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# Articles

## TORTURE AND THE NECESSITY DOCTRINE

John Alan Cohan\*

*Imagine that you are creating a fabric of human destiny with the object of making men happy in the end, giving them peace and rest at last, 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, and tell the truth.<sup>1</sup>*

### I. INTRODUCTION

The use of torture undertaken to obtain information to prevent an imminent terrorist attack has been the focus of much scholarly work. Much of the extensive commentary on this subject has alluded to the necessity doctrine as justification for torturing a suspect who likely has information concerning a “ticking bomb,” but there has been little elaboration on just how the necessity doctrine would work in this context.<sup>2</sup>

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<sup>1</sup> FYDOR DOSTOYEVSKY, *THE BROTHERS KARAMAZOV* 291 (Constance Garnett, trans., Vintage Books 1955).

<sup>2</sup> See, e.g., Julie Angell, *Ethics, Torture, and Marginal Memoranda at the DOJ Office of Legal Counsel*, 18 GEO. J. LEGAL ETHICS 557 (2005); Mirko Bagaric & Julie Clarke, *Not Enough Official Torture in the World? The Circumstances in Which Torture Is Morally Justifiable*, 39 U.S.F. L. REV. 581, 588-89 (2005); Richard B. Bilder & Detlev F. Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT’L L. 689 (2004); John Cornyn, *In Defense of Alberto R. Gonzales and the 1949 Geneva Conventions*, 9 TEX. REV. L. & POL. 213 (2005); Alan M. Dershowitz, *The Torture Warrant: A Response to Professor Strauss*, 48 N.Y.L. SCH. L. REV. 275 (2003-04) [hereinafter Dershowitz, *The Torture Warrant*]; Oswaldo A. Estrada, *Human Dignity and the Convention Against Torture: Has the Burden of Proof Become Heavier than Originally Intended?*, 3 REGENT J. INT’L L. 87 (2005); Kimberly Kessler Ferzan, *Torture, Necessity, and the Union of Law & Philosophy*, 36 RUTGERS L.J. 183 (2004); Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481 (2004); Linda M. Keller, *Is Truth Serum Torture?*, 20 AM. U. INT’L L. REV. 521 (2005); Harold Hojgju Koh, *A World Without Torture*, 43 COLUM. J. TRANSNAT’L L. 641 (2005); Sanford Levinson, *Ticking Bombs and Catastrophes*, 8 GREEN BAG 311 (2005); David Luban,

1588 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

This Article starts from the empirical observation that no other practice except slavery is so universally condemned in law and human convention as torture. While ethicists all agree that torture is morally repugnant, there are competing theories—utilitarianism and deontology—on just how that should play out in the world.<sup>3</sup>

The deontological claim is that torture is categorically wrong under any circumstances because of its intrinsic affront to human decency and dignity. If there is anything meaningful in the concept “human rights,” then the right of the individual not to be subjected to torture is so fundamental that it cannot be derogated even in extreme circumstances. There has, at least until recently, been the tendency to assume that the deontological prohibition of torture presents few conceptual or ethical problems. The opposing view, which is examined in this Article, is that there are utilitarian “exceptions” that would allow torture in certain circumstances, even while acknowledging that the practice is morally repugnant.

First, this Article examines the deontological and utilitarian ideas behind the use of torture. Its goal is to provide a solution to the dilemma between deontology and utilitarianism through the common law doctrine of necessity. In particular, this Article considers the underpinnings of the prohibition against torture in international law and how this has developed in recent years. After a brief overview of the definition of torture, referring to various international documents, the Article will briefly explore the controversial Justice Department memoranda of 2002 and 2004 that suggested a certain leeway in the definition of torture. Then, this Article turns to an analysis of the

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*Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425 (2005); Andrew A. Moher, *The Lesser of Two Evils? An Argument for Judicially Sanctioned Torture in a Post-9/11 World*, 26 T. JEFFERSON L. REV. 469 (2004); Jason R. Odesho, *Truth or Dare?: Terrorism and “Truth Serum” in the Post-9/11 World*, 57 STAN. L. REV. 209 (2004); Adam Raviv, *Torture and Justification: Defending the Indefensible*, 13 GEO. MASON L. REV. 135, 151-53 (2004); Louis-Philippe F. Rouillard, *Misinterpreting the Prohibition of Torture Under International Law: The Office of Legal Counsel Memorandum*, 21 AM. U. INT’L L. REV. 9 (2005); Louis Michael Seidman, *Torture’s Truth*, 72 U. CHI. L. REV. 881 (2005); Elizabeth S. Silker, *Terrorists, Interrogation, and Torture: Where Do We Draw the Line?*, 31 J. LEGIS. 191 (2004).

<sup>3</sup> The most important proponent of deontological moral theory in Western thought is undoubtedly Immanuel Kant. See IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* (Cambridge Univ. Press 1991). For a contemporary account, see, e.g., ROBERT NOZICK, *ANARCHY STATE, AND UTOPIA* (1974). Important proponents of utilitarianism (or, more generally, consequentialism) include Jeremy Bentham, (see JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (J.H. Burns & H.L.A. Hart eds., Univ. of London 1970)) and John Stuart Mill (see J. S. MILL, *UTILITARIANISM* (Roger Crisp ed., Oxford Univ. Press 1999)).

“ticking bomb” case developed by Alan Dershowitz, and discusses his salient justifications. As fantastic as the situation might seem, it raises fundamental issues for consideration and helps us evaluate the moral principles associated with torture and the necessity doctrine.

Next, the Article explains the underpinnings of the necessity doctrine, its various elements, and the application of those elements to the ticking bomb case. The Article touches upon the deployment of torture by the French against Algerians and the Israelis against Palestinian detainees. Finally, this Article concludes that while the moral objections to torture are potent, these arguments are not persuasive when the stakes are high enough.

## II. DEONTOLOGICAL AND UTILITARIAN IDEAS CONCERNING THE USE OF TORTURE

Deontological ethical theories hold that certain moral rules that govern the most important aspects of how we ought to live our lives have no exceptions. Deontology claims that it is impermissible to violate these rules even though better consequences would result. Many of these moral constraints are also laws that, for the most part, admit of no exceptions.

There is always a dilemma with deontological constraints because, on the one hand, there may be a greater good produced in violating the constraint and, on the other hand, the constraint is a way to protect the dignity and liberty of the individual whose rights are at issue. The tension is between a categorical imperative and social utility, between rights and interests, and between absolutism and consequentialism.

On the utilitarian side, a number of commentators believe that in a post-September 11 world, the use of torture is permissible, or indeed justifiable, in extreme situations to obtain information for investigative purposes.<sup>4</sup> The use of torture, under this view, would be justifiable in

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<sup>4</sup> See Marcy Strauss, *Torture*, 48 N.Y.L. SCH. L. REV. 201, 227 (2003-04). No less a civil libertarian than Justice Thurgood Marshall said in a dissent:

[T]he public's safety can be perfectly well protected without abridging the Fifth Amendment. If a bomb is about to explode or the public is otherwise imminently imperiled, the police are free to interrogate suspects without advising them of their constitutional rights. . . . If trickery is necessary to protect the public, then the police may trick a suspect into confessing. . . . All the Fifth Amendment forbids is the introduction of coerced statements at trial.

New York v. Quarles, 467 U.S. 649, 686 (1984).

1590 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

the war against terrorism as a last resort “when there is no alternative and when hundreds, thousands, potentially hundreds of thousands of lives hang in the balance . . . .”<sup>5</sup> The argument is that “methods of interrogation that normally would not be tolerated in a free society nonetheless might be constitutionally permissible if there is a compelling government interest that out-weighs an individual’s rights.”<sup>6</sup> Under this utilitarian view, torture is morally permissible if the benefits to third parties significantly outweigh the harm to the victim.

It just isn’t true that one should allow a nuclear war rather than killing or torturing an innocent person. It isn’t even true that one should allow the destruction of a sizable city by a terrorist nuclear device rather than kill or torture an innocent person. To prevent such extraordinary harms extreme actions seem to me to be justified.<sup>7</sup>

No less a libertarian than Jeremy Bentham argued that there are cases in which nobody would object to the deployment of torture.<sup>8</sup> Bentham’s justification for the use of torture was based on case or act utilitarianism—a demonstration that, in a particular case, the benefits that would flow from the limited use of torture would outweigh its costs. He emphasized:

Suppose an occasion, 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

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<sup>5</sup> Strauss, *supra* note 4, at 254.

<sup>6</sup> *Id.* at 239.

<sup>7</sup> Michael S. Moore, *Torture and the Balance of Evils*, 23 ISR. L. REV. 280, 328 (1989).

<sup>8</sup> See W.L. Twining & P.E. Twining, *Bentham on Torture*, 24 N. IR. LEGAL Q. 305, 310 (1973).

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 a 100 innocent persons to the same fate?<sup>9</sup>

In effect, this Article argues that there cannot be an absolutist position taken with respect to any rights, not even fundamental rights. Under this view, the universal norm against torture is not absolute, just as the right of free speech and the right to be free from being intentionally killed by another are not absolute. If the prohibition against intentional homicide, for instance, were absolute, then self-defense or killing to prevent someone from killing a third party, or to prevent a suspected felon from escaping, would be impermissible. In fact, the law regards these acts as not only permissible, but *justifiable*.

An absolutist position may come into conflict with our common sense moral intuitions. A typical example would be a situation where the killing of one innocent person would save the lives of many others, a topic well addressed in the literature.<sup>10</sup> While torture is a grievous and

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<sup>9</sup> See *id.* at 347 n.3 (internal quotations omitted) (quoting Bentham Mss. Box 74.b., p. 429 (May 27, 1804)).

<sup>10</sup> For instance, we might refer to a hypothetical dilemma posed by Bernard Williams, *A Critique of Utilitarianism*, in *UTILITARIANISM: FOR AND AGAINST* 75, 98 (Cambridge Univ. Press 1973):

The captain of the local police in a small South American town is about to kill twenty innocent Indians when Jim stumbles onto the scene. The captain gives Jim a choice. As a courtesy to Jim, the captain says that if Jim kills one of the hostages, the captain will let the other nineteen go free; if Jim refuses to accept the offer, all twenty will be executed.

Should Jim accept the offer? Is necessity a justification that makes it morally permissible to proceed with the killing? Or, on deontological grounds, must Jim refuse? Williams sees this as a difficult case but in the end seems inclined to say that Jim should kill the one Indian. There is no realistic way of saving all twenty.

If Jim should refuse the “invitation” to kill the one innocent person, and instead walks away from the situation, we would hesitate to condemn him even his refusal results in the death of the entire group. Jim may regret the mass killing he failed to prevent, but yet he will remain free of moral fault for having failed to act. By not acting, he simply allows something to happen, which is the same result as if he had never come upon the scene in the first place.

The argument in support of Jim’s shooting the one victim is that it is hard to see how killing can be condemned as immoral when it leaves the victim no worse off—he would have been shot anyway. Jim has no realistic way of saving all twenty of the Indians. Killing the one Indian would not make that person any worse off than he was otherwise going to be. The one suffers the same loss he would have suffered had Jim not been in the picture. And on top of that the action benefits others substantially.

As the consequences become more catastrophic, if for instance, Jim’s action of killing the one Indian would result in saving 1,000 others, deontological prohibitions would seem

1592 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

abominable practice that is universally condemned, if our moral intuitions allow for exceptions in cases of intentional killing, it would seem to provide exceptions in cases of nonlethal torture. But we need not rely on intuitions. For our purposes, we may well rely on the necessity doctrine and its application to cases of torture. Under this doctrine, the letter of the law might be violated justifiably because of the necessity of the circumstances, as explored in Part V.

III. GENERAL CONSIDERATIONS ABOUT TORTURE

A. *International Law*

Several international agreements prohibit the use of torture in any circumstances, including the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War,<sup>11</sup> Article 5 of the Universal Declaration of Human Rights,<sup>12</sup> Article 7 of the International Covenant on Civil and Political Rights (“ICCPR”),<sup>13</sup> and the United Nations Convention Against Torture, and Other Cruel, Inhuman, or Degrading Treatment or Punishment (“the U.N. Convention”).<sup>14</sup> These conventions generally impose an absolute prohibition on the use of torture or other cruel, inhuman, or degrading treatment or punishment.

In 1994, the United States ratified the U.N. Convention,<sup>15</sup> which allows that “Certain rights may be restricted in emergency situations,” and that such emergencies “must be proved to require a particular restriction on a right” before derogation will be permitted.<sup>16</sup> However, it is clear that “No exceptional circumstances whatsoever, whether a state

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to be increasingly problematic to guide one’s decision-making process. If one agrees that it is morally permissible, or even morally required, that Jim commit the act, then, unless torturing is worse than killing, one would allow the moral view that torture of a suspect is permissible, if not morally required, when it will likely save the lives of many innocents.

<sup>11</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

<sup>12</sup> Universal Declaration of Human Rights, G.A.Res. 217A(III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (Dec. 12, 1948). “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” *Id.*

<sup>13</sup> International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 175 (1966) [hereinafter ICCPR]. “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” *Id.*

<sup>14</sup> United Nations Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984) [hereinafter Convention Against Torture].

<sup>15</sup> See Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8478 (Feb. 19, 1999).

<sup>16</sup> John Quigley, *International Limits on Use of Force to Elicit Confessions: A Critique of Israel’s Policy on Interrogation*, 14 BROOK. J. INT’L L. 485, 491-92 (1988).

of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”<sup>17</sup> Thus, the prohibition is absolute, admitting of no exceptions. The deontological view that torture is prohibited under any circumstances has found its way into customary international law, along with crimes against humanity, genocide, rape, hijacking, and terrorism.<sup>18</sup> Similarly, the ICCPR expressly states in Article 2(2) that “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”<sup>19</sup> The absolutist approach means that if a terrorist in the ticking bomb situation, which is discussed in Part IV, refuses to tell the bomb’s location, then the consequences of the holocaust will simply have to be endured. From a human rights approach, what matters is how we live our lives; the act of torturing someone, for whatever reason, so distorts human beings that it can never be allowed.

*B. The De Facto Violation of Torture Conventions*

In a study of whether countries that have signed human rights treaties have refrained from using torture more than countries that have not, Oona Hathaway found the difference to be almost statistically insignificant, with an average gap of just 0.06 on a 1-to-5 scale.<sup>20</sup> In fact, according to Hathaway’s study, signators of the American Torture Convention<sup>21</sup> and the African Charter<sup>22</sup> have *worse* records on torture than the regional organizations that did not sign these treaties.<sup>23</sup> States that engage in torture to exact confessions or use it as a mode of punishment always deny that they use torture.<sup>24</sup>

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<sup>17</sup> Convention Against Torture, *supra* note 14, at art. 2(2) (adopted by the U.N. General Assembly, Dec. 12, 1984, and in effect since June 26, 1987, after it was ratified by twenty nations).

<sup>18</sup> See GEERT-JAN G. J. KNOOPS, DEFENSES IN CONTEMPORARY INTERNATIONAL CRIMINAL LAW 29 (2001).

<sup>19</sup> ICCPR, *supra* note 13, at art 2(2).

<sup>20</sup> See Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1978 (2002).

<sup>21</sup> Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, 25 I.L.M. 519 (entered into force Feb. 28, 1987).

<sup>22</sup> African Charter on Human and Peoples’ Rights, June 27, 1981, 21 I.L.M. 58 (entered into force Oct. 21, 1986).

<sup>23</sup> See Hathaway, *supra* note 20, at 1979.

<sup>24</sup> See AMNESTY INT’L, REPORT ON TORTURE 104 (1975). “Though many authoritarian regimes use torture, not one of even these openly admits it.” *Is Torture Ever Justified?*, THE ECONOMIST, Jan. 11, 2003, at 9.



## 1594 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41]

It has been widely reported that the United States has transferred terrorist suspects who refused to cooperate with their interrogators to foreign intelligence services.<sup>25</sup> Similarly, it is widely reported that torture is used in Egypt, Jordan, Morocco, the Philippines, Iran, and Pakistan, among numerous other countries.<sup>26</sup> A study of 195 countries and territories by Amnesty International between 1997 and mid-2000 found reports of torture or ill-treatment by state officials in more than 150 countries,<sup>27</sup> and in more than seventy countries, torture or ill-treatment was reported as widespread or persistent.<sup>28</sup>

### C. Definition of Torture

What exactly constitutes torture? Is there any agreement on the definition of torture? Certainly, the boundaries of the concept of torture are undefined. If we allow a largely sentimental definition of torture in which it means whatever anyone wishes it to mean, or if virtually any discomfort, physical, or emotional pain inflicted constitutes torture, the concept loses its ability to shock and disgust. Moreover, universal condemnation may be eroded if the definition is too broad.

Reasonable individuals might disagree as to whether keeping individuals “standing or kneeling for hours, in black hoods or spray-painted goggles” constitutes torture, or whether holding them “in awkward, painful positions and deprived of sleep with a 24-hour bombardment of lights—subject to what are known as ‘stress and duress’ techniques[,]” constitute torture.<sup>29</sup> In fact, certain techniques that involve physical discomfort or pain, such as protracted standing against the wall on tip toes, exposing a suspect to loud noise, putting hoods on suspects during detention, while constituting inhumane and degrading treatment, have also been held not to constitute torture.<sup>30</sup> Other practices that may constitute torture to some minds include solitary confinement for an

<sup>25</sup> Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations: ‘Stress and Duress’ Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A1. “Some who do not cooperate are turned over—‘rendered,’ in official parlance—to foreign intelligence services whose practice of torture has been documented by the U.S. government and human rights organizations.” *Id.*

<sup>26</sup> See Raviv, *supra* note 2, at 151-53.

<sup>27</sup> AMNESTY INT’L, TORTURE WORLDWIDE: AN AFFRONT TO HUMAN DIGNITY 2 (2000).

<sup>28</sup> See *id.*

<sup>29</sup> Priest & Gellman, *supra* note 25, at A1.

<sup>30</sup> See *Ireland v. United Kingdom*, 2 Eur. Ct. H.R. 25 (1978) (holding that protracted standing against the wall on tip toes, covering the suspect’s head during detention, exposing the suspect to loud noise for a prolonged period of time, and sleep, food, and drink deprivation did not constitute torture, but were prohibited because they subjected the suspect to inhuman and degrading treatment).

extended period of time, dousing in ice cold water, playing of loud music, or mental suffering inflicted on a person (such as threats of execution or mock execution rituals).<sup>31</sup> In some instances, torture might not involve physical discomfort at all: for instance, reasonable people might agree that to force a Muslim individual to fall to his knees and kiss the cross can be humiliation and torture.

Yet others may think that the treatment of prisoners in the Abu Ghraib prison, in which a number of Iraqi prisoners were subjected to sexual humiliation, constituted torture.<sup>32</sup> According to various accounts, numerous prisoners at the detention center were hooded, stripped naked, and mocked sexually by female guards. Other reports indicated that detainees in Afghanistan's Bagram Detention Center were subjected to abuse in the form of sleep deprivation, punching and kicking, and standing in difficult positions for prolonged periods of time.<sup>33</sup> Two prisoners died, and the death was listed by a military pathologist as homicide.<sup>34</sup> These acts, while certainly cruel, inhuman, and degrading, might not amount to torture under the conventions discussed below. It is debatable.

Torture is defined in the U.N. Convention as follows:

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. It does not include

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<sup>31</sup> For a good discussion of what constitutes torture, see Emanuel Gross, *Legal Aspects of Tackling Terrorism: The Balance Between the Right of a Democracy To Defend Itself and the Protection of Human Rights*, 6 U.C.L.A. J. INT'L L. & FOREIGN AFF. 89, 94-97 (2001).

<sup>32</sup> See, e.g., Susan Sontag, *Regarding the Torture of Others*, N.Y. TIMES MAG., May 23, 2004, at 24.

<sup>33</sup> See Douglas Jehl & David Rohde, *The Struggle for Iraq: Abuse*, N.Y. TIMES, May 24, 2004, at A1, A12.

<sup>34</sup> See *id.*

pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>35</sup>

In connection with ratification of the U.N. Convention by the United States Senate, the following statement of understanding was set forth:

(2) Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture. . . .

(4) In order to constitute torture, mental pain or suffering must be prolonged mental harm caused by or resulting from:

(i) The intentional infliction or threatened infliction of severe physical pain or suffering;

(ii) The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(iii) The threat of imminent death; or

(iv) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the sense or personality.<sup>36</sup>

Thus, in addition to physical torture there can be psychological torture, such as threatening to execute the suspect, putting a gun to his head and saying you will shoot, threatening to castrate him, telling him that you are going to kill his family members if he does not tell you the information you are seeking, and similar tactics that, while not physically painful, inflict mental pain or suffering, even when there is no intent to carry out such threats. The United States's interpretation of the U.N. Convention is that such infliction of mental pain or suffering must be *prolonged* in order to constitute torture. This "prolonged" qualification is at odds with the definition provided by the U.N. Convention itself.

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<sup>35</sup> Convention Against Torture, *supra* note 14, at art. 1(1).

<sup>36</sup> See Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8490 (Feb. 19, 1999).

In 1997, the United Nations Committee Against Torture concluded that certain physical coercive methods employed by Israel during interrogations of detainees, especially when used in combination, constituted torture as defined by the U.N. Convention. The tactics included forcing detainees to stand naked with their hands chained to the ceiling and their feet shackled, covering their heads with black hoods, forcing them to stand or kneel in uncomfortable positions in extreme cold or heat, sleep deprivation, food deprivation, exposing them to disorienting sounds and lights, and violent shaking.<sup>37</sup>

Thus, the nature and definition of torture, as discussed here, involves more than coercive techniques, such as sleep deprivation or bright lights. To be sure, breaking bones, burning skin, and ripping out fingernails constitute “real, unambiguous torture” as opposed to threats to cause pain, or deprivation of sleep or food.<sup>38</sup> “[T]here is a world of difference morally between the slight tortures of sleep deprivation and the severe tortures of physical mutilation.”<sup>39</sup>

*D. The United States Department of Justice Memoranda*

An August 1, 2002 legal opinion prepared by the Department of Justice’s Office of Legal Counsel<sup>40</sup> received significant criticism and little approbation for essentially authorizing and justifying torture.<sup>41</sup> This memorandum sought to interpret torture as defined under 18 U.S.C. §§ 2340-2340A, which pertain to both physical torture and “severe mental pain or suffering.” The memorandum stated that “[P]hysical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment

<sup>37</sup> See Dershowitz, *The Torture Warrant*, *supra* note 2, at 286 n.57 (citing Press Release, UN Committee Against Torture, UN Committee Against Torture Concludes Eighteenth Session Geneva (May 13, 1997)).

<sup>38</sup> Stuart Taylor, *Should We Hit Him?*, *LEGAL TIMES*, Mar. 10, 2003, at 52.

<sup>39</sup> Moore, *supra* note 7, at 334.

<sup>40</sup> Memorandum from U.S. Dep’t of Justice, Office of Legal Counsel, Office of the Assistant Attorney General to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C. 2340-2340A, at 46, available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf> [hereinafter Standards of Conduct Memorandum I].

<sup>41</sup> See, e.g., Angell, *supra* note 2, at 557; Bilder & Vagts, *supra* note 2, at 689; Cornyn, *supra* note 2, at 213; Marisa Lopez, *Professional Reponsibility: Tortured Independence in the Office of Legal Counsel*, 57 *FLA. L. REV.* 685 (2005); Jesselyn Radack, *Tortured Legal Ethics: The Role of the Government Advisor in the War on Terrorism*, 77 *U. COLO. L. REV.* 1 (2006); Rouillard, *supra* note 2, at 9; Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 *COLUM. L. REV.* 1681 (2005).

1598 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

of bodily function, or even death.”<sup>42</sup> This interpretation was disavowed in a later memorandum issued in 2004, discussed below.

Under the 2002 memorandum, for mental pain and suffering to amount to torture, “it must result in significant psychological harm of significant duration, e.g., lasting for months or even years.”<sup>43</sup> The memorandum sought to interpret the statutory text of 18 U.S.C. § 2340, which states that “severe mental pain or suffering” means “prolonged mental harm”<sup>44</sup> that is caused by or results from the exact same components stated in paragraph (4)(i)-(iv) of the Senate’s statement of understanding that accompanied the ratification of the U.N. Convention, quoted above.

The memorandum also argued that a defendant is guilty of torture under the statute “only if he acts with the express purpose of inflicting severe pain or suffering . . . .”<sup>45</sup> Accordingly, if “a government defendant were to harm an enemy combatant during an interrogation in a manner that might arguably violate Section 2340A, he would be doing so in order to prevent further attacks on the United States by the Al Qaeda terrorist network.”<sup>46</sup> And, if the defendant’s purpose is to obtain information, even though he knows that “severe pain will result from his actions, . . . he lacks the requisite specific intent” to violate the statute.<sup>47</sup> The memorandum also stated that interrogators could justify torture under the doctrine of necessity and self-defense in connection with the “war on terrorism.”<sup>48</sup>

The memorandum relied in part on the English High Court opinion in *Ireland v. United Kingdom*,<sup>49</sup> which held that inhuman or degrading treatment is a necessary, but not sufficient, condition to constitute torture. The techniques at issue in that case were (1) wall standing (forcing detainees to remain for periods of some hours in a “stress position”); (2) hooding (putting a dark bag over the detainees’ heads and only removing it during interrogation); (3) subjection to continuous loud

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<sup>42</sup> See Standards of Conduct Memorandum I, *supra* note 40.

<sup>43</sup> See *id.* (emphasis added).

<sup>44</sup> 18 U.S.C. § 2340 (2000) (emphasis added).

<sup>45</sup> See Standards of Conduct Memorandum I, *supra* note 40.

<sup>46</sup> See *id.*

<sup>47</sup> See *id.*

<sup>48</sup> See *id.*

<sup>49</sup> *Ireland v. United Kingdom*, 2 Eur. Ct. H.R. 25 (1978).

and hissing noises; (4) sleep deprivation; and (5) deprivation of food and drink.<sup>50</sup>

The 2002 memorandum by the U.S. Department of Justice was superseded by another one published in 2004.<sup>51</sup> The 2004 memorandum diminishes the extreme statements in the earlier memorandum. It reiterates that torture is a graver kind of act than mere ill treatment and emphasizes that torture is an aggravated form of ill treatment. However, it disagrees with the earlier view that an extremely high degree of physical pain is necessary for torture to occur.<sup>52</sup>

#### IV. TORTURE AND THE TICKING BOMB SITUATION

##### A. *The Nature of the Problem*

As mentioned, under the deontological approach, torturing someone in order to reveal the location of a ticking bomb that will detonate and kill thousands of people is morally prohibited regardless of the beneficial consequences. In his book, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge*, Alan Dershowitz argues that there is little doubt that the use of nonlethal torture as well as other techniques of coercion short of torture (such as very rough interrogation) can produce leads that can help prevent the killing of many civilians.<sup>53</sup>

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<sup>50</sup> See *id.*

<sup>51</sup> Memorandum from U.S. Dep't of Justice, Office of Legal Counsel, Office of the Assistant Attorney General, for James B. Comey, Deputy Attorney General, Legal Standards Applicable Under 18 U.S.C. 2340-2340A (Dec. 30, 2004), available at <http://news.findlaw.com/hdocs/docs/terrorism/dojorture123004mem.pdf> [hereinafter Standards of Conduct Memorandum II].

<sup>52</sup> See *id.*

<sup>53</sup> See ALAN DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 140 (Yale Univ. Press 2002) [hereinafter DERSHOWITZ, *WHY TERRORISM WORKS*]. Apart from interrogational torture, another type of torture is done not to extract information but to intimidate others or to deter dissent with the expected impact of the news of the torture on other people over whom the torture victim has some power or leadership. This is what we might call terroristic torture, the effect of which is to terrorize people other than the victim of the torture. The victim's suffering is being used as a means to an end over which the victim has little control, namely to deter dissent. China and other authoritarian states are known to use this technique.

Terroristic torture might be justified under the necessity doctrine in order to protect national security by averting the evil of dissidents who may be urging the overthrow of government or fomenting anarchy. One commentator proffered a list of necessary conditions, all of which would have to be satisfied in order for terroristic torture to be morally permissible:

A first necessary condition would be that the purpose actually being sought through the torture would need to be not only morally good

1600 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

The ticking bomb is a situation when a terrorist who admits to planting a weapon of mass destruction in a largely populated city but refuses to say where—a situation that has been discussed by philosophers, including Michael Walzer, Jean-Paul Sartre, and Jeremy Bentham.<sup>54</sup> Of course, we can imagine other situations that do not involve bombs but are equally perilous, such as a planned release of a deadly chemical or biological agency. Waltzer described such a hypothetical case in which a decent leader of a nation plagued with terrorism is asked

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but supremely important, and examples of such purposes would have to be selected by criteria of moral importance which would themselves need to be justified. Second, terroristic torture would presumably have to be the least harmful means of accomplishing the supremely important goal. Given how very harmful terroristic torture is, this could rarely be the case. And it would be unlikely unless the period of use of the torture in the society was limited in an enforceable manner. Third, it would have to be absolutely clear for what purpose the terroristic torture was being used, what would constitute achievement of that purpose, and thus, when the torture would end. The torture could not become a standard practice of government for an indefinite duration.

Henry Shue, *Torture*, 7 PHIL. & PUB. AFF. 124, 137-38 (1978). Shue notes with skepticism that it is hard to conceive any “supremely important end” to which terroristic torture would be the least harmful means of attaining. *Id.* Such use of torture could have the effect of creating outrage in the population and exacerbated unrest over a tyrannical regime. On the other hand if terroristic torture is effective in quieting dissent from the perspective of the government, since it “worked,” it would continue to be used.

<sup>54</sup> Another scenario is this: Suppose a terrorist has planted a megaton atomic bomb that will obliterate several square miles and kill hundreds of thousands of people. Either torture the terrorist who will provide the specific location about the bomb in time to find it and neutralize it; or drop several large bombs on the vicinity where the bomb is known to be located, killing hundreds of innocent adult and children civilians in the vicinity, but preventing the bomb from detonating and killing thousands of others.

This “solution” is not farfetched. On the morning of September 11, 2001, after the World Trade Center was hit, and it appeared clear that a terrorist hijacking was in progress with United Flight 93, some eighty miles inbound from Washington, D.C., the Vice President, based on his prior conversation with the President, authorized Air Force fighter aircraft to shoot down the hijacked aircraft. *See Excerpts from Report on Orders To Shoot Down Planes on Sept. 11*, N.Y. TIMES, June 18, 2004, at A17. Officials believed that the plane was headed towards the U.S. Capitol or the White House. *Id.* Innocent people who themselves were non-threats were so situated that they were subject to an order to be killed in order to avert a greater danger. *Id.*

Subsequently, the German Parliament passed a law authorizing the military to shoot down civilian airplanes if it believes they are being used in a 9/11-style terrorist attack. *See Kristen Grieshaber, World Briefing Germany: New Air Security Law*, N.Y. TIMES, June 19, 2004, at A4. In addition, Poland enacted a similar law that allows the head of the Polish Air Force to order hijacked aircraft shot down as a last resort. *See Victor Homola, World Briefing Poland: Law Allows Hijacked Planes to be Shot Down*, N.Y. TIMES, Jan. 14, 2005, at A9.

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 around 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.<sup>55</sup>

Dershowitz acknowledges that the use of torture is a violation of core civil liberties and human rights, but he argues that a cost-benefit analysis illustrates the justification for employing nonlethal torture.<sup>56</sup> Moreover, Dershowitz clearly understands certain deontological objections. He says:

The case against torture, if made by a Quaker who opposes the death penalty, war, self-defense, and the use of lethal force against fleeing felons, is understandable. But for anyone who justifies killing on the basis of a cost-benefit analysis, the case against the use of nonlethal torture to save multiple lives is more difficult to make.<sup>57</sup>

On a related point, Dershowitz emphasizes that the law permits judges to imprison witnesses who refuse to testify after being given a grant of immunity.<sup>58</sup> A recalcitrant witness may be imprisoned until he talks, and prison 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.”<sup>59</sup>

<sup>55</sup> Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 PHIL & PUB. AFF. 160, 167 (1973).

<sup>56</sup> DERSHOWITZ, WHY TERRORISM WORKS, *supra* note 53, at 144.

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.

*Id.*

<sup>57</sup> *Id.* at 148.

<sup>58</sup> For example, it is illegal to withhold relevant information from a grand jury after receiving immunity. See *Kastigar v. United States*, 406 U.S. 441 (1972).

<sup>59</sup> DERSHOWITZ, WHY TERRORISM WORKS, *supra* note 53, at 147.



1602 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

Therefore, the imposition of nonlethal torture, in circumstances where a great many lives are in jeopardy, would seem unobjectionable.

Further, Dershowitz points to the anomaly in the law that permits police to use lethal force against fleeing suspects of dangerous felonies, even though they are only suspects not yet brought to trial. “The very idea of deliberately subjecting a captive human being to excruciating pain violates our sense of what is acceptable.”<sup>60</sup> It seems far worse to shoot and kill a fleeing felon in the back than to torture an informant in the ticking bomb situation; yet every civilized government authorizes shooting a suspected felon who flees from the police. With nonlethal torture, the pain is temporary, while death is permanent. “In our modern age death is underrated, while pain is overrated.”<sup>61</sup>

B. *Torture Warrants*

Dershowitz suggests that “torture warrants” might be implemented—a procedure which would require an application on the part of investigators and, if due cause is shown, a magistrate to authorize the procedure. Torture warrants were in frequent use in England during the sixteenth and seventeenth centuries. In his book on legalized torture, *Torture and the Law of Proof*, John Langbein points out that torture was used to obtain evidence necessary to prove the guilt of the accused under the rigorous standards of evidence of the time, which required either the testimony of two eyewitnesses or the confession of the accused; circumstantial evidence was simply inadmissible in those days. Thus, if officials had a “suspicion” based on compelling circumstantial evidence of guilt, they would want to pursue their hunches and seek to exact a “direct” confession from the suspect by obtaining a torture warrant.<sup>62</sup>

Torture was also used for people who were convicted of capital crimes, such as high treason, in an effort to obtain further information necessary to prevent future attacks on the state. Langbein shows that of eighty-one torture warrants, issued between 1540 and 1640, many of them were used for discovery in order to protect the government from plots.<sup>63</sup> Of course, torture was undoubtedly abused, as is famously known during the reign of Henry VIII.

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<sup>60</sup> *Id.* at 155.

<sup>61</sup> *Id.* at 149.

<sup>62</sup> JOHN LANGBEIN, *TORTURE AND THE LAW OF PROOF* 7 (2006).

<sup>63</sup> *See id.* at 90.

This Article mentions Dershowitz's proposal of torture warrants only in passing. Of course, one might well argue against this procedure in that officials might abuse their discretion in applying for torture warrants; both the granting or the denial of torture warrants would have severe repercussions, and in emergencies there may simply be insufficient time to apply for a torture warrant.

*C. Is the Fifth Amendment a Bar to Torture?*

The Fifth Amendment prohibits compelled self-incrimination, which means that statements elicited by means of torture or other coercive techniques may not be introduced into evidence against the individual being tortured.<sup>64</sup> Coerced confessions are inadmissible in court, whether the confession is obtained by physical brutality or induced by such tactics as lengthy incommunicado detentions,<sup>65</sup> sleep deprivation,<sup>66</sup> involuntary nakedness,<sup>67</sup> "truth serum,"<sup>68</sup> or protracted questioning over a period of days.<sup>69</sup>

However, the use of torture solely to gain information is a separate matter. In *Leon v. Wainwright*,<sup>70</sup> apparently for the first time in American jurisprudence, the Florida Court of Appeals "articulated a distinction between violent police conduct, the purpose of which is to gain information which might save a life, and such conduct employed for the purpose of obtaining evidence to be used in a court of law."<sup>71</sup> In *Leon*, the defendant was convicted of kidnapping and possession of a firearm during commission of a felony.<sup>72</sup> On a writ of habeas corpus, the Court of Appeals considered the question of whether Leon's post-arrest confession should have been suppressed as the product of earlier police threats and physical violence.<sup>73</sup> Violence had certainly occurred in these circumstances. The defendant kidnapped a cabdriver and held him for

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<sup>64</sup> See, e.g., *Brown v. Mississippi*, 297 U.S. 278 (1936) (holding that confessions obtained by torture as a basis for conviction and sentence was a clear denial of due process). But see *Leon v. Wainwright*, 734 F.2d 770 (11th Cir. 1984) (holding that a *subsequent* statement made by a suspect who had been *previously* tortured into revealing the location of a kidnap victim could be introduced into evidence).

<sup>65</sup> See *Haynes v. Washington*, 373 U.S. 503 (1963); *Reck v. Pate*, 367 U.S. 433 (1961); *Ashcroft v. Tennessee*, 322 U.S. 143 (1944).

<sup>66</sup> See *Greenwald v. Wisconsin*, 390 U.S. 519 (1968).

<sup>67</sup> See *Malinski v. New York*, 324 U.S. 401 (1945).

<sup>68</sup> *Townsend v. Sain*, 372 U.S. 293, 307-08 (1963) (citations omitted).

<sup>69</sup> See *Chambers v. Florida*, 309 U.S. 227 (1940).

<sup>70</sup> *Leon v. Wainwright*, 734 F.2d 770, 772-73 (11th Cir. 1984).

<sup>71</sup> *Leon v. Florida*, 410 So. 2d 201, 206 (Fla. Dist. Ct. App. 1982) (Ferguson, J., dissenting).

<sup>72</sup> *Leon*, 734 F.2d at 771.

<sup>73</sup> *Id.* at 772.

ransom; the cabdriver's brother then contacted the police and arranged to meet the defendant to give him \$4,000 in ransom money.<sup>74</sup> At the arranged meeting in a parking lot, the defendant pulled a gun on the brother, and the police who had accompanied him immediately arrested the defendant.<sup>75</sup> The police demanded that he tell them where the kidnapped victim was being held, and when he refused, "he was set upon by several of the officers. They threatened and physically abused him by twisting his arm behind his back and choking him until he revealed where [the victim] was being held."<sup>76</sup>

After he provided the information, the police safely recovered the victim.<sup>77</sup> The defendant was later questioned at the police station by a separate group of police officers, and after waiving his right to have counsel present, confessed to the kidnapping.<sup>78</sup> That incriminating statement was later used at trial, though the admissions made to police in the parking lot were not used at trial.<sup>79</sup> The Eleventh Circuit said that the second confession was voluntary, but that the first statement was coerced.<sup>80</sup> Specifically, the Due Process Clause of the Fourteenth Amendment prohibits prosecutorial use of coerced confessions, but because the parking lot confession was not used against the defendant, there was no violation of his rights.<sup>81</sup> The Eleventh Circuit unanimously held that, while it does not condone the use of force and coercion by police officers,

this case does not represent the typical case of unjustified force. We did not have an act of brutal law enforcement agents trying to obtain a confession in total disregard of the law. This was instead a group of concerned officers acting in a reasonable manner to obtain information they needed in order to protect another individual from bodily harm or death.<sup>82</sup>

Additionally, the "violence was not inflicted to obtain a confession or provide other evidence to establish appellant's guilt. Instead it was motivated by the immediate necessity to find the victim and save his

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<sup>74</sup> *Id.* at 771.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 772.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 772-73.

<sup>80</sup> *Id.* at 772.

<sup>81</sup> *Id.* at 772-73.

<sup>82</sup> *Id.* at 773.

life.”<sup>83</sup> *Leon* is interesting in that it, in effect, condoned the use of torture by police under the necessity doctrine—that is, under circumstances where it reasonably appears necessary to avert a greater and imminent harm. The ruling effectively allowed the police to engage in torture in order to find the kidnapping victim and save him from bodily harm or death.

Similarly, it has been suggested that if a suspect is given immunity from prosecution and then tortured into providing information about a future terrorist act, his privilege against self-incrimination is not violated.<sup>84</sup> In this regard, Dershowitz has argued that the Fifth Amendment privilege against self-incrimination

does not prohibit *any* interrogation techniques including the use of truth serum or even torture. The privilege only prohibits the *introduction into evidence of the fruits* of such techniques in a criminal trial against the person on whom the techniques were used. Thus, if a confession were elicited from a suspect by the use of truth serum or torture, that confession—and its fruits—could not be used against that suspect. But it could be used against *another* suspect, or against *that* suspect in a non-criminal case, such as a deportation hearing.

If a suspect is given “use immunity”—a judicial decree announcing in advance that nothing the defendant says (or its fruits) can be used against him in a criminal case—he can be *compelled* to answer all proper questions. The question then becomes what sorts of pressures can constitutionally be used to implement that compulsion. We know that he can be imprisoned until he talks. But what if imprisonment is insufficient to compel him to do what he has a legal obligation to do? Can other techniques of compulsion be attempted?

Let’s start with truth serum. What right would be violated if an immunized suspect who refused to

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<sup>83</sup> *Id.* at 773 n.5. In its consideration of this case, the Florida court noted that “we do not attempt to resolve the moral and philosophical problem of whether the force used on Leon in the emergency, life-threatening situation presented to the arresting officers was ‘justified’ or ‘proper.’” *Leon*, 410 So. 2d at 203 n.3. Thus, the court viewed the question as a moral and philosophical one, rather than a legal issue.

<sup>84</sup> *Kastigar v. United States*, 406 U.S. 441 (1972).

comply with his legal obligation to answer questions truthfully were compelled to submit to an injection which made him do so? Not his privilege against self-incrimination, since he has no such privilege now that he has been given immunity. What about his right of bodily integrity? The involuntariness of the injection itself does not pose a constitutional barrier. No less a civil libertarian than Justice William J. Brennan rendered a decision that permitted an allegedly drunken driver to be involuntarily injected in order to remove blood for alcohol testing. Certainly there can be no constitutional distinction between an injection that *removes* a liquid and one that *injects* a liquid. What about the nature of the substance injected? If it is relatively benign and creates no significant health risk, the only issue would be that it compels the recipient to do something he doesn't want to do. But he has a legal obligation to do precisely what the serum compels him to do: answer all questions truthfully.<sup>85</sup>

On the other hand, several courts have ruled that a Due Process violation occurs at the moment coercive questioning overcomes the will of the suspect, regardless of whether the evidence is used at trial, based on a "shock the conscience" approach. For example, the Ninth Circuit Court of Appeals held that the coercion of a police statement from a suspect is not a "full-blown Constitutional violation" of the Due Process Clause only when the statement is used against the suspect in court—the violation "is complete with the coercive behavior itself."<sup>86</sup> In addition, the Supreme Court, in *Chavez v. Martinez*,<sup>87</sup> held that a victim of police brutality could bring a cause of action for civil rights violations under the Due Process Clause, even though there was no criminal trial. The Court's decision seems to be based broadly on placing appropriate limits on police behavior and with respecting an individual's dignity and autonomy. Specifically, Justice Kennedy wrote that "it seems to me a

<sup>85</sup> DERSHOWITZ, *WHY TERRORISM WORKS*, *supra* note 53, at 247-48.

<sup>86</sup> *Cooper v. Dupnik*, 963 F.2d 1220, 1244-45 (9th Cir. 1992) (en banc).

Can the coercing by police of a statement from a suspect in custody ripen into a full-blown Constitutional violation only if and when the statement is tendered and used against the declarant in court? We think not. . . . The due process violation caused by coercive behavior of law-enforcement officers in pursuit of a confession is complete with the coercive behavior itself.

*Id.*

<sup>87</sup> *Chavez v. Martinez*, 538 U.S. 760 (2003).

simple enough matter to say that use of torture or its equivalent in an attempt to induce a statement violates an individual's fundamental right to liberty of the person. The Constitution does not countenance the official imposition of severe pain or pressure for purposes of interrogation."<sup>88</sup> However, in a ticking bomb situation, as distinguished from "ordinary" police brutality, it has been argued that "no constitutional violation would be found if the circumstances surrounding the use of torture were sufficiently compelling."<sup>89</sup>

Another basic question arises: Is the Eighth Amendment a bar to torture? The simple answer is that the Eighth Amendment's right to be free from "cruel and unusual punishment" applies solely to punishment after conviction.<sup>90</sup> In the ticking bomb situation, torture would be employed against an individual to extract information, not as punishment following conviction of an offense.

#### V. THE NECESSITY DOCTRINE AND THE TICKING BOMB SITUATION

##### A. *An Overview of the Necessity Doctrine*

The doctrine of necessity, with its inevitable weighing of choices-of-evil, may be stretched to the outer limits in the context of torture. The doctrine holds that certain conduct, though it violates the law and produces a harm, is justified because it averts a greater evil and hence produces a net social gain or benefit to society.<sup>91</sup> Glanville Williams expressed the necessity doctrine this way: "some acts that would otherwise be wrong are rendered rightful by a good purpose, or by the necessity of choosing the lesser of two evils."<sup>92</sup> He offers this example:

Suppose that a dike threatens to give way, and the actor is faced with the choice of either making a breach in the dike, which he knows will result in one or two people being drowned, or doing nothing, in which case he knows that the dike will burst at another point involving a whole town in sudden destruction. In such a situation,

<sup>88</sup> *Id.* at 796 (Kennedy, J., dissenting) (internal citations omitted).

<sup>89</sup> Strauss, *supra* note 4, at 268.

<sup>90</sup> "An examination of the history of the [Eighth] Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes. We adhere to this longstanding limitation . . . ." *Ingraham v. Wright*, 430 U.S. 651, 664 (1977).

<sup>91</sup> See Joseph J. Simeone, "Survivors" of the *Eternal Sea: A Short True Story*, 45 ST. LOUIS U. L.J. 1123, 1141 (2001).

<sup>92</sup> GLANVILLE WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 198 (1957).

1608 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

where there is an unhappy choice between the destruction of one life and the destruction of many, utilitarian philosophy would certainly justify the actor in preferring the lesser evil.<sup>93</sup>

The utilitarian idea is that certain illegal conduct ought not be punished because, due to the special circumstances of the situation, a net benefit to society has resulted. This utilitarian rationale is sometimes criticized as “ends-justifying-the-means” because the doctrine allows that, within certain limits, it is justifiable to break the letter of the law if doing so will produce a net benefit to society.<sup>94</sup> Yet another commentator has observed:

[T]hese [justified] acts are ones, as regard which, upon balancing all considerations of public policy, it seems desirable that they should be encouraged and commended even though in each case some individual may be injured or the result may be otherwise not wholly to be desired.<sup>95</sup>

As a result, the necessity doctrine “represents a concession to human weakness in cases of extreme pressure, where the accused breaks the law rather than submitting to the probability of greater harm if he does not break the law.”<sup>96</sup> The idea, in its simplest form, is that it is unjust to penalize someone for violating the law when the action produces a greater good or averts a greater evil. Had the unlawful action not taken place, society would have endured a greater evil than that which resulted from violating the law. English and American courts have long recognized the defense of necessity as a common law principle, even in

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<sup>93</sup> WILLIAMS, *supra* note 92, at 199-200.

<sup>94</sup> Justice Brandeis in a famous dissent in *Olmstead v. United States*, 277 U.S. 438, 485 (1928), noted:

In a government of laws, existence of the government would be imperilled if it fails to observe the law scrupulously. . . . Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

<sup>95</sup> JUSTIN MILLER, *HANDBOOK OF CRIMINAL LAW* 189 (West Pub. Co. 1934).

<sup>96</sup> A. J. Ashworth, *Reason, Logic and Criminal Liability*, 91 L. Q. REV. 102, 106 (1975).

the absence of statutory law on the subject.<sup>97</sup> Today, many states have enacted varying forms of a statutory necessity defense.<sup>98</sup> Accordingly, with the necessity defense, there will always be a prima facie violation of the law. It might involve the violation of a minor traffic law, with no harm caused to life or limb, but the technical violation of the law will nonetheless count as a harm to society. In other instances, the violation of law may involve tortious conduct that causes damages to economic or property interests. Or, the violation of law may involve serious criminal conduct that results in the maiming of innocent people. The one exception appears to be cases involving intentional homicide. The necessity defense may not be used to justify intentional killing, even if the act produces a net saving of lives. In other words, the doctrine of necessity is itself subject to deontological constraints (i.e., with respect to intentional homicide).<sup>99</sup>

The doctrine of necessity has been expressed in numerous ways, but this discussion applies a comprehensive six-prong test that must be met in order for someone to invoke the defense. The defendant must prove (1) that he was faced with a choice of evils and chose the lesser evil; (2) that he acted to prevent imminent harm; (3) that he reasonably anticipated a causal relationship between his conduct and the harm to be avoided; and (4) that there were no other legal alternatives to violating

<sup>97</sup> Edward B. Arnolds & Norman F. Garland, *The Defense of Necessity in Criminal Law: The Right To Choose the Lesser Evil*, 65 J. CRIM. L. & CRIMINOLOGY 289, 291-96 (1974).

<sup>98</sup> See, e.g., ALASKA STAT. § 11.81.320 (2002); ARK. CODE ANN. § 5-2-604 (2004); COLO. REV. STAT. ANN. § 18-1-702 (West 2003); DEL. CODE ANN. tit. 11, § 463 (2001); HAW. REV. STAT. ANN. § 703-302 (LexisNexis 2003); KY. REV. STAT. ANN. § 503.030 (West 2003); MO. ANN. STAT. § 563.026 (West 2004); N.J. STAT. ANN. § 2C:3-2 (West 2004); N.Y. PENAL LAW § 35.05 (McKinney 2004); TEX. PENAL CODE ANN. § 9.22 (Vernon 2004); WIS. STAT. ANN. § 939.47 (West 2003).

<sup>99</sup> See, e.g., *Regina v. Dudley & Stephens*, 14 Q.B.D. 273, 286-87 (1884). The Court held that nothing can justify intentionally killing an "innocent," "unoffending" individual, unless the killing can be justified by some well-recognized excuse admitted by the law. It is further admitted that there was in this case no such excuse, unless the killing was justified by what has been called "necessity." But the temptation to the act which existed here was not what the law has ever called necessity. Nor is this to be regretted.

See also, *R.I. Recreation Ctr., Inc. v. Aetna Cas. & Sur. Co.*, 177 F.2d 603, 605 (1st Cir. 1949) (stating that "It appears to be established . . . that . . . necessity will never excuse taking the life of an innocent person . . ."). But see *United States v. Holmes*, 26 Fed. Cas. 360 (C.C.E.D. Pa. 1842) (Case No. 15,383). This is the only case in Anglo-American law that explicitly suggests, in dictum, that the necessity defense might be appropriately invoked in the killing of innocents where an imminent danger threatens the entire group with death, provided a fair method of sacrifice is employed. *Id.* However, the court held that, in this case the necessity defense did not apply to the facts. *Id.*



1610 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

the law.<sup>100</sup> Additionally, the fifth factor is that “the Legislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue.”<sup>101</sup> Finally, a sixth factor is that the necessitous circumstances were not caused by the negligent or reckless acts of the defendant in the first instance.<sup>102</sup> Courts generally require that all factors be proven in order for the defendant to succeed in the necessity defense.<sup>103</sup>

Courts generally require that all of the factors be proven in order for the defendant to succeed in invoking the necessity defense. A further consideration is what standard will apply in assessing the existence of a given factor. In evaluating the individual elements of the necessity doctrine, if a jury is impaneled, much depends on jury instructions.<sup>104</sup> For instance, if the judge instructs the jury to construe the second factor—the imminence factor—to require evidence that the threatened harm was imminent in fact, the defendant might be found culpable if the situation was a “false alarm.” On the other hand, if the instruction is to

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<sup>100</sup> United States v. Aguilar, 883 F.2d 662, 693 (9th Cir. 1989).

<sup>101</sup> Commonwealth v. Brugmann, 433 N.E.2d 457, 461 (Mass. 1982); see also Missouri v. Diener, 706 S.W.2d 582, 585 (1986) (quoting same language).

<sup>102</sup> See, e.g., United States v. Agard, 605 F.2d 665, 667 (2d Cir. 1979). “[D]efendant must show . . . that defendant had not recklessly or negligently placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct.” *Id.*

<sup>103</sup> In this discussion of torture to these six factors are referred to as follows: (1) the choice-of-evils factor; (2) the imminence factor; (3) the causal nexus factor; (4) the legal way out factor; (5) the preemption factor; and (6) the clean hands factor.

<sup>104</sup> One author has opined that the question of justification in torture situations is simply too complex for juries to decide:

Allowing juries to make decisions about justification would have the disadvantage of inconsistency. Two different juries, judging the same torture case, might well come to differing conclusions about whether torture was warranted in that particular circumstance. They might come to this conclusion not because they come to different conclusions with respect to the facts, but rather because they have different views about whether a certain act was truly justified. Some jurors might think that torture is never justified, or is justified only when it is necessary to stop a nuclear scale attack. Other jurors might be willing to see a suspect tortured even to save one life, or perhaps even an unoccupied building if the suspect is unsympathetic enough. Jurors might also have highly variant views about which methods of torture are worse than others, and therefore are less permissible except in the most extreme circumstances. Some jurors might be swayed by horror at the fact that a government agent used his authority to inflict extreme pain on a captive, while others might be more concerned with the innocent life that agent was trying to save.

Raviv, *supra* note 2, at 176.

decide whether the threat reasonably appeared to be imminent, the defendant would be in a better position to assert the necessity defense.

Courts almost always scrutinize the facts based on the balance of human reason in light of all the relevant circumstances. The actor must entertain a reasonable belief in the necessity of his conduct. The reasonableness standard ensures that a jury, in evaluating the defendant's action, shares the actor's evaluation of the necessitous circumstances. This standard has been expressed as follows:

While an accused's perceptions of the surrounding facts may be highly relevant in determining whether his conduct should be excused, those perceptions remain relevant only so long as they are reasonable. The accused person must, at the time of the act, honestly believe, on reasonable grounds, that he faces a situation of imminent peril that leaves no reasonable legal alternative open. There must be a reasonable basis for the accused's beliefs and actions. but it would be proper to take into account circumstances that legitimately affect the accused person's ability to evaluate the situation. The test cannot be a subjective one, and the accused who argues that he perceived imminent peril without an alternative would only succeed with the defence of necessity if his belief was reasonable given his circumstances and attributes.<sup>105</sup>

Under this standard, it is not sufficient if an interrogator subjectively believes that an act of torture is necessary to prevent a greater evil.<sup>106</sup> Under the reasonableness standard, an actor must reasonably construe that there is an actual, imminent threat in the first place and, in making a choice-of-evils, that one evil was greater than the other. The threat need not be an actual threat, provided that the actor has a well-founded belief that impending harm will result unless he takes steps to avert it.<sup>107</sup> The

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<sup>105</sup> Regina v. Latimer, [2001] 1 S.C.R. 3, at ¶ 33 (Can.) (emphasis added).

<sup>106</sup> See Tom Stacy, *Acts, Omissions, and the Necessity of Killing Innocents*, 29 AM. J. CRIM. L. 481, 518 (2002).

<sup>107</sup> See, e.g., United States v. Ashton, 24 F. Cas. 873 (C.C.D. Mass. 1834) (No. 14, 470) (Story, J.) (involving a group of sailors charged with mutiny). The defendants sought to justify mutiny on the grounds that their ship was not seaworthy. *Id.* The court instructed the jury "that the defendants ought not to be found guilty, if they acted bona fide upon reasonable grounds of belief that the ship was unseaworthy . . ." *Id.* at 874. The court said that if in fact the crew was mistaken as to the un-seaworthiness of the ship, the jury could determine whether, nonetheless, the crew was reasonable in holding its belief and in taking

1612 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

balancing of evils “cannot, of course, be committed to the private judgment of the actor, but must, in most cases, be determined at trial with due regard being given for the crime charged and the higher value sought to be achieved.”<sup>108</sup> A person’s conduct will not be excused by necessity merely because he thought it served a “higher value.”<sup>109</sup>

1. The Choice-of-Evils Factor

The threshold factor is whether employing torture is, in fact, the lesser evil in a ticking bomb situation. A deontologist might argue that it is by no means clear that torture would be a “lesser evil,” even in a ticking bomb case, in light of the severe effects of these measures on the interrogee. Putting that towards one side, one might consider these issues: the number of lives at risk, the availability of other means to acquire the information, the degree of force to be used, and the likelihood that the suspect has the relevant information. Obviously, the greater the number of lives at risk, the more the choice-of-evils weighs in favor of torturing the suspect.<sup>110</sup>

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action in accordance with that reasonable belief. *Id.* The jury could acquit if it found that the crew, “having acted upon their best judgment fairly, and in a case where respectable, intelligent, and impartial witnesses should assert, that they should have done the same . . . .” *Id.*

<sup>108</sup> Vermont v. Warshaw, 410 A.2d 1000, 1003 (Vt. 1979).

<sup>109</sup> Glanville Williams, *Necessity*, 1978 CRIM. L. REV. 128, 134.

<sup>110</sup> Mirko Bagaric and Julie Clarke have devised a kind of algorithm in evaluating whether a particular situation warrants the use of torture:

[T]he strength of the case in favor of torture can be mapped as follows:

$\frac{W+L+P}{T \times O}$

TxO

Where:

W = whether the agent is the wrongdoer

L = the number of lives that will be lost if the information is not provided

P = the probability that the agent has the relevant knowledge

T = the time available before the disaster will occur (“immediacy of the harm”)

O = the likelihood that other inquiries will forestall the risk

Torture should be permitted where the application of the variables exceeds a threshold level. Once beyond this level, the higher the figure the more severe the forms of torture that are permissible.

Bagaric & Clarke, *supra* note 2, at 614.

The degree of force to be used and the degree of the suspect's culpability are interrelated. For instance, one needs to analyze the degree of force in light of the degree of the suspect's ability to provide the relevant information in order to properly assess the choice-of-evils. How certain is it that this suspect knows where the bomb is? How agonizing would the torture be? Would less extreme methods likely work on this individual?

Some individuals are highly immune to physical interrogation, yet they may possess the information being sought to avert an imminent terrorist attack. In such an instance, is it justified to use extreme torture rather than more moderate types of physical abuse? Would it be acceptable to torture the suspect's child in his presence, hoping to get the suspect to disclose where a detonating device has been planted? How many lives would need to be in jeopardy before you might say "Yes"? If one million lives would be saved? One might keep in mind that the utilitarian underpinning of the necessity doctrine permits just about any preventive action, no matter how severe, short of intentional homicide, as long as the other elements are satisfied.

Another issue in assessing the choice-of-evils is the impact that the use of torture might have on the psyche of society as a whole. A deontologist would argue that there would be a significant harm to society if it were to endorse and engage in torture, and hence there would be a net loss of social goods. "Specifically, the inability of the United States to maintain the moral high ground both in its fight against terrorism and in its fight against torture and human rights abuses around the world must be part of the calculus . . ."<sup>111</sup>

Another concern in the choice-of-evils analysis is that officials could become desensitized to the moral objectionability of torture once it is employed and that torture erodes the humanity of those who are the torturers. However, the threat of terrorist attacks is a rare occurrence, and it may be exceedingly rare that a ticking bomb case would become a reality. Thus, a typical official very likely would never actually face the choice of whether to torture a suspect.

Also weighing in the balance is that if we use torture, then we should not be surprised if our enemies mistreat our citizens who might be taken as hostages or prisoners in reliance on the precedent we have set, or use that precedent to justify their own conduct. Indeed, we have

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<sup>111</sup> Strauss, *supra* note 4, at 268-69.

## 1614 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

seen just such a tit-for-tat sort of case in June, 2004, when, in the wake of the Abu Ghraib prison abuse scandal, Islamist militants abducted Paul M. Johnson, an American working in Saudi Arabia, in order to inflict the same abuse that had been inflicted on Iraqi detainees. His captors subsequently beheaded Johnson in a gruesome video distributed worldwide.<sup>112</sup> Dershowitz acknowledges that, "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."<sup>113</sup> In addition, the Israeli-Palestinian experience has shown that, in the long-term, torture is an ineffective method to prevent terrorism, as it increases hostility and the justifications for torture also justify terrorism.<sup>114</sup> Thus, it is important to consider the reality that "torture creates resentments, fears, and hatreds that, in the long run, are far more destructive than any evil it might avoid."<sup>115</sup>

Another consideration under the choice-of-evils factor involves the slippery slope problem: even if the act of torture will likely save many lives, it ought not be employed because of the slippery slope effect that leads to abuse in less dire cases. There is the danger that, once introduced, the government will resort to torture in ever increasing circumstances; there is no convenient stopping point. While no one would seriously endorse the wholesale use of torture, once torture is legitimized in some cases, many unjustified acts of torture are likely to occur.<sup>116</sup>

Torture might actually become formally institutionalized and become the norm rather than the exception. According to Amnesty

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<sup>112</sup> See Craig Whitlock, *Islamic Militants Behead American in Saudi Arabia*, WASH. POST, June 20, 2004, at A6.

<sup>113</sup> DERSHOWITZ, *WHY TERRORISM WORKS*, *supra* note 53, at 145.

<sup>114</sup> See Barak Cohen, *Democracy and the Mis-rule of Law: The Israeli Legal System's Failure To Prevent Torture in the Occupied Territories*, 12 IND. INT'L & COMP. L. REV. 75, 90 (2001) (quoting in part Sanford H. Kadish, *Torture, the State and the Individual*, 23 ISR. L. REV. 345, 353 (1989)).

On a long-term view, torture fails to prevent terrorism because it builds hostility in the Palestinians of the Territories, encouraging them to support and pursue terrorism. Also, the very rationale used to justify torture, *mutatis mutandis*, justifies terrorism. As Sanford H. Kadish noted, "[i]f the norm to prevail for torture and other cruel treatment is that it may be justified if the evils to be avoided are great and significant enough, how can a similar qualification be denied to the resort to acts of terrorism?"

*Id.*

<sup>115</sup> Louis Michael Seidman, *Torture's Truth*, 72 U. CHI. L. REV. 881, 893 (2005).

<sup>116</sup> See Cohen, *supra* note 114, at 91.

International, torture tends to become entrenched in a bureaucracy and becomes “administrative practice”—a routine procedure institutionalized into the method of governing.<sup>117</sup> If torture is allowed for one purpose, then why not extend its use to other high-stake purposes, or even in ordinary criminal cases, where a suspect in custody clearly has critical information, but refuses to provide it through ordinary interrogation? For instance, why not use torture on someone who likely knows the name or whereabouts of a serial killer? It may come to be used for minor purposes or used when not actually necessary and the bureaucracy’s existence may depend upon frequent use of the practice. In other words, “the legitimization of repugnant practices in special cases inevitably loosens antipathy to them in all cases,” and “[w]hen torture is no longer unthinkable, it will be thought about.”<sup>118</sup>

Richard Posner has noted:

If rules are promulgated permitting torture in defined circumstances, some officials are bound to want to explore the outer bounds of the rules. Having been regularized, the practice will become regular. Better to leave in place the formal and customary prohibitions, but with the understanding that they will not be enforced in extreme circumstances.<sup>119</sup>

To counter these concerns, Dershowitz suggests that the slippery slope concern can be abated by insuring that torture would be “limited by acceptable principles of morality”—that is, its use would be constrained by some sort of “principled break.”<sup>120</sup>

But another slippery slope concern is that the sheer brutality of torture techniques might escalate. If nonlethal torture of one person is justified in an extreme case, then what if it became necessary to use lethal torture, or torture that poses a substantial risk of death? What is to limit the candidate of torture to the suspect himself—why not torture the suspect’s mother or threaten to kill his family, friends, or compatriots? This prospect is not merely hypothetical; a former CIA officer suggested that the CIA should consider targeting close relatives of known terrorists as a means to coerce intelligence from the terrorists. “You get their

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<sup>117</sup> See AMNESTY INT’L, REPORT ON ALLEGATIONS OF TORTURE IN BRAZIL (Amnesty Int’l Publ’n. 3d. ed. 1976).

<sup>118</sup> Kadish, *supra* note 114, at 353.

<sup>119</sup> Richard Posner, *The Best Offense*, THE NEW REPUBLIC, Sept. 2, 2002, at 28 (book review).

<sup>120</sup> DERSHOWITZ, WHY TERRORISM WORKS, *supra* note 53, at 147.

1616 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

mothers and their brothers and their sisters under your complete control, and then you make that known to the target . . . You imply or you directly threaten [that] his family is going to pay the price if he makes the wrong decision.”<sup>121</sup>

2. The Imminence of Harm Factor

Imminence signifies some sort of immediacy of the threat, but how immediate must be the threat to be “imminent” in order to justify torture? What if the ticking bomb is to go off not within a day or so, but within the month? Or a week? The imminence requirement generally means that the threatened harm is something that is temporally quite proximate to the present moment. Bentham alludes to the imminence factor in saying that torture “ought not to be employed but in cases which admit of no delay; in cases in which if the thing done were not done immediately there is a certainty, at least a great probability, that the doing it would not answer the purpose.”<sup>122</sup>

If the threat is not imminent, then there is time to employ traditional methods of law enforcement and other reasonable legal means to uncover the pertinent facts. However, the question of imminence must be construed in light of the gravity of the harm to be averted. If the gravity of the threat is enormous, such as a ticking nuclear bomb that may kill many thousands of people, the threat may be days away, but the gravity of the threat may justify extreme measures now. On this point, a report by a national commission in Israel, known as the Landau Commission Report, explored in Part VI.B, determined that it may be justifiable to employ torture to discover the location of a bomb, whether it is set to explode in five minutes or five days.<sup>123</sup>

3. The Causal Nexus Factor

Under this factor, the action taken must be reasonably calculated to be causally effective in averting the greater evil. Bentham posed the causal nexus factor this way: “Even on occasions which admit not of delay, [torture] ought not to be employed but in Cases where the benefit produced by the doing of the thing required is such as can warrant the

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<sup>121</sup> Bob Drogin and Greg Miller, *Spy Agencies Facing Questions of Tactics*, L.A. TIMES, Oct. 28, 2001, § 1, at 1 (internal quotations omitted).

<sup>122</sup> Twining & Twining, *supra* note 8, at 313.

<sup>123</sup> See Mordecai Kremnitzer, *The Landau Commission Report—Was the Security Service Subordinated to the Law, or the Law to the “Needs” of the Security Service?*, 23 ISR. L. REV. 216, 253 (1989).

employing of so extreme a remedy."<sup>124</sup> If there is a minimal likelihood of success from torture and less intrusive, lawful investigative techniques are available, then the utility of torture under the necessity doctrine cannot be sustained.

A consideration under this factor is whether the suspect has it in his power to provide the desired information. To some extent, this overlaps with the choice-of-evils factor where this Article suggests considering the degree of certainty that authorities believe that the suspect has the needed information in assessing whether torture is the lesser evil. If the suspect admits to planting the bomb, but refuses to disclose its location, that would seem to be a pretty high level of certainty that the suspect has it in his power to disclose the relevant information. But if authorities have a mere suspicion without a lot to back it up, we have an entirely different situation.

On this point, Jeremy Bentham said:

There seem to be two Cases in which Torture may with propriety be applied.

1. The first is where the thing which a Man is required to do being a thing which the public has an interest in his doing, is a thing which for a certainty is in his power to do; and which therefore so long as he continues to suffer for not doing he is sure not to be innocent.

2. The second is where a man is required what probably though not certainly it is in his power to do; and for the not doing of which it is possible that he may suffer, although he be innocent; but which the public has so great an interest in his doing that the danger of what may ensue from his not doing it is a greater danger than even that of an innocent person's suffering the greatest degree of pain that can be suffered by Torture, of the kind and in the quantity permitted to be employed.<sup>125</sup>

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<sup>124</sup> Twining & Twining, *supra* note 8, at 313.

<sup>125</sup> *Id.* at 312-13.



1618 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

Bentham goes on to say that torture “ought not to be employed without good proof of its being in the power of the prisoner to do what is required of him.”<sup>126</sup>

There is a difference of opinion as to the causal efficacy of torture, even if the suspect has the necessary information. The pain and stress of torture make it almost impossible for an ordinary individual to endure without caving in to the interrogators. Much depends on the degree of torture, ranging from discomfort to ill treatment to intolerable pain. Each person has his own pain threshold, his own psychological make-up, and his own cultural conditioning. Of course, history is replete with instances of victims who would not be broken under the threat of or actual use of torture. One notable example consists of the individuals who, during the second and third centuries, were persecuted and tortured to death for refusing to renounce Christianity.<sup>127</sup> What if the suspect, once subjected to torture, does not capitulate? If the torture fails to be causally effective in getting the crucial information, would it be appropriate to go one step beyond—to take a child of the suspect and torture him or her in front of the suspect?

Another concern related to the causal nexus factor is whether information gained through torture is reliable. One objection to torture is that torture is inefficient; it produces false confessions and wrong information. If torture is ineffective in gaining accurate information, then the causal connection between torture and averting a greater evil is gone. Many believe that torture tactics often raise such reliability questions.<sup>128</sup> A spokesman for Human Rights Watch has said that torture in the United States is uncommon because it lacks causal efficacy. “Law enforcement professionals in this country understand that torture is a wonderful technique for getting confessions from innocent people

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<sup>126</sup> See *id.* at 313.

<sup>127</sup> See, e.g., ELAINE PAGELS, *THE GNOSTIC GOSPELS* 70-101 (1979).

<sup>128</sup> See Strauss, *supra* note 4, at 261-65 (numerous torture opponents have argued that torture seldom works); see, e.g., Philip B. Heymann, *Torture Should Not Be Authorized*, BOSTON GLOBE, Feb. 16, 2002, at A15 (“Torture is a prescription for losing a war for support of our beliefs in the hope of reducing the casualties from relatively small battles.”); Peter Maass, *Torture, Tough or Lite: If a Terror Suspect Won’t Talk, Should He Be Made To?*, N.Y. TIMES, Mar. 9, 2003, at D4 (“[M]any terrorism experts believe that in the long run torture is a losing strategy.”); Alisa Solomon, *The Case Against Torture*, VILLAGE VOICE, Dec. 4, 2001, at 56 (citing a CIA training manual and a study of Argentina’s dirty war for the proposition that torture is ineffective).

and a lousy technique for getting truth out of guilty people.”<sup>129</sup> It seems intuitive that most people subjected to torture will say virtually anything to stop the pain.

Long-term inefficiencies of torture have been noted with the British experience in Ireland and the French experience in Algeria.<sup>130</sup> In Algeria, for example, while the French military defeated terrorists in the Battle of Algiers through the widespread use of torture, such resentment was engendered that there was great difficulty in establishing peace thereafter.<sup>131</sup>

Others have argued that torture simply does not work in most cases. An individual subject to extreme physical and mental abuse will talk, but what they say will not be reliable. A person will say anything in these circumstances, but not necessarily the truth.<sup>132</sup> Even the CIA has acknowledged that torture is not effective in ferreting out the truth.<sup>133</sup>

On the other hand, many think torture is in fact reliable, as “[h]umans have an intense desire to avoid pain,” and thus will “comply with the demands of a torturer to avoid the pain.”<sup>134</sup> Some think that the use of torture has successfully coerced Palestinian terrorists into revealing information that has directly prevented further acts of terrorism.<sup>135</sup> In 1995, Filipino authorities used torture and obtained information that enabled them to thwart the hijacking and destruction of eleven airliners.<sup>136</sup> Nonetheless, the Supreme Court of Israel, in its opinion that disallowed the use of torture of terrorism suspects,

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<sup>129</sup> Eric Schmitt, *There Are Ways To Make Them Talk*, N.Y. TIMES, June 16, 2002, § 4, at 1 (quoting Tom Malinowski, Human Rights Watch spokesman) (internal quotations omitted).

<sup>130</sup> *See id.*

<sup>131</sup> *See id.*

<sup>132</sup> Strauss, *supra* note 4, at 261.

<sup>133</sup> *See* Tim Werner, *CIA Taught, Then Dropped Mental Torture in Latin America*, N.Y. TIMES, Jan. 29, 1997, at A1.

<sup>134</sup> Bagaric & Clarke, *supra* note 2, at 588-89.

The main benefit of torture is that it is an excellent means of gathering information. Humans have an intense desire to avoid pain, no matter how short term, and most will comply with the demands of a torturer to avoid the pain. Often the threat of torture alone will evoke cooperation.

*Id.*

<sup>135</sup> *See* Cohen, *supra* note 114, at 90.

<sup>136</sup> *See* Matthew Brzezinski, *Bust and Boom: Six Years Before 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*, WASH. POST, Dec. 30, 2001, at W09.

1620 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

discussed in Part VI.B, said that the severe shaking of suspected terrorists by the Israeli General Security Services cannot be prohibited “without seriously harming the GSS’ ability to effectively thwart deadly terrorist attacks. Its use in the past has led to the thwarting of murderous attacks.”<sup>137</sup>

Similarly, a senior Pentagon civilian lawyer stated that intense interrogation techniques were necessary with respect to a Saudi Arabian detainee who was believed to be the planned twentieth hijacker in the September 11 terrorist plot. The situation was one of “some urgency” in that he likely “had information that the people at Guantanamo believed was important, not just about perhaps 9/11, but about future events.”<sup>138</sup> This particular detainee ended up providing information about a planned attack and about financial networks to fund terrorist operations.<sup>139</sup>

Is it worth the risk that false information will be elicited by the tortured subject? Given the potential unreliability of information obtained from torture, the worst that could happen is that the inevitable conflagration will still happen despite law enforcement’s best efforts to secure needed information. But because torture has worked at times in the past, there will ultimately be similar successes in the future.<sup>140</sup>

#### 4. The Legal Way Out Factor

This factor requires a showing that there is no reasonable legal alternative to avert the greater evil. In order for torture to pass scrutiny under the necessity doctrine, other reasonable alternatives would need to be deployed, if time permits. The legal way out factor is associated with the imminence factor—that is, if the necessitous circumstance is truly imminent, there may be no time in which to pursue legal alternatives.

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<sup>137</sup> The case is reported as *The Public Committee Against Torture in H.C. 5100/94, Israel v. Israel*, [1999]. See *Supreme Court of Israel: Judgment Concerning the Legality of the General Security Service’s Interrogation Methods*, 38 I.L.M. 1471, 1475 (1999) [hereinafter *GSS Torture Case*].

<sup>138</sup> See David Johnston & Thom Shanker, *Pentagon Approved Intense Interrogation Techniques for Sept. 11 Suspect at Guantanamo*, N.Y. TIMES, May 21, 2004, at A10 (internal quotations omitted).

<sup>139</sup> See *id.*

<sup>140</sup> Strauss, *supra* note 4, at 263. For example, Jordan broke the famous terrorist Abu Nidel by threatening his family. *Id.* at n.212. The Philippines reportedly cracked the 1993 World Trade Center bombings by convincing a suspect that they would turn him over to the Israelis. *Id.* And in 1995, the Philippines state police turned the testicles, and broke the ribs of one al Qaeda agent who, after two weeks, was broken and revealed a plot to hijack eleven aircraft. *Id.*

However, if the danger is not imminent, Bentham suggests that “a method of compulsion apparently less severe and therefore less unpopular ought to be employed in preference.”<sup>141</sup> Obviously, if the danger to be averted is so imminent that there is no time to explore less intrusive techniques, interrogators may determine that torture is, under the circumstances, the only reasonable means of averting the greater evil.

Alternatives, such as offering a bribe, other incentives, or psychological strategies might also be considered. Interrogators might consider the less painful alternative of injecting the suspect with “truth serum.”<sup>142</sup> The use of truth serum or other mind-altering substances may well be legal under United States law, unless the use of the substance produces “prolonged mental harm.”<sup>143</sup> In any event, “a significant number of subjects retain the ability to dissemble while under the influence of truth serum” and these substances cannot ensure the accuracy of the information obtained.<sup>144</sup> Other commentators also argue against the causal efficacy of truth serum, saying that while drugs make suspects chatty, there is more evidence that they are simply “chirruping on” rather than telling the truth and that there is lack of scientific evidence of the reliability of confessions elicited under so-called truth serum.<sup>145</sup> Still, the use of truth serum lacks the painfulness and, under the United States interpretation of the U.N. Convention, it is a permitted technique. Short of torture, “[w]here the stakes are sufficiently high, and where other methods have proven unsuccessful, even a relatively modest chance of discovering useful information might very well be

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<sup>141</sup> Twining & Twining, *supra* note 8, at 313.

<sup>142</sup> See *Townsend v. Sain*, 372 U.S. 293, 322 (1963). The drug, hyoscine, as well as the drug, scopolamine, are familiarly known as “truth serum.” *Id.*

<sup>143</sup> As mentioned in Part III.D, the definition of torture under 18 U.S.C. § 2340(2), the infliction of “severe mental pain or suffering,” requires that it be “prolonged” in duration, and the definition explicitly prohibits “the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality . . . .”

For an argument that the use of truth serum cannot be considered “prolonged mental harm,” and therefore cannot be construed as torture, see Odeshoo, *supra* note 2, at 201. The author concludes that “neither international law nor U.S. law categorically bars the United States from using truth serum for intelligence-gathering purposes in its efforts to combat terrorism.” *Id.* at 253. However, another commentator argues that torture should encompass the mental harm caused by truth serum used for the purpose of coercing the divulgence of information. See generally Keller, *supra* note 2, at 521.

<sup>144</sup> Odeshoo, *supra* note 2, at 215.

<sup>145</sup> See Strauss, *supra* note 4, at 262 n.209.

1622 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

regarded as sufficient to justify the use of such interrogation methods," including for example, truth serum.<sup>146</sup>

As mentioned in Part IV.C, Dershowitz asserts that if a suspect is given immunity from prosecution, then the Fifth Amendment privilege against self-incrimination does not prohibit the use of truth serum or even torture. Thus, if the use of truth serum to interrogate a suspect does not violate substantive due process rights, this could be a reasonable legal alternative to torture. The evidence may not be used in court, but the suspect's civil rights might not be considered to be violated—in contrast with straightforward, physical torture.<sup>147</sup> That is perhaps because the injection of truth serum is minimally invasive, involves almost no pain or deleterious side effects, and simply lowers a person's inhibitions.<sup>148</sup> If this reasonable legal alternative does not result in information sought, then the interrogation may have no other course but to proceed with torture.

5. The Preemption Factor

One might argue that the necessity doctrine is unavailable because the issue of the use of torture has been settled by a deliberate legislative choice in the international community, evidenced by the various conventions mentioned above that make torture illegal under any circumstances. This deontological principle, being part of customary international law, is in effect a deliberate legislative determination that preempts the matter. The fact that numerous states, both signators and nonsignators to these conventions, violate this norm does not detract from the deontological language of these conventions any more than the fact that some people commit murder suggests that the law of homicide "admits" of some exceptions. The situation seems to be much the same as the "preemption" indicated in cases that have disallowed the necessity defense in the context of intentional homicide, even though the act saved a greater number of lives.<sup>149</sup> Inasmuch as the torture conventions specifically state that war or other exigencies offer no justification for torture, it appears that the issue has been "preempted"

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<sup>146</sup> Odeshoo, *supra* note 2, at 216.

<sup>147</sup> See Strauss, *supra* note 4, at 237. It has been suggested that the use of truth serum might require, under the Fourth Amendment, that police obtain a search warrant based upon probable cause to believe the individual has relevant information important for averting a terrorist plot. See *id.* at 238 n.133.

<sup>148</sup> See *id.* at 238.

<sup>149</sup> See *R.I. Recreation Center, Inc. v. Aetna Cas. & Sur. Co.*, 177 F.2d 603, 605 (1st Cir. 1949); *United States v. Holmes*, 26 Fed. Cas. 360 (C.C.E.D. Pa. 1842) (Case No. 15,383); *Regina v. Dudley & Stephens*, 14 Q.B.D. 273, 286 (1884).

by statutes that address the subject. Under the preemption notion of the necessity defense, it seems that this factor precludes justifying the use of torture under any circumstances.

It seems likely that if officials are faced with a ticking bomb case, they will engage in torture knowing full well it is considered to be a deontological constraint under international law, with the only question being whether it will be done openly, pursuant to some legal protocol if one is in place, or in a clandestine manner. A former CIA agent with thirty years of experience stated, "A lot of people are saying we need someone at the agency who can pull fingernails out. Others are saying, Let others use interrogation methods that we don't use. The only question then is, do you want to have CIA people in the room?"<sup>150</sup> The preemption factor is probably the most important hurdle for one to overcome in connection with arguing that necessity is a justification or excuse for torture in certain exigent circumstances.

#### 6. The Clean Hands Factor

The clean hands factor seems intuitive: if the actor has in some way been responsible for bringing about the necessitous circumstances, the necessity defense may not be interposed. A blameworthy actor ought not be able to invoke necessity if he recklessly assumed the risk of a terrible predicament in which a choice-of-evils might develop. Suppose someone is speeding down a narrow alley. Suddenly he sees a group of people; it is too late to stop. He can avoid killing them if he veers into an adjacent shop, where a shopkeeper is rearranging a window display. The driver turns his car into the shop window, killing the owner, but thereby saves the lives of the group of people ahead. He defends a charge of vehicular homicide by pleading necessity in that he made a reasonable choice-of-evils and, if he had not driven into the shop, he would have killed many more people. While we may approve of his quick thinking that resulted in killing one person in the shop instead of the five in the alley, it still seems counterintuitive for a defendant to be acquitted for vehicular manslaughter based on necessity where his overall recklessness caused the circumstances that occasioned the choice-of-evils. Intuitively, the defense seems wrong in such a case because it was the defendant's recklessness that established the Hobson's choice in

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<sup>150</sup> DERSHOWITZ, *WHY TERRORISM WORKS*, *supra* note 53, at 151 (quoting an unnamed CIA agent) (internal quotations omitted).

1624 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

the first place.<sup>151</sup> The choice-of-evils might mitigate the sentence, but not acquit the actor from the crime.

To cite another example, suppose someone negligently starts a brush fire and, in order to prevent it from spreading to a town, he destroys someone's house to clear the way for a firebreak. It seems intuitive that the actor ought not be able to defend an action in tort for damages to the structure he destroyed, even though he did succeed in preventing the fire from spreading to an area where it would have produced greater harm.

Many terrorists operate under the belief that they have "clean hands" – that is, that they are not responsible for bringing about the state of affairs that have pushed them to launch attacks on us. They believe that they are truly innocent of any wrongdoing—that the evil to be averted is wholly outside of themselves—such things as imperialism, hegemony, imposition of Western values, etc. Terrorists may perceive that they are faced with a significant form of injustice or oppression by a powerful political enemy, that an act of terrorism is necessary to avert this harm because there is no other remedy, and that the act would be, on balance, the lesser evil. Furthermore, to a terrorist, there is no such thing as an "innocent target" in the enemy population, and thus civilians and other "innocent" targets are fair game against the offending government. From the terrorist's perspective, the targets are not truly innocent, but are collectively guilty of their government's policies. Terrorists may believe that they are not the initial aggressors, but that the enemy government's imperialism constitutes unlawful violence and aggression against their fundamental rights, and that terrorist action is the only reasonable means of fending off the offending government and overcoming tyranny.

According to R.M. Hare, terrorists are "acting on behalf of an oppressed section of the population which has absolutely no alternative means of securing redress of its just grievances. Such people might claim that they were prepared to have anybody do the same to them in a like case."<sup>152</sup> As Hare points out, however, the question is what counts as "just grievances."<sup>153</sup> Specifically, it will be necessary to show that there were no other feasible means for the resolution of grievances.<sup>154</sup> Thus, to

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<sup>151</sup> Leo Katz, *ILL-GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD, AND KINDRED PUZZLES OF THE LAW* 42 (1996).

<sup>152</sup> R.M. Hare, *On Terrorism*, 13 *J. VALUE INQUIRY* 241, 244 (1979).

<sup>153</sup> *Id.* at 244-45.

<sup>154</sup> *Id.*

terrorists, the clean hands factor is fully complied with—they have clean hands, and thus they are not the source of the evil that they seek to eradicate.

The various elements of the necessity defense make it extremely difficult for authorities to justify or excuse the use of torture, even when extremely exigent circumstances exist. That does not mean that authorities would *refrain* from the use of torture in a ticking bomb situation. Still, the international consensus that torture is wrong appears to have risen to the status of customary international law. Thus, it would apply to all state actors, and “necessity” would not be a justification or excuse for its violation. In the final analysis, states will take such action as they deem necessary, where exigent circumstances exist that under ordinarily would not be considered.

#### VI. MODERN INSTANCES OF TORTURE BY THE FRENCH AND THE ISRAELIS

##### A. *The French Experience in the Use of Torture Against the Algerians*

Application of the necessity doctrine in the context of torture is a reality. Not surprisingly, occasions arise where interrogators are tempted to use torture as a lesser evil in an effort to avert a greater evil—future terrorist acts.

A well known example of the extensive use of torture was by the French army during its brutal anti-colonial war in Algeria from 1955 to 1957. An estimated one million Algerians were killed in their anti-colonial struggle against France.<sup>155</sup> During that period, the French committed more than half a million troops to repress the Algerian rebellion.<sup>156</sup> The army was left more or less to its own devices and torture and other atrocities became widespread.<sup>157</sup> Some of the torture consisted of applying electrodes to various parts of the body and wrapping a wet towel around the person’s face until they choked and vomited.<sup>158</sup>

French soldiers also committed many rapes of Algerian women. Some tens of thousands of Algerians who fought on the side of the French during the war were later abandoned by the French and

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<sup>155</sup> See Richard Deaton, *Western Colonial Terrorism Makes bin Laden Look Tame*, THE OTTAWA CITIZEN, Dec. 10, 2001, at A13.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> See *60 Minutes Transcript*, 34 BURRELL’S INFO. SERV. PUB., Jan. 20, 2002, at 6-7.



## 1626 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

massacred when the French pulled out. France never apologized for its conduct in the war,<sup>159</sup> and in 2000, the French Prime Minister, Lionel Jospin, ruled out a parliamentary inquiry into the torture committed by the French army during the Algerian war.<sup>160</sup> An officer who supervised the torture, General Paul Aussaresses, wrote a memoir, *Algeria Special Services 1955-1957*, narrating his cold-blooded use of torture and how he summarily executed twenty-four men.<sup>161</sup> In the book, the General gives chilling details about how and why he tortured prisoners and says that almost all who were interrogated were killed, whether or not they talked.<sup>162</sup> No one was tried for war crimes in connection with this matter. However, once the General's book came out in France, he was prosecuted, not for his acts of supervising torture, but under an obscure French law that made it a crime to try and justify war, which the prosecutor argued was evidenced by the General seeking to reveal the facts of the episode to the public.<sup>163</sup> The General was fined \$6,500.<sup>164</sup>

The trial focused almost exclusively on passages singled out from the General's memoir.<sup>165</sup> In a passage of his book quoted in court, the General wrote, "'The best way to make a terrorist talk when he refused to say what he knew was to torture him.' 'I was indifferent. They had to be killed; that's all there was to it.'"<sup>166</sup> In addition, the General said in court, "'Alas, torture does serve a purpose. And today I would do the same thing again if I had a bin Laden in my hands' . . ." <sup>167</sup> The General, age 83 at the time of trial, testified that the acts of torture were necessary to obtain information fast and to save lives.<sup>168</sup>

*B. The Israeli Experience in the Use of Torture Against Palestinians*

For a number of years, Israel's General Security Service ("the GSS") routinely employed coercive interrogation methods towards Palestinians

<sup>159</sup> See Suzanne Daley, *France Is Seeking a Fine in Trial of Algerian War General*, N.Y. TIMES, Nov. 29, 2001, at A6 [hereinafter Daley, *France Is Seeking a Fine*].

<sup>160</sup> See Susan Bell, *France Rejects Inquiry over Algerian War Torture*, THE SCOTSMAN, Nov. 27, 2000.

<sup>161</sup> *Id.*

<sup>162</sup> See Robert Graham, *Confession of a Torturer Open Scars of Algerian War*, FIN. TIMES (LONDON), May 5, 2001, at 6.

<sup>163</sup> Daley, *France Is Seeking a Fine*, *supra* note 159, at A6.

<sup>164</sup> See Suzanne Daley, *France Fines General, 83, for Memoir Justifying Algerian War*, N.Y. TIMES, Jan. 26, 2002, at A4.

<sup>165</sup> *Id.*

<sup>166</sup> Daley, *France Is Seeking a Fine*, *supra* note 159, at A6.

<sup>167</sup> See Harry de Quetteville, *General Who Justified War Crimes Fined*, THE DAILY TELEGRAPH (LONDON), Jan. 26, 2002, at 18.

<sup>168</sup> Daley, *France Is Seeking a Fine*, *supra* note 159, at A6.

suspected of involvement in or having knowledge of terrorist activity.<sup>169</sup> Under the GSS interrogation tactics, “untold numbers of Palestinians have been subjected to systematic torture, often resulting in permanent physical and psychological trauma and, on occasion, even death.”<sup>170</sup>

For many years the GSS denied that it used coercive interrogation techniques.<sup>171</sup> The techniques consisted of prolonged isolation of detainees in harsh conditions, sleep deprivation, shackling detainees in painful positions for long periods, usually covering their heads with sack cloth, making it difficult to breathe, playing loud music non-stop, beating and shaking detainees, and making various threats relating to the detainees and their families.<sup>172</sup> These interrogation techniques became public knowledge in 1987 with the publication of a report by a national commission of inquiry on the GSS interrogation methods, known as the *Landau Commission Report*.<sup>173</sup> The Israeli government established the Landau Commission, headed by a retired Israeli Supreme Court justice, to examine the dilemma of how a democratic society should respond to the prospect of using nonlethal torture in cases where there is the vital need to preserve the very existence of the State and its citizens and maintain fundamental principles of law.

The *Landau Commission Report* said that the physical pressure used by the GSS against Palestinian detainees was “‘largely to be defended, both morally and legally.’”<sup>174</sup> The *Report*, in effect, expressly authorized the GSS to use physical and psychological force on individuals suspected of being involved in “political subversion.”<sup>175</sup> In fact, the Commission outlined what “physical methods” of interrogation were permissible, making it clear that the “rule of law” required that these methods be employed within strict guidelines, never to be exercised “disproportionately.”<sup>176</sup> The Commission also concluded that the

<sup>169</sup> See Mordechai Kremnitzer & Re’em Segev, *The Legality of Interrogational Torture: A Question of Proper Authorization or a Substantive Moral Issue?*, 34 ISR. L. REV. 509, 501 (2000).

<sup>170</sup> Ardi Imseis, “Moderate” Torture On Trial: Critical Reflections on the Israeli Supreme Court Judgment Concerning the Legality of General Security Service Interrogation Methods, 19 BERKELEY J. INT’L L. 328, 329 (2001).

<sup>171</sup> See Kremnitzer & Segev, *supra* note 169, at 512.

<sup>172</sup> See *id.* at 511. The Landau Commission Report is formally known as the *Report of the Commission of Inquiry in the Matters of Investigation Methods of the General Security Service Regarding Hostile Terrorist Activity*, 23 ISR. L. REV. 146, 146-88 (1987) [hereinafter Landau Commission Report] (excerpts of the Report were translated into English).

<sup>173</sup> See Kremnitzer & Segev, *supra* note 169, at 512.

<sup>174</sup> See Imseis, *supra* note 170, at 334 (quoting from the Landau Commission Report, *supra* note 169, at ¶ 2.18).

<sup>175</sup> See *id.* at 336 (emphasis omitted).

<sup>176</sup> Landau Commission Report, *supra* note 172, ¶ 3.16.

necessity defense was available to GSS interrogators, should any of them be prosecuted.<sup>177</sup>

However, the Commission refrained from commenting on whether the physical interrogation methods constituted torture. But in a classified appendix to the *Landau Commission Report*, the contents of which still have not been disclosed to the public, the Commission set forth specific guidelines concerning the conditions and limits for using coercive interrogation methods.<sup>178</sup> Thereafter, the GSS continued to employ coercive interrogation techniques against Palestinians and frequently went beyond what was allowed in the Commission's guidelines.<sup>179</sup>

Despite hundreds of petitions by detainees to Israel's Supreme Court, claiming that the GSS was employing illegal interrogation techniques, the Israeli courts routinely refused to interfere in the use of these harsh methods of interrogation on various procedural pretexts, including that the claims made were too general and did not concern a specific instance, or that the applicant's interrogation had been completed by the time of the hearing, and hence the question was moot.<sup>180</sup> This changed in 1999 when the Israeli Supreme Court held that while there might be a moral necessity for using exceptional interrogation techniques in order to save lives and, while the necessity defense is embodied in Israeli law, the government was not authorized to use such means in the absence of explicit legislation to that effect.<sup>181</sup> In particular, the court emphasized, "violence directed at a suspect's body or spirit does not constitute a reasonable investigation practice[.]" and that "a reasonable investigation is necessarily one free of torture."<sup>182</sup>

This decision apparently contradicted the Landau Commission's finding that the GSS was authorized to use exceptional interrogation techniques. The court held that the GSS interrogation techniques constituted torture or was cruel, unhuman, or degrading treatment, that the law prohibits the use of "'brutal or inhuman means' in the course of an investigation" and that Israel is a signatory to various international law treaties, which prohibit the use of torture, cruel, inhuman, or

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<sup>177</sup> See Imseis, *supra* note 170, at 335.

<sup>178</sup> See Kremnitzer & Segev, *supra* note 169, at 514; see also Imseis, *supra* note 170, at 335.

<sup>179</sup> See Kremnitzer & Segev, *supra* note 169, at 514.

<sup>180</sup> See *id.*

<sup>181</sup> See *id.* at 510; see also GSS Torture Case, *supra* note 137.

<sup>182</sup> *Id.*

degrading treatment.<sup>183</sup> These prohibitions are “absolute,” and admit of no exceptions, according to the court.<sup>184</sup> The court considered Israel’s statutory law of necessity, which has two “imminence” requirements.<sup>185</sup> First, there must be an immediate need to commit the unlawful act and, second, the danger to be averted must also be imminent.<sup>186</sup> It is hard to understand why the statute is so written, for in practically any situation the need to act immediately is based on the fact that the danger to be averted is itself imminent. Construing this provision, the court determined that the necessity defense

might arise in instances of “ticking bombs,” and that the immediate need [requirement] . . . refers to the imminent nature of the act rather than that of the danger. Hence, the imminence criteria is satisfied even if the bomb is set to explode in a few days, or perhaps even after a few weeks, provided the danger is certain to materialize and there is no alternative means of preventing its materialization. In other words, there exists a concrete level of imminent danger of the explosion’s occurrence (references omitted).<sup>187</sup>

Thus, the court indicated that in analyzing the necessity defense, the justification in using coercive interrogation techniques could apply even if the danger to be averted will not occur until after a few weeks.<sup>188</sup> In such a situation, it is hard to understand how the interrogator would be justified in using coercive interrogation techniques immediately. There is plenty of time, it would seem, to obtain the relevant information from the suspect by the use of legal alternatives.

One can imagine some cases where the need to take action may be immediately necessary, even though the danger to be averted may be

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<sup>183</sup> *See id.*

<sup>184</sup> *See id.*

<sup>185</sup> *See id.* at 522.

A person shall bear no criminal liability for committing an act immediately necessary for the purpose of saving the life, liberty, body or property, of either himself or another person, from tangible danger of serious harm, imminent from the particular state of affairs, at the requisite time, and absent alternative means for avoiding the harm.

*Id.* (quoting Penal Act 1977, art. 34k (Isr)).

<sup>186</sup> *Id.*

<sup>187</sup> *See id.* at 523 (quoting HCJ 5100/94 The Public Comm. Against Torture in Israel v. The State of Israel [1999] IsrSC 53(4) PD 817 § 33).

<sup>188</sup> *Id.*

1630 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

remote in time. Suppose a detainee has set off a timed nuclear bomb. The bomb will detonate in two weeks in the middle of a populated center and, even if people are evacuated, there will be great destruction to property and cultural monuments and grave environmental damage. But the detainee has hidden a switch which, if activated within one week before the bomb is scheduled to go off, will stop it. He confesses that the switch is so well hidden in an underground cave that it would take days for workers to locate it. Thus, in such a situation, there would be an imminent need to apply coercive interrogation techniques here and now, even though the particular danger to be avoided will not occur for two weeks.

The Israeli government argued that, based on the *Landau Commission Report*, an act that meets the necessity defense is a choice of a lesser evil and, as such, is not only permissible, but also constitutes a moral duty.<sup>189</sup> As the GSS interrogators are responsible for the protection of the public, they are justified in employing coercive measures as part of interrogations when the necessity defense conditions are met.<sup>190</sup> The court noted that “in the appropriate circumstances, GSS investigators may avail themselves of the ‘necessity’ defense, if criminally indicted[,]” but that the doctrine of necessity does not afford interrogators the general authority, *ab initia*, to use improper interrogation methods.<sup>191</sup> The decision seems to contradict the Landau Commission’s finding that coercive techniques were lawful and within the scope of GSS investigative power.

The Israeli Supreme Court also said that it would be up to the legislative branch to enact laws to grant affirmative powers to the authorities to utilize coercive interrogation methods.<sup>192</sup> The problem here, from the standpoint of the security police, is that they put themselves in jeopardy in that they could be prosecuted for their actions, and their only recourse would be to take their chances and offer the doctrine of necessity as a defense to possible charges.

After the GSS torture case decision was handed down, it was reported that GSS interrogators designated many dozens of ticking bomb

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<sup>189</sup> GSS Torture Case, *supra* note 137.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* Clearly, a legal statutory provision is necessary for the purpose of authorizing the government to instruct in the use of physical means during the course of an interrogation, beyond what is permitted by the ordinary “law of investigation,” and in order to provide the individual GSS investigator with the authority to employ these methods. *Id.*

detainees on whom exceptional interrogation techniques were used and justified under the necessity doctrine.<sup>193</sup> In addition, the GSS continued to routinely use sleep deprivation, prolonged shackling in painful situations, and beatings (but apparently stopped using violent shaking and covering detainees' heads with sacks).<sup>194</sup>

#### VII. CONCLUSION

In *The City of God*, St. Augustine stated that torture is “a thing, indeed, to be bewailed, and, if that were possible, watered with fountains of tears.”<sup>195</sup> However, it seems implausible that any right could be couched in absolutist terms. Not even the right to life is absolute: self-defense, for instance, is a justification for the intentional killing of another human being. The blanket prohibition on torture fails to convince governments to refrain from the practice, and some governments have explicitly codified the necessity doctrine in connection with torture.<sup>196</sup>

The conclusion of this Article is that the way to handle torture in an extreme emergency is to recognize that, while torture is prohibited, necessity provides an overriding justification under the circumstances. One commentator has offered:

[I]t seems strange to argue that people's moral compasses will truly be damaged if torture is prohibited 99.9% of the time rather than 100%. . . . [T]he state can accord great respect to human rights while still acknowledging that, just as it is sometimes necessary to deprive people of their freedom (imprison them) in order to protect the public, sometimes it is necessary to physically hurt people to protect the public. Just because certain human rights norms are not absolute priorities of the state does not mean that the state has entirely lost respect for them.<sup>197</sup>

<sup>193</sup> See Kremnitzer & Segev, *supra* note 169, at 531.

<sup>194</sup> See *id.*

<sup>195</sup> ST. AUGUSTINE, *THE CITY OF GOD*, bk. XIX, ch. 6 (1950).

<sup>196</sup> Great Britain has explicitly codified a necessity justification for torture—Article 134(4) of the Criminal Justice Act of 1988, which states that acting under “lawful authority, justification or excuse” is a defense against prosecution for torture. See Criminal Justice Act, 1988, c. 33, § 134(4) (Eng.).

<sup>197</sup> Raviv, *supra* note 2, at 144-45.

1632 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

Thus, under the necessity doctrine, torture would be permissible (or even justifiable) if the circumstances are so extreme that there would be a significant “utilitarian” advantage to the action. In the ticking bomb situation, the advantage is extremely high, considering the number of lives to be saved compared to the (one) person tortured. Of course, there is always the possibility of getting false information from the tortured individual. Also, it has been pointed out that torture is not death—the victim survives, albeit with the memory of the painful episode. The terrorist will not be killed, but will be “merely” subjected to a highly painful assault of his body.

On the other hand, there is the slippery slope concern that, once torture is justified in certain circumstances, authorities—and world standards—will gradually slide down so that torture might even become a norm. We actually see this is the case today in certain countries, including Egypt and Syria, where torture is known to be deployed on a fairly routine basis in numerous situations.

It is hard to say, from a legal theory standpoint, that the necessity doctrine is “correct” for practically every conceivable felony as well as civil wrongs, but that it may not be invoked in cases of torture. That would be theoretically and analytically improper. However, as we have seen, the pre-emption factor may well “trump” the situation. For if there is a deontological constraint that has taken on a certain weight of authority, as is the case in the prohibition against torture, then there is no exception to the rule (not even necessity).

This discussion is of practical importance because we live in a world where terrorism—however you wish to define it—is a prevalent and persistent feature of life. But we live in an era where a number of nations entertain torture not only of terrorists, but of all manner of prisoners under circumstances that are a far cry from meeting the criteria of the necessity doctrine. Again, the necessity doctrine is largely of utilitarian value, so that there is hardly unanimity as to its moral soundness. Yet the prospect of saving many lives that would otherwise be lost is morally appealing.