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The Myth of the Virtuous Torturer: Two Defences of the Absolute Ban on Torture

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Review Essay

The Myth of the Virtuous Torturer: Two Defences of the Absolute Ban on Torture

WHY NOT TORTURE TERRORISTS? MORAL, PRACTICAL, AND LEGAL ASPECTS OF THE "TICKING BOMB" JUSTIFICATION FOR TORTURE, by Yuval Ginbar[1]

THE ABSOLUTE VIOLATION: WHY TORTURE MUST BE PROHIBITED, by Richard Matthews[2]

CRAIG FORCESE[3]

IN THE AFTERMATH OF 11 SEPTEMBER 2001 (9/11), two unusual characters featured in White House legal memoranda, in the writings of legal and other academics, and in popular culture including the American television series *24*: the omniscient, unbounded US commander-in-chief and the virtuous torturer. The first creature provided the legal imprimatur for everything from warrantless intercepts of communications to detention in Guantanamo Bay and at CIA "black sites." The second character was the interrogator, willing and able to take extreme measures to extract confessions that stave off future terrorist attacks. That individual, more than anything else in the George W. Bush administration's "war on terror," exemplified the United States' drift to the "dark side," to use the words of then Vice President Dick Cheney.[4]

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1. (New York: Oxford University Press, 2008) 414 pages.
2. (Montreal: McGill-Queen's University Press, 2008) 238 pages.
3. Associate Professor, Faculty of Law (Common Law Section), University of Ottawa.
4. "In 2001, Vice-President Dick Cheney, in an interview on 'Meet the Press,' said that the government might have to go to 'the dark side' in handling terrorist suspects, adding, 'It's going to be vital for us to use any means at our disposal.'" See Jane Mayer, "A deadly interrogation: Can the C.I.A. legally kill a prisoner?" *The New Yorker* (14 November 2005), online: <http://www.newyorker.com/archive/2005/11/14/051114fa_fact>.

The literature on this "dark side" includes the two books reviewed here. These two volumes come almost a decade into a perplexing evolution in thinking on torture, a significant portion of which serves as an apologia for extreme interrogation. Much, indeed most, of the content of these two books is intended as a rebuttal to these musings. Richard Matthews's *The Absolute Violation* is almost entirely a philosophical meditation. Its express purpose, exemplified by its subtitle, is to demonstrate "why torture must be prohibited." Matthews does so largely through a sustained critique of philosophical justifications for torture advanced elsewhere in the "dark side's" literature. The book's preoccupation is to diffuse utilitarian and virtue ethics justifications for torture by retraining the focus on the broad, society-level implications of torture. Put simply, these broader consequences, properly appreciated, are so corrosive that they supersede any justification for torture that can be advanced in the heat of an emergency.

In *Why Not Torture Terrorists?* Yuval Ginbar covers much of the same ground as Matthews, and with the same objective. He too analyzes the philosophical debate on torture, although he spends substantial time examining the legal approach to this matter as well. Like Matthews, Ginbar focuses on the systemic and societal impact of torture in his defence of an absolute prohibition. Also like Matthews, Ginbar views the consequences of legitimizing torture as a slippery slope which confirms the wisdom of the torture ban.

In the course of advancing their projects, both authors establish the legal backdrop for the torture question—Matthews in his first chapter and Ginbar towards the end of his book. Both are concerned with the ticking bomb parable, one of the core justifications advanced for torture, and both raise concerns about the normalization of torture in reaction to this scenario. Given the authors' common preoccupations and the extent to which they react to what has come before them, it is worth beginning this essay with an overview of the normalization of torture, the legal backdrop, and the ticking bomb justification.

I. THE NORMALIZATION OF TORTURE

One of the most notorious attributes of the recently departed Bush administration was the lawyerly effort to present as normal methods of interrogation exceeding commonly accepted limits. Among the highlights is an infamous (and subsequently disavowed) 1 August 2002 memorandum by then Assistant

Attorney General and now Judge Jay Bybee. In this document, he confined the definition of torture to the most egregious acts producing lasting psychological damage such as post-traumatic stress syndrome or physical pain of an "intensity akin to that which accompanies serious physical injury such as death or organ failure."[5] "Because the acts inflicting torture are extreme," wrote Bybee, "there is a significant range of acts that though they might constitute cruel, inhuman, or degrading treatment or punishment fail to rise to the level of torture."[6]

Moreover, urged administration lawyers, "criminal law defenses of necessity and self-defence could justify interrogation methods needed to elicit information to prevent a direct and imminent threat to the United States and its citizens,"[7] and "[a]ny effort to apply [the US federal criminal provision outlawing torture] in a manner that interferes with the President's direction of such core war matters as the detention and interrogation of enemy combatants ... would be unconstitutional."[8]

The result of this lawyerly parsing of once well understood limits was, famously, the use of extreme interrogation techniques. Various US government memos describe interrogation "stress" techniques approved for use in overseas military interrogations.[9] News stories, meanwhile, have reported on CIA interrogation methods.[10] They range from forceful shaking, open-handed slaps "aimed at causing pain and triggering fear," and "hard open-handed slap[s] to the stomach" designed "to cause pain, but not internal injury," to more extreme measures. These measures include forcing detainees "to stand, handcuffed and with their feet shackled to an eye bolt in the floor for more than 40 hours," producing "[e]xhaustion and sleep deprivation"; chilling the detainee by leaving him to "stand naked in a cell kept near 50 degrees" and dousing them with cold water; and waterboarding, a process by which a detainee is "bound to an inclined

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5. Memorandum from Jay S. Bybee to Alberto R. Gonzales (1 August 2002) in Karen J. Greenberg & Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (New York: Cambridge University Press, 2005) 172 at 213-14.

6. *Ibid.* at 214.

7. *Ibid.* at 207.

8. *Ibid.* at 200.

9. See *e.g.* Greenberg & Dratel, *supra* note 5.

10. See Brian Ross & Richard Esposito, "CIA's Harsh Interrogation Techniques Described" *ABC News* (18 November 2005), online: <http://abcnews.go.com/WNT/Investigation/story?id=1322866>.

board, feet raised and head slightly below the feet."[11] Then, "[c]ellophane is wrapped over the prisoner's face and water is poured over him," triggering powerful gag reflexes.[12]

Reports on happenings at Abu Ghraib prison in Iraq disclose even more extreme measures. At Abu Ghraib, concludes a US military report, unauthorized but intentional violent and sexual abuses included "acts causing bodily harm using unlawful force as well as sexual offenses including, but not limited to rape, sodomy and indecent assault."[13] Media reports have pointed to the use of extreme and occasionally deadly interrogation techniques at places like Bagram, Afghanistan and Guantanamo Bay, Cuba.[14]

Summarizing the US record extracted from 100,000 government documents disclosed under US information laws, the American Civil Liberties Union (ACLU) reported in 2006 on "a systemic pattern of torture and abuse of detainees in U.S. custody in Afghanistan, the U.S. Naval Base Station at Guantánamo Bay, Cuba, Iraq, and other locations outside the United States."[15] Methods of torture and abuse described in the report included "prolonged incommunicado detention; disappearances; beatings; death threats; painful stress positions; sexual humiliation; forced nudity; exposure to extreme heat and cold; denial of food and water; sensory deprivation such as hooding and blindfolding; sleep deprivation; water-boarding; use of dogs to inspire fear; and racial and religious

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11. *Ibid.*

12. *Ibid.* See also Walter Pincus, "Waterboarding historically controversial" *The Washington Post* (5 October 2006) A17. For a discussion of the background to CIA interrogations in the war on terror, see David Johnston, "At a secret interrogation, dispute flared over tactics" *The New York Times* (10 September 2006), online: <http://www.nytimes.com/2006/09/10/washington/10detain.html>. The CIA director denied in 2007 that any of the stress techniques employed at black sites constituted torture. See Walter Pincus, "CIA chief complains about agency's critics in Europe" *The Washington Post* (17 April 2007) A12 [Pincus, "CIA chief complains"].

13. The Fay-Jones Report (August 2004) in Greenberg & Dratel, *supra* note 5, 987 at 993.

14. See *e.g.* Tim Golden, "In US report, brutal details of 2 Afghan inmates' deaths" *The New York Times* (20 May 2005), online: <http://www.nytimes.com/2005/05/20/international/asia/20abuse.html>; David Johnston, "More of FBI memo criticizing Guantanamo methods is released" *The New York Times* (22 March 2005), online: <http://www.nytimes.com/2005/03/22/politics/22detain.html>; and Seymour Hersh, *Chain of Command: The Road from 9/11 to Abu Ghraib* (New York: HarperCollins, 2004).

15. American Civil Liberties Union, *Enduring Abuse: Torture and Cruel Treatment by the United States at Home and Abroad* (April 2006) at 4, online: <http://www.aclu.org/safefree/torture/torture_report.pdf>.

insults."[16] Further, "around one hundred detainees in U.S. custody in Afghanistan and Iraq have died. The government has acknowledged that 27 deaths in U.S. custody were homicide, some caused due to 'strangulation,' 'hypothermia,' 'asphyxiation,' and 'blunt force injuries.'"[17]

Interrogation techniques employed by allied states in the campaign against terrorism have also generated controversy, especially where detainees are placed in the custody of these nations via "extraordinary rendition" by the United States or another nation. Rendition—covert removals without formal extradition or deportation—is not a new practice. The procedure was employed by US officials before 9/11 to remove expeditiously persons wanted abroad for suspected involvement in terrorism.[18] It has since been conducted on a much vaster scale, and its focus has shifted from rendition to "justice" to rendition to interrogation, often in circumstances where torture is likely.[19] Estimates made in 2005 suggested that 150 people had been rendered by the United States since 9/11.[20] News reports name several countries—all of which have been accused by the US State Department of employing torture[21]—as countries to which individuals have been rendered. These nations include Egypt, Jordan, Morocco, and Syria.[22] These actions have fuelled particular controversy in Europe[23] and, after the Maher Arar matter, in Canada.[24]

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16. *Ibid.*

17. *Ibid.*

18. See Human Rights Watch, *Still at Risk: Diplomatic Assurances no Safeguard Against Torture* (14 April 2005), online: <http://www.hrw.org/en/reports/2005/04/14/still-risk>; Association of the Bar of the City of New York & Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions"* (New York: ABCNY & NYU School of Law, 2004), online: <http://www.chrgj.org/docs/TortureBy Proxy.pdf> [*Torture by Proxy*].

19. *Torture by Proxy*, *ibid.* at 5.

20. See Jane Mayer, "Outsourcing torture: The secret history of America's 'extraordinary rendition' program" *The New Yorker* (14 February 2005), online: <http://www.newyorker.com/archive/2005/02/14/050214fa_fact6> [Mayer, "Outsourcing torture"]. In 2007, CIA director Michael Haydon claimed that the number of rendered persons is closer to one hundred. See Pincus, "CIA chief complains," *supra* note 12.

21. See U.S., Department of State, *Country Reports on Human Rights Practices* (2005), online: <http://www.state.gov/g/drl/rls/hrrpt/2005/> (under the headings "Morocco," "Egypt," "Jordan," and "Syria").

22. See Mayer, "Outsourcing torture," *supra* note 20.

II. THE LAW'S WRIT

Complicity in and actual infliction of torture by the United States, which has historically been a noisy proponent of the rule of law, has galvanized a substantial academic debate. The starting point in any serious legal analysis of torture is the recognition that in international law torture is absolutely prohibited. Two broadly ratified international treaties include a prohibition on both torture and cruel, inhuman, and degrading treatment and punishment (CID treatment). The *International Covenant on Civil and Political Rights*[25] (ICCPR) provides in Article 7 that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[26] (UNCAT) includes more detailed prohibitions. Torture is defined in UNCAT as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[27]

The Convention is unequivocal in outlawing torture:

> Each State Party shall take effective legislative, administrative, judicial or other

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23. Indeed, it would appear that European intelligence services at least tacitly assisted in some renditions. See *e.g.* Holger Stark, "Berlin 'Helped CIA' With Rendition of German Citizen" *Spiegel Magazine* (11 January 2007), online: <http://www.spiegel.de/international/spiegel/0,1518,459075,00.html>; Craig Whitlock, "German Lawmakers Fault Abduction Probe" *The Washington Post* (4 October 2006) A18; and Tracy Wilkinson, "Details emerge in cleric's abduction" *Los Angeles Times* (10 January 2007) A4, online: <http://articles.latimes.com/2007/jan/10/world/fg-renditions10>.

24. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (Ottawa: Public Works and Government Services Canada, 2006).

25. 19 September 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR].

26. 1465 U.N.T.S. 85, (entered into force 26 June 1987) [UNCAT].

27. *Ibid.*, art. 1.

> measures to prevent acts of torture in any territory under its jurisdiction. ... 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. ... An order from a superior officer or a public authority may not be invoked as a justification of torture.[28]

Moreover, "[e]ach State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture."[29]

The United Nations Committee Against Torture—a treaty body established by the UNCAT—has rejected efforts to justify torture in the name of counter-terrorism.[30] Meanwhile, under the ICCPR, freedom from torture and CID treatment is among the rights from which no derogation is permitted, even in times of emergency that threaten the life of a nation.[31]

III. THE TICKING BOMB

Yet much academic attention has focused on whether this legal absolutism is wrong-headed and deeply naive in a world of nihilistic terrorism. A common image in much of the contemporary debate is the famous ticking bomb scenario, or one of its variants. Coming in several guises, the classic scenario imagines a stolen suitcase-sized thermonuclear device set to detonate imminently somewhere in a large urban area. State agents have in their custody the terrorist who planned the attack and who is aware of the precise location of the weapon. The terrorist refuses to cooperate and is willing to die for his or her cause. The dilemma posed is stark: do the agents engage in "interrogational torture" employed strictly to extract the critical information from the terrorist and designed to save millions of innocent lives?[32]

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28. *Ibid.*, art. 2.
29. *Ibid.*, art. 4.
30. See *e.g.* Committee Against Torture, *Conclusions and Recommendations of the Committee against Torture: Egypt*, UNCATOR, 29th Sess., UN Doc. CAT/C/CR/29/4 (2002) at para. 4 ("The Committee is aware of the difficulties that the State party faces in its prolonged fight against terrorism, but recalls that no exceptional circumstances whatsoever can be invoked as a justification for torture").
31. ICCPR, *supra* note 25, art. 4.
32. Henry Shue, "Torture" in Sanford Levinson, ed., *Torture: A Collection* (New York: Oxford University Press, 2004) 47 at 53.

Faced with this imaginary scenario, some commentators have answered in the affirmative. As Jean Bethke Elshtain observes, "[f]ar greater moral guilt falls on a person in authority who permits the death of hundreds of innocents rather than choosing to 'torture' one guilty or complicit person."[33] She urges, poignantly, "[w]ere I the parent or grandparent of a child whose life might be spared [in a ticking bomb scenario], ... I would want officials to rank their moral purity as far less important in the overall scheme of things than eliciting information that might spare my child or grandchild... ."[34]

Oren Gross writes that "legal rigidity in the face of severe crises [like the ticking bomb scenario] is not merely hypocritical but is, in fact, detrimental to long-term notions of the rule of law. It may also lead to more, rather than less, radical interference with individual rights and liberties."[35]

Civil libertarian Alan Dershowitz points to this scenario in his famous argument that because it is already happening *sub rosa*, torture should be regulated and available in extreme circumstances, governed by judicially issued warrants.[36] Judge Richard Posner, although critical of Dershowitz's warrant idea, supports his premise: "only the most doctrinaire civil libertarians ... deny ... that if the stakes are high enough, torture is permissible. No one who doubts that should be in a position of responsibility."[37]

IV. TORTURE'S OPPONENTS

Obvious objections can be mounted to the ticking bomb scenario. A pragmatic objection is that the premises underlying this scenario are dubious. It is possible to imagine a situation in which interrogators *know*, not just suspect, that the detainee is the bomber; in which they *know* the suspect *will* crack under pain and torture *will* save the day; in which they *know* the bomb's detonation is *certain* to happen; in which they *know* that other investigative techniques are *certain* to fail. Such scenarios are by definition vanishingly rare, except on tele-

33. Jean Bethke Elshtain, "Reflection on the Problem of 'Dirty Hands'" in Levinson, *ibid.*, 77 at 87.

34. *Ibid.*

35. Oren Gross, "The Prohibition on Torture and the Limits of the Law" in Levinson, *ibid.* at 237.

36. Alan M. Dershowitz, *Why Terrorism Works* (New Haven: Yale University Press, 2003) [Dershowitz, *Why Terrorism Works*]; Alan Dershowitz, "Tortured Reasoning" in Levinson, *ibid.*, 257.

37. Richard A. Posner, "Torture, Terrorism, and Interrogation" in Levinson, *ibid.*, 291 at 295.

vision.[38] It is claimed, somewhat unpersuasively, for example, that Philippine authorities "tortured a terrorist into disclosing information that may have foiled plots to assassinate the pope and to crash eleven commercial airliners carrying approximately four thousand passengers into the Pacific Ocean."[39] President Bush, meanwhile, without giving details, urged in 2006 that the CIA's use of an "alternate set" of interrogation techniques at secret CIA detention centres foiled multiple terrorist attacks.[40] Ginbar, in the book reviewed here, cites Israeli cases that appear to satisfy the ticking bomb's premises, but without providing specifics.[41]

Yet even if these instances are treated as bona fide ticking bomb scenarios, it is unknown how many false positives have been created by extreme interrogation—false confessions made to halt the interrogation and diverting attention from real threats. Inevitably the law would overreach if it permitted torture where interrogators perceived an immediate and extreme threat. Sometimes such torture would turn out to be inefficacious, or the threat would prove much less serious than that associated with the time bomb scenario. This is acutely the case given the notorious unreliability of information extracted under torture. Elaine Scarry, in her attack on the ticking bomb's logic, has made exactly this point: "In the two and a half years since September 11, 2001, five thousand foreign nationals suspected of being terrorists have been detained without access to counsel, only three of whom have ever eventually been charged with terrorism-related acts; two of those three have been acquitted."[42] She doubts that the success

38. For a discussion on this point, see Emanuel Gross, *The Struggle of Democracy Against Terrorism: Lessons from the United States, the United Kingdom, and Israel* (Charlottesville: University of Virginia Press, 2006) at 66. For an elegant discussion of balancing in the context of, *inter alia*, torture, see Dieter Grimm, "How to Balance Freedom and Security" *Spiegel Atlantic Forum* (26 April 2007), online: <http://www.spiegel.de/international/world/0,1518,479668,00.html>.

39. Dershowitz, *Why Terrorism Works*, *supra* note 36 at 137, cited in Posner, *supra* note 37.

40. Sheldon Alberts, "No torture used, U.S. insists" *Edmonton Journal* (7 September 2006) A6. See also Jamie Doward, "US claims Guantanamo 'saved lives'" *The Observer* (8 October 2006), online: <http://www.guardian.co.uk/world/2006/oct/08/terrorism.guantanamo>. For similar claims by former CIA director George Tenet, see Tim Reid, "Tough US interrogation 'saved lives'" *Times Online* (26 April 2007), online: <http://www.timesonline.co.uk/tol/news/world/us_and_americas/article1707342.ece>.

41. See *e.g.* Ginbar, *supra* note 1 at xxvii.

42. Elaine Scarry, "Five Errors in the Reasoning of Alan Dershowitz" in Levinson, *supra* note 32, 281 at 284.

rate would be any better in a system authorizing torture to deal with perceived emergencies: "When we imagine the ticking bomb situation, does our imaginary omniscience enable us to get the information by torturing one person? Or will the numbers more closely resemble the situation of the detainees: we will be certain, and incorrect, 4,999 times that we stand in the presence of someone with the crucial data, and only get it right with the five thousandth prisoner?"[43] Distracted by thousands of false positives, state agents confront a time bomb that still ticks.

V. THE GREATER EVIL

The second objection to an apologia for torture is principled: even accepting the ticking bomb's premises, torture can never be permitted. It is exactly this proposition with which both Ginbar and Matthews grapple in their respective treatises. In so doing, they mount an important frontal assault on the very premises that drive the arguments of torture apologists. For this reason alone, they are essential reading. The added bonus is the calibre of their analysis, although, as I shall argue below, they ultimately advance an impossible case.

A philosopher at Mount Allison University, Matthews takes the philosopher's analytic razor to the apologists in *The Absolute Violation*. Matthews begins with a chapter entitled "Understanding Torture," a famously fraught undertaking. Somewhat preambular to Matthews's overarching purpose, this chapter is ultimately the least satisfying. The chapter touches on the legal definition of torture found in UNCAT, reproduced above. Its key point is that this legal definition is minimalist and fails to appreciate the full scope of harm caused by torture—a recurring idea in Matthews's work.

Matthews does, however, make one important mistake in his assessment of the international law of torture: he concludes that the ban on torture is more absolute than that on CID treatment and punishment, a concept also invoked in UNCAT.[44] This conclusion presumably stems from the exclusive reliance on UNCAT. In fact, as noted, both concepts are also unequivocally barred by the ICCPR, and a derogation in relation to CID treatment is no more permissible than one in relation to torture.

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43. *Ibid.*

44. Matthews, *supra* note 2 at 33.

Thus, the real problem associated with the bifurcation between torture and CID treatment lies not in how they are proscribed in international law but in how they are received in domestic criminal codes. UNCAT obliges the criminalization of torture occurring both within the state and extraterritorially. It also requires each state party to "undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture."[45] However, UNCAT does not compel the criminalization of CID treatment domestically, let alone extraterritorially. As a consequence, state parties including Canada have often criminalized torture in their domestic laws, but not CID treatment. This phenomenon explains, at least in part, the preoccupation in the United States with whether, for example, waterboarding is truly torture. In international law, it matters little: even if it is not torture, it is surely CID treatment. In domestic criminal law, however, torture is typically the crime with the extraterritorial reach, and acts short of torture are subject to prosecution as, for example, conventional assaults and batteries, if at all. The latter crimes do not necessarily reach beyond territorial boundaries, rendering them perhaps of little application to acts taking place in CIA black sites located abroad.

These legal niceties are, however, incidental to Matthews's principal preoccupation in this chapter: to demonstrate the violence that torture does to individuals and to societies. Torture destroys will and assaults identity. This attack on identity may exploit gender—sexual assault is commonplace. Torture also requires an institutional environment designed to instil fear, terror, and suffering in the victim. It is a tool of domination and oppression.

Matthews's conclusions on these points are amply defended with reference to past instances of torture, which, in practice, are associated with authoritarian and totalitarian regimes. It is this very empiricism, however, that gives his arguments a straw-man feel. Torture as practised by repressive regimes will, by definition, be an instrument of their repression and will manifest a range of tactics, techniques, and foci stemming from the illegitimacy of the objective: maintaining the repressive capacity of the regime. What apologists for post-9/11 torture imagine, however, is a torturing democracy—that is, a virtuous torturer where the qualities of a rights-observing state temper the evils of torture and the precise tactics employed. It is no answer to these imaginings, therefore, to draw a straight line from torture's heinous past to its new manifestation.

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45. UNCAT, *supra* note 26, art. 16.

Matthews's most important contribution is, therefore, his robust attack on the virtuous torturer. For the balance of his book, his project is to show that there is no such thing. He begins by demolishing the ticking bomb hypothesis, raising concerns about its suppositions and construction not greatly dissimilar to those outlined above. Subsequently, in his most original contributions (beginning in chapter three), he canvasses philosophical justifications for torture, dispelling each in turn. Broadly speaking, his attention focuses on two schools of justification for torture: utilitarianism and virtue ethics.

VI. TORTURE CANNOT MAXIMIZE HAPPINESS

Utilitarianism—and more specifically, the act-utilitarian tradition associated with Jeremy Bentham[46]—imagines that torture may be justified in the extraordinary case in which it maximizes happiness among a greater number of people. Utilitarianism underlies the ticking bomb dilemma. Defusing the bomb by extracting the necessary information from a person via torture saves millions, so the needs of many outweigh the rights of one.

Matthews rejects, however, the propositions upon which this simple expectation is built. Utilitarian defences of torture are characterized as underestimating the injury caused by torture and overestimating its effectiveness in achieving the end result. Torture is described as wounding more than the immediate victim. To diffuse ticking bombs and satisfy the utilitarian objective, torture must be effective, and effective torture requires skilled torturers. Skilled torturers, in turn, need an institutional framework in which to hone their abilities. A society that endorses torture in extreme circumstances must, therefore, be prepared to breed a torture infrastructure that inevitably normalizes torture. To maintain the stable of trained torturers, the state must torture. According to Matthews, no utilitarian who properly includes the certainty of torture normalization into the utilitarian calculation can endorse torture, especially when this cost of torture is properly contrasted with the only possible benefits of inflicting torture.

VII. THERE IS NO VIRTUE IN EVIL

Beginning in chapter four, Matthews critiques virtue ethics defences of torture. Virtue ethicists posit that while torture is an unequivocal evil, it may be the lesser

46. Matthews, *supra* note 2 at 102.

evil given the alternatives. This approach may produce the same outcome as the utilitarianism described above: torture in the name of a greater good. But while for utilitarians the immorality of the lesser evil is of no consequence, given the gains, for virtue ethics, the lesser evil remains just that: an evil. Virtue ethicists cranking the electricity are acutely conscious of their dirty hands. They are forced by the confluence of events into a tragic choice, where they must commit an indisputable evil for a higher cause. A shamed, guilt-ridden torturer, as well as a civic leader who authorizes the torture, is disinclined to excess and prepared to use torture only when pushed to the extreme.

And yet this is a doubtful proposition. The world is full of torturers, some significant proportion of whom are fully prepared to administer the most horrific of sufferings. These persons may be sadists, emotional cripples, or simply normal people labouring under what Hannah Arendt famously called the "banality of evil."[47]

Consequently, Matthews rightly attacks the virtue ethics position. There is no reason to believe that those who populate the torture cells of authoritarian and totalitarian states would be replaced in democracies with virtuous torturers, or that leaders insulated from the immediacy of the suffering inflicted would be cowed in a manner that provides a real check on excess. Those with virtue are unlikely to drift into the guild of torturers, leaving this new profession to be filled by people like the "few bad apples" famously implicated in the egregious acts at Abu Ghraib.[48] And leaders will insulate themselves with layers of plausible deniability if not outright false consciousness. At any rate, those leaders, persuaded of the necessity of the lesser evil, will not wait for a sufficiently virtuous torturer. If a sadist is all that is on hand, then the evil of torture may be slightly larger than would otherwise be the case, but it still is the lesser evil.

Perhaps most critically, the hand wringing associated with doing the lesser evil will abate to the extent that torture is normalized—as noted, an inevitable

47. See Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, rev. ed. (New York: Penguin Books, 2006).

48. For an example of the use of the "few bad apples" argument by a US government official, see Interview of Deputy Secretary of Defense Paul Wolfowitz (4 May 2004) on the Pentagon Channel, News Transcript, online: <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2970>. See also "Abu Ghraib, Whitewashed," Editorial, *The New York Times* (24 July 2004) online: <http://query.nytimes.com/gst/fullpage.html?res=9E00EEDA173DF937A15754C0A9629C8B63>.

outcome of any policy endorsing torture. With time and repetition, even persons of good conscience can be numbed to the horror of their activities. Nor is public opinion a likely check on excess. Public sentiment as a limit on government action depends on a public not only more morally upstanding than its leaders but also adequately informed and preoccupied with the relevant facts. Neither is a sure bet, especially in a time of fear and crisis.

VIII. THE CASE FOR MINIMAL ABSOLUTISM

Why Not Torture Terrorists? is the perfect complement to Matthews's project. A legal advisor to Amnesty International, Ginbar asks whether "twenty-first century democratic states facing terrorism [should] use torture in the interrogation of terrorists [*sic*] suspects, at least in extreme, 'ticking bomb situations'?"[49] Unlike Matthews, whose initial salvo is to cast doubt on the premises of the ticking bomb parable, Ginbar accepts those premises. Nevertheless, Ginbar's ultimate answer to the question he poses is "no."

Ginbar looks at scenarios in which a private citizen is placed in the torture dilemma by a ticking bomb and then transports that analysis to circumstances in which the state contemplates torture. He urges that torture is one of the few cases where a morally absolute prohibition makes sense. Ginbar calls this a "minimally absolutist" conclusion.[50] Put another way, torture is one of the few circumstances in which an absolute ban is defensible, even when juxtaposed against the extremes of the ticking bomb scenario.

Like Matthews, Ginbar justifies his response principally by reference to the broader costs of engaging in torture—what he consciously calls the "slippery slope."[51] Some of these consequences flow from the very effort to confine instances of torture to truly ticking bomb situations. The fog of war might drive one to resort to torture even when, in hindsight, it turns out that the premises in the ticking bomb scenario are not met. Other effects of torture echo Matthews's preoccupation with the institutionalization of torture. Ginbar concludes that "[a]s a tool of the democratic state, torture must be applied by those properly authorized, trained and equipped to do so, under proper command structure, institutions,

49. Ginbar, *supra* note 1 at xxvii.

50. *Ibid.* at 30.

51. *Ibid.* at 111.

regulations, laws and supervision."[52] The professionalization of torture would have profound implications "for a myriad of professions, institutions and persons, including members of the various security services, the army, police and prison system, doctors and other medical professionals, judges, legislators and government ministers—all will be affected, all persons involved will become torturers, or complicit in torture, in the moral sense of the term, and most in the legal sense as well."[53] All told, the lifting of the anti-torture taboo and the resulting social self-immolation would constitute a victory of sorts for terrorism.

Given these second-order effects, Ginbar concludes that philosophical justifications for torture "would only allow a state to change its policy on torture if the disastrous consequences are not only far worse than the pain and humiliation that the tortured person may suffer, but also far worse than any damage which the 'slippery slope' ... [is] calculated to produce."[54]

The balance of Ginbar's treatise is much more doctrinal, examining past efforts to legalize interrogations that possibly amount to torture, including Israel's infamous Landau model[55] and the US practices described above. Ginbar challenges claims that these methods are in compliance with international law. He also examines whether devices such as defences of necessity or self-defence can ever legally excuse or justify torture and concludes that the defence of necessity is possible in common law jurisdictions. He describes *ex post facto* defences to torture as having your cake and eating it as well—a way to save innocents threatened by the bomb but still maintain the ban on torture.[56] His description and analysis in these sections are exhaustive and indeed commended as a key resource on this subject.

Ginbar ultimately concludes that necessity-based defences, even when available only after the fact, erode the deterrent effect of the ban on torture to the point of non-existence. In any event, as Matthews would add, *ex post facto* defences are irreconcilable with a premeditated system that "effective" torture would require: an institutionalized arrangement of skilled tortures who, in advance, acquire the aptitude enabling them to perform their task in emergencies.

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52. *Ibid.* at 157.
53. *Ibid.* at 157-58.
54. *Ibid.* at 158-59.
55. *Ibid.* at 171-82.
56. *Ibid.* at 350.

IX. THE TROUBLE WITH TORTURE

Matthews concludes his treatise by urging that those who defend torture can do so only through a "lack of attention to the demonstrable historical, medical, psychological, and social impacts of torture."[57] Considered with an appropriate attention to these broader consequences, "[t]orture is an absolute violation precisely because the scale of the violence that it inflicts goes well beyond the simple violations of physical integrity that torture defenders suppose. It is not clear what parts of a society state torture fails to touch and damage. Consequently, the absolute prohibition against torture ... is morally sound. Hence torture must be absolutely forbidden, no matter what."[58]

Ginbar reaches similar conclusions: "when we hold a knowledgeable prisoner who will not talk, and innocent lives are at risk, ... we ... must do anything humanly possible to save the lives at risk. ... Which means doing everything in our power that does not involve losing our own humanity. Which in turn means never to torture or otherwise ill-treat another human being, whatever the circumstances."[59]

These are attractive conclusions. Indeed, Matthews and Ginbar deliver as sterling a defence of the absolute prohibition of torture as might reasonably be made. Both works are tightly argued, almost always quite compelling, and (especially in the case of Ginbar) constitute a worthy desktop companion on legal questions surrounding torture.

Ultimately, however, both Matthews and Ginbar predicate their positions on what boils down to a re-jigged cost-benefit analysis. That is, they develop powerful arguments concerning the infrastructure necessitated by a torturing state and the pernicious consequences that infrastructure would have. They advance the view that these negative consequences *must* outweigh the gains associated with the use of torture, even when the bomb ticks. However, that position is ultimately an empirical one. It is possible to press one's finger on the scale and increase the consequences of the bomb to such an extent that any conceivable second-order effect associated with a torturing state is overcome. Enough suitcase-sized nuclear weapons in enough cities would justify a total police state in the minds of many otherwise sensible, right-minded individuals.

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57. Matthews, *supra* note 2 at 220.

58. *Ibid.*

59. Ginbar, *supra* note 1 at 356.

Nor is it entirely clear that the corrosion of a society by the infrastructure of evil is more harmful than the consequences of even *one* modestly-sized time bomb. The United States, for example, regularly executes a large number of people in an institutionalized system of state-sanctioned murder, which implicates judges, doctors, prisons, police, politicians, the media, the public, religion, and other social actors. Militaries the world over kill people in times of armed conflict and spend vast amounts of time and money preparing to do so efficiently. Yet, functioning, reasonably ethical democracies persist, and they are capable of drawing lines between when murder is justifiable and when it is not. It is difficult to imagine that the infrastructure of torture would necessarily be more pernicious than the infrastructure of killing.

Moreover, as Oren Gross notes, there are second-order effects to *not* torturing.[60] If the suitcase nuclear bomb were to detonate, the reaction would likely sweep away most of the civil liberties most opponents of torture cherish. The overreactions of the post-9/11 era would appear mild if ever juxtaposed with a post-nuclear attack society. In these circumstances, a state that fails to do everything in its power, including torture, to forestall such an event runs the risk of being much worse than the state equipped with the torture infrastructure both Matthews and Ginbar fear.

In sum, no one can conclusively prove empirically or philosophically that torture is necessarily *always* worse than the failure to torture, and that is a conclusion Matthews and Ginbar both rightly fear. Such a conclusion risks making the ban on torture less than absolute.

Yet, while such a conclusion may be true as a matter of philosophy, it need not be so as a matter of law. Law codifies a choice. In practice, that choice is to ban torture and thereby bear the risk even in circumstances where torture may defuse a ticking bomb. International law—and if properly implemented, domestic law—makes torture a violation that can never be justified. That absolute prohibition can be reasonably sustained on the basis that true ticking bomb scenarios are at best rare and even more rarely appropriately recognized at the time of their occurrence. False positives are more common.

If, in the confluence of events, the costs of observing this absolute prohibition exceed the costs of violating it, and officials act accordingly, that may be the way of the world. The way of the law is, however, that punishment follows

60. Gross, *supra* note 35.

crime. Interrogators, driven to extremes by the imminence of a catastrophe like Jack Bauer—a character on the American TV show *24* who engages in torture to foil terrorist plots—may end up torturing. If they do, then they assume two burdens: that of being a torturer and that of going to jail. The certainty of punishment, unmediated by any self-defence or necessity argument, maintains the absolute prohibition. It also places the burden of defusing the bomb on the shoulders of the state agent. Even if, in the cold light of hindsight, the bomb was defused only through torture, the consequences of that decision fall on the individual.

Such a result may appear unfair. Yet, we ask for greater sacrifices every day from those who put their very lives (and not simply their liberty) at risk in the line of duty. Moreover, it is substantially more fair to punish the rare torturer who gets it right than to inflict legalized torture on innocents. As noted, in a system that regularizes torture performed by those who wrongly believe they have a ticking bomb scenario on their hands, innocent victims are inevitable. Ultimately, there is no perfect solution to the conundrum. However, on balance, the punishment of that extremely exceptional creature—the virtuous torturer—is a reasonable cost to pay to reconcile the absolute ban on torture with the recognition that torture may not always be the greater evil.