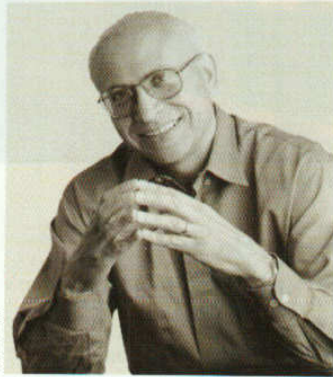


Torture and the Ticking Bomb

BY PROFESSOR DAVID LUBAN



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Ludwig Wittgenstein once wrote that confusion arises when we become bewitched by a picture. He meant that it's easy to be seduced by simplistic examples that look compelling but actually misrepresent the world we live in.

More than a year after Abu Ghraib, we continue to confront the issues of abusive interrogation, torture, and legal positions purporting to vindicate harsh tactics in the name of national security. In this confrontation, the picture that bewitches us is the "ticking bomb" scenario. Suppose a bomb is planted somewhere in the crowded heart of an American city, and we have custody of the man who planted it. He won't talk. Surely, the scenario suggests, we shouldn't be too squeamish to torture the information out of him and save hundreds of lives. After all, abstract moral prohibitions must yield to the calculus of consequences.

To take a real-life example: in 1995, an al Qaeda plot to bomb 11 U.S. airliners was thwarted by information tortured out of a Pakistani suspect by the Philippine police. According to a report by journalists Marites Vitug and

Glenda Gloria, "For weeks, agents hit him with a chair and a long piece of wood, forced water into his mouth, and crushed lighted cigarettes into his private parts. His ribs were almost totally broken and his captors were surprised he survived." Grisly, to be sure—and yet if they hadn't done it, thousands of innocent travelers might have died horrible deaths.

But look at the example again. The Philippine police were surprised he survived—in other words, they came close to torturing him to death before he talked. And they tortured him for weeks, during which time they presumably didn't know any of the details they wanted about the al Qaeda plot. What if he too hadn't known? Or what if there had been no such plot? Then they would have tortured him for weeks, possibly tortured him to death, for naught. For all they knew at the time, that is precisely what they were doing. We can't use the argument that preventing the al Qaeda attack justified the decision to torture, because at the moment the decision was made no one knew about the al Qaeda attack.

The ticking bomb scenario cheats its way around these difficulties by stip-

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ulating that the bomb is there, ticking away, and that officials know they have the man who planted it. Those conditions will seldom be met. Let's look at some more realistic scenarios and ask the questions they raise:

- The authorities know there may be a bomb plot in the offing, and they've captured a man who may know something about it, but may not. Should they torture him? How

severely? For how long? For weeks? Months? The chances are considerable that they are torturing a man with nothing to tell. If he

doesn't talk, is that a signal to stop, or to up the level of torture? How likely must it be that he knows something important? Fifty-fifty?

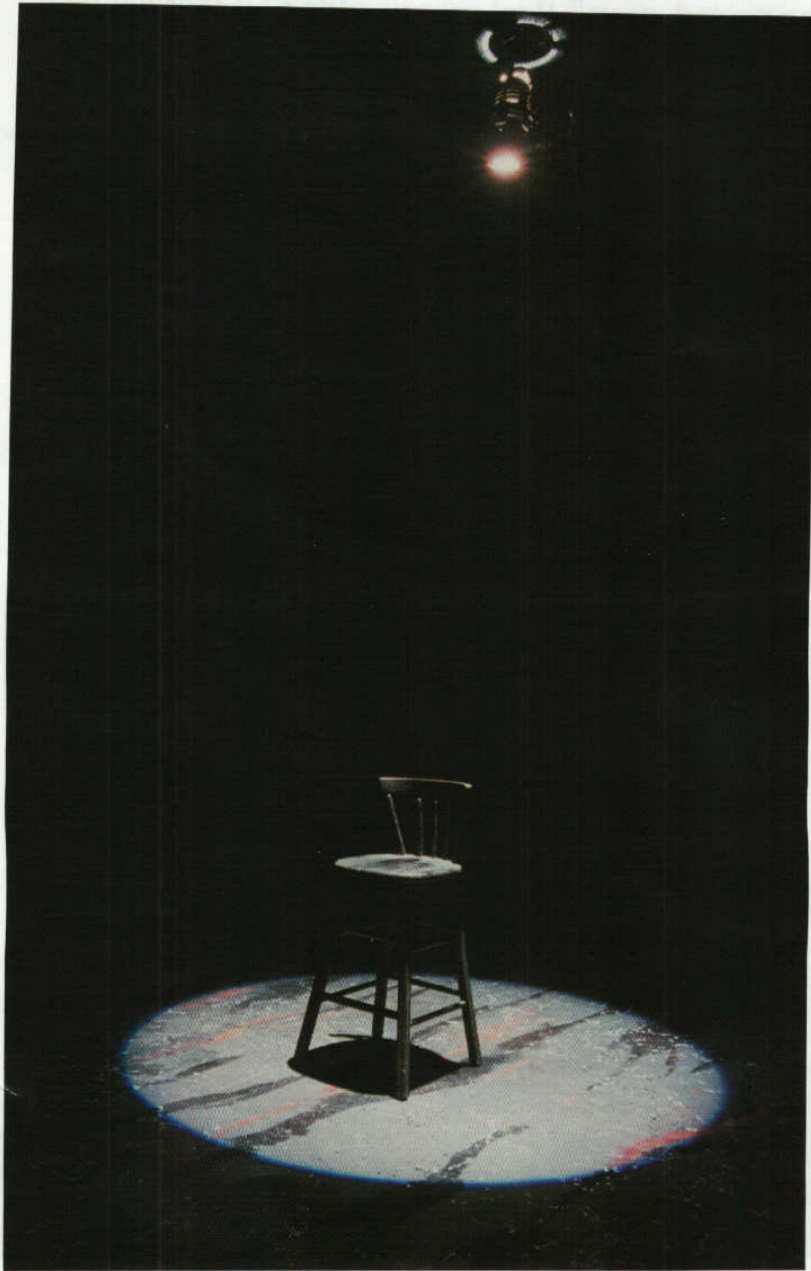
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- Do we really want to make the torture decision by running the numbers? A one percent chance of saving a thousand lives yields 10

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statistical lives saved. Does that mean that we will torture up to nine people on a one percent chance of finding crucial information?

- Suppose authorities believed that one out of a group of 50 captives at Camp X-Ray in Guantánamo Bay, Cuba might know where Osama bin Laden is hiding—but they didn't know which captive. Torture them all? That is: torture 49 captives with nothing to tell you on the uncertain chance of capturing bin Laden? For that matter, would capturing bin Laden demonstrably save a single human life? Months ago, the Bush administration stated that bin Laden had been marginalized. Maybe capturing him would save lives somehow—but how do you demonstrate it? Or doesn't it



matter whether the torture was intended to save lives, as long as it furthered some goal in the War on Terror? And if the answer is that it doesn't matter, why limit the efficacy of torture to the War on Terror? Why not torture in pursuit of any worthwhile goal?

- Indeed, if we're willing to torture 49 innocent people to get information from the one person who has it, why stop there? If suspects won't break under torture, why not torture their loved ones in front of them? A moral consequentialist should be willing to accept the torture of one innocent child to save hundreds of lives. Of course, until you try, you won't know whether torturing a child will break the suspect. But that just affects the odds, not the argument.

The point of these examples is that in a world of uncertainty and imperfect knowledge, the ticking

bomb scenario should not form the point of reference in the torture debate. The ticking bomb is the picture that bewitches us. The actual choice is not between one guilty

interrogations, decisions are not made that way. They are based on policies, guidelines, and directives. Officials inhabit a world of practices, not of ad hoc emergency measures. Any respon-

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man's pain and hundreds of innocent lives. It is the choice between the certainty of that anguish and the mere possibility of learning something vital and saving lives.

There is a second insidious error built into the ticking bomb hypothetical. It assumes a single ad hoc decision about whether to torture, by officials who ordinarily would do no such thing except in a desperate emergency. But in the real world of

sible discussion of torture therefore must address the practice of torture, not the ticking bomb hypothetical.

That means discussing other, different questions. For instance, should we create a professional cadre of torturers, of interrogators who have been trained in the techniques and who have learned to overcome their instinctive revulsion against causing pain? Medieval executioners were schooled in the arts of agony. In Louis

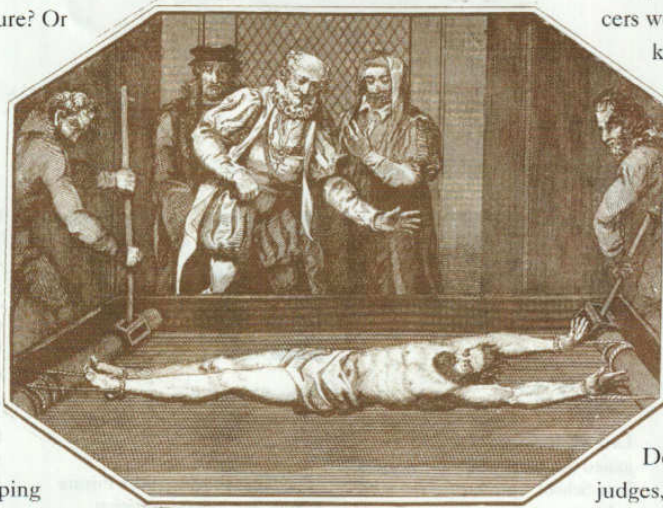


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Iraqi detainees reside in the newly constructed Camp Redemption inside Abu Ghraib prison on the outskirts of town, in a photo taken October 5, 2004.

XIV's Paris, torture was a family trade whose tricks were passed on from father to son.

Of course, in our era, higher education has replaced inheritance of family trades. Should universities create an undergraduate major in torture? Or should the major be offered only in police and military academies? Would we want federal grants for research to devise new and better torture techniques? Patents issued on high-tech torture devices? Companies competing to manufacture them? Trade conventions in Las Vegas? Should there be a medical subspecialty of torture doctors, who ensure that gasping captives don't die before they talk? Recall the chilling words of Sgt. Ivan Fredericks, one of the abusers at Abu Ghraib, who saw the body of a detainee after the interrogation went awry: "They stressed the man out so much that he passed away." Real pros wouldn't let that happen; it wastes a



But concealment does not reject the normalization of torture. It accepts it but layers on top of it the normalization of state secrecy. The result would be a shadow culture of torturers and

those who train and support them, operating outside the public eye and accountable only to other insiders of the torture culture.

Yet a further question arises: Who can guarantee that case-hardened torturers, inured to levels of violence

what they were doing, until their priests assured them that they were fighting God's fight. By the end of the Dirty War, the qualms were gone, and, as John Simpson and Jana Bennett have reported, hardened young officers were placing bets on who could

kidnap the prettiest girl to rape and torture.

Escalation is the rule, not the aberration. Abu Ghraib is the fully predictable image of what a torture culture looks like. Abu Ghraib is not a few bad apples. It is the apple tree.

That is why Harvard law professor Alan

Dershowitz has argued that judges, not torturers, should oversee the permission to torture by means of warrants. The irony is that former Assistant Attorney General Jay S. Bybee, who signed a notorious, highly permissive torture memo for the Justice Department in 2002, is now a federal judge. Politicians pick judges, and if the politicians accept torture, the judges will too. Judges don't fight their culture. They reflect it. Once we create a torture culture, only the naive would suppose that judges will provide a safeguard.

The ticking bomb scenario is an intellectual fraud. In its place, we must address the real questions about torture—questions about uncertainty, questions about the morality of consequences, questions about what it does to a culture to introduce the practice of torture, questions about what torturers are like and whether we really want them walking among us.

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The basic question is this one: Do we really want to create a torture culture and the kind of people who inhabit it? The ticking time bomb distracts us from the real issue, which is not about emergencies but about the normalization of torture. Some might argue that keeping the practice of torture secret avoids the moral corruption that might arise from creating a public culture of torture.

and pain that would sicken ordinary people, will know where to draw the line? They never have in the past. In the Argentinian Dirty War, tortures began because terrorist cells had a policy of fleeing when any of their members had disappeared for 48 hours. Authorities had just two days to wring the information out of a captive. University of Iowa law professor Mark Osiel, who has studied the Dirty War, reports that at first many in the Argentinian military had qualms about