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The Ticking Bomb Hypothetical [1]

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Abstract

Recent literature arguing for, or reaffirming, the impermissibility of torture has deplored the ticking bomb hypothetical and its frequent invocation. I have in mind in particular the work of David Luban and Henry Shue. I share their views, by and large, but at the same time I think that just what is so problematic about the hypothetical has not been adequately articulated. Contrasting this use of a hypothetical from the use of hypotheticals by Philippa Foot and Judith Jarvis Thomson, I argue that the ticking bomb hypothetical has the singular problem that it relies for its effectiveness on the supposed plausibility of the scenario, and yet it is put forward as if its plausibility does not matter. I show how very implausible it is, drawing from the work of Darius Rejali, former FBI agent Ali Soufan, and others. In brief, it relies on the false notion that torture is more effective in eliciting the truth than "non-enhanced" interrogation or that a combination of the two works better than the latter.

Keywords: interrogational torture, ticking bomb hypothetical, thought experiments, interrogation, Ali Soufan, Darius Rejali.

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1. This is a lightly revised version of a paper that I previously published in *Confronting Torture: Essays on the Ethics, Legality, History, and Psychology of Torture Today*, edited by Scott A. Anderson and Martha C. Nussbaum (University of Chicago Press, 2018) and in Mark Timmons, ed., *Disputed Moral Issues*, 3rd edition (OUP, 2014) and 4th edition (OUP, 2017). Please do not reprint it, in whole or in part, without my permission.

I.

Recent literature arguing for, or reaffirming, the impermissibility of torture has deplored the ticking bomb hypothetical and its frequent invocation. I have in mind in particular the work of David Luban and Henry Shue.[2] I share their views, by and large, but at the same time think that just what is so problematic about the hypothetical remains somewhat unclear.[3] This essay, while very much indebted to their work, aims to bring out more sharply how the focus on the ticking bomb hypothetical in the revived torture debates has led us astray.[4] I take issue not only with those who rely on the hypothetical to defend the use of interrogational torture,[5] but also with those who,

2. David Luban, "Liberalism, Torture, and the Ticking Bomb," *Virginia Law Review* 91 (2005): 1425-61, and "Unthinking the Ticking Bomb," in *Global Basic Rights*, ed. Charles R. Beitz and Robert E. Goodin (New York: Oxford University Press, 2009), 181-206; and Henry Shue, "Torture in Dreamland: Disposing of the Ticking Bomb," *Case Western Reserve Journal of International Law* 37 (2005): 231-239. See also Bob Brecher, *Torture and the Ticking Bomb* (Malden, MA: Blackwell, 2007); Claudia Card, "Ticking Bombs and Interrogations," *Criminal Law and Philosophy* 2 (2008): 1-15; Elaine Scarry, "Five Errors in the Reasoning of Alan Dershowitz," in *Torture: A Collection* (revised ed.), ed. Sanford Levinson (New York: Oxford University Press, 2005): 281-98; Kim Lane Scheppele, "Hypothetical Torture in the 'War on Terrorism'," *Journal of National Security Law and Policy* 1 (2005): 285-340; and Yuval Ginbar, *Why Not Torture Terrorists?* (Oxford: Oxford University Press, 2010).

3. This much, however, is very clear: employing the hypothetical to try to justify the use of torture by the US during the administration of George W. Bush is deplorable. There torture was used (among other reasons, such as to avenge killings and to humiliate) as a fishing expedition to uncover plots, *not* to prevent a ticking bomb from detonating. For more on the singular inappropriateness of trying to justify via the ticking bomb hypothetical the use of torture in the "war on terror," see Scheppele, "Hypothetical Torture."

4. That there is some confusion about just what the point is in dismissing ticking bomb hypotheticals as "artificial" is evident from Oren Gross, "The Prohibition on Torture and the Limits of Law," in Levinson, *Torture*, 229-255 at 234.

5. My focus throughout this paper is on interrogational torture, i.e., torture aimed at acquiring information crucial to preventing, or limiting the scope of, a catastrophe. I do not in this paper address instances of torture in direct self-defense or defense of others, where, say, someone is torturing my child and threatening to kill her, and for some reason the only way to get him to stop is to torture him (or his confederate…or his child). For discussion of such cases, see Sherry F. Colb, "Why is Torture 'Different' and How 'Different' Is it?" *Cardozo Law Review* 30 (2009): 1411-73. Nor do I consider in this paper torture for purposes of obtaining information that could then be used to convict someone; I assume that readers of this volume would not regard that as worth considering. Even those who think that torture might very occasionally be permissible presumably would not want the criminal justice system to rely on information obtained by torture. Indeed, torture other than preventive interrogational torture or torture in direct self-defense—e.g., torture to extract confessions, exorcize demons, intimidate rebels, get revenge, or relieve boredom—I assume all

while taking a much more nuanced view, insist on "the relevance and significance of the catastrophic case."[6] Oren Gross writes that "there are two perspectives from which we ought to approach the question of the use of preventive interrogational torture, namely, the general policy perspective and the perspective of the catastrophic case.... We can only focus on one to the exclusion of the other at our peril."[7] I see no peril in ceasing to take "the perspective of the catastrophic case."

When I presented a version of this paper at a conference, some expressed perplexity at my attention to empirical facts. Perhaps the expectation, given my strong Kantian leanings, was that I would focus on moral principles, and offer a Kantian argument against torture. But arguing against torture on Kantian grounds is unlikely to budge those who believe that moral opposition to torture needs to be tempered by (as they see it) realism. Indeed, one often comes across such phrases as "all but unabashed Kantians recognize" in discussions of torture, as in "the fact that all but unabashed Kantians recognize the difficulties presented by extreme cases to any absolutist position is taken as further evidence that an absolutist position with respect to a ban on torture is untenable."[8] To engage those who defend torture, or who believe that the ticking bomb hypothetical forces us to reconsider the ban on torture, it is crucial to meet them on their turf rather than invite them to consider the issue from a Kantian perspective.

II.

I begin by quoting two versions of the ticking bomb hypothetical, the first by an opponent of torture, and the second by authors who defend it. Henry Shue presents it as follows in his classic 1978 article, "Torture":

> There is a standard philosopher's example which someone always invokes: suppose a fanatic, perfectly willing to die rather than collaborate in the thwarting of his own scheme, has set a hidden nuclear device to explode in the heart of Paris. There is no time to evacuate…the only hope of preventing tragedy is to torture the perpetrator, find the device, and deactivate it.[9]

Mirko Bagaric and Julie Clarke offer the following version:

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readers of this journal, indeed all even moderately reasonable persons, agree is absolutely impermissible.

6. Gross, "Prohibition on Torture," 239.

7. *Ibid*., 239-40.

8. *Ibid*., 231.

9. Henry Shue,"Torture," *Philosophy and Public Affairs* 7 (1978): 124-43 at 141.

> A terrorist network has activated a large bomb on one of hundreds of commercial planes carrying more than three hundred passengers that are flying somewhere in the world at any point in time. The bomb is set to explode in thirty minutes. The leader of the terrorist organization announces this via a statement on the Internet. He states that the bomb was planted by one of his colleagues at one of the major airports in the world in the past few hours. No details are provided regarding the location of the plane where the bomb is located. Unbeknownst to him, he was under police surveillance and is immediately apprehended by police. The terrorist leader refuses to answer any police questions, declaring that the passengers must die and will shortly.[10]

The conclusion, as Bagaric and Clarke see it, is clear. "Who would deny that all possible means should be used to extract the details of the plane and the location of the bomb?"[11]

So, just what is problematic about the hypothetical? Doesn't it test our intuitions, getting us to question our commitment to a principle that torture is always wrong? The idea in putting forward the example, David Luban writes, is to "force the liberal prohibitionist to admit that yes, even…she would agree to torture in at least this one situation. Once [she] admits that, then she has conceded that her opposition to torture is not based on principle. Now that [she] has admitted that her moral principles can be breached, all that is left is haggling about the price."[12] Luban goes on to say that the ticking bomb example "bewitches" us, and I think he is right, though just how it bewitches us is elusive. But I can also see that this would sound pretty lame to those who defend torture, as if when confronted by an example that clinches their case (as they see it) we protest that there is some unfairness, some trickery, that we are being bewitched. We seem to be dodging the problem. Shouldn't we have to answer their question and say whether we think that torture in such a situation is permissible?

I don't think we should have to. I also don't think that granting that torture might be permissible in extraordinary circumstances would weaken the prohibitionist's case in the way Luban's remarks suggest. But before we get to that, and before I explain in what ways the hypothetical has misled us, we need to be clear on what the problem isn't.

Those who take the ticking bomb hypothetical very seriously sometimes suppose that

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10. Mirko Bagaric and Julie Clarke, *Torture: When the Unthinkable Is Morally Permissible* (Albany: SUNY Press, 2007), 2.
11. *Ibid*., 3.
12. Luban, "Liberalism," 1440.

opposition to it is merely opposition to "artificial cases" or "fantastic examples" in general.[13] This is not entirely surprising. Although both Shue and Luban provide excellent reasons for seeing the ticking bomb hypothetical as problematic in a way that distinguishes it from most "fantastic examples," some of their remarks, at least if read out of context, may leave the impression that the ticking bomb example is of the same ilk as other "artificial cases." Luban remarks that "artificial cases" such as those of "fat men thrown in front of runaway trolleys, blown out of mineshafts with bazookas, or impaled on pitchforks as they fall from windows" are "deeply cartoonish."[14] Shue writes that "There is a saying in jurisprudence that hard cases make bad law, and there might well be one in philosophy that artificial cases make bad ethics."[15]

Artificial cases are not all of a kind. Some help us focus on key issues, while others distract us from the real issues or distort a reality they purport to depict (or both). The ticking bomb hypothetical is artificial and dangerously misleading in a way that the examples Luban refers to are not.[16] There may be reasons for objecting to them, but the problem I wish to bring out is not a problem they share.[17]

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13. See e.g., Bagaric and Clarke, *Torture*, 3, where they write that "fantastic examples cannot be dismissed summarily merely because they are 'simply' hypothetical." I agree (though not with the implication that some opponents of torture dismiss the ticking bomb hypothetical solely on those grounds).

14. Luban, "Unthinking," 206.

15. Shue, "Torture," 141.

16. Clarification is in order concerning the content of the hypothetical. It is part of the content not only that a bomb will detonate soon unless we disable it and that we don't know where it is, but also that (a) we cannot find out in time except by torturing someone we have in captivity, (b) torturing him or her will indeed enable us to prevent the catastrophe, and (c) we know this. The clarification is needed because some writers respond to claims that the hypothetical is extremely implausible by saying there is no doubt that ticking bomb scenarios do occur, and pointing to a case where a suicide bombing was averted but where (not only was the bomb not yet ticking, but more importantly) there is no indication that torture was used in the interrogation that led to the disclosure of the planned bombing, let alone that torture was needed (and, moreover, known to be needed). See e.g., Stephen de Wizje's review of Karen Greenberg, ed., *The Torture Debate in America*, in *Democratiya* 7 (2006): 10-36, especially 21.

17. Allen Wood has claimed in conversation that some of the problems I single out as problems with the ticking bomb hypotheticals also afflict trolley examples. I do not think that is the case with the original example by Foot and the ensuing discussions by J.J. Thomson, but it may be true of some of the more recent work on (and distortions of the original) trolley problem. For a critical discussion of trolley problems, see Allen W. Wood, "Humanity as an End in Itself," in Samuel Scheffler (ed.), Derek Parfit, *On What Matters*, Volume 2 (OUP, 2011), pp. 58-82.

Just as it is not the sheer "cartoonishness" or "artificiality" of the examples that is the problem, the objection to the reliance on the hypothetical is not that ticking bomb scenarios are so rare that it is unwise to let them shape our general policy regarding the use of torture (though that is closer).

III.

So what is the problem? Partly this: as Shue has explained, it is almost impossible to be in the position depicted in ticking bomb hypotheticals and also to know that one is in such a position. But once again it may sound as if the claim is only that the hypothetical is unrealistic, and why does that matter, when many hypotheticals are unrealistic? To understand why it matters in this case yet not in general and to see in what way this hypothetical is aptly said to "bewitch" us, we need to reflect on the role of hypotheticals in philosophical discussion, and then examine how this hypothetical differs from others.

Normally when we are presented with a hypothetical, we accept it as a hypothetical and focus attention on whatever the person presenting the hypothetical asks us to consider. It is bad form to ask, "Does it really work that way?" We are expected to accept the hypothetical as such. But if we do so, granting it for the sake of discussion, we may be granting assumptions that are highly implausible. Often in philosophy it doesn't matter that we are granting highly implausible assumptions for the sake of discussion; we bracket one thing in order to focus on another. With many hypotheticals, it is fruitful to do so. There is something to be gained by thinking about the issue without worrying about the details that we are agreeing not to question. The fantastic examples may provide (as they do in Thomson's "A Defense of Abortion")[18] a way to disentangle the various arguments against a particular practice or policy or individual choice and examine them more clearheadedly. In the case of the ticking bomb hypothetical, however, it is hard to see why it would be helpful to set aside relevant facts about torture, when the matter under discussion is the moral permissibility of the practice of interrogational torture.

In many discussions involving an implausible hypothetical, the person proffering it is not claiming or assuming that this is in fact something that happens (or that we had better be prepared to see happen or, if it is something we might want to see happen, that we can bring about). With the ticking bomb hypothetical, things are different; yet we may, if we

18. Judith Jarvis Thomson, "A Defense of Abortion," *Philosophy and Public Affairs* 1 (1971): 47-66.

treat the hypothetical as one normally treats a hypothetical, fail to recognize this. We may, in effect, be tricked by the ticking bomb hypothetical into thinking that we are only accepting it as a hypothetical, when in fact we are being led to view torture in a wholly inaccurate way.

It should now be clearer why the ticking bomb hypothetical is problematic in a way that other "artificial cases" are not, but more needs to be said to bring out how the former differs from the latter. Recall the runaway trolley, the fat man wedged in the mouth of a cave, the kidnapped violinist, and the people seeds that can drift into homes and take root in the upholstery. Or consider the cases involving killing someone—or, in another case, helping a starving person to die—so that his body can be used for medical research, or for "spare parts," or for making a serum from his dead body that will save several lives. Imagine someone objecting to one of the medical examples by saying "Wait a minute, is it really possible to make a serum from someone's dead body that would then save several lives?" We would reply, "Don't worry about that; it doesn't matter whether it is possible," and would explain (supposing that we are discussing Philippa Foot's "Abortion and the Doctrine of Double Effect"[19]) that Foot's point was to contrast (a) our view that killing or allowing someone to die in order to save several people is clearly wrong, to (b) our reaction to a case where a decision is made to withhold a life-saving drug that is in short supply from a patient who requires a massive dose, and instead to give it to several people who also require the drug, but for whom a much smaller dose will suffice. Note that her point in doing this was not to convince us of the wrongness or rightness of one medical policy or another, so her use of "fantastic examples" is strikingly different from the use to which the ticking bomb hypothetical is put. Her aim, rather, was to consider whether the Doctrine of Double Effect or a different principle best accounts for our judgments about such cases.

In the essays from which I've drawn these examples—Foot's "Abortion and the Doctrine of Double Effect" and Thomson's "A Defense of Abortion"—there is distance between the example and the point in support of which the example is put forward, distance that we don't have between the ticking bomb hypothetical and the claim it is intended to support. The relation between the example and the intended point is such that it makes no difference at all that the example is artificial, or unrealistic. But because the ticking bomb hypothetical is intended to weaken our commitment to prohibitions on torture and lend support to a (possibly very limited) practice of torture, it indeed does matter whether the hypothetical is realistic. Yet, perhaps because normally we do not question the realism of a hypothetical,

19. Philippa Foot, *Virtues and Vices* (Berkeley, CA: University of California Press, 1978), Ch. 2.

many people pay little attention to whether the ticking bomb hypothetical is at all plausible.

IV.

Let's look more closely at a couple of versions of the ticking bomb hypothetical—versions put forward by those who believe the hypothetical should be taken seriously—to see in what way it is unrealistic, and in what way its being unrealistic leads us astray.

Recall the Bagaric and Clarke example. There we are asked to envision a situation where a leader of a terrorist organization has announced that a bomb has been placed on a passenger jet. The jet is now in flight, and the bomb is set to go off in thirty minutes. The terrorist leader was already under surveillance; we are asked to imagine that he is therefore apprehended quickly. We are to accept that he knows where the bomb is, that by torturing him (but by no other means[20]) we can extract the necessary information, that the pilots can then be contacted, and that it will be possible either to quickly land and evacuate the plane, or to locate the bomb on the plane and defuse it—all in less than thirty minutes. We are to accept, in short, that torture is the solution, and that the only thing standing in the way of saving the lives of over 300 people is our moral scruples.

Or consider a version of the ticking bomb hypothetical put forward by Jean Bethke Elshtain. In her version, a bomb has been planted in one of several hundred elementary schools in a particular city. We don't know which school (though we know which city), but we are virtually certain that we have apprehended someone who is not only part of the plot, but who also knows in which school the bomb has been placed. The bomb is to go off within the hour. Officials know, Elshtain writes, that "they cannot evacuate all of the schools."[21] Curiously, it is considered a much surer thing to torture the suspect, extract the information,

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20. Bagaric and Clarke, in *Torture*, do not specify that no other means will be effective, though "the terrorist leader refuses to answer any police questions" (2) seems intended to indicate this. It is possible that they think that we should use an assortment of techniques, torture included, with the idea that by using "all means" we increase our chances of extracting the torture. But success is not increased by increasing the number of means used. Using torture seriously undermines the effectiveness of Army Field Manual techniques, since these are based on establishing some rapport. See Jane Mayer, *The Dark Side* (New York: Doubleday, 2008); Darius Rejali, *Torture and Democracy* (Princeton, NJ: Princeton University Press, 2007); and Sherwood Moran, "Suggestions for Japanese Interpreters Based on Work in the Field," excerpted in William F. Schulz, ed., *The Phenomenon of Torture: Readings and Commentary* (Philadelphia: University of Pennsylvania Press, 2007), 249-54. Someone might hold that torture can be justifiable other than as a last resort, but I do not think that view worth discussing, and so do not take it up here. See also n. 22, below.

21. Jean Bethke Elshtain, "Reflection on the Problem of 'Dirty Hands'," in Levinson, ed. *Torture*, 78.

and then evacuate the school in question. If there is time to evacuate the school in question after the torture has extracted the information, why not skip the torture and immediately evacuate all the several hundred schools? That would be a much surer way to prevent loss of life.

These versions of the hypothetical stand in stark contrast to such cases as the runaway trolley and the drifting people seeds. To make sense of the hypothetical we accept, perhaps without fully realizing we are doing so, assumptions that in effect give the game away: that torture works, works very quickly, in some situations is the only thing that will work,[22] and moreover, that we can know when we are in a situation where torture, and only torture, will prevent a disaster. If we do not accept these assumptions, we will find the hypothetical baffling; if we accept it as a hypothetical and do not question the assumptions, most of the important issues about the moral permissibility of the practice of torture have been taken off the table. The only thing that has not been taken off the table is moral principles condemning torture; concern about these, however, is dismissed as a sort of prissiness, or moral narcissism.[23]

The ticking bomb hypothetical asks us to forget about the fact that we do not know that our prisoner actually has the information we need, and to ignore all the evidence that even if we do have the right person, torture is generally ineffective—certainly unreliable—as a way of obtaining the information we need.[24] It invites us to conceive of torture as in effect a truth

22. My claim that to make sense of the hypothetical, we accept this assumption, is predicated on the idea that we regard torture as something to be avoided if at all possible. Things will look quite different to those who believe that terrorists deserve to be tortured. Against that background belief, it may not seem necessary, to justify torture, that it be the only way to prevent a catastrophe; it will matter more that those engaging in torture not make mistakes and torture someone who, whether or not he or she possesses the information they need to prevent the catastrophe, is not a terrorist (or someone else they think deserves to be tortured).

23. Elshtain asks us who we would want in a position of judgment in her hypothetical. Would we prefer a "person of such stringent moral and legal rectitude that he or she would not consider torture because violating his or her own conscience is the most morally serious thing a person can do? Or a person, aware of the stakes and the possible deaths of hundreds of children, who acts in the light of harsh necessity and orders the prisoner tortured? This second leader," Elshtain adds, "does not rank his or her 'purity' above human lives." Elshtain, "Reflection," 80-81.

24. See, among other sources, Rejali, *Torture and Democracy*, especially Chs. 21-22; the Senate testimony of former FBI agent Ali Soufan (who obtained extremely important information without using "enhanced" techniques, and saw effective interrogations ruined when another agent insisted on torturing the detainee), Committee on the Judiciary, U.S. Senate, May 13, 2009 (available at:

serum. Indirectly, it also prods us to ignore the evidence that torture is very difficult to contain. I'll say more about this shortly.

V.

The ticking bomb hypothetical is marred by the very feature that is supposed to make it so compelling: that there is no time to lose. Torture is particularly unlikely to work when the bomb will go off within thirty minutes, or even a couple of hours. A determined terrorist is likely to be able to withstand the torture until the bomb goes off, and even this is not necessary, since naming the wrong flight or school is as likely to end the torture as is naming the correct one.

A defender of torture might concede this, and put forward a different hypothetical, where there is more time. But when there *is* time for torture to have a somewhat better chance of working,[25] there is also time to try to gain the captive's trust; when one does, one

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http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da14945e6&wit_id=e655f9e2809e5476862f735da14945e6-1-2, accessed November 27, 2012, hereafter Soufan, "Testimony"); and his *New York Times* Op-Eds, in particular, "My Tortured Decision," (April 22, 2009), and "What Torture Never Told Us" (September 5, 2009); Mayer, *The Dark Side*; Jean Maria Arrigo, "A Utilitarian Argument against Torture Interrogation of Terrorists," *Science and Engineering Ethics* 10 (2004): 1-30; and the Army Field Manual.

25. Only somewhat, however, and only at enormous cost. It has a better chance of working in part because time provides an opportunity to interrogate many other people, and thereby confirm or disconfirm the information obtained. But once the notion that torture is the most effective way of obtaining information has taken hold, there is now an incentive for torturing an ever-increasing number of people, and over a long period of time. As torture becomes an ongoing activity, torturing those whom one has no good reason to think have valuable information becomes increasingly common. For a vivid picture, see the literature on the use of torture by the French in Algeria; e.g., Rejali, *Torture and Democracy*, Ch. 22, part of which is published, with some modification, as "Does Torture Work?" in Schulz, *Phenomenon of Torture*, 256-65.

Worth noting, too, is that it is not as if detainees will have reason to figure that any misinformation they provide will be easily detected; some misinformation will be hard to detect, particularly by agents focused on torturing rather than on understanding the political situation. One tactic when pressed for names of those plotting terrorist attacks is to name members of a rival, more moderate group. The effect is that those who might have helped to develop a compromise and end the violence are themselves destroyed or radicalized by torture; support for the more extremist, more violent group thus increases. This strategy was employed by the Algerian FLN. As Rejali writes, the French soldiers, knowing little about the subtleties of Algerian nationalism, "helped the FLN liquidate the infrastructure of the more cooperative organization and tortured MNA members, driving them into extreme opposition" (Rejali, "Does Torture Work?" 256).

The other reason that prolonged torture is more likely to work than brief torture is that it is more likely to "break" the captive. Not to be forgotten, though, is that the captive may well not

generally learns far more than when one tortures. Some defenders of torture, e.g., Charles Krauthammer, find such suggestions preposterous. One would almost think from their scoffing that intelligence is generally obtained only via torture.[26]

Readers accustomed to such scoffing might find it helpful to hear something about how interrogators can successfully interrogate without relying on violence, humiliation, degradation, and in general breaking the person down so fully that (if he survives intact enough to be able to remember the information and communicate it) he blurts out whatever the interrogator wants to hear (which defenders of torture assume will be something true). Given space limitations, a brief summary drawn from Ali Soufan's Senate testimony will have to do.[27] The "Informed Interrogation Approach" is based on the following, Soufan explains: the interrogator turns "the fear that the detainee feels as a result of his capture and isolation from his support base" and the fact that people "crave human contact" to his advantage, "becoming the one person the detainee can talk to and who listens to what he has to say, and uses this to encourage the detainee to open up"; in addition, the kindness he shows the detainee takes the detainee by surprise, as the detainee is trained to resist torture but not to resist kindness. (Soufan's offer of sugar-free cookies to Abu Jandal, whom he knew to be diabetic, is but one example of the many ways he established the rapport that quickly led Jandal to share with him extensive information, just after 9-11, on the 9-11 hijackers and the structure of Al Qaeda.) The interrogator also takes into account "the need the detainee feels to sustain a position of respect and value to interrogator." In addition, "there is the impression the detainee has of the evidence against him. The interrogator has to do his or her homework and become an expert in every detail known to the intelligence community about the detainee." This serves both "to impress upon the detainee that everything about him is known and that any lie will be easily caught" and to establish

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have the information sought, and if she does, may be so damaged by the torture as to be unable to recall or articulate the information. The particular horrors of prolonged torture need to be borne in mind here; they are hard to fathom, but we can get some sense of them from the film, "Taxi to the Dark Side" (2007) and from memoirs of those who survived torture.

26. Charles Krauthammer, "Torture? No. Except…" Op-Ed, *Washington Post*, May 1, 2009.

27. For more detail, see the full text of his statement in Soufan, "Testimony." See also Michael Isikoff, "'We Could Have Done This the Right Way': How Ali Soufan, FBI Agent, Got Abu Zubaydah to Talk without Torture," *Newsweek* (April 25, 2009); the film *The Oath* (Laura Poitras, 2010); Sherwood Moran, "Suggestions for Japanese Interpreters" 249-54; Scott Pelley's interview with George Piro about his interrogations of Saddam Hussein, "60 Minutes," January 27, 2008, available at http://www.cbsnews.com/video/watch/?id=4758713n&tag=mncol;lst;3 (accessed February 1, 2012); and Rejali, *Torture and Democracy*.

rapport.[28] Such expertise of course is also important in other ways: without it, the interrogator is less likely to ask the right questions and to pick up on details that might otherwise not seem significant.[29]

VI.

I mentioned that the ticking bomb hypothetical encourages us to view torture as something easily contained. It suggests that torture can happen just once, just for this particular emergency, without there being a practice of torture, and without torture ever being used again. But it is seriously misleading to speak of a single instance of torture, necessary only for this one emergency.

There are two reasons for this. To have any prospect of even occasional success, torture requires, *inter alia*, training, manuals, equipment, practice at torturing, personnel to assist in torturing, and medical personnel to revive the detainee as needed and to advise on limits that need to be observed lest the torture result in death or another state that precludes extracting the needed information. Thus, although it would be an exaggeration to say that torture is impossible except as part of a practice of torture, we have to assume that torture defended on the grounds that it may be necessary, albeit only in rare circumstances, for obtaining information needed to prevent a ticking bomb from detonating, will be not a "one time" use of torture, but part of a practice. Any attempt to justify interrogational torture for use only in rare circumstances will also either be, or require, a justification of torture as a practice.

The second reason why torture needs to be viewed as a practice concerns not what has to have preceded it if the contemplated torture is going to have any chance of being effective, but what follows in its train. As Rejali has meticulously documented and Shue, Luban and others have emphasized, it is virtually impossible for torture to be limited to just one instance. Even when the plan is to allow it in only very rare instances, soon other situations

28. In his first interrogation of Zubaydah, Soufan asked him his name; Zubaydah replied with his alias, and Soufan responded, "How about if I call you 'Hani'?" ('Hani' being the name Zubaydah's mother nicknamed him as a child). "He looked at me in shock, said 'ok,' and we started talking," Soufan recounts. Soufan, "Testimony."

29. The need for interrogators to be very knowledgeable was put more starkly by an unnamed former CIA operative, quoted by Jane Mayer. Lamenting the interrogations in Afghanistan by people with "no understanding of Al Qaeda or the Arab World," the operative emphasized that "the key to interrogation is knowledge, not techniques. We didn't know anything. And if you don't know anything, you can't get anything." Mayer, *The Dark Side*, 144.

arise where a catastrophe looms, even if not quite as huge a catastrophe, and torture is deemed necessary there, too; and then, as we saw in the conduct of the US in recent years, it is pointed out that we cannot afford to wait until there is a ticking bomb, and need to uncover terrorist plots before they are executed (a sound thought so far!), and to that end—given the seriousness of the calamity if we do not prevent it—we must employ "enhanced techniques" of interrogation as an ongoing part of our war on terror.

Torture spreads. History shows that soldiers bring it home, where it is used in police interrogations and by prison guards.[30] Torture intended only for very limited use (e.g., in Guantanamo) soon shows up in US-run prisons in Iraq and Afghanistan.[31] It spreads not only geographically, but also from one accepted purpose to a purpose that initially was not seen as justifying it. As the torture equipment, training, and personnel expand, torture becomes "normalized," and the range of instances where torture is deemed necessary (or even just "worth a try") expands. The more torture is viewed as the best way to get crucial intelligence, the truly valuable techniques languish and intelligence-gathering skills deteriorate; torture is then relied on all the more.[32] In addition, torture initially justified only for intelligence gathering is soon used to express a sense of mastery, to humiliate...and to get the captive to say what one wants to hear (possibly to provide a pretext for some military action,[33] or to justify action already taken).

VII.

It might be objected that I have chosen to examine versions of the ticking bomb hypothetical that are stunningly stupid. It is true that they are—especially the one about the school. But that itself tells us something. It is very telling that those who find

30. See Rejali, *Torture and Democracy*, 436 and 178-80.

31. For details, see Scheppele, "Hypothetical Torture," and Mayer, *The Dark Side*, among others.

32. A further factor, difficult to assess, is that torture—it is reported by some who have taken part in torturing or in exercises designed to fortify soldiers in case they become victims of torture—is often quite intoxicating. See Rejali, *Torture and Democracy*, pp. 486-87, and Jane Mayer, "The Experiment," *The New Yorker* (July 11, 2005).

33. See Mayer, *The Dark Side*, Chs. 6-7, especially her discussion of the interrogation of Ibn al-Shaykh al-Libi, who was speaking freely with FBI agents interviewing him in the rapport-based way, but then was forcibly removed by the CIA and taken to Egypt. There, under torture, he said what he gathered they wanted him to say, and thus provided the "intelligence" CIA Director George Tenet relied on when he told Secretary of State Colin Powell that Al Qaeda and Hussein's secret police trained together in Baghdad, and that chemical and biological weapons were involved (137). See also the discussion of al-Libi in Rejali, *Torture and Democracy*, 504-05.

the hypothetical compelling and rely on it in their arguments do not notice either that torture, in the scenario they have drawn up, hardly stands a chance of working in time (as in the example of the bomb on the plane) or that there is another, far better solution, not involving torture (as in the case of the schools, where immediate evacuation of all the schools would be a much surer way of saving lives than torturing first and then, relying on whatever one elicited from the captive, evacuating only the school in question). It is evidence of how mesmerized people are by the idea of a ticking bomb scenario that people with JD's or PhD's and a record of excellent scholarship can commit such a blunder. More specifically, it is evidence of the readiness on the part of many intelligent people to see torture as the best solution (if moral issues are set to one side), the most effective way (at least when time is of the essence) to deal with terrorism. The mindless way the topic of torture is discussed itself deserves our attention, and is part of the reason why Luban's hyperbolic claim that the ticking bomb hypothetical has bewitched us is apt.

Still, we might ask if these are just poor versions of the ticking bomb hypothetical. Will a better version avoid the problems I have noted? Interestingly enough, Shue's version fares somewhat better than those put forward by supporters of torture. In his version, it is an entire city that will be blown up, not just a school, so evacuation is not a very serious option (depending on the time frame, which is not indicated). Still, it is hard to imagine—even if we somehow know we have the (or a) perpetrator, and that the perpetrator knows where the bomb is—that we know with a reasonable degree of certainty that torture will extract the information and do so in time for the bomb to be located and deactivated. If the terrorist is determined that the bomb go off, he is more likely to hold out or lie or otherwise gain time than to tell the truth.[34] This and other points made above apply to thoughtfully crafted

34. And if he does cave in and release the information, chances are that it is no longer accurate, since when terrorists suspect that one of their cohort is in custody, they generally alter their plans and their own locations. This should be borne in mind in assessing claims one often hears along the following lines (drawing here from Jeff McMahan's "Torture, Morality, and Law," *Case Western Reserve Journal of International Law* 37 (2006): 241-48 at 244): in some instances in which Israeli security forces captured persons in the process of making or transporting such bombs, those captured were then "tortured in order to force them to divulge information about other attacks…planned for the future." The information thereby obtained "then enabled the security forces to take preemptive action to thwart the planned attacks." This may be just what happened; it is hard to say because no specifics are provided. But given the standard practice of altering plans when one of their cohort cannot be reached and is presumed to be in custody, one wonders if what

ticking bomb hypotheticals, not only to Elshtain's and to Bargaric and Clarke's.

It may be countered that torture has worked—that there have been real ticking bomb scenarios, where torture succeeded in extracting the necessary information in time, where the bomb really would have gone off had the information not been extracted, and where there is very good reason to believe that nothing else will have worked. Careful scrutiny of the cases calls this into question. In a case defenders of torture often cite, that of Abdul Hakim Murad, the torture—67 days of it!—may possibly have played a role in gleaning the information, though the information was provided not under torture, but only afterwards, when the interrogators threatened to turn Murad over to the Israelis. But in fact, all the information that Murad eventually provided was on his laptop, which the interrogators had in their possession the entire time they were busy torturing him. Not only was torture unnecessary, but the information could have been obtained much more quickly if proper intelligence gathering procedures were used. Rejali describes that interrogation as a textbook case of "how a police force is progressively deskilled by torture."[35] In another case often cited to show that torture does indeed work, Abu Zubaydah in fact revealed valuable information[36] only when the interrogators quit torturing and a new interrogator persuaded the captive that it was his religious duty to reveal the requested information.[37]

Rather than discuss further the question of whether there have been any authentic ticking bomb scenarios—where torture thwarted a major disaster that could not have been thwarted otherwise, and where those deciding to use torture believed on good evidence that torture and only torture would do the trick—I want to shift my focus and ask this question: suppose there really have been authentic ticking bomb scenarios. Or, even if there haven't been such cases, suppose there can be. What would that show?

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thwarted the planned attacks was perhaps simply the capture of someone involved in and informed about the plan, rather than the intelligence gleaned through the torture.

35. Rejali, *Torture and Democracy*, 507. Another instructive example is that of an Algerian locksmith arrested by the French and tortured for three days. He had in his pocket "bomb blueprints with the address of an FLN bomb factory in Algiers." The "locksmith bought time, the bombers relocated, and the French raid three days later fell on open air." "Had the soldiers been able to read Arabic, they would have found the bomb factory days earlier" and had they not been focused on torturing, they could have sought help with the Arabic. *Ibid*., 486.

36. Such as it was; the value of the information Abu Zubaydah provided is a matter of dispute. See Luban, "Unthinking," 189-90.

37. See details in *ibid*., 189. See also Ali Soufan, "My Tortured Decision." Soufan was one of Zubaydah's interrogators.

I raise this question in part because I note in some of the literature with which I sympathize an eagerness to deny that a ticking bomb scenario could ever happen. The worry is that if we concede that it could, we'll be asked whether it is permissible to torture in such circumstances. And then, it is thought, we are in trouble. Luban writes (as noted above) that the idea in putting forward the ticking bomb hypothetical is to "force the liberal prohibitionist to admit that yes, even…she would agree to torture in at least this one situation. Once the prohibitionist admits that, then she has conceded that her opposition to torture is not based on principle. Now that [she] has admitted that her moral principles can be breached, all that is left is haggling about the price."[38] In the article I am quoting, it is not entirely clear whether Luban is agreeing that the concession really is this significant, or simply explaining a strategy. But in his "Unthinking the Ticking Bomb," he makes it clear that he does think it quite significant: "After making the initial concession, any prohibition on torture faces significant dialectical pressure toward balancing tests and the unwelcome…conclusion that interrogational torture can be justified whenever the expected benefits outweigh the expected costs."[39]

But the problem is not as serious as that suggests. Switch for a moment from torture to rape. Suppose that in some very weird scenario, perhaps involving a demented character like Jack C. Ripper from "Dr. Strangelove," a horrible catastrophe—the detonation of nuclear bombs—could be prevented only by raping or abetting a rape. (If it helps, add to the example that one has to rape a child, and has to do so in front of the child's family and one's own family.) We do not in any way deny that rape is impermissible—nor do we deny that our objection to it is based on principle—if we do not rule out the possibility that were this absolutely the only way to prevent a horrific catastrophe, and we knew it would prevent it, choosing to do so would not be wrong in those circumstances. The categories countenanced by Luban are too limited. It is not as if believing that X is wrong on principle—even horribly wrong—entails denying that there could be a scenario in which X would be a permissible choice. That we allow this does not mean that X can be permitted anytime the benefits of permitting it outweigh the costs.[40]

38. Luban, "Liberalism," 1440.

39. Luban, "Unthinking," 198.

40. It is worth noting here that Kant, despite his position that suicide is impermissible, raised the following question, to which he did not offer an answer: "A man who had been bitten by a mad dog already felt hydrophobia coming on. He explained, in a letter he left, that, since as far as he knew the disease was incurable, he was taking his life lest he harm others as well in his madness

We are expected to be prepared to answer questions about whether we would torture, or want others to torture, in a ticking bomb scenario, yet are not expected to answer questions about whether we would be willing to rape someone, or order or abet a rape, if that were necessary to prevent a catastrophe of massive proportions. Both scenarios are very unlikely, but torture is treated differently. I believe it is treated differently only because we are still bedeviled into thinking that torture is generally effective, and that therefore in a ticking bomb scenario, or perhaps even in a situation where we think there may be plans to bomb a city, torture is—from a strictly pragmatic standpoint—your best bet for obtaining the crucial information. We have not fully abandoned the idea that torture will work when nothing else will. Despite the fact that most of us really do know better, torture retains its status as the method of choice—as what you'll do if you really want to get the job done.

VIII.

I have tried in my paper to bring out what is so misleading about the ticking bomb hypothetical, in the context of a discussion of the practice of interrogational torture, and to show that it is problematic in a way that other hypotheticals—the runaway trolley, etc.—are not. The latter in no way rely for their effectiveness on the case being realistic, whereas the ticking bomb hypothetical does. Relatedly, the ticking bomb hypothetical takes off the table most of the objections to torture, in effect asking us to ignore such facts as that torture is a very unreliable way to gather intelligence and that torture is both very difficult to contain and particularly unlikely to succeed if it is not part of an ongoing practice, involving assistants, equipment, and extensive training. It is thus not well suited to a "one time" or very occasional use that those who think it justifiable in ticking bomb scenarios envision.

I realize that some may find there to be something chilling about my attention to these pragmatic considerations, and in closing I want to emphasize that nothing I say should be construed as an indication that I think torture would be morally defensible if only it did work. As I noted at the outset, arguing against torture by focusing on its moral wrongness is very unlikely to budge those I hope to engage. Some defenders of torture believe that morality requires that we use torture in such a ticking bomb scenario; others do not, but hold that moral principles—or "scruples"—are a luxury that we cannot afford in an

(the onset of which he already felt). Did he do wrong?" Immanuel Kant, *The Metaphysics of Morals*, Mary Gregor, ed. and trans. (New York: Cambridge University Press, 1996), 178 (AK 6:423-424).

emergency. What is needed to convince those inclined to either position is to show how very misleading the ticking bomb hypothetical is.[41]

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