

Chapter Two

The Fantasy of the Ticking Bomb Scenario

Dershowitz's Argument and the Ticking Bomb

Dershowitz's elaboration of the ticking bomb scenario represents by far the most sophisticated advocacy of legalizing interrogational torture (and, as I have said, in the view of some, though not himself, of interrogational torture itself). He begins by telling us how he has

always challenged (my) students with hypothetical and real-life problems requiring them to choose among evils. . . . The classic hypothetical case involves the train engineer whose brakes become inoperative. There is no way he can stop his speeding vehicle of death. Either he can do nothing, in which case he will plow into a busload of schoolchildren, or he can swerve onto another track, where he sees a drunk lying on the rails. (Neither decision will endanger him or his passengers.) There is no third choice. What should he do? [1]

Drawing on this version of the classic "trolley problem", [2] he reminds us that we are sometimes faced with an unavoidable moral dilemma which demands that we choose the lesser of two evils. We have to choose: the only question is what should guide that choice. Should it be the number of people involved; who those people are; both of these; or what? Even leaving it to chance is a decision. However you decide, *someone* is going to suffer the consequences. In these circumstances, unless you really do think that the consequences of what you do is not morally to the point, you are likely to choose that course of action which leads to the least suffering possible in the circumstances –

however you conceptualize that suffering and whatever account you take of issues such as the identity of those suffering, the length of their suffering or the length and/or quality of their lives so far. The problem is all too familiar, especially for health workers and for those caught up in all sorts of violence. Nor will less than complete certainty of success save us from having to face such a dilemma. The attempted 'swerve' might fail, but still, the train driver has to try. And so with torture to prevent catastrophe: 'It is impossible to avoid the difficult moral dilemma of choosing among evils by denying the empirical reality that torture *sometimes* works, even if it does not always work. No technique of crime prevention always works.' [3]

Dershowitz goes on to point out that in Israel in the 1980s and 1990s,

the use of torture to prevent terrorism was not hypothetical; it was very real and recurring. I soon discovered that virtually no one was willing to take the "purist" position against torture in the ticking bomb case . . .

and concludes that if

the reason you permit nonlethal torture is based on the ticking bomb case, why not limit it exclusively to that compelling but rare situation? Moreover, if you believe that nonlethal torture is justifiable in the ticking bomb case, why not require advance judicial approval – a 'torture warrant'? [4]

Briefly to remind ourselves, the substantial position is this. First, there are some extraordinary cases where interrogational torture is the least bad option, namely variants of the ticking bomb scenario. Second, since torture is going to remain present in the real world anyway, it is better to drop the hypocritical pretence that it is something "we" don't do and legalize the use of interrogational torture in relevant cases. The argument seems disarmingly simple: sometimes it is necessary to do what is least bad, and we cannot wish away that reality. Better, surely, that – if absolutely necessary – one person be tortured than that hundreds or thousands be killed and maimed. And since such circumstances are inevitably going to arise, it is better that torture be legally regulated, so as both to avoid abuse and to ensure that it is used as sparingly as possible.

But the appearance of simplicity is deceptive. When we look closely at the scenario on which it is based, it turns out that it really is just a fantasy – and not merely in the sense simply of being unrealistic or far-fetched. It is a fantasy because its conditions run counter to each other. The circumstances of the purported scenario preclude just the “solution” proposed – the legalization of interrogational torture in those cases in which the competent authority issues the requisite warrant. It is central for the argument that there be sufficient urgency to justify torture – but not so much that there is not enough time for the judge(s) (or whoever) to consider whether or not the case merits a warrant to torture; that the torture be effective enough to elicit the information needed in the short time available; that the information the captive gives under torture will be accurate rather than designed to mislead in order to buy time; and of course that they actually have the information in the first place (and although Dershowitz equivocates somewhat about how many “mistakes” are tolerable, unlike others he at least recognizes the issue). Military, political and legal apologists for torture often combine these conditions under the single notion of necessity: torture is necessary to avoid catastrophe. When it is unpacked, however, the argument falls apart. The time and effectiveness conditions run against each other; the likelihood of accurate information is very far from certain; and the necessity which the circumstances press upon the authorities can only ever be retrospective: we cannot know in advance that we are faced with such a case. As Michael Davis nicely puts it, ‘Realists pay surprisingly little attention to reality’. [5] Before going into these and other details, however, I want to discuss the ticking bomb scenario itself, since its uncritical acceptance in the first place helps obscure them.

Dershowitz is of course right that the ‘scenario has been discussed by many philosophers’ and that the consensus ‘across the political spectrum from civil libertarians to law-and-order advocates’ [6] is that in such a case torture is permissible. The ticking bomb scenario is indeed the touchstone of discussions of torture. Here is how Corey Robin’s review of Sanford Levinson’s recent collection of essays on the subject opens:

If *Torture* is any indication of contemporary sensibilities, neo-cons in the White House are not the only ones in thrall to romantic notions of

danger and catastrophe. Academics are too. Every scholarly discussion of torture, and the essays collected in *Torture* are no exception, begins with the ticking time bomb scenario. . . . What to do?

It's an interesting question. But given that it is so often posed in the name of moral realism, we might consider a few facts before we rush to answer it. [7]

Indeed we might. Consider the scenario presented by Jean Bethke Elshtain in her contribution to the book:

A bomb has been planted in an elementary school building. There are several such buildings in the city in question. A known member of a terrorist criminal gang has been apprehended. The authorities are as close to 100 percent certain as human beings can be in such circumstances that the man apprehended has specific knowledge of which school contains the deadly bomb, due to go off within the hour. He refuses to divulge the information as to which school, and officials know they cannot evacuate all of the schools, thereby guaranteeing the safety of thousands of school children. It follows that some four hundred children will soon die unless the bomb is disarmed. Are you permitted to torture a suspect in order to gain the information that might spare the lives of so many innocents? [8]

While opposing warrants, Elshtain nonetheless thinks interrogational torture is morally justifiable. As Robin eloquently puts it, it 'is not the routinizing of *torture*' that she objects to; 'it is the *routinizing* of torture' [9] that she thinks wrong.

Her "example", however, is strikingly careless. The bomb is 'due to go off within the hour': so why can't 'officials' simply pick up the phone to every school in the city? Why on earth can't they 'evacuate all of the schools'? What even remotely plausible "facts" would have to be filled in to answer that question? This is not just a fantasy; it is a ludicrous fantasy. It would be simply and obviously idiotic to waste time torturing the "suspect" to find out in which of several schools the bomb was – even assuming for the moment that 'the authorities' really did know that 'he' really did know in which school it had been planted – instead of getting on the phone to evacuate everyone from all the schools. Admittedly this is a particularly inept example, offered by someone who states in the same article, apparently without the slightest irony, that

it is often the case nowadays that some, like the United States military, take seriously those ethical restraints on war-fighting derived from the just or justified war tradition and encoded in various international conventions and agreements. Others may ignore these restraints. Nevertheless, those restraints – most importantly *noncombatant immunity* – are central to the way the United States makes war. [10]

But the carelessness of the example is by no means exceptional, as we shall see.

What seems even more remarkable, though, is that so many *opponents* of interrogational torture appear not to have given much more thought to the “facts” of the ticking bomb scenario examples than its supporters (whether with or without a warrant). It seems that its careless use by philosophers engaged in thought-experiments to test moral theory has had a profound effect even on those who offer a detailed critique of other aspects of this sort of argument.

Here is Jonathan Allen, an otherwise clear and robust critic of interrogational torture:

In my view, torture may be an excusable tragic choice in very extreme circumstances. These circumstances are likely to be so rare that they do not justify taking the risks involved in incorporating torture within the legal system. Rather, officials who do torture in order to avert serious harms must face public scrutiny and penalties – even when we have good reason to think that they acted out of concern for public security. In some (but certainly not all) cases, those penalties would presumably be suspended, or would be minimal, or pardons would be granted. But the general prohibition against torture would be upheld. [11]

But if there really are some circumstances where torture is justifiable, albeit rarely, does not the ‘general prohibition’ survive only thanks to that rarity? And when the extraordinary becomes less so, the prohibition becomes increasingly precarious. Or consider Henry Shue, one of the foremost academic opponents of torture over the past twenty-five years:

Nevertheless, it cannot be denied that there are imaginable cases in which the harm that could be prevented by a rare instance of pure interrogational torture would be so enormous as to outweigh the cruelty

of the torture itself and, possibly, the enormous potential harm which would result if what was intended to be a rare instance was actually the breaching of the dam which would lead to a torrent of 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 innocent people or even the movable art treasures – the only hope of preventing a tragedy is to torture the perpetrator, find the device, and deactivate it.

I can see no way to deny the permissibility of torture in a case *just like this*. [12]

Shue goes on to argue that although 'If the example is made sufficiently extraordinary, the conclusion that the torture is permissible is secure', nonetheless 'one cannot easily draw conclusions for ordinary cases from extraordinary ones'. [13] Nor does 'the possibility that torture might be justifiable in some of the rarefied situations which can be imagined . . . provide any reason to consider relaxing the legal prohibitions against' torture. [14] But the problem is what counts as 'sufficiently extraordinary' or as 'rarefied'. Others are considerably less impressed by the 'extraordinary' nature of the philosophical example as a real-world possibility. Indeed, the extraordinary, they argue, has become all too everyday.

The rarity of the extraordinary is too precarious a basis for objections to interrogational torture. Once the concession is made that it might very, very occasionally be justified, in certain rare but not impossible cases, then all that stands in the way of justifying interrogational torture is the world's slowness in providing the requisite scenarios. And when that changes, whether in reality or in people's perception of reality, then interrogational torture comes to be seen as justified. The scene is now set for arguing either that it is morally justified and ought therefore to be legalized; or that, while morally objectionable, it ought nonetheless to be legalized; or that, while it is morally justified, it should remain illegal.

It is worth pointing out in passing that it is unclear whether Shue's point is that torture is justified if the example is made sufficiently *unusual*, or if it is made sufficiently *plausible* as a possibility: the phrase 'sufficiently extraordinary' remains ambiguous. Depending on whether he would take the first or the second view about 'how unlike the

circumstances of an actual choice about torture the philosopher's example is', [15] he could be making either claim. But they are very different. And while it is all too easy quite unintentionally to move between these two different senses of 'extraordinary' – perhaps even more so in the heat of public debate than in academic exchange – that is all the more reason to avoid ambiguity. Whichever is in the end Shue's view, the question is not degree of unusualness, but whether or not the example *can* be made sufficiently plausible.

To clarify why that is the important question, let me return for a moment to the charge of hypocrisy. You might think that something morally right should nonetheless remain illegal, on the grounds that the likely consequences of its legalization are morally undesirable. Consider voluntary euthanasia, for example. As things currently stand, it might be thought that it were better that the practice, while morally right – even laudable – remain illegal, for fear of embarking on a slippery slope; and that we should continue to rely on the good sense of jurors not to convict even where it is clear that the accused did in fact assist someone to die. This is clearly Shue's position regarding interrogational torture:

An act of torture ought to remain illegal so that anyone who sincerely believes such an act to be the least available evil is placed in the position of needing to justify his or her act morally in order to defend himself or herself legally. The torturer should be in roughly the same position as someone who commits civil disobedience. [16]

Now, that certainly escapes Dershowitz's charge of hypocrisy. Allen and Shue think that while interrogational torture might be morally justified "in principle and at the extreme", its remaining illegal is also morally justified – in fact, it is morally *demande*d. Like Dershowitz's, their reasoning is consequentialist. Where they differ from him is in their assessment of the likely consequences of legalization. Their position may be succinctly summed up by what Antony Flew argued some thirty years ago: 'If and when the conceivable, but in practice extremely rare, exceptional case occurs, the case in which torture actually would be justified, then let it be against the law that it is done, if it is done'. [17] Because of what I think would be the consequences of institutionalizing, and thus normalizing, interrogational torture, I agree with Allen, Shue and Flew about its legalization, as I shall argue in chapter three.

But that is not enough. It is *torture* and its acceptance that is the fundamental point, not its legalization. Objections to its legalization, then, are to the point only insofar as they constitute objections to one particular form – the most significant form, certainly – of its routinization, normalization or institutionalization. We need to take the ticking bomb scenario apart and to expose its internal structure, rather than just taking comfort from its rarity. For as Richard Jackson reminds us in his analysis of the language of ‘the discursive construction of torture in the war on terrorism’: while ‘In fact, administration officials would have known that in thousands of cases of torture under similar presumptions, from Algeria to Israel, no bomb has ever been found’, nonetheless, ‘The internal logic of the discourse (however,) means that such knowledge is discounted in favour of a predetermined course of action’. [18] It is precisely that ‘internal logic’ which needs to be unpicked if the proposal to legalize interrogational torture is to be defeated, rather than becoming the new reality.

Who Tortures?

The first question, then, is this: is the so-called ticking bomb scenario in fact on a par with the train-driver example? Is it really an example of the “trolley problem”? I do not think it is. To see why, let us consider just a few more examples of its careless invocation. First, Anthony Quinton, writing in 1971:

I do not see on what basis anyone could argue that the prohibition of torture is an absolute moral principle. . . . Consider a man caught planting a bomb in a large hospital, which no one dare touch for fear of setting it off. It was this kind of extreme situation I had in mind when I said earlier that I thought torture could be justifiable. [19]

Oddly, Quinton himself sees the obvious problem, but fails to see that it rules out just the sort of example he puts forward. He rightly points out that ‘any but the most sparing recourse to [torture] will nourish a guild of professional torturers, a persisting danger to society much greater, even if more long-drawn-out, than anything their employment is likely to prevent’; and that ‘If a society does not professionalize torture, then the limits of its efficiency make its application in any

particular extreme situation that much more dubious'. The inevitable 'limits of its efficiency', however, do not '*make its application . . . much more dubious*' (my emphasis); [20] *they rule such application out*, simply because the ticking bomb scenario requires just that efficiency which the amateur torturer could not bring to it. The train driver is a train driver, not a trained torturer. Nor are Dershowitz's students. Nor is Dershowitz or other lawyers or philosophers. Nor are you. Nor am I. The first reason why the ticking bomb scenario remains a fantasy, and not a description of a rare but realistic possibility, is that it fails to distinguish between what you or I *might* do in that imagined case and what you or I *could* do in an actual case. It fails to distinguish between individuals' possible visceral responses and any proper basis of public policy.

The occasional advocates of torture in the 1980s – Gary Jones, [21] Michael Levin [22] – also blithely failed to distinguish between “us” and the professional torturers required actually to do the torturing. The tradition continues. Here is Fritz Allhoff, more recently:

For example, imagine that we have just captured a high ranking official with an internationally known terrorist group and that our intelligence has revealed that this group has planted a bomb in a crowded office building that will likely explode tomorrow. This explosion will generate excessive civilian casualties and economic expense. We have a bomb squad prepared to move on the location when it is given, and there is plenty of time for them to disarm the bomb before its explosion tomorrow. We have asked this official for the location of the bomb, and he has refused to give it. Given these circumstances (which satisfy all four of my criteria), I think that it would be justifiable to torture the official in order to obtain the location of the bomb. [23]

Again, who are the 'we' who have captured this person and asked them where the bomb is? Is it the same 'we' who are to carry out the torture? The ready acceptance of the ticking bomb scenario without distinguishing between what you or I *might do* in that imagined case, what you or I *could do* in an actual case and what “*someone*” *would be expected to do* in an actual case has been both disastrous and unnecessary. Its irresponsible use by philosophers engaged in thought-experiments to test moral theory has had a profound effect even on those who offer a detailed critique of other aspects of this sort of argument. Even Jean Arrigo, Seth Kreimer, Barrie Paskins and Christopher

Tindale – all trenchant critics of the permissibility of interrogational torture, as we shall go on to see – overlook *this* fundamental flaw in the imagined scenario. Perhaps Michael Walzer’s is the most galling example. In a recent interview, conducted in 2003, he quite reasonably objects to Dershowitz’s use of his (Walzer’s) treatment of “the problem of dirty hands” to justify torture warrants because ‘extreme cases make bad law’, yet immediately goes on to accept the case itself, apparently without noticing exactly what he is committing himself to: ‘[Yes], I would do whatever was necessary to extract information in the ticking bomb case – that is, I would make the same argument after 9/11 that I made 30 years before. But I do not want to generalize from cases like that; I don’t want to rewrite the rule against torture to incorporate this exception.’ [24] Or has Walzer recently undertaken torture training?

Nor is it just philosophers and the lawyers in their wake who indulge their thinking in this way. Here is Roy Hattersley, a British government minister, later to become Deputy Leader of the Labour Party (now thankfully thoroughly disillusioned):

Let’s imagine 250 people in an aeroplane, let’s say we know some terrorists mean business because one bomb has gone off already, let’s assume we’ve got a man and could save twenty-two odd lives by finding out where the second bomb is. If he wouldn’t tell me I’d have to think very hard before I said don’t bring any pressure to bear on that man that might cause him pain. [25]

At least Hattersley might be interpreted as half-seeing the problem, however. Despite the empirical oddities of his example, he distinguishes – whether entirely knowingly or not – between the man’s telling ‘*me*’ and his not saying, *presumably to someone else*, ‘don’t bring any pressure to bear . . .’.

You or I can imaginatively, and reasonably, put ourselves in the position of Dershowitz’s train driver, at least to the extent of knowing how to operate the controls so as to ‘swerve onto another track’. But we cannot put ourselves in the position of a torturer, and for two reasons. First, there is the sort and the precision of the skills required; second, and far more importantly, there is the question of the depths to which the acquisition and practice of such skills requires the torturer to sink. One need only read Ronald Crelinsten’s discussion of how torturers are

recruited and trained, for instance, [26] to realize the absurdity of asking the question, ‘What would *you* do in a “ticking bomb” case?’ Even if “you” were there when the person “you” knew to know where the bomb was, “you” would not know what to do. So I have to say that if “you” were an advocate either directly of the use of torture in such cases or of its legalization, you might have been expected to take into account such basic factual considerations. The train driver example and the ticking bomb scenario are radically different cases. The ticking bomb scenario requires us not to imagine what *we* would do, but to imagine what we would require *someone else* – a professional torturer – to do on our behalf; and not, furthermore, as an act of supererogation or altruism, but as the practice of their profession.

The institutionalization of the profession of torturer is a necessary condition of the example’s even getting off the ground; and I shall pursue that in the next chapter. First, however, there are several other basic flaws in the ticking bomb scenario that need to be exposed.

Effectiveness and Time

Does torture work? We know that it is all too often effective in punishing, humiliating and terrorizing both the person under torture and others. The history of the second half of the twentieth century in Central and South America, the Middle East, Africa and the Far East is testament to that. [27] But that is not the issue here. The issue is whether or not it is an effective means of obtaining information. There are in turn two questions here. Is it effective in eliciting general and/or background intelligence? Is it effective in “ticking bomb” circumstances?

Field Manual 34–52, the rulebook of American military interrogators, ‘prohibits the use of coercive techniques because they produce low quality intelligence’: ‘The use of force is a poor technique, as it yields unreliable results, may damage subsequent collection efforts, and can induce the source to say whatever he [*sic*] thinks the interrogator wants to hear’. [28] Dershowitz, on the contrary, argues that ‘It is precisely because torture sometimes does work and can prevent major disasters that it still exists in many parts of the world and has been totally eliminated from none’. [29] He offers no direct argument against the claims of the American *Field Manual*, however, an omission which in the

circumstances appears odd. For the *Field Manual* is not alone in its conclusion. Here is Cyril Cunningham, for example, a psychologist with British Intelligence, writing to *The Times* already in 1971 about the “physical and psychological pressure” used by British forces in Northern Ireland:

If the Royal Ulster Constabulary, or indeed the Army, is using the methods reported, they are being singularly stupid and unimaginative. . . . A variety of “backdoor” methods are available, all of which depend for their effectiveness upon the avoidance of brutality in any form. [30]

Across the world, those who have the best claim to know – the military – agree that torture is largely ineffective in eliciting intelligence. That is why the latest version (at the time of writing) of the US *Field Manual*, updated in response to the Abu Ghraib scandal, is not alone in underlining the point. [31]

But what about the specific circumstances of a “ticking bomb”? Such evidence as we have is, inevitably, anecdotal and contradictory. For instance, I have personally been told that members of the Israeli security forces have claimed that a bomb was found and defused as a result of torturing the person who had planted it. [32] On the other hand, such claims are also denied. I shall return to this issue presently.

What is striking, however, is that Dershowitz’s own examples, of Egypt and Jordan, to whom of course ‘the US government sometimes “renders” terrorist suspects’, [33] are not remotely of the ticking bomb variety. Nor is it interrogational torture to prevent an imminent disaster that is being described by the French general, ‘Paul Aussaresses, [who] wrote a book recounting what he had done and seen, including the torture of dozens of Algerians. “The best way to make a terrorist talk when he refused to say what he knew was to torture him,” he boasted.’ [34] Dershowitz’s examples of Abu Nidal and the 1993 World Trade Center attacks in his *explicit* defence of the claim ‘that torture sometimes works, even if it does not always work’, [35] furthermore, are conspicuous by the enormity of their difference from that of the ticking bomb scenario. Here is what he says: ‘There can be no doubt that torture sometimes works. Jordan apparently broke the most notorious terrorist of the 1980s, Abu Nidal, *by threatening his mother*. Philippine police reportedly helped crack the 1993 World Trade Center

bombings by torturing a suspect' (my emphasis). [36] The first case is *obviously not* one where physically torturing a terrorist, or terrorist suspect, worked; it was when his mother was threatened that Abu Nidal 'broke', which is quite another matter (as I shall elaborate below). And in neither case was there a ticking bomb waiting to be defused. Even stranger in the context of a ticking bomb is his citing this report (which I shall assume for the sake of argument is accurate):

There are numerous instances in which torture has produced self-proving, truthful information that was necessary to prevent harm to civilians. The *Washington Post* has recounted a case from 1995 in which Philippine authorities tortured a terrorist into disclosing information that may have foiled plots to assassinate the pope and to crash eleven commercial airliners carrying approximately four thousand passengers into the Pacific ocean, as well as a plan to fly a private Cessna filled with explosives into CIA headquarters. For sixty-seven days, intelligence agents beat the suspect. . . . [37]

Sixty-seven days? So what on earth has this report to do with any *ticking bomb*, or with any imminent catastrophe?

So much for Dershowitz's supporting arguments about the effectiveness of torture in cases where time really is of the essence. As for threats against a prisoner's mother, suffice it to say for the moment that, if carried out, it would directly contradict Dershowitz's avowed objection to torturing a third party, rather than the person purportedly known actually to have the information. (Of course, such a threat may itself be regarded as a form of torture; but that is clearly not what he has in mind, either explicitly – 'a sterilized needle inserted under the fingernails' [38] – or implicitly, since its credibility would depend on the authorities being prepared to carry the threat out.) I shall return to this in the next chapter.

Still, the only evidence available about real ticking bomb cases is anecdotal and thus inconclusive. So the best we can do is to try to think through what might reasonably be expected to happen in such a case. Accepting for the moment that the captive in question really does know where the bomb is, what is their likely strategy? Remember that it is only interrogational torture which is permitted; and remember also that part of the case for legalizing it is that doing so will help ensure that non-interrogational torture – as punishment, for example – will

be more likely to be eliminated. The captive's position, then, is this. First, they know that unless they reveal where the bomb is, they will be (non-lethally) tortured. Second, they know that the torture will cease immediately they give the information required. Third, they know that, since the torture will also cease immediately the bomb explodes, the time for which they have to endure the torture is comparatively short. After all, the legal conditions surrounding torture, and in particular its being limited to interrogational torture, are something any likely terrorist would have very good reason to know, as Dershowitz himself rightly recognizes: 'the torturee will know that there are limits to the torture being inflicted'. [39] How short that time will be, neither we, the interrogators, the torturers, nor anyone else knows; but the captive does, since that is part of the scenario. But it will certainly be short: 'if they know about the bomb, they'll know how long they have got to hold out, which gives them an important psychological advantage'. [40] Furthermore, realistically and unsurprisingly, bombers are going to leave as little time as possible between planting the bomb and its going off, precisely so as to avoid "premature" discovery. In light of all that, the captive's tactic is obvious: 'Terrorists willing to die for their cause would also be willing to plant false tales under torture', [41] as John Langbein, the eminent legal historian of torture, succinctly puts it. The point is that the already 'guilty terrorist' [42] – who is most unlikely to be the crazed fanatic, unable to act rationally, of popular misrepresentation – is rather more dedicated and determined than you or I.

Furthermore, anyone planting a bomb is likely to have undergone training in resisting torture (in the knowledge that it is likely to be applied, should they be caught in these circumstances) and is likely to have their wits about them. Again, what will they do? Their first recourse, surely, is to prevaricate, and deny knowing where the bomb is. They would also be well advised to try to persuade their interrogators that *someone else* knows where it is. Certainly they could buy precious time by persuading interrogators to seek a torture warrant for someone else. But let us assume, perhaps reasonably, that such a tactic would not last very long. Or, perhaps no less realistically, if somewhat generously, we could assume that the captive would calculate that it was not a tactic worth trying, since they knew that the interrogators knew that they knew where the bomb was. The interrogators had, after all, persuaded the relevant authorities to issue a torture

warrant on the basis of the evidence of such knowledge. What now? The critical issue here is time. And again, one pretty obvious way of buying time in *these* circumstances is simply to lie about the whereabouts of the bomb, and in as complicated a way as possible, hoping that by the time their lie was discovered, the bomb would be that much closer to going off – and the (now resumed) torture, remember, therefore that much closer to stopping.

In fact, why not lie repeatedly? The interrogators cannot know they are being lied to until the location given is checked out; and every location stated has to be checked out, just in case it turns out to be the real one. In light of this obvious point, it is perhaps not surprising that none of those who argue that interrogational torture is justifiable tell us whether or not they think the torture ought to stop while the stated location is checked out. For if it did stop, the “suspect’s” best strategy is obvious, perhaps even making difficult the *systematic* infliction of pain that torture consists in. And if the torture really were to remain solely interrogational, note, the torture would *have* to stop while the authorities checked the captive’s story – however cynical you might be about interrogators actually behaving in such a “gentlemanly” way, or about observers insisting on this condition. On the other hand, if for just that reason the argument were that the torture should not stop while the story was checked out, then we have something rather different from purely *interrogational* torture: practically speaking, an element of torturing “just in case” ineluctably appears. And if that is justified here, why not elsewhere? Why not torture people whom the authorities have reason to think *might* know where the bomb is?

Then there is also the likelihood of lying out of desperation, rather than deliberately misleading the interrogators. That likelihood increases in direct proportion to the degree of pain inflicted: the closer the pain is to being literally unbearable, the greater the incentive to say just anything at all to bring it to an end. And of course, the less time there is, the more likely that would be to work as a tactic anyway. So for both reasons – desperation and tactics – the more urgent the situation, and thus the more justified the torture and the warrant authorizing it, the smaller the chance of stopping the bomb going off. Conversely, the greater that chance, the less urgent the situation. But it is urgency that is said to justify the torture. No wonder there is a general, if not of

course unanimous, agreement, reflected in the *Field Manual* referred to above, that information given under torture is unreliable.

I am not saying that these reflections show that torture cannot possibly be effective in the ticking bomb scenario; only that the evidence offered, such as it is, fails to take any cognisance of obvious practical objections. What we are being invited to weigh, therefore, is *not* the torture of one person against the death and maiming of hundreds, or even thousands, of innocent civilians (and allowing for the moment an unfounded confidence that we know they are indeed a ‘guilty terrorist’). It is, rather, the torture of that person against the *possibility* of the death and maiming of hundreds, or even thousands, of innocent civilians. How high is that possibility? We do not know. But what we do know is this. If you agree with the utilitarian approach on which the argument is based, then, the higher you think the possibility is of death and mutilation, the more heavily you will take it to weigh on the side of torture; and the lower you think it is, the less heavily you will take it to weigh. So unless you do know what the possibility is, at least roughly, you *cannot* be in a position to judge its weight against torture. Your position therefore has to be that torture is justified by even the possibility of catastrophe – not by its certainty.

Interestingly, Dershowitz himself acknowledges the empirical difficulty, even if he resolutely ignores its implications. In a footnote to the sentence above where he states that ‘torture *sometimes* works’, and in which he offers the examples of Abu Nidal’s mother and the World Trade Center bombings, he concedes, as we have already seen, that ‘It is of course possible that judicially supervised torture will work less effectively than unsupervised torture, since the torturee will know that there are limits to the torture being inflicted. At this point in time, any empirical resolution of this issue seems speculative.’ [43] Indeed so. But then on what grounds exactly *does* Dershowitz think that the balance of judgement *just obviously* lies on the side of interrogational torture? And why does he *not* consider either the implications of his own empirical caveat or the claims of the US *Field Manual* and other counter-evidence?

Furthermore, if there really is good reason to suppose that there is a bomb about to go off very soon – but not so soon as to make torture impractical – and the available professional techniques of torture are sufficiently refined and effective to offer a realistic prospect of rapid

success, then, as Levinson points out, ‘anyone who believes that torture is acceptable with a warrant would, I suspect, waive the requirement when time is truly of the essence’. [44] Again, it is curious that Dershowitz does not address this point in his published writing. [45] Nor is that all. To the extent that time really was pressing, then, as Allen reminds us, ‘it seems all too likely that a genuinely stringent process of scrutiny would slow the process down to the point of ineffectiveness. . . . it would take time to compile evidence, and time for judges to sift through it (and even) [I]f authority to issue warrants was reserved to a small set of highly qualified judges, it might well be difficult to obtain rapid access to (them)’. [46] Or to put it rather more bluntly: these are ‘classic cases of emergency or exigent circumstances in which the police generally do not have time to obtain warrants’. [47] For ‘the court hearing the warrant application will scarcely have more time to make the decision than the front-line official confronted with the problem at first instance. In making this decision, the court will need information, which means that the applicant will need time to prepare materials.’ [48] And even after that delay, the more deeply a conscientious judge inquires as to whether or not the matter really is sufficiently urgent, the more time will turn out to have been wasted if it does turn out to be urgent. On the other hand, the louder the ticking, so to speak, the less time for a judge to consider the matter. Under these inevitable counter-pressures, it is a reasonable expectation that judges’ default position would be to issue a warrant lest it turn out that they be accused of having blood on their hands.

One has to ask if it is the lack of realism about time in real cases that allows advocates of torture also not to consider empirical issues about the efficacy of other methods of interrogation. [49] A reasonable response would of course be that we are dealing with extremely determined people, on whom such “softer” methods would be extremely unlikely to work; or that we could give such methods a quick try, perhaps while the authorities are considering whether or not to issue a warrant. The argument is that torture is the ultimate weapon against determination. But then as I have indicated, the argument just *assumes* that torture is sufficiently likely to be effective; it appeals to examples quite different from interrogational torture in ticking bomb scenarios; and it fails to offer remotely adequate positive evidence.

The more closely one tries actually to specify the time conditions of the ticking bomb case, the more the reality obtrudes against the fantasy

of the thought-experiment. Unsurprisingly, perhaps, it was a serving American soldier, Major William Casebeer, who made the central point of which advocates of interrogational torture appear so disconcertingly unaware:

The imminence of the danger requirement will probably only be met in radically underspecified thought-experiments like the ticking bomb scenario (indeed, the very intelligence that will enable us to know we are facing an imminent danger will also likely serve to give us means to discover the source of the danger without having to resort to torture interrogation). [50]

Knowledge and Necessity

We have already seen that it is an assumption that interrogators know that their captive has the information they are after, that they are ‘guilty’ before any legal process which might establish their guilt. Now of course it is *possible* that the person concerned has admitted planting the bomb or knowing where someone else has planted it; or that the authorities really do know, from surveillance perhaps, that the captive knows where the bomb is (see chapter four). We are dealing not with a thought-experiment, however, but with reality. We have to take into account just how likely it is that the interrogators have the requisite knowledge.

Jonathan Allen sets out the situation regarding knowledge succinctly:

for the “ticking bomb” scenario to constitute a truly compelling case for torture, we would have to know: (a) that we are holding the right person; (b) that the person being tortured really does possess the information we need; (c) that acquiring the information the captured terrorist possesses would be very likely to put us in a position to avert a disaster, and that his accomplices haven’t already adopted a contingency plan he knows nothing about; (d) that the information we obtain through torture is reliable.

We can of course stipulate that we know these things – and if we do, we really are presented with an important test of the validity of moral absolutism. *However, in reality, we will be operating to a greater or lesser degree on the basis of supposition, not certainty* [my emphasis]. [51]

Citing the case of Paul Teitgen during the Algerian war of liberation, Allen reminds us that ‘real cases, even those that approximate the “ticking bomb” scenario, involve much more uncertainty, and therefore require complex judgements’. [52] Even Levinson, who reluctantly semi-endorses Dershowitz’s proposal – since we ‘are staring into an abyss, and no one can escape the necessity of a response’ [53] – notes that ‘there is no known example of this actually occurring, in the sense of having someone in custody who knew of a bomb likely to go off within the hour’. [54] And as we have seen, all Dershowitz offers is the unreferenced claim that in Israel ‘There is little doubt that some acts of terrorism – which would have killed many civilians – were prevented. There is also little doubt that the cost of saving these lives – measured in terms of basic human rights – was extraordinarily high.’ [55] As against that, consider for example Alisa Solomon’s comment on the sort of claim that people certainly *make* – and not only Dershowitz – but one which, to my knowledge, remains *unsubstantiated*:

The Israelis made much use of their ability to use “moderate physical pressure” to save hundreds of lives in “ticking bomb” cases – that is, on occasions when a confession can lead directly to the prevention of an imminent attack. Nonetheless, according to Dr. Ruchama Marton, the founder of Israel’s Physicians for Human Rights and coeditor of *Torture: Human Rights, Medical Ethics and the Case of Israel*, even the staunchest defenders of the most aggressive interrogation methods never provided details of a single specific case in which torture led to the immediate deactivating of a ticking bomb. [56]

Now of course to quote someone who, like Dr Marton, may reasonably be taken to be an authority on the matter, is not to substantiate Solomon’s claim. Nonetheless, one can at least check the source, compare it with other sources and so on. What strikes me as significant here is not only that Dershowitz appears to rely on unsubstantiated hearsay, but that when he goes on to make an argument on the basis of it two pages later, he quotes Jeremy Bentham’s discussion of interrogational torture. And what Bentham says there is very different indeed from Dershowitz’s own stipulation, in the form of a quotation from Twining and Twining (which he gives another two pages further on) that ‘The evidence in support of the contention that he has the

relevant information would satisfy the requirements of evidence for *convicting him of an offence*' (my emphasis). [57] What Bentham says, and what Dershowitz correctly quotes him as saying, is this: 'Suppose an occasion were to arise, in which a suspicion is entertained, as strong as that which would be received as a sufficient ground for *arrest and commitment as for felony . . .*' (my emphasis). [58] And that is very far indeed from knowing that the captive has the information, that they are a 'guilty terrorist'. Evidence sufficient to convict is one thing; evidence sufficient to arrest is quite another. Nor is he alone here. Others who countenance torture *in extremis* are even more vague. Walzer, for example, whom Dershowitz quotes, [59] writes of authorizing 'the torture of a captured rebel leader who *knows or probably knows* the location of a number of bombs' (my emphasis). [60] In a matter as serious as this, such laxity is irresponsible, to say the least.

The empirical question of how likely it is that a given captive has the requisite knowledge remains uncertain. So, to extend the earlier points about the efficacy of torture and the time element in the ticking bomb scenario – and remembering that putative bomb-planters know that being captured before the bomb goes off will lead to torture – the question to be asked is this. How likely is it that someone *already* in custody is the bomb-planter, or a sufficiently close associate of the bomb-planter, to know where the bomb is? People who plant bombs will, after all, have taken care to leave as little time as possible between planting the bomb and its going off. Unless they had already been under surveillance, therefore, their being taken into custody in the interval between planting and explosion must be extraordinarily unlikely; and of course, if they had been under surveillance, then those conducting the surveillance would be very likely to know where the bomb was or who the person was who knew where it was. Elaine Scarry's comment is exactly to the point, even if 'highly improbable' turns out to be an understatement, since it is not only knowing that the detainee knows what the ticking bomb scenario has them know that is the problem:

What makes it improbable is not the existence of a ticking bomb (it is entirely possible that a terrorist or a deranged state leader will one day try to use a nuclear bomb, or a chemical or biological weapon capable of killing hundreds of thousands). What instead makes the ticking bomb scenario improbable is the notion that in a world where knowledge is ordinarily so imperfect, we are suddenly granted the

omniscience to know that the person in front of us holds this crucial information about the bomb's whereabouts. [61]

To put it succinctly: 'we cannot usually be certain of guilt if we do not have all the information. If we did have it, we would not be tempted to resort to torture.' [62] In the United States, as Scarry goes on to point out, 'In the two and a half years since September 11, 2001[at the time of writing], 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'. [63] Or consider the case of Ziad Mustafa Al-Zaghal, whom 'six persons' accused of being an active member of 'an Islamic military organization' and of whom the legal representative of the GSS (in the case he brought against it) stated that he was a man 'who if he talks under interrogation, can prevent bombings': after five months of detention without charges or trial, he was released, having not been 'accused of any offense' – 'the "six persons" were not brought to testify that Al-Zaghal was "active in a military organization" or planned any time of bombings [*sic*]' . [64] Again, as Arrigo asks, 'What proportion of ignorant or innocent suspects are likely to be interrogated under torture? Modern crime statistics indicate that among suspects arrested and charged with serious crimes, one-half to three-quarters are not convicted, depending on the [US] state of jurisdiction.' [65] So how likely is it that in the ticking bomb scenario the authorities should come to be blessed with the near-omniscience they lack elsewhere?

Let me sum up. If anyone really intends torture warrants to be issued only in those cases where it is as certain as it empirically can be that the person to be tortured has the relevant knowledge, then the onus is on them to establish how we may achieve such certainty. So far as I know, no one has done so. Given the obvious empirical obstacles I have outlined, that omission seriously undermines the ticking bomb scenario.

Its whole point is to engender a sense of necessity: "the terrorist" *who knows where the bomb is* has to be tortured in order to prevent the death and maiming of thousands of innocent people. But what sort of necessity is this? How do we know that the torture is necessary, that the disaster is imminent and unavoidable other than through the use of torture – or rather, as imminent as my earlier qualifications allow?

The situations said to demand torture warrants are extremely likely to be underdetermined in respect of its being known whether or not the person to be tortured actually does know what it is proposed to torture them to find out. And the more closely specified the example is, so as to make such knowledge plausible, the less persuasive it is as one describing a real situation.

Now, it could be said in reply that *of course* empirical knowledge can never be certain, and that talk of the necessity of torture is to be understood as using an ordinary, everyday sense of ‘necessary’, and not some theoretical (or philosophical) sense of the word.

‘It’s raining: you need to take your umbrella or you’ll get wet.’ That’s what I mean by its being ‘necessary’ to use torture here. Unless you use torture, you won’t get the information – which is not to say that even if you do use it, you’ll *certainly* get it. As I’ve already said, ‘No technique of crime prevention always works.’ [66]

That is an entirely fair point. But precisely because it is, precisely because certainty is unavailable, what we are actually being invited to accept is that interrogational torture is morally justifiable because it *might* – and, if my arguments so far are right, *only just might* – avoid the catastrophe. What is at issue here is the possibility of having the knowledge that time is sufficiently short to make the case a matter of necessity; and this takes us back to my earlier discussion of time and effectiveness. If it is not *known* that time is (sufficiently) short, then it cannot be *known* that the case is a matter of necessity, and that there is therefore not time to try techniques such as “talking the suspect down”. How then does the interrogator know that time is (sufficiently) short? It is logically possible that the detainee has told them – but of course the knowledge that the interrogators’ knowing this leads to torture would make this even less likely than it already is. Can anyone seriously imagine a prisoner’s admitting that there is a bomb set to go off at a particular time but then adamantly refusing to say where it is, knowing that they will be tortured to make them give that information? [67] As we have seen, it is obviously in such a person’s interest to know what the law allows and what it does not. The knowledge that torture would follow from such an admission would make it even more unlikely than it already is in the absence of such a threat that they would make the original admission. Perhaps, though, someone else has

told them that there is such a bomb, that they themselves do not know where it is, but that they do know that this other person knows where it is. But then how do the interrogators, or the authorities charged with issuing or withholding a torture warrant, know that *that* information is reliable? Again, it is inordinately unlikely, to say the least, that the interrogator would have the knowledge that is a logical condition of invoking necessity.

To argue, then, that the ticking bomb scenario is one where torture is *necessary* is misleading. It is only in the everyday sense that we can, in the real world, say in advance that something or other is necessary. But in that case all we really mean is that, for example, taking an umbrella is *one* way of not getting wet. You could take a mac; or you could stay at home. You could also choose to get wet. The necessity of torture in a particular instance, as the *only* possible solution, cannot be known in advance. That is why the ticking bomb scenario must remain radically underspecified. Probability is all there can be in the matter; and probability, not being certainty, raises three issues.

First, how strong a probability would be required to generate a torture warrant? If the standard were set too high – say 99 per cent – then the whole practical point of legalizing interrogational torture would disappear. As Dershowitz rightly insists, no legal sanctions or processes are 100 per cent effective. Perhaps, then, a 90 per cent likelihood would be sufficient. But in that case, why not 89 per cent? After all, the circumstances of the “ticking bomb” are so extreme as to justify what even the advocates of torture and/or its legalization agree to be a last resort. The point is that the more convincing the urgency of the scenario, the lower it makes sense to set the threshold of torture. So why not 51 per cent? Or less? The structure of the proposal leads remorselessly to the conclusion that torture warrants would come to be issued where there *might* be a bomb shortly to go off; where there *might* be a bomb which *might* be shortly to go off; and where that ‘shortly’ *might* be so short that torture was the only possible means of avoiding the catastrophe. Torture warrants would rapidly come to be issued routinely, just because torture *might* be needed. What follows from this, is that, second, there cannot but be some risk, in all probability an increasingly considerable risk, of torturing the wrong person, or of torturing a person when torture might not have been necessary after all. As Scarry says, ‘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 [five thousand] 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?’ [68] Third, as we have already seen, we cannot be sure that the torture will work: ‘success is being assumed and not demonstrated’, since, as again Tindale points out, ‘Viewed prospectively, the guarantee of success cannot be assumed. The terrorist may withstand whatever humane or inhumane treatment is applied or may give misleading information that will be time-consuming to check.’ [69]

The “necessity” that gives the thought experiment its force is inevitably absent in the real case. In the real world, necessity is always retrospective. Anat Biletzki makes this abundantly clear in the course of her analysis of the Israeli Supreme Court’s 1999 ruling against interrogational torture: ‘the “necessity” defense is an after-the-fact judgement, useful and relevant in cases where an investigator is accused of wrong-doing. It cannot function as a normative, before-the-fact guide to anything’. [70] No wonder that the best evidence Dershowitz can cite is that ‘the Israeli security services *claimed* that, as a result of the Supreme Court’s decision, at least one preventable act of terrorism had been allowed to take place, one that killed several people when a bus was bombed’ (my emphasis). In fairness, he clearly recognizes the shortcoming: ‘Whether this claim is true, false, or somewhere in between is difficult to assess’, [71] he says. But yet again, what he does not recognize is the impact that that admission should have on his argument.

He points out, as we have seen, that we sanction other legal practices where success cannot be guaranteed and/or where we may inadvertently be committing an injustice against a particular individual. And certainly, he is right to point out that ‘In the United States we execute convicted murderers, despite compelling evidence of the unfairness and ineffectiveness of capital punishment’. [72] But what he fails to consider, whether parochially, disingenuously or for some other reason, is that this argument can as easily be inverted: given ‘compelling evidence of the unfairness and ineffectiveness of capital punishment’, it should be abolished. Or again, ‘imprisoning a witness who refuses to testify after being given immunity is designed to be punitive – that is painful’, and success cannot be assured. [73] True enough: but imprisonment is hardly on a par with torture. Still, Dershowitz is right that

in general ineffectiveness is no bar to penal practices: we know that in the UK the success rate of prison sentences in preventing youths reoffending is at best only round about 20 per cent, and that all too often innocent people are jailed, yet that does not lead most people to argue that these practices should be abandoned (whether or not it ought to). But that is not the point. The point is that the case for interrogational torture depends on such plausibility as some think it has on its *necessity* as a last resort, so that the more the claim regarding certainty of success is qualified, the weaker its justification. And it turns out that it *may be necessary* – that is all. Substitute this more cautious phrase in a ticking bomb scenario and any initial plausibility disappears.

The Ticking Bomb Scenario: Conclusion

The more closely the real case approximates to the ticking bomb fantasy, the closer it is to its being too late to prevent the impending catastrophe. By the time the “guilty” terrorist who has planted the bomb has been apprehended, then, if its going off really is imminent, it is too late. Arrigo brings a much-needed empirical realism to the fantasy:

As a prototype to guide a torture interrogation program, the time scale of the ticking bomb scenario is extremely misleading. In FBI experience, deterrence of terrorist acts is a long-term affair, with informants, electronic surveillance networks, and undercover agents. Operations must be tracked and allowed to play out almost to the last stage to comprehend their scope. The fanatics, martyrs, and heroes scenario errs, like the ticking bomb scenario, in its focus on key terrorists. They are difficult to apprehend and likely to require great exertions from torturers. Their numerous peripheral associates are much easier to apprehend and more susceptible to interrogation – whence the inevitable trend towards the dragnet interrogation model of knowledge acquisition. Among the detainees will be many innocent or ignorant persons but these, too, are critical for comparison of nonterrorist with terrorist data. The difficulty ‘from a purely intelligence point of view’, as noted by Horne, is that ‘more often than not the collating services are overwhelmed by a mountain of false information extorted from victims desperate to save themselves further agony’. [74]

The answer to the “tragic scenario” is that we need to do what we can to ensure that we never get anywhere near it. The proposal to legalize interrogational torture, in addition to all its other demerits, stands in the way of our succeeding in doing exactly that. Why should we think that legally torturing suspects would diminish, rather than increase, terrorist bombings, when the evidence we have – such as it is – of the effect of parallel legal measures (and of other related policies) in the so-called war on terror points in exactly the opposite direction? In appearing to offer a solution, this short cut would serve to deflect from the harder task of eliminating the causes of the putative incident where “we” are urged to resort to legal torture. Despite claiming the “realist” high ground, these arguments are firmly rooted in fantasy. And while, as Shue and others argue, hard cases make bad law, fantasy makes for something far worse. Maybe ‘We can imagine and describe cases in which we would think torture justified and unjustified . . . (and) state the grounds on which we are making the distinction. But what we cannot do is this: *we cannot provide for ourselves, or for those who must act for us in real situations, any way of making our notional distinctions in reality*’. But even if Barrie Paskins is right in his first claim, the second destroys any plausibility that such cases might have as the basis of an argument about what ought to be done in real situations, where ‘we can never be certain that the case in hand is of this kind rather than another’. [75]

Nowhere in *Why Terrorism Works* or anywhere else is there a draft wording, however embryonic, of the legislation proposed. That might seem surprising. But it is not. For any attempt legislatively to specify the circumstances in which such a warrant might be granted, the conditions governing who would grant it and to whom, and what it would permit and what not, would require a basis of just that realism which the ticking bomb scenario precludes. No wonder, then, that as Markus Wagner points out, Dershowitz prefers appeals to fantasies such as *Marathon Man* to saying anything realistic about ‘the exact requirements for obtaining’ such warrants. [76] Like so much of the rest of the so-called war on terrorism, the object of the proposal is a fantasy. [77]