It is hard to see how the use of torture (especially non-lethal torture-lite) to obtain the information on these kidnapped girls' location, would be considered immoral in such circumstances. Indeed the failure to use some kind of pressure points to a serious moral failing. For details of this horrific case see http://en.wikipedia.org/wiki/Marc_Dutroux.
- [27] Here Luban trades on an undefended assumption that the price itself cannot be governed by principles. It is not clear that this is indeed so. (I am grateful to Hillel Steiner for alerting me to this point.)
- [28] For an extended discussion of this point see Steinhoff, E. (p. 342 ff.)
- [29] 'Torture-lite' refers to those methods of interrogation that some argue fall just short of torture. These methods include 'sleep deprivation, exposure to heat or cold, the use of drugs to cause confusion, rough treatment (slapping, shoving, or shaking, forcing a prisoner to stand for days at a time or to sit in uncomfortable positions, and playing on his fears for himself and his family.' What is more, although these methods can be excruciatingly painful for the victim they do not result in permanent and irreversible physical damage. Torture-lite may, of course, cause irreversible psychological damage. See Mark Bowden, 'The Dark Art of Interrogation' in *The Atlantic* online, October 2003. (<http://www.theatlantic.com/doc/200310/bowden> Accessed 20/08/06)

- [30] Bufacchi and Arrigo (2006): pp. 360-362, offer a parallel argument that echoes the concern about the veracity and relevance of key assumptions that underwrite the TBS. They insist that TBS falls prey to what they call 'The Deductive Fallacy,' where an argument 'infers invalid conclusions from certain premises, either because the conclusions rest on a different set of premises, and/or because the premises don't support the conclusions.' (p. 360)
- [31] Posner in Levinson (ed.) (2004): pp. 294-5.
- [32] Ironically interrogators have claimed that it is the fear of torture, rather than torture itself, that is most effective at extracting vital information. When the prisoner believes that there are no limits then he is most vulnerable to the interrogator's methods. However, as McCarthy notes, Alan Dershowitz has documented in some detail that 'torture has been known to be a very effective method to get at truth; that it is not foolproof is hardly a reason to prohibit its selective use' (p. 108) Also, see Dershowitz, A. 'Tortured Reasoning' in Levinson (ed.) (2004): pp. 257-280.
- [33] Bowden (2003): p. 14.
- [34] For a detailed discussion of these costs see Bufacchi and Arrigo (2006): pp. 362-367.
- [35] But why trust judges to prevent the slide down the slippery slope? They are in no better a situation to judge the seriousness of the threat than the interrogators who are petitioning for a warrant. Judges will have to rely on information given by the interrogators who are unlikely to apply for a warrant without making very strong claims that in all likelihood will convince the judge that a torture warrant is needed. As Luban points out judges will not fight a culture of torture, they will reflect it. (p. 51)
- [36] The Milgram and Zimbardo experiments in social psychology clearly illustrate the ease with which individuals resort to brutality in certain social conditions. (see <http://www.new-life.net/milgram.htm> and <http://www.prisonexp.org/>)
- [37] It is important to note that Dershowitz and others are against a total ban on torture because as a matter of fact it takes place, albeit illegally. However, there are other laws, such as prohibition against murder, which demand a total ban even though it is clear that murders do, and will continue to, occur. This absolute ban against murder clearly does not promote disrespect for the law. What makes the total ban on torture different for theorists such as Dershowitz is that presumably it is generally accepted by those who are charged with our security and well-being that sometimes torture *should* occur. So Dershowitz, McCarthy, and others insist that by failing to recognise this, the law becomes unclear, and this results in the perverse effect of increasing unjustifiable and preventative torture.
- [38] Stocker, M. (1990), *Plural and Conflicting Values* (Oxford: Clarendon Press) p. 10.
- [39] Stocker, M. (1990): p. 13. This position is, unsurprisingly, strongly and widely contested by the vast majority of moral theorists as incoherent and confused. However this is not the place to engage in a discussion with these critics of dirty hands theory. Rather, I lay out the dirty hands position as an alternative for readers whose intuitions are similar to mine. For an extended discussion of the 'dirty hands' problem and the appropriate moral emotion, 'tragic-remorse,' see my 'Tragic-Remorse – The Anguish of Dirty Hands' in *Ethical Theory and Moral Practice* (ETMP), 7, 2004, pp. 453-471.
- [40] Weber, Max. (1958) 'Politics as a Vocation' in *From Max Weber: Essays in Sociology*, trans. and eds. Gerth, H.H. and Wright Mills, C., (New York: Oxford University Press). 'We must be clear about the fact that all ethically oriented conduct may be guided by one of two fundamentally differing and irreconcilably opposite maxims: conduct can be oriented to an 'ethic of ultimate ends' or to an 'ethic of responsibility.' (p. 120.) And, 'Whoever wants to engage in politics at all, and especially in politics as a vocation, has to realise these ethical paradoxes. He must know

that he is responsible for what may become of himself under the impact of these paradoxes. I repeat, he lets himself in for the diabolic forces lurking in all violence.' (pp. 125-126.)

[41] See Gross, Oren 'The Prohibition on Torture and the Limits of the Law' in Levinson (ed.) (2004): pp. 229-253.

[42] For philosophical accounts that essentially argue for this position, see Shue, H. 'Torture' (pp. 47-60); Walzer, M. 'Political Action: The Problem of Dirty hands' (pp. 61-76); Bethke Elshtain, J. 'Reflections on the Problem of "Dirty Hands"' (pp. 77-92) and Gross, O. 'The Prohibitions on Torture and the Limits of the Law' (pp. 229-256) all in Levinson (ed.) (2004). Also see Steinhoff, E. (2006). To be clear, from the legal perspective, there is no suggestion here that the ex post justification provides a legal sanction for torture under specific circumstances. The law remains unambiguous – torture is illegal in all circumstances – but there is the acknowledgment that *in extremis* the law will be broken, albeit with deep reluctance and regret, because not to do so would be to accept an even worse situation. What is more, there can be no case here of a common-law reliance on precedent for future cases that may arise. Every case needs to be argued *ab initio*, with the knowledge that the law has been broken; and the question to be answered is whether in this particular situation such a violation can be accepted as unavoidable due to the choice between lesser evils. (I am grateful to Jon Quong for discussions on this issue.)

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