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Should the Ticking Bomb Terrorist Be Tortured?

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HOW THE CURRENT TORTURE DEBATE BEGAN

Before September 11, 2001, no one thought the issue of torture would ever reemerge as a topic of serious debate in this country. Yet shortly after that watershed event, FBI agents began to leak stories suggesting that they might have to resort to torture to get some detainees, who were suspected of complicity in al-Qaeda terrorism, to provide information necessary to prevent a recurrence. An FBI source told the press that because "we are

known for humanitarian treatment" of arrestees, we have been unable to get any terrorist suspects to divulge information about possible future plans. * * * A senior FBI aide warned that "it could get to the spot where we could go to pressure, . . . where *we won't have a choice*, and we are probably getting there."[1] But in a democracy there is *always* a choice.

In 1978 a terrorist group kidnapped Italy's former prime minister Aldo Moro and threatened to kill him. A summary of the case described the decision not to resort to torture: "During the hunt for the kidnappers of Aldo Moro, an investigator for the Italian security services proposed to General Carlo Della Chiesa [of the State Police] that a prisoner who seemed to have information on the case be tortured. The General rejected the idea, replying, 'Italy can survive the loss of Aldo Moro, but it cannot survive the introduction of torture.' " The terrorists eventually murdered Moro.

* * * The Geneva Convention Against Torture prohibits all forms of torture and provides for no exceptions. It defines torture so broadly as to include many techniques that are routinely used around the world, including in Western democracies:

> For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him 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.[2]

Many nations that routinely practice the most brutal forms of torture are signatories to this convention, but they hypocritically ignore it. * * *

* * * There are legal steps we could take, if we chose to resort to torture, that would make it possible for us to use this technique for eliciting information in dire circumstances. Neither the presence nor the absence of legal constraints answers the fundamental moral question: should we? This is a choice that almost no one wants to have to make. Torture has

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1 Walter Pincus, "Silence of 4 Terror Probe Suspects Poses a Dilemma for FBI," *Washington Post*, 10/21/2001 (emphasis added).

2 "Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," adopted by the U.N. General Assembly, 12/10/1984, and in effect since 6/26/1987, after it was ratified by twenty nations.

been off the agenda of civilized discourse for so many centuries that it is a subject reserved largely for historians rather than contemporary moralists (though it remains a staple of abstract philosophers debating the virtues and vices of absolutism). I have been criticized for even discussing the issue, on the ground that academic discussion confers legitimacy on a practice that deserves none. I have also been criticized for raising a red herring, since it is "well known" that torture does not work—it produces many false confessions and useless misinformation, because a person will say anything to stop being tortured.

*** The tragic reality is that torture sometimes works, much though many people wish it did not. There are numerous instances in which torture has produced self-proving, truthful information that was necessary to prevent harm to civilians. The *Washington Post* has recounted a case from 1995 in which Philippine authorities tortured a terrorist into disclosing information that may have foiled plots to assassinate the pope and to crash eleven commercial airliners carrying approximately four thousand passengers into the Pacific Ocean, as well as a plan to fly a private Cessna filled with explosives into CIA headquarters. For sixty-seven days, intelligence agents beat the suspect "with a chair and a long piece of wood [breaking most of his ribs], forced water into his mouth, and crushed lighted cigarettes into his private parts"—a procedure that the Philippine intelligence service calls "tactical interrogation." After successfully employing this procedure they turned him over to American authorities, along with the lifesaving information they had beaten out of him.[3]

It is impossible to avoid the difficult moral dilemma of choosing among evils by denying the empirical reality that torture *sometimes* works, even if it does not always work. No technique of crime prevention always works. ***

It is precisely because torture sometimes does work and can sometimes prevent major disasters that it still exists in many parts of the world and has been totally eliminated from none. It also explains why the U.S. government sometimes "renders" terrorist suspects to nations like Egypt and Jordan, "whose intelligence services have close ties to the CIA and where they can be subjected to interrogation tactics—including torture and threats to families—that are illegal in the United States," as the *Washington Post*

3 Matthew Brzezinski, "Bust and Boom: Six Years Before the September 11 Attacks, Philippine Police Took Down an al Qaeda Cell That Had Been Plotting, Among Other Things, to Fly Explosives-Laden Planes into the Pentagon—and Possibly Some Skyscrapers," *Washington Post*, 12/30/2001.

has reported. * * * Our government has a "don't ask, don't tell" policy when it comes to obtaining information from other governments that practice torture. All such American complicity in foreign torture violates the plain language of the Geneva Convention Against Torture, which explicitly prohibits torture from being inflicted not only by signatory nations but also "at the instigation of or with the consent or acquiescence of" any person "acting in an official capacity." * * *

HOW I BEGAN THINKING ABOUT TORTURE

In the late 1980s I traveled to Israel to conduct some research and teach a class at Hebrew University on civil liberties during times of crisis. In the course of my research I learned that the Israeli security services were employing what they euphemistically called "moderate physical pressure" on suspected terrorists to obtain information deemed necessary to prevent future terrorist attacks. * * * In most cases the suspect would be placed in a dark room with a smelly sack over his head. Loud, unpleasant music or other noise would blare from speakers. The suspect would be seated in an extremely uncomfortable position and then shaken vigorously until he disclosed the information. * * *

In my classes and public lectures in Israel, I strongly condemned these methods as a violation of core civil liberties and human rights. The response that people gave, across the political spectrum from civil libertarians to law-and-order advocates, was essentially the same: but what about the "ticking bomb" case?

The ticking bomb case refers to a scenario that has been discussed by many philosophers, including Michael Walzer, Jean-Paul Sartre, and Jeremy Bentham. Walzer described such a hypothetical case in an article titled "Political Action: The Problem of Dirty Hands." In this case, a decent leader of a nation plagued with terrorism is asked "to authorize the torture of a captured rebel leader who knows or probably knows the location of a number of bombs hidden in apartment buildings across the city, set to go off within the next twenty-four hours. He orders the man tortured, convinced that he must do so for the sake of the people who might otherwise die in the explosions—even though he believes that torture is wrong, indeed abominable, not just sometimes, but always."[4]

4 Michael Walzer, "Political Action: The Problem of Dirty Hands," *Philosophy and Public Affairs*, 1973.

In Israel, the use of torture to prevent terrorism was not hypothetical; it was very real and recurring. I soon discovered that virtually no one was willing to take the "purist" position against torture in the ticking bomb case: namely, that the ticking bomb must be permitted to explode and kill dozens of civilians, even if this disaster could be prevented by subjecting the captured terrorist to nonlethal torture and forcing him to disclose its location. I realized that the extraordinarily rare situation of the hypothetical ticking bomb terrorist was serving as a moral, intellectual, and legal justification for a pervasive *system* of coercive interrogation, which, though not the paradigm of torture, certainly bordered on it. It was then that I decided to challenge this system by directly confronting the ticking bomb case. I presented the following challenge to my Israeli audience: If the reason you permit nonlethal torture is based on the ticking bomb case, why not limit it exclusively to that compelling but rare situation? Moreover, if you believe that nonlethal torture is justifiable in the ticking bomb case, why not require advance judicial approval—a "torture warrant"? That was the origin of a controversial proposal that has received much attention, largely critical, from the media. Its goal was, and remains, to reduce the use of torture to the smallest amount and degree possible, while creating public accountability for its rare use. I saw it not as a compromise with civil liberties but rather as an effort to maximize civil liberties in the face of a realistic likelihood that torture would, in fact, take place below the radar screen of accountability.

THE CASE FOR TORTURING THE TICKING BOMB TERRORIST

The arguments in favor of using torture as a last resort to prevent a ticking bomb from exploding and killing many people are both simple and simple-minded. Bentham constructed a compelling hypothetical case to support his utilitarian argument against an absolute prohibition on torture:

> Suppose an occasion were to arise, in which a suspicion is entertained, as strong as that which would be received as a sufficient ground for arrest and commitment as for felony—a suspicion that at this very time a considerable number of individuals are actually suffering, by illegal violence inflictions equal in intensity to those which if inflicted by the hand of justice, would universally be spoken of under the name of torture. For the purpose of rescuing from torture these hundred innocents, should any scruple be made of applying equal or superior torture, to extract the requisite information from the mouth of one criminal, who having it in his power to make known the place where at this time the enormity was practising or about to be practised,

> should refuse to do so? To say nothing of wisdom, could any pretence be made so much as to the praise of blind and vulgar humanity, by the man who to save one criminal, should determine to abandon 100 innocent persons to the same fate?[5]

If the torture of one guilty person would be justified to prevent the torture of a hundred innocent persons, it would seem to follow—certainly to Bentham—that it would also be justified to prevent the murder of thousands of innocent civilians in the ticking bomb case. Consider two hypothetical situations that are not, unfortunately, beyond the realm of possibility. In fact, they are both extrapolations on actual situations we have faced.

Several weeks before September 11, 2001, the Immigration and Naturalization Service detained Zacarias Moussaoui after flight instructors reported suspicious statements he had made while taking flying lessons and paying for them with large amounts of cash.[6] The government decided not to seek a warrant to search his computer. Now imagine that they had, and that they discovered he was part of a plan to destroy large occupied buildings, but without any further details. They interrogated him, gave him immunity from prosecution, and offered him large cash rewards and a new identity. He refused to talk. They then threatened him, tried to trick him, and employed every lawful technique available. He still refused. They even injected him with sodium pentothal and other truth serums, but to no avail. The attack now appeared to be imminent, but the FBI still had no idea what the target was or what means would be used to attack it. We could not simply evacuate all buildings indefinitely. An FBI agent proposes the use of nonlethal torture—say, a sterilized needle inserted under the fingernails to produce unbearable pain without any threat to health or life, or the method used in the film *Marathon Man*, a dental drill through an unanesthetized tooth.

The simple cost-benefit analysis for employing such nonlethal torture seems overwhelming: it is surely better to inflict nonlethal pain on one guilty terrorist who is illegally withholding information needed to prevent an act of terrorism than to permit a large number of innocent victims to die. Pain is a lesser and more remediable harm than death; and the lives of a thousand innocent people should be valued more than the bodily integrity of one guilty person. If the variation on the Moussaoui case is not sufficiently compelling to make

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5 Quoted in W. L. Twining and P. E. Twining, "Bentham on Torture," *Northern Ireland Legal Quarterly*, Autumn 1973, p. 347. Bentham's hypothetical question does not distinguish between torture inflicted by private persons and by governments.

6 David Johnston and Philip Shenon, "F.B.I. Curbed Scrutiny of Man Now a Suspect in the Attacks," *New York Times*, 10/6/2001.

this point, we can always raise the stakes. Several weeks after September 11, our government received reports that a ten-kiloton nuclear weapon may have been stolen from Russia and was on its way to New York City, where it would be detonated and kill hundreds of thousands of people. The reliability of the source, code named Dragonfire, was uncertain, but assume for purposes of this hypothetical extension of the actual case that the source was a captured terrorist—like the one tortured by the Philippine authorities—who knew precisely how and where the weapon was being brought into New York and was to be detonated. Again, everything short of torture is tried, but to no avail. It is not absolutely certain torture will work, but it is our last, best hope for preventing a cataclysmic nuclear devastation in a city too large to evacuate in time. Should nonlethal torture be tried? Bentham would certainly have said yes.

The strongest argument against any resort to torture, even in the ticking bomb case, also derives from Bentham's utilitarian calculus. Experience has shown that if torture, which has been deemed illegitimate by the civilized world for more than a century, were now to be legitimated—even for limited use in one extraordinary type of situation—such legitimation would constitute an important symbolic setback in the worldwide campaign against human rights abuses. Inevitably, the legitimation of torture by the world's leading democracy would provide a welcome justification for its more widespread use in other parts of the world. Two Bentham scholars, W. L. Twining and P. E. Twining, have argued that torture is unacceptable even if it is restricted to an extremely limited category of cases:

> There is at least one good practical reason for drawing a distinction between justifying an isolated act of torture in an extreme emergency of the kind postulated above and justifying the *institutionalisation* of torture as a regular practice. The circumstances are so extreme in which most of us would be prepared to justify resort to torture, if at all, the conditions we would impose would be so stringent, the practical problems of devising and enforcing adequate safeguards so difficult and the risks of abuse so great that it would be unwise and dangerous to entrust any government, however enlightened, with such a power. Even an out-and-out utilitarian can support an absolute prohibition against institutionalised torture on the ground that no government in the world can be trusted not to abuse the power and to satisfy in practice the conditions he would impose.[7]

Bentham's own justification was based on *case* or *act* utilitarianism—a demonstration that in a *particular case*, the benefits that would flow from the

7 Twining and Twining, "Bentham on Torture," pp. 348–49. The argument for the limited use of torture in the ticking bomb case falls into a category of argument known as "argument from the extreme case," which is a useful heuristic to counter arguments for absolute principles.

limited use of torture would outweigh its costs. The argument against any use of torture would derive from *rule* utilitarianism—which considers the implications of establishing a precedent that would inevitably be extended beyond its limited case utilitarian justification to other possible evils of lesser magnitude. Even terrorism itself could be justified by a case utilitarian approach. Surely one could come up with a singular situation in which the targeting of a small number of civilians could be thought necessary to save thousands of other civilians—blowing up a German kindergarten by the relatives of inmates in a Nazi death camp, for example, and threatening to repeat the targeting of German children unless the death camps were shut down.

The reason this kind of single-case utilitarian justification is simple-minded is that it has no inherent limiting principle. If nonlethal torture of one person is justified to prevent the killing of many important people, then what if it were necessary to use lethal torture—or at least torture that posed a substantial risk of death? What if it were necessary to torture the suspect's mother or children to get him to divulge the information? What if it took threatening to kill his family, his friends, his entire village? Under a simple-minded quantitative case utilitarianism, anything goes as long as the number of people tortured or killed does not exceed the number that would be saved. This is morality by numbers, unless there are other constraints on what we can properly do. These other constraints can come from rule utilitarianisms or other principles of morality, such as the prohibition against deliberately punishing the innocent. Unless we are prepared to impose some limits on the use of torture or other barbaric tactics that might be of some use in preventing terrorism, we risk hurtling down a slippery slope into the abyss of amorality and ultimately tyranny. Dostoevsky captured the complexity of this dilemma in *The Brothers Karamazov* when he had Ivan pose the following question to Alyosha: "Imagine that you are creating a fabric of human destiny with the object of making men happy in the end, giving them peace at least, but that it was essential and inevitable to torture to death only one tiny creature—that baby beating its breast with its fist, for instance—and to found that edifice on its unavenged tears, would you consent to be the architect on those conditions? Tell me the truth."

A willingness to kill an innocent child suggests a willingness to do anything to achieve a necessary result. Hence the slippery slope.

It does not necessarily follow from this understandable fear of the slippery slope that we can never consider the use of nonlethal infliction of pain,

if its use were to be limited by acceptable principles of morality. After all, imprisoning a witness who refuses to testify after being given immunity is designed to be punitive—that is painful. Such imprisonment can, on occasion, produce more pain and greater risk of death than nonlethal torture. Yet we continue to threaten and use the pain of imprisonment to loosen the tongues of reluctant witnesses.

It is commonplace for police and prosecutors to threaten recalcitrant suspects with prison rape. As one prosecutor put it: "You're going to be the boyfriend of a very bad man." The slippery slope is an argument of caution, not a debate stopper, since virtually every compromise with an absolutist approach to rights carries the risk of slipping further. An appropriate response to the slippery slope is to build in a principled break. For example, if nonlethal torture were legally limited to convicted terrorists who had knowledge of future massive terrorist acts, were given immunity, and still refused to provide the information, there might still be objections to the use of torture, but they would have to go beyond the slippery slope argument.

In debating the issue of torture, the first question I am often asked is, "Do you want to take us back to the Middle Ages?" The association between any form of torture and gruesome death is powerful in the minds of most people knowledgeable of the history of its abuses. This understandable association makes it difficult for many people to think about nonlethal torture as a technique for *saving* lives.

*** Raising the issue of torture makes Americans think about a brutalizing and unaesthetic phenomenon that has been out of our consciousness for many years.

*** It is clear that if the preventable act of terrorism was of the magnitude of the attacks of September 11, there would be a great outcry in any democracy that had deliberately refused to take available preventive action, even if it required the use of torture. ***

The real issue, therefore, is not whether some torture would or would not be used in the ticking bomb case—it would. The question is whether it would be done openly, pursuant to a previously established legal procedure, or whether it would be done secretly, in violation of existing law.

Several important values are pitted against each other in this conflict. The first is the safety and security of a nation's citizens. Under the ticking bomb scenario this value may require the use of torture, if that is the only way to prevent the bomb from exploding and killing large numbers of civilians. The second value is the preservation of civil liberties and human

rights. This value requires that we not accept torture as a legitimate part of our legal system. In my debates with two prominent civil libertarians, Floyd Abrams and Harvey Silverglate, both have acknowledged that they would want nonlethal torture to be used if it could prevent thousands of deaths, but they did not want torture to be officially recognized by our legal system. As Abrams put it: "In a democracy sometimes it is necessary to do things off the books and below the radar screen." Former presidential candidate Alan Keyes took the position that although torture might be *necessary* in a given situation it could never be *right*. He suggested that a president *should* authorize the torturing of a ticking bomb terrorist, but that this act should not be legitimated by the courts or incorporated into our legal system. He argued that wrongful and indeed unlawful acts might sometimes be necessary to preserve the nation, but that no aura of legitimacy should be placed on these actions by judicial imprimatur.

This understandable approach is in conflict with the third important value: namely, open accountability and visibility in a democracy. "Off-the-book actions below the radar screen" are antithetical to the theory and practice of democracy. Citizens cannot approve or disapprove of governmental actions of which they are unaware. We have learned the lesson of history that off-the-book actions can produce terrible consequences. Richard Nixon's creation of a group of "plumbers" led to Watergate, and Ronald Reagan's authorization of an off-the-books foreign policy in Central America led to the Iran-Contra scandal. And these are only the ones we know about! ***

In a democracy governed by the rule of law, we should never want our soldiers or our president to take any action that we deem wrong or illegal. A good test of whether an action should or should not be done is whether we are prepared to have it disclosed—perhaps not immediately, but certainly after some time has passed. No legal system operating under the rule of law should ever tolerate an "off-the-books" approach to necessity. Even the defense of necessity must be justified lawfully. The road to tyranny has always been paved with claims of necessity made by those responsible for the security of a nation. Our system of checks and balances requires that all presidential actions, like all legislative or military actions, be consistent with governing law. If it is necessary to torture in the ticking bomb case, then our governing laws must accommodate this practice. If we refuse to change our law to accommodate any particular action, then our government should not take that action.

Only in a democracy committed to civil liberties would a triangular conflict of this kind exist. Totalitarian and authoritarian regimes experience no

such conflict, because they subscribe to neither the civil libertarian nor the democratic values that come in conflict with the value of security. The hard question is: which value is to be preferred when an inevitable clash occurs? One or more of these values must inevitably be compromised in making the tragic choice presented by the ticking bomb case. If we do not torture, we compromise the security and safety of our citizens. If we tolerate torture, but keep it off the books and below the radar screen, we compromise principles of democratic accountability. If we create a legal structure for limiting and controlling torture, we compromise our principled opposition to torture in all circumstances and create a potentially dangerous and expandable situation.

In 1678, the French writer François de La Rochefoucauld said that "hypocrisy is the homage that vice renders to virtue." In this case we have two vices: terrorism and torture. We also have two virtues: civil liberties and democratic accountability. Most civil libertarians I know prefer hypocrisy, precisely because it appears to avoid the conflict between security and civil liberties, but by choosing the way of the hypocrite these civil libertarians compromise the value of democratic accountability. Such is the nature of tragic choices in a complex world. As Bentham put it more than two centuries ago: "Government throughout is but a choice of evils." In a democracy, such choices must be made, whenever possible, with openness and democratic accountability, and subject to the rule of law.[8]

* * * It seems logical that a formal, visible, accountable, and centralized system is somewhat easier to control than an ad hoc, off-the-books, and under-the-radar-screen nonsystem. I believe, though I certainly cannot prove, that a formal requirement of a judicial warrant as a prerequisite to nonlethal torture would decrease the amount of physical violence directed against suspects. At the most obvious level, a double check is always more protective than a single check. In every instance in which a warrant is requested, a field officer has already decided that torture is justified and, in the absence of a warrant requirement, would simply proceed with the torture. Requiring that decision to be approved by a judicial officer will result in fewer instances of torture even if the judge rarely turns down a request. Moreover, I believe that most judges would require compelling evidence before they would authorize so extraordinary a departure from our constitutional norms, and law enforcement officials would be reluctant to seek a warrant unless they had compelling evidence that the suspect had

8 Quoted in Twining and Twining, "Bentham on Torture," p. 345.

information needed to prevent an imminent terrorist attack. A record would be kept of every warrant granted, and although it is certainly possible that some individual agents might torture without a warrant, they would have no excuse, since a warrant procedure would be available. They could not claim "necessity," because the decision as to whether the torture is indeed necessary has been taken out of their hands and placed in the hands of a judge. In addition, even if torture were deemed totally illegal without any exception, it would still occur, though the public would be less aware of its existence.

I also believe that the rights of the suspect would be better protected with a warrant requirement. He would be granted immunity, told that he was now compelled to testify, threatened with imprisonment if he refused to do so, and given the option of providing the requested information. Only if he refused to do what he was legally compelled to do—provide necessary information, which could not incriminate him because of the immunity—would he be threatened with torture. Knowing that such a threat was authorized by the law, he might well provide the information. If he still refused to, he would be subjected to judicially monitored physical measures designed to cause excruciating pain without leaving any lasting damage. * * *

I * * * believe that in a democracy it is always preferable to decide controversial issues in advance, rather than in the heat of battle. I would apply this rule to other tragic choices as well, including the possible use of a nuclear first strike, or retaliatory strikes—so long as the discussion was sufficiently general to avoid giving our potential enemies a strategic advantage by their knowledge of our policy.

Even if government officials decline to discuss such issues, academics have a duty to raise them and submit them to the marketplace of ideas. There may be danger in open discussion, but there is far greater danger in actions based on secret discussion, or no discussion at all.

Whatever option our nation eventually adopts—no torture even to prevent massive terrorism, no torture except with a warrant authorizing nonlethal torture, or no "officially" approved torture but its selective use beneath the radar screen—the choice is ours to make in a democracy. We do have a choice, and we should make it—before local FBI agents make it for us on the basis of a false assumption that we do not really "have a choice."