

IN DEFENSE OF THE ABSOLUTE PROHIBITION OF TORTURE

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I. INTRODUCTION

Torture is the extreme of cruelty.¹ One person subjects another, held captive and helpless, to terrible pain. Cruelty is combined with cowardice, because the captive not only cannot escape, but cannot fight back or retaliate. Defenselessness magnifies the captive's terror. Reduced to absolute passivity, he or she experiences, in David Sussman's apt phrase, a "living death."² We do not need a lengthy discourse on the immorality of torture. If torture is not wrong, nothing is wrong. No one should be subjected to the pain and terror that torture entails.

No one defends torture as a general practice. No society gives private citizens or even public officials *carte blanche* to torture. (Even slave societies such as antebellum America placed legal limits on the torture of slaves, though the limits were routinely ignored.) But throughout history states have claimed (behind closed doors, when not in public) that torture is warranted in limited circumstances. States that use torture claim that they have good reason to breach the otherwise general prohibition of torture.

To block such arguments, contemporary international law prohibits torture in all circumstances. The prohibition may never be lifted or disregarded, not even during an emergency that "threatens the life of the nation." So heinous is the crime of torture that in many countries its prosecution falls under the rubric of universal jurisdiction. This authorizes prosecution of torture committed anywhere in the world, regardless of the citizenship of the perpetrator or victim. The 145 member states of the Torture Convention are obligated to prosecute any perpetrator found on their territory, or else extradite the perpetrator for prosecution in another country. The Geneva Conventions obligate all member states (now literally every country in the world) to prosecute acts of torture and inhuman treatment committed in the context of war, regardless of the citizenship of the perpetrator or victim and location of the crime.

Contemporary international law frames the absolute universal ban on torture in terms of human rights. Everyone has an absolute human right not to be tortured.

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” This canonical formulation, now reproduced in many international treaties and domestic constitutions, appears first in the 1948 Universal Declaration of Human Rights, which postulates the ban as a moral imperative prior to law and derives it from the equal dignity of all human beings. The UN Declaration against Torture, adopted by unanimous vote of the General Assembly in 1975, states that “any act of torture or other cruel, inhuman or degrading treatment or punishment is an offense to human dignity.”

The absolute ban on torture has not gone unchallenged. Today the most common objection is that torture is sometimes warranted as a means of combating terrorism. Against the view that torture should not be used even as a means of preventing terrorism, appeal is invariably made to the ticking bomb scenario. “Imagine that a bomb has been planted that, if allowed to explode, will kill some number of innocent civilians. [Sometimes, to increase the argument’s force, the number is fixed very high.] The man who planted the bomb has fallen into our custody, and refuses to tell us its location. If torturing the man is the only way for us to locate and defuse the bomb, thereby saving innocent people’s lives, then aren’t we morally permitted—even required—to torture him? This shows that torture is sometimes justified as a means of preventing terrorism.”

The ticking bomb argument has exerted enormous influence. Popularized in books, movies, TV dramas, newspaper editorials, TV commentaries, public lectures, journal articles, college courses, and presidential debates, it has persuaded a large portion of the voting public and policy-making elite that torture is warranted on some (larger or smaller) number of occasions. It became an argument for justifying the massive use of torture by the French army during the Algerian War of Independence. It has been the primary argument for the widespread use of torture by Israeli security forces in the Occupied Territories. It is the main justification for the use of torture by the US government in the “War on Terror.”

The fallacy of the ticking bomb argument has been repeatedly and forcefully demonstrated. Especially in the last few years, several powerful refutations have appeared in print. Anyone who is persuaded or even perplexed by the ticking bomb argument should read these works.

Several of these works make the point that the ticking bomb argument deceives us about the choices we face in the real world.³ The argument deceives us in two ways: by suggesting that torture could be limited to ticking bomb situations, and by suggesting that the ticking bomb situation is itself a realistic possibility. The work that most powerfully exposes the empirical deceitfulness of the ticking bomb argument is Darius Rejali’s recently published book *Torture and Democracy*.⁴ On the basis of staggeringly thorough research, Rejali lays waste to the empirical assumptions that are implied and re-circulated by the argument. Ticking bomb stories cannot be heard in the same way after one has absorbed Rejali’s findings.

Other writers have confronted the ticking bomb argument on its own terrain.

They argue that even if a ticking bomb situation were to occur, torture would still be wrong. Ben Juratowitch makes such an argument in this symposium. I find considerable force in his argument.⁵ However, in this essay, I will be mostly concerned to expose the misleading nature of the hypothetical itself.

In his contribution to this symposium Jeff McMahan argues that governments cannot authorize torture in ticking bomb situations without causing the wider use of torture.⁶ He therefore supports an absolute legal and policy ban on torture. Though he thinks (and takes some time to argue) that torture is, in principle, morally permitted, or even required, in a small number of cases, he thinks that virtually nothing follows from this in practice.

The main goal of my essay is to show that ticking bomb scenarios are unreal. They are unreal because they do not, in fact, occur, and because their features make it almost impossible for them to occur. The ticking bomb scenario, as we are invited to imagine it, almost certainly has never occurred and almost certainly never will occur. This point is not original, but however frequently and however well it is made, it has not sunk in. So it must be made again and again. I elaborate on the unreality of the hypothetical below. But let me here make the salient observation, which I shall repeat below, that in the long history of counter-terrorist campaigns there has not been one verified report of a genuine ticking bomb torture scenario. There has not been a verified incident that even comes close to the ticking bomb torture scenario.

Among the many unrealistic elements of the ticking bomb hypothetical, I give particular attention to the exaggerated degree of certainty attributed to our belief in the prisoner's guilt. In the scenario we are fully certain that the individual in our custody has launched an attack on civilians and is now withholding the information needed to save the civilians' lives. Such certainty is unrealistic. Any realistic approximation of the ticking bomb scenario creates too high a risk that an innocent person will be tortured.

The made-to-order features of the ticking bomb scenario blind us to torture's reality. In the real world, torture "yields poor information, sweeps up many innocents, degrades organizational capabilities, and destroys interrogators."⁷ Consider the problem of false information, which not only causes delays, swallows man hours, and leads down blind alleys, but can also encourage disastrous choices. Below I discuss how the Bush administration used false information extracted under torture to help justify the Iraq war. In this case, torture did not save lives, but helped bring about a great many deaths. Torture also inflames enemies, alienates friends, and scares away informants. And it spreads.

These dangers, purged from the ticking bomb hypothetical, are inseparable from actual torture. Yet public attention is consumed by the hypothetical. Obsession with the better-than-best case scenario warps our thinking about torture. We overlook torture's dangers and exaggerate its effectiveness. By now, the ticking bomb narrative has acquired its own momentum, but fear and anger do much to keep it aloft. (When fear and anger take a racialized cast, our thinking is further distorted.)

I argue below that we should set aside the ticking bomb scenario because of its unrealistic character, that realistic approximations of the scenario pose an unacceptable risk to the innocent, that other extensions of the ticking-bomb argument to more realistic scenarios not sharing its morally relevant features must be rejected, and that reasons for an absolute legal ban on torture also support an absolute moral ban on torture. I join Juratowitch's conclusion that torture is always wrong.

I classify my argument as a defense of an absolute moral and legal prohibition on torture. There are different kinds of absolutists. Some hold that torture is always wrong in this or any other possible world; some, that torture is always wrong in *this* world, never mind the others; some that torture, in this world, is wrong in every realistically imaginable case, and could at most be permitted in cases so infinitesimally unlikely that they are not worth talking about. Absolutists are united in opposing the view that torture could be permitted in any realistically imaginable case.

2. TORTURE AND MORAL PHILOSOPHY

I begin with some cautionary remarks. I believe there are certain risks in treating torture as a topic in moral philosophy. Thinking that we can enlighten and improve public discourse, we may end by sowing confusion and corruption. The risks are not confined to professional philosophers alone, but are shared by all of us who try to think rigorously and systematically about the "rights and wrongs" of torture.⁸

One danger is that by posing the question, "Should we torture in this or that situation?" we become desensitized to the idea of using torture. Each time we pose the question anew, each time it is applied to a new situation not considered before, torture becomes psychologically less unthinkable, the taboo against it progressively eroded. Herein lies one possible source of moral corruption.

A second danger is the desensitization that can arise from discussing torture in an abstract way. To sort through the complex theoretical issues, philosophers must think about torture in general. By dint of discussing torture in general, they may forget what they are talking about. This is desensitization: we talk about torture in a way that distances ourselves from its reality. We stop trying to imagine torture, and forget how hard it is to imagine. We forget to heed Jacobo Timerman's challenge: "In the long months of confinement, I often thought about how to convey the pain that a tortured person undergoes. And always I concluded that it was impossible. It is a pain without points of reference, without revelatory symbols or clues to serve as indicators."⁹

Desensitization of this kind may lead us into misleading or obscuring characterizations of torture. I believe, for example, that we misrepresent reality when we try to rank the badness of torture and death. Who is equipped to make this judgment? We know that many people have feared torture more than death, that many torture victims have committed or attempted suicide, and that torturers, aware that their victims may attempt suicide, often take considerable precautions to prevent them from doing so. Sussman's comparison of torture to a "living death" is one that torture victims have drawn themselves.¹⁰

A third danger is that abstraction itself causes false ideas about the use of torture. Philosophers construct examples that clear away the messiness of the real world. Their defense is that doing so is necessary to distill the relevant moral principles, and that empirical complexity can be brought back into consideration when moral agents apply the principles to real-life cases. The problem is that real-life complexities often are *not* brought back into consideration. People confuse the abstract example with the real world. Hence the catastrophic fall-out from discussion of the ticking bomb torture scenario. Philosophers who recur to their traditional modes of analysis can contribute to the problem.

A fourth danger is that, because many philosophers who address torture know little about the topic, they are vulnerable to common misconceptions. The misconceptions enter their discussions and are thereby re-circulated. This is another way that philosophical discussion can spread false ideas about torture.

A fifth danger is that philosophical reasoning about torture may be distorted by the volatile emotions of fear and anger. Philosophers can be especially blind to this danger, because the cool and detached tone they cultivate easily disguises the influence of these emotions.

A sixth danger, connected to the previous ones, is the exaggerated confidence philosophers may place in the contributions of their craft. Philosophers notice a difficult moral dilemma—the ticking bomb torture scenario—and may feel called upon to solve it. But it may be that their contribution is of little value, or even harmful, because the dilemma distracts us from far more relevant questions and reinforces false myths. Philosophers compound the difficulty if they set aside certain questions relevant to their inquiry—for example, Is the ticking bomb scenario realistic?—on the grounds that these are questions for *other* disciplines to address.

These are not unconquerable dangers, but they need to be taken seriously. Philosophers should think carefully before addressing the morality of torture. They should beware of corrupting our moral feelings and beliefs. For these reasons, I enter into the following discussion with some hesitation.

3. HOW TICKING BOMB ARGUMENTS DECEIVE

Henry Shue observes that ticking bomb arguments mislead us because of idealization and abstraction:

Idealization is the addition of positive features to an example in order to make the example better than reality, which lacks those features. Abstraction is the deletion of negative features of reality from an example in order to make the example still better than reality. Idealization adds sparkle, abstraction removes dirt. Together they make the hypothetical superior to reality and thereby a disastrously misleading analogy from which to derive conclusions about reality.¹¹

Take abstraction first. Ticking bomb arguments falsely suggest that torture could be limited to ticking bomb situations. However, torturers must be trained for their

task, and can operate only with bureaucratic backing. One cannot empower the conscientious torturer without creating a cadre of bureaucratically authorized trained torturers who, from bureaucratic momentum and political and peer pressure and the desire to use their skills, will extend the practice to other situations.¹² As Shue writes, “torture is an institution.”¹³ Furthermore, as McMahan reminds us, torture in ticking bomb situations will be interpreted as a precedent for torture in non-ticking bomb situations. The ticking bomb argument imagines that torture of the terrorist will have no further effects beyond saving the civilians from the ticking bomb, but in the real world it will cause the subsequent torture of innocent people.

So torture cannot be limited to ticking bomb situations. But, and this is where idealization comes in, the ticking bomb scenario is itself a fantasy. I argue below that it is not only unrealistic, but that it almost certainly never will occur as it is standardly imagined. The hypothetical is unrealistic because it imagines that we know with certainty that our captive has planted the bomb, that although we do not know the bomb’s location he does, that torture will lead him to yield the information, and that the information once gained will enable us to defuse the bomb. It is virtually impossible that we could know any of these things, much less all of them, with certainty.

Kim Scheppele underscores the difficulties. The hypothetical

envisions that we will have certain, or near certain, knowledge of virtually everything about an imminent and momentous threat, except for a few tiny but crucial pieces of information. And it further imagines that the person we could choose to torture knows the crucial details that we do not (in this case, where the bomb is located and how to defuse it). In any real situation, however, it is highly unlikely that any interrogator would know enough to be justified in torturing someone to get the missing information. An interrogator in the “war on terrorism” is far more likely to have vague and general information, making it tempting to torture in an effort to learn whether there is a real threat in the first place.¹⁴

The ticking bomb scenario posits certainty that cannot be had in the real world. Some people may respond that certainty regarding all features of the hypothetical is not necessary to establish the permissibility of torture. We would, for example, be permitted to torture even if we thought it likely but not certain that torture would elicit the life-saving information from the terrorist. But certainty on at least one point is morally required. Torture would be a grave wrong if we lacked full certainty that our captive had indeed participated in the delayed attack against the civilians and was now withholding the information needed to save the civilians’ lives. (Torture might be wrong even if we possessed such certainty, but I set that question aside for now.) In the absence of full certainty, we run the risk of torturing an innocent person, and that is a morally unacceptable risk.

Full certainty is sometimes available to us. I am fully certain that Christine Gregoire is the governor of Washington state. I am fully certain that Helsinki lies north of Athens. I am fully certain that my name is Jamie Mayerfeld. But full cer-

tainty is quite rare in the world of criminal detection. *Sometimes* a victim will be fully certain of the identity of his or her attacker: there will be cases, for example, in which a wife is fully certain that it was her husband who assaulted her. But that confidence falls below the level of full certainty when it comes to the judge or jury who hears the wife's report. And of course the strong, even fervent, opinions of victims do not always rise to the level of full certainty. Victim identifications, like eyewitness identifications in general, are notoriously fallible.

In the criminal justice system we deal with the problem by requiring that no one may be punished for a criminal offense unless his or her guilt has been proved beyond a reasonable doubt. For this reason, every defendant is entitled to a fair trial before an impartial judge with the opportunity of a full defense. And even if, following a fair trial, the judge or jury believes in the defendant's guilt but that belief is shadowed by reasonable doubt, acquittal is required. Proof beyond reasonable doubt is a demanding standard. It falls well short of full certainty, however. We send many innocent, wrongly convicted people to prison (notoriously, many have been sent to death row and some undetermined number have almost certainly been put to death). Though many wrongful convictions occur because fair trial standards were not observed, this is not always the case. Many people are wrongly convicted even after receiving a fair trial.

Whatever its adequacy as a requirement for assigning prison sentences, the "proof beyond a reasonable doubt" rule is clearly an insufficient basis for subjecting suspected ticking-bomb terrorists to torture. If we adopt this rule, we know that we will condemn some number of innocent people to torture. Neither "proof beyond a reasonable doubt," nor "reasonable certainty," nor "near-certainty," nor "epistemically justified belief" is sufficient. Nothing less than full certainty is required.

So far are we from attaining full certainty in any realistic approximation of the ticking bomb situation, however, that we do not even rise to the level of proof beyond a reasonable doubt. To reach that standard, we would need to provide the suspected ticking-bomb terrorist with a fair trial before a genuinely impartial judge and to give him full opportunities to establish his innocence or even just create reasonable doubt in the judge's mind. But the hypothetical scenario rules out any possibility of a fair trial.

And yet the ticking bomb hypothetical assumes full certainty regarding the captive's guilt. It is no accident that the hypothetical gains its primary inspiration from fiction—novels, movies, and TV shows. The conventions of fiction allow us, the readers or viewers, to know things that can never be known in real life. Facts are stipulated by the author, revealed in as many scenes as the author wishes to have us observe, undistorted by fading memory or perceptual limitations. We may even be told the characters' thoughts. The ticking bomb hypothetical confuses reality with fiction: it blurs the line between what can and cannot be known. Popular works of fiction have stoked the confusion.¹⁵

The ticking bomb hypothetical makes a gripping story. Because the separate

elements resemble events that have happened or could happen in real life, we are not bothered by the impossibility of their conjunction. Fear makes the details more vivid and heightens the apparent plausibility of the whole.¹⁶ As David Luban notes, drawing on Wittgenstein, we are bewitched by a picture.¹⁷

The problem extends beyond the ticking bomb scenario in its pure form. The public (already softened up the media's habit of uncritically repeating government claims) is plied with stories purporting to show that the torture of terrorist suspects has elicited life-saving information, while the subsequent debunking of those stories never receives anything close to the same attention. In his highly publicized speech of September 6, 2006, the occasion for introducing the Military Commissions Bill to Congress, President Bush claimed that the use of "alternative" interrogation techniques—a transparent reference to torture—had yielded information crucial to the fight against terrorism, including information about specific terrorist plots. Where Bush's claims could be checked, it turned out that the information referred to was probably worthless or, when not worthless, obtained by means other than torture.¹⁸ But there was little public airing of these facts.

In December 2007 ABC News created a sensation by broadcasting an interview in which former CIA intelligence officer John Kiriakou claimed that the water-boarding of Al Qaeda member Abu Zubaydah by CIA interrogators yielded information that stopped "maybe dozens of attacks."¹⁹ A *Washington Post* article casting doubt on Kiriakou's assertions about the efficacy of Zubaydah's torture received far less attention.²⁰ Then there is the oft-told story that in 1995 an Al Qaeda plot to blow up eleven US passenger jets was foiled when Philippine police tortured the information out of a Pakistani suspect. This story, popularized by Alan Dershowitz as a justification for the exceptional use of torture warrants, derives from accounts by Philippine and US officials shared with the *Washington Post*. However, it omits a crucial fact reported in the original newspaper articles. The bomb plot admitted by the suspect after sixty-seven days of torture was also revealed in the computer files that police had seized among the bomb-making equipment in his apartment at the time of his arrest.²¹ The torture was unnecessary to thwart the plot.

From time to time, the media offers stories of apparent ticking bomb torture situations. In these stories, officials prevent a terrorist attack by torturing the life-saving information out of a knowledgeable terrorist in their custody.²² There are two problems with such stories. The first is that they are told by interrogation officials with a vested interest in demonstrating the practical success and moral legitimacy of their activities. The second is that, even if we were to trust the facts as reported, they are selectively chosen from a much larger set of cases involving the use of torture against the guilty and innocent alike. Cherry-picking the "successful" case not only hides the wider practice, but also distorts the nature of the case being reported. Because the outcome proves that the captive was indeed guilty of withholding lifesaving information connected to a terrorist plot, an illusion is created that this fact was always in the interrogators' possession. More prob-

ably, the interrogators had no more “certainty” regarding this person’s culpable silence than they had regarding the culpable silence of other people whom they also tortured and who, as it turned out, had no life-saving information to give. Cherry-picked examples of ticking bomb torture situations are false examples, because they imply a false level of certainty regarding the guilt of the tortured person (not to mention that they are a misleading sample).

And yet even cherry-picked examples are hard to come by. In the long history of counter-terrorist campaigns there does not appear to be a single verified incident. In his exhaustive study of French torture in the Battle of Algiers—the historical episode cited more than any other as proof that torture is an effective tool against terrorism, and the conflict that popularized the modern version of the ticking bomb hypothetical—Darius Rejali has found that “no rank-and-file soldier has related an incident in which he personally, through timely interrogation, produced information that stopped a ticking bomb from exploding.”²³ Nor have any confirmed examples come out of Israel-Palestine, Northern Ireland, or the US “War on Terror.”

What we do know is that in all these campaigns large numbers of innocent people were tortured—not only those not involved in an unfolding terrorist attack, but those not connected to terrorism at all. Rejali calculates conservatively that during the Battle of Algiers, “*at least* fifteen innocents were tortured for every one FLN operative.”²⁴ The torture of large numbers of non-terrorist Palestinians, Northern Irish, Iraqis, and Afghans is well documented. When torture is used to gather intelligence about terrorist operations, a dragnet is used.²⁵

One sometimes hears reports that torture was successfully used to defuse ticking bombs in Israel. Such reports are often based on hearsay, or attributed to unidentified security officials.²⁶ The impression is often created that Israeli torture is limited to ticking bomb situations. In fact, Israeli torture of Palestinian prisoners has been widespread and indiscriminate, and much of it has been carried out not to secure intelligence but for purposes of intimidation or to obtain confessions for use in criminal prosecutions.²⁷ Writers who speculate about ticking bomb torture cases in Israel without referring to these facts disguise the reality of Israeli torture.

A May 2007 report by the Public Committee Against Torture in Israel (PCATI) shows how easily the ticking bomb justification can be abused.²⁸ It tracks the case of eight Palestinians tortured by Israeli security forces. In five of those cases, the Israeli government responded to the PCATI complaint with a boiler-plate invocation of the ticking-bomb rationale, stating that the prisoner “was arrested for interrogation due to a grave suspicion against him that was based on reliable information, according to which he was allegedly involved in or assisted in carrying out serious terrorist activities that were liable to have been carried out in the very near future, and which could have injured or endangered human life.” (Formal appeal to the ticking-bomb justification became more common after the Israeli High Court of Justice in 1999 reaffirmed the illegality of torture and inhuman treatment but stated that the ticking-bomb argument might serve as a criminal defense in the trial of

an accused interrogator.) Four of these five prisoners were subsequently charged with criminal offenses. But in no case were they charged with plotting to carry out a violent attack that was due to be completed after the date of their arrest.²⁹

To sum up: Ticking bomb torture cases do not occur in real life. Confirmed cases are lacking, and even the unconfirmed cases that get discussed are ones in which there is significant *ex ante* uncertainty that the torture victim is culpably withholding life-saving information. Moreover, such alleged cases occur in the context of an institutional policy that leads to the widespread torture of innocent people, and to the widespread use of torture in cases that lack even a superficial resemblance to the ticking bomb hypothetical. It could not be otherwise. Torture requires an institutional apparatus, and no practicable institutional rules could confine its use to genuine ticking bomb cases.³⁰ Moreover, even if we allow ourselves the fantasy of the pure ticking bomb torture situation, we must remember that torture in that situation will become a precedent for torture in future situations not nearly as pure.

It is further worth remarking that discussions of the ticking bomb case tend to assume that torture can be carried out in a precise, scientific, and restrained manner; that it tends to elicit prompt actionable intelligence; that interrogators and their superiors can distinguish true tortured statements from false ones; that torture will not corrupt bureaucracies; and that it will not alienate populations from which the torture victims are drawn. These assumptions are illusory.³¹ They are additional myths that are reinforced by the ticking bomb argument.

Meanwhile, the argument has been and still is used to justify the widespread use of torture. It has been the cause of untold suffering. One of the most valuable things a philosopher can do is to remind people that the ticking bomb torture scenario is a fiction detached from reality.

4. TORTURE IN TICKING BOMB CASES

Though noting its unrealistic character, both Juratowitch and McMahan ask what we ought morally to do in a genuine ticking bomb situation. McMahan writes that if, improbably, one could sufficiently minimize the danger of encouraging illicit torture in the future, one might in principle be morally justified in torturing the ticking bomb terrorist. He states that many people's intuitions support this view. He shows that the reasoning behind such intuitions can appeal to the concept of moral liability, a concept that structures well-established social practices of tort law and criminal punishment, and that underlies the best theory of permissible violence undertaken in self-defense.

The reply to this argument is that even if moral liability can justify the imposition of other kinds of harms, it can never justify torture. Juratowitch argues that torture is a violation of our humanity, no matter what the circumstances. It violates our autonomy, because unbearable suffering is inflicted on a defenseless individual in a manner calculated to break his will. It violates our dignity, because

the torturer exploitatively uses the prisoner's suffering for his own purposes: "the tortured person is reduced to a suffering instrument of the torturer" (p. 87).³² Juratowitch concludes that for this reason "torture is something that the state should not inflict on any human, by virtue of her humanity" (p. 87).

McMahan believes that such considerations cannot prevail in the ticking bomb situation because in that situation the prisoner has, in a sense, brought the torture on himself. The terrorist is morally responsible for creating the situation in which torturing him is the only way to save the innocent. He does not create the threat innocently or unknowingly or involuntarily. The threat arises from his continuing conscious wrongful action (first initiating the attack, now refusing to give us the information necessary to prevent it). McMahan derives the stark conclusion that torture "would not wrong" the ticking bomb terrorist. The terrorist's guilt makes him "liable" to torture, meaning that we may torture him if torturing him is necessary to save the lives of the innocent people threatened by his intended attack (p. 97). Let us call this the "liability view."

The question is whether moral guilt can ever make someone liable to torture. It is possible to deny this. We may think that no one is so bad that it can be permissible to torture him. One thing to bear in mind (not the only thing) is that the terrorist is betrayed by his false beliefs. He may think that the completion of the attack is required by loyalty to his friends, or that halting the attack now would be an unpardonable failure of courage, or that his intended victims deserve their fate, or that the attack is ordered by God. All these beliefs are false. The terrorist's greatest error is failing to recognize the supreme wrongness of his action. Because he is betrayed by false beliefs, our anger should be mixed with pity. The terrorist is not evil in the same way that his action is evil.

If we say on the contrary that some people, namely terrorists, are so bad that they become liable to torture when (implausibly) their torture will save innocent people from being killed, a dangerous door is opened. In March 2003 the United States invaded Iraq. By the time US troops seized Baghdad and overthrew Saddam Hussein in early April, they had killed many thousand civilians.³³ Like the worst terrorists, the war's architects, planners, and executors claimed that their cause was just, but, like the worst terrorists also, they knew that their actions would kill a large number of civilians.³⁴ If terrorists make themselves liable to torture because of their terrorist acts, then do the architects, planners, and executors of the Iraqi invasion also make themselves liable to torture? Might an Iraqi, for example, be justified in torturing a knowledgeable high-ranking American officer in order to learn which civilian areas needed to be evacuated?

Some will be tempted to reply: it is worse to cause someone's death intentionally (as terrorists kill civilians) than to cause someone's death knowingly (as the US killed civilians in Iraq). This is the much debated doctrine of double effect. The trouble with this reply is that it makes one's immunity from torture depend on a philosophical theory the truth of which remains a matter of heated dispute in

the leading philosophy journals, not to mention the public at large. Once we claim that certain forms of violence make their perpetrators liable to torture, it becomes difficult to know where, theoretically, to draw the line. Many Americans do not draw the line at terrorism, believing that torture would also be justified to save American soldiers from insurgent attacks.³⁵ International law tries to draw a clear line between those who may and those who may not be permissibly attacked during wartime. But the question of where the line *ought* to be drawn and what justifies its being drawn in that place is notoriously difficult. If we adopted the liability view, we would need a complete theory of which kinds of violent threats make one liable to torture. That is a heavy burden for moral philosophers to bear.

A further point is that our intuitions about ticking bomb cases may be colored by unconscious racism.³⁶ The racism may be our own, or that of other citizens whose moral intuitions serve as a reference for our views. When Americans think about ticking bombs, they usually imagine an American (probably not Arab or Muslim) in the role of the conscientious torturer and an Arab or Muslim (probably foreign) in the role of the terrorist. Our intuitions might well be different if the roles were reversed, or if the word “terrorist” were not racially coded. This is a difficulty for ticking bomb casuists.

5. TORTURE BEYOND THE TICKING BOMB CASES

Ticking bomb scenarios do not occur in real life. But some writers say that the intuitions elicited by them show us that torture is morally permitted (or even required) in other more realistic cases.³⁷ The idea seems to be that if we have captured a known terrorist, torture need not be confined to actual ticking bomb situations. We may torture him even if we are not fully certain but only think that there *may* be a ticking bomb plot, or that he *may* have the knowledge necessary to abort it. Even if there is no ticking bomb, we may torture him for information about his organization’s infrastructure—information that will help us achieve our long-term goal of destroying the organization. In Krauthammer’s words, torture is sometimes warranted for slow-fuse as well as ticking bombs.

These are scary proposals. We claim the moral right to torture even if, *as we acknowledge*, there may well be no ticking bomb plot to abort, or our captive may well have no relevant information to give, or the information sought may well be unnecessary to prevent an actual attack. The captive’s past crime becomes our continuing license to torture him for speculative gain. This carries our dehumanization of him to a new level—far beyond that contemplated in the fanciful ticking-bomb case. The line between self-defense and sadism becomes ever harder to see. Notice that such reasoning places no temporal limit on a person’s torture. We may, in principle, torture someone for months or years—possibly the rest of his or her life. Guantanamo Bay is the hellish incarnation of the slow-fuse bomb justification of torture.

Meanwhile, all the earlier-noted problems remain, though now in magnified form. We lack full certainty that our captive is in fact a terrorist. The institutional

dynamics of torture will lead us to torture even more widely than our now greatly broadened rubric, so that many entirely innocent people will be tortured. Our practice will encourage others to torture with even less restraint. The view that terrorism makes its practitioners broadly liable to torture may be extended, in logic not always easy to refute, to crimes (or alleged crimes) other than terrorism. The broader use of torture will impede the struggle against terrorism, even stimulate terrorism. It will brutalize the torturers, causing abuse to spread in families, police cells, and military barracks.

6. THE LIABILITY VIEW: FEAR AND ANGER

Most contemporary justifications of torture adopt some variant of McMahan's liability view. The ostensible attraction of the liability view is that it places a restraint on two familiar sources of moral reasoning. It reins in consequentialist or loosely consequentialist reasoning that would authorize torture of the innocent for the sake of averting some sufficiently great catastrophe. It reins in retributivist thinking that would authorize torture of a terrorist captive, whether or not such torture was necessary to prevent the loss of innocent life. Both a retributivist reason (the captive is responsible for the threat) and a consequentialist reason (torture is necessary to save innocent people from being killed) are required; neither one is sufficient. The consequentialist criterion and the retributivist criterion are the two locks on the door to torture.

So it seems, but things may not be what they seem. The danger of the liability view, as with other "hybrid" moral theories, is that each criterion may break loose of the other. The liability view may end up liberating consequentialist reasons from retributivist constraints, and vice versa. Each reason is supposed to sit silently in the other's absence, but instead they may take turns. There is a danger of gradually expanding the number of occasions on which torture is morally permitted.

This danger is realized in actual discussions of torture. Notice, first, that the retributivist constraint is rarely tight. The pure ticking bomb scenario assumes a threat-posing terrorist, but many people (including most of those who appeal to the scenario) are open to the risk of torturing the innocent. Even McMahan believes that we may sometimes resort to torture when our "reasonable or epistemically justified" belief that our captive is a ticking bomb terrorist falls short of full certainty (p. 103). He thus believes we are permitted to expose the innocent to some risk of being tortured. (Of course, actual torture policies that have been justified with reference to the ticking bomb scenario widen the risk far more than McMahan would permit. And McMahan rejects any adoption of a torture *policy* in the first place.)

Second, people are surprisingly indifferent to the *consequentialist* dangers of torture. The view is that torture is sometimes necessary to keep us safe. Yet those who profess this view are often deaf to repeated demonstrations that torture produces bad information, that the information sought from torture can usually be obtained by other and better means, that torture spins out of control, that it hinders more effective counter-terrorist strategies, that it enrages existing enemies

and recruits new ones, that it wrecks the lives of those ordered to torture. It's as though people stop listening after they've learned that the captive person is a terrorist. I believe these habits of thought may be encouraged by stark formulations such as the claim that a ticking-bomb terrorist makes himself "liable to be tortured" or that "torturing him would not wrong him."

CIA agents or their Egyptian partners tortured Ibn al-Shaykh al-Libi into stating that Saddam Hussein trained Al Qaeda in the use of weapons of mass destruction.³⁸ Bush administration officials—notably including Colin Powell in his historic speech to the United Nations in February 2003—relied heavily on al-Libi's statement in their arguments for the Iraq War. After the war began, al-Libi retracted his statement. The purpose of torturing terrorists, we are told, is to save lives. But torture in this case helped bring about a war that killed hundreds of thousands of people (and that, as everyone agrees, has been a boon to international terrorism). It is the cataclysmic ticking bomb scenario in reverse. And it is an *actual* case unlike the fictional cases that dominate public discussions of the morality of torture. Yet it is rarely mentioned.

We may flatter ourselves on our ability to be guided by the intersection of consequentialist and retributivist reasoning, but the emotions that stand behind such reasoning—fear and anger—are not easily brought under control. Fear of terrorism distorts our calculations of risk and probability. As David Cole and Jules Lobel observe, drawing on social science research, "emotional factors are likely to cause us to overestimate risks based on vivid, emotionally laden events, such as terrorist attacks, and to underestimate costs and risks that are abstract, statistical, and likely to arise in the long term."³⁹ For this reason, worst-case terrorist scenarios take on exaggerated reality in our minds, and ticking bomb hypotheticals, introduced as fictions, come to seem like possibilities. Ticking bomb reasoning is extremely vulnerable to the distorting effect of fear. Nor is it surprising that retributivist constraints will come under pressure from the exaggerated fear of terrorist attacks. Worse yet, fear distorts our moral principles as well as the probability calculations used to implement them. Government officials sometimes speak and act as though anything is justified in the name of fear, and this attitude finds an echo in the general public. Fear brings with it a swollen sense of entitlement.

Anger unleashes further currents. It encourages the infliction of unnecessary harm. I think that in public discourse the liability view has become a thin disguise for uncontrolled anger. There is in fact little regret, on the contrary there is some satisfaction, in the thought that terrorists have been tortured unnecessarily or excessively. A further point is that anger, which finds an outlet in the liability view, undermines the ostensible rationale of the liability view. Whereas fear makes us exaggerate the dangers posed by ticking-bomb terrorists, anger makes us *overlook* the dangers caused by our own retaliatory actions, including torture.⁴⁰ This is why, in discussions about the morality of torture, arguments that torture in fact makes us less safe are so often greeted with bored impatience. The sequence

of thoughts seems to be this: “Our lives are in danger, and torturing terrorists may be necessary to keep us safe. Terrorists whom we torture in self-defense are not wronged; they have no right to complain. Therefore, we may torture them, whether or not doing so makes us safe. And if torturing them makes us *less* safe, we are at worst guilty of imprudence, not immorality.” Such reasoning is reinforced by the tacit or not-so-tacit thought that only a violent response to terrorism (with torture standing for maximum violence) constitutes an adequate moral condemnation of terrorism.

In a masterful chapter Rejali identifies several reasons why governments don’t learn from the failures of torture. One reason is that the actual motives for torture deviate from the purported rationale: “The terrorist’s suffering is uniquely satisfying regardless of whether he reveals any information. Beneath the urbane, civilized appeal to torture for information, lurks a deeper impulse, born from fear and satisfied by pain.” Rejali continues: “When a public official is prepared to spill the blood of a detained, helpless individual, breaking bonds of law and morality, this appears to satisfy a debt incurred by the violence of a terrorist.”⁴¹ The liability view gives dangerous scope to fear and anger. Racism (conscious or unconscious) lends further power to these emotions.⁴²

7. WHY AN ABSOLUTE LEGAL BAN IMPLIES AN ABSOLUTE MORAL BAN

McMahan argues that the law must prohibit torture in all circumstances whatsoever. He nonetheless thinks that in rare cases torture might be permitted as a matter of individual morality. I will argue against the latter view, drawing on McMahan’s arguments for an absolute legal ban.

McMahan reminds us that a law permitting torture only in the unlikely event of the ticking bomb scenario would lead inevitably to its wider use.⁴³ This is so because of the institutional character of torture, because officials on the look-out for ticking bomb situations will overestimate their occurrence, and because there will be irresistible pressure to stretch the permission whenever it is thought that torture may reap some genuine advantage in the struggle against terrorism. Israeli experience shows that laws permitting or retroactively excusing torture in ticking bomb cases lead to the frequent use of torture in non-ticking bomb cases.⁴⁴ In the past, emergency interrogational torture has tumbled down a slippery slope into routine torture, and there is no reason to expect that the future will be different.⁴⁵ Finally, a law authorizing torture in exceptional cases will become a precedent to others less restrained than ourselves (assuming that we are restrained by comparison).

The lessons that McMahan draws for the law extend to morality also. His argument is that if we create an exception for ticking bomb torture, public officials cannot be trusted to remain within the confines of the exception. But that would appear to be true, whether the source of the permission is legal authorization or personal moral belief. If the personal moral belief is widely shared, and known to be widely shared, and generally approved, it becomes increasingly difficult to distinguish the

legal exception from the extra-legal exception. McMahan rightly says that we must reject torture “not only legally but institutionally” (p. 106), but he underestimates the danger that a moral permission will evolve into an institutional permission.

But the problem is not just institutional. Individuals, like institutions, are too prone to error. Fear, anger, racism, and bombardment by government and media messages distort our perceptions, predisposing us to see ticking bombs where they do not exist. The constant recirculation of the ticking bomb story increases our suggestibility. Above all, there is the extreme unlikelihood of the ticking bomb situation itself. Add to that our incurable tendency to exaggerate the certainty of our beliefs. The upshot is that if you think you are faced with a ticking bomb scenario—there is a ticking bomb, the person in your custody has planted it, etc.—there is a very high probability that you are wrong. This alone is a strong argument that you should never torture.

Some might reply as follows. It is impossible to formulate a legal exception (or institutionalized extra-legal exception) that will not end up licensing illicit torture, but it *might* be possible to formulate an individual moral exception that would not do so. If one builds in enough demanding conditions, the permission will not get out of control. It is hard to formulate a general statement of those conditions, though wildly imaginary examples may encourage the thought that it can be done. For example, you *see* the terrorist tie the bomb around the child’s neck, but only he knows the combination. The point is that we cannot authorize a moral exception to the ban on torture based on the claim that you are morally permitted to use torture if you are faced with a recalcitrant ticking-bomb terrorist. That exception is negated by the high probability that your belief that you are faced with a recalcitrant ticking-bomb terrorist is wrong. The exception would have to be drawn much more narrowly. My view is that it could not be drawn to cover cases that occur in the real world.

I will make two further points. The first is that we should not be lulled into thinking that an absolute legal ban will block the influence of a moral exception. Saying that despite an absolute legal ban we are morally permitted (or required) to use torture in exceptional cases amounts to saying that in exceptional cases we are morally permitted (or required) to break the law. This will be widely interpreted as an instruction to break the law. After all, “morality is the higher law.” Some people have already taken the lesson to heart. Retired General James “Spider” Marks, the national security advisor to former presidential candidate Mitt Romney, told CNN that torture as a policy should be against the law, but that we might still have to use it. Asked, “If you could save the life of a soldier, rescue the hostage children, stop the next terrorist bomb by torturing a prisoner for information, would you do it?” Marks replied, “I’d stick a knife in somebody’s thigh in a heartbeat.”⁴⁶ A moral injunction at variance with the law erodes the law’s force. (Sometimes this is a good thing, but not in the case of torture.)

The second point is that moral principles are woven into the law, human rights

law in particular. International law proclaims an absolute human right not to be tortured, deriving it from the equal dignity of all human beings. The UN General Assembly has unanimously declared that “any act of torture or other cruel, inhuman or degrading treatment or punishment is an offense to human dignity.” To deny an absolute moral prohibition of torture is to undermine the absolute legal ban on torture as understood by the law, and thus to alter the law.

CONCLUSION

The claim that torture is permissible in exceptional cases is defeated by several reasons, some directly connected to human dignity, others more practical in nature. Some readers may continue to press. What about the most extreme case? What if there were hundreds of thousands of victims, millions? What if we were absolutely certain? Hypotheticals of this kind leave reality far behind. For too long, they have corrupted our moral and political thinking. For too long, the concession that torture would be permitted in some sufficiently extreme and unreal case has been used to justify the indefensible torture of large numbers of people. In this world, we may set the notorious ticking bomb scenario aside. Torture is always wrong.⁴⁷

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NOTES

1. I thank George Kateb for sending me his penetrating insights on this topic. Whatever merit this essay contains derives largely from his inspiration. I thank Jeff McMahan for his stimulating criticism and unflinching encouragement. I thank Michael Bell for early words of wisdom. For expert commentary at the last minute, I thank Louis Frankenthaler, Lisa Hajjar, George Lovell, Darius Rejali, and Brad Roth. For their heroic assistance and inspired advice, I thank Peter Mack, William Talbott, and Jack Turner. Any errors in the article are mine alone.

2. David Sussman, “Defining Torture,” *Case Western Reserve Journal of International Law*, vol. 37 (2006), pp. 225–230.

3. Jean Maria Arrigo, “A Utilitarian Argument against Torture Interrogation of Terrorists,” *Science and Engineering Ethics*, vol. 10 (2004), pp. 543–572; Bob Brecher, *Torture and the Ticking Bomb* (Oxford: Blackwell, 2007); David Luban, “Liberalism, Torture, and the Ticking Bomb,” in *The Torture Debate*, ed. Karen J. Greenberg (Cambridge: Cambridge University Press, 2006); Alfred W. McCoy, “The Myth of the Ticking Bomb,” *The Progressive* (October 2006), pp. 20–24; Kim Lane Scheppele, “Hypothetical Torture in the ‘War on Terrorism,’” *Journal of National Security Law and Policy*, vol. 1 (2005), pp. 285–340; Henry Shue, “Torture in Dreamland: Disposing of the Ticking Bomb,” *Case Western Reserve Journal of International Law*, vol. 37 (2006), pp. 231–240; and Jessica Wolfendale, “Training Torturers: A Critique of the ‘Ticking Bomb’ Argument,” *Social*

Theory and Practice, vol. 32 (2006), pp. 269–287. See also the blogpost by Katherine on Obsidian Wings, “Choose Your Own Adventure,” http://obsidianwings.blogs.com/obsidian_wings/2007/11/choose-your-own.html.

4. Darius Rejali, *Torture and Democracy* (Princeton, N.J.: Princeton University Press, 2007).

5. Ben Juratowitch, “Torture Is Always Wrong,” *Public Affairs Quarterly*, vol. 22, no. 2 (April 2008), pp. 81–90. For another discussion that reaches a similar conclusion, see Association for the Prevention of Torture, *Defusing the Ticking Bomb Scenario: Why We Must Always Say No to Torture, Always* (Geneva, 2007).

6. Jeff McMahan, “Torture in Principle and in Practice,” *Public Affairs Quarterly*, vol. 22, no. 2 (April 2008), pp. 91–108.

7. Rejali, *Torture and Democracy*, p. 478.

8. These worries also find expression in Henry Shue’s essay “Torture,” *Philosophy and Public Affairs*, vol. 7 (1978), pp. 124–143; and in David Luban, “Unthinking the Ticking Bomb” (working paper).

9. Jacobo Timerman, *Prisoner Without a Name, Cell Without a Number*, trans. Toby Talbot (New York: Knopf, 1981), p. 32.

10. Sussman, “Defining Torture,” p. 230. This is a recurrent theme in Jean Améry’s memoir, on which Sussman offers valuable reflections. Améry, *At the Mind’s Limits: Contemplations by a Survivor on Auschwitz and Its Realities*, trans. Sidney Rosenfeld and Stella P. Rosenfeld (Bloomington: Indiana University Press, 1980). Another victim, referring to the onset of brutal torture, states: “That day I ceased really knowing I was alive.” David Rose, “MI6 and CIA ‘Sent Student to Morocco to Be Tortured,’” *Observer* (December 11, 2005), p. 20. Many inmates at Guantanamo Bay have attempted suicide, some of them successfully. For additional examples of suicide, see Rejali, *Torture and Democracy*, p. 498.

11. Shue, “Torture in Dreamland,” p. 231.

12. See Arrigo, “A Utilitarian Argument against Torture Interrogation of Terrorists”; Wolfendale, “Training Torturers”; Scheppele, “Hypothetical Torture.”

13. Shue, “Torture in Dreamland,” p. 236.

14. Scheppele, “Hypothetical Torture,” p. 325.

15. Jane Mayer, “Letter from Hollywood: Whatever It Takes,” *The New Yorker* (February 19, 2007).

16. I discuss this point below.

17. Luban, “Liberalism, Torture, and the Ticking Bomb,” p. 45.

18. See David Cole and Jules Lobel, *Less Safe, Less Free* (New York: The New Press, 2007), pp. 125–127. The authors write, “Where details are capable of being checked, there is evidence that President Bush either exaggerated or lied with respect to the role of the tortured evidence” (p. 125). Rejali admires the “skill with which the Bush administration has successfully pitched the persistent failures of coercive interrogation programs as unqualified successes.” Rejali, *Torture and Democracy*, p. 508.

19. Richard Esposito and Brian Ross, “Coming in from the Cold: CIA Spy Calls Waterboarding Necessary but Torture,” *ABC News* (December 10, 2007).

20. Dan Eggen and Walter Pincus, "FBI, CIA Debate Significance of Terror Suspect: Agencies Also Disagree On Interrogation Methods," *Washington Post* (December 18, 2007).

21. Matthew Brzezinski, "Bust and Boom," *Washington Post Magazine* (December 30, 2001). Moreover, when he eventually yielded the information to his interrogators, it was not under torture, but rather the threat of being transferred to Israel. Doug Struck, Howard Schneider, Karl Vick, and Peter Baker, "Borderless Network of Terror; Bin Laden Followers Reach Across Globe," *Washington Post* (September 23, 2001). For a discussion of this episode, see Rejali, *Torture and Democracy*, pp. 507–508.

22. An example is Bruce Hoffman, "Must We Torture?" *The Atlantic Monthly* (January 2002).

23. Rejali, *Torture and Democracy*, p. 481. Rejali also shows that, contrary to enduring myth, torture did not contribute to French victory in the Battle itself. *Torture and Democracy*, pp. 480–492.

24. *Ibid.*, p. 492. Emphasis in the original.

25. Rejali gives reasons for thinking this is probably unavoidable. *Ibid.*, pp. 470–474.

26. Joseph Lelyveld describes this pattern in "Interrogating Ourselves," *New York Times Magazine* (June 12, 2005). On the absence of hard evidence and reliance on rumor, see also Rejali, *Torture and Democracy*, p. 517.

27. Rejali, *Torture and Democracy*, pp. 62–63, 515–518; Lisa Hajjar, *Courting Conflict: The Israeli Military Court System in the West Bank and Gaza* (Berkeley: University of California Press, 2004).

28. Public Committee Against Torture in Israel, "*Ticking Bombs*": *Testimonies of Torture Victims in Israel* (Jerusalem, May 2007).

29. Two of them were charged with violent attacks that occurred before their arrest. One of these charges—facilitating a suicide bombing—resulted in acquittal. The other charge—conspiracy to commit "a shooting attack on guards at the separation wall," a conspiracy that did not materialize—had not reached trial at the time the report was published. Other charges included membership in banned organizations, manufacture of weapons, possession of weapons, forgery, "giving cover to wanted people," and "violation of an order regarding a closed area." In some cases the charges are based on statements by the tortured prisoners or other detainees who may also have been tortured. One of the four trials was settled by a plea bargain, the judge giving as one of his reasons "the fact that [the trial] did not involve grave crimes" (p. 37).

30. Scheppele, "Hypothetical Torture," pp. 307–318.

31. Rejali, *Torture and Democracy*, chap. 21.

32. For related arguments, see David Sussman, "What's Wrong with Torture?" *Philosophy and Public Affairs*, vol. 33 (2005), pp. 1–33; Andrew Sullivan, "The Abolition of Torture," *The New Republic* (December 19, 2005); Shue, "Torture"; and Luban, "Unthinking the Ticking Bomb."

33. Michael Massing, "Iraq: The Hidden Human Costs," *New York Review of Books* (December 20, 2007).

34. I leave aside the large number of Iraqi civilians killed, injured, and tortured by US forces after April 2003. I also leave aside the crime of killing large numbers of Iraqi

combatants (and causing the deaths of many US and allied combatants) in a war that was waged in violation of international law and promoted on the basis of doctored and distorted intelligence.

35. See the example discussed at the end of section 7 below.

36. I thank William Talbott for pressing this issue on my attention.

37. Charles Krauthammer develops this argument in his essay, “The Truth About Torture,” *The Weekly Standard*, vol. 11 (December 5, 2005). McMahan cryptically writes, “Pointing out that actual cases have neither the epistemic features nor the all-or-nothing character of the make-believe example leaves it open that actual cases may nevertheless raise similar challenges” (p. 95). He does not defend this claim. Though McMahan’s cryptic phrase may remind some readers of Krauthammer’s argument, there is a vast gulf between their respective positions. Krauthammer argues for, while McMahan argues strenuously and powerfully against, a limited legal permission to use torture in “ticking bomb” and “slow-fuse bomb” cases. A clear example of the slow-fuse bomb argument may be found in the notorious “torture memo” signed by Assistant Attorney General Jay S. Bybee, quoted in Mark Danner, *Torture and Truth* (New York: New York Review Books, 2005), p. 144.

38. Rejali, *Torture and Democracy*, pp. 504–505.

39. Cole and Lobel, *Less Safe, Less Free*, p. 191. A survey conducted shortly after the 9/11 attacks showed that the average US citizen estimated his or her likelihood of being injured in a terrorist attack over the next year at 20 percent—a probability that would not have been realized even if an attack on the scale of 9/11 occurred every day for one year. *Less Safe, Less Free*, p. 194, citing Jeffrey Rosen, *The Naked Crowd: Reclaiming Security and Freedom on an Anxious Age* (New York: Random House, 2004), p. 73. “When people are asked how much they will pay for flight insurance to cover losses resulting from terrorism, they agree to pay more than when asked what they would pay for flight insurance to cover losses from all causes (which would by definition include terrorist causes).” Cole and Lobel, *Less Safe, Less Free*, citing Eric J. Johnson et al., “Framing, Probability Distortion and Insurance Decisions,” *Journal of Risk and Uncertainty*, vol. 7 (August 1993), pp. 35–51.

40. This is the theme of Stephen Holmes’s book, *The Matador’s Cape: America’s Reckless Response to Terror* (Cambridge: Cambridge University Press, 2007).

41. Rejali, *Torture and Democracy*, p. 534.

42. On the role that racism has played in the “War on Terror,” see George Kateb, “A Life of Fear,” in Kateb, *Patriotism and Other Mistakes* (New Haven, Conn.: Yale University Press, 2006).

43. It is difficult to know how such an exception could even be formulated. See Scheppele, “Hypothetical Torture,” pp. 307–318.

44. Public Committee Against Torture in Israel, *Back to a Routine of Torture: Torture and Ill-Treatment of Palestinian Detainees during Arrest, Detention and Interrogation* (Jerusalem, September 2001–April 2003).

45. Rejali, *Torture and Democracy*, pp. 529–532.

46. Anderson Cooper 360 Degrees, November 8, 2005, <http://transcripts.cnn.com/TRANSCRIPTS/0511/08/acd.02.html>.

47. As Juratowitch rightly states.