Why Torture is Wrong: Always; Everywhere

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Introduction

As others have said before me there is something bizarre about addressing the issue of torture at all.1 Certainly it is not something I would ever have expected to write about; and that I now find myself doing so is surely a sign of the times. Of course torture was ubiquitous in the second half of the twentieth century, from the Nazis Europe-wide to the French in Algeria, the British in Malaya, Kenya and Northern Ireland, the Americans in Vietnam, the Israelis in Palestine and dozens of regimes in their own countries. What is new, however, is the phenomenon of academics seriously advocating that torture be legally permitted under certain circumstances; that it would be better to issue ‘non-lethal torture warrants in extraordinary cases’2 than to go along with the hypocrisy of ‘its selective use beneath the radar screen’.3 Dershowitz’s advocacy of the legal institutionalisation of torture in cases ‘When torture is the least evil of terrible options’4 is the most notorious and most fully elaborated of these: but he is not alone.5 Indeed, two Australian lawyers are apparently arguing ‘the torture is “morally defensible” even if it causes the deaths of innocent people’; and they sought American publication for their paper ‘because Americans were “more open to new ideas on human rights”’.6 It is necessary to get the information now because from now on to the future it might be too late. And to save time, everything is valid.7

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2 ‘When torture is the least evil of terrible options’, THES, June 11 2004, 20-1.
4 Dershowitz, THES, op. cit.
6 Mirko Bagaric and Julie Clarke, ‘Not enough (official) torture in the world’, University of San Francisco Law Review May 2005: reported in THES, 27 May 2005, 14 - ‘Make torture legal, say law academics’.
It is interrogational torture, and specifically interrogational torture in the so-called ticking bomb scenario, that is being advocated. It constitutes the basis of Dershowitz’s argument; and it is in these circumstances that considerable sections of the public appear to think that torture is justifiable. And not just the public: having been invoked by the Israeli judiciary in its consideration of torture, Dershowitz is now being invoked by members of the legal profession in the USA in cases quite different from his. That alone is reason enough to focus on interrogational torture. However, there are two more. First, it constitutes the limiting case of objections to torture; so if I can show that interrogational torture remains unjustifiable, then the case is thereby already made against torture as punishment, as an instrument of terror, or as vengeance. Second, and more importantly, almost all critics of such a proposal, both current and historical, agree with Dershowitz that interrogational torture is justified in the “ticking bomb” scenario. The thought, however reluctant it may be, is that there are cases where torturing a person to gain the information that only they have and that is needed to prevent the deaths of thousands of innocent people is morally justifiable. But such a thought is far too quick.

If I can persuade you of that, then I will have done two things: I will have defused the chief weapon in the armoury of the proponents of “moral and/or legal realism”; and since the popular appeal of their case depends on that misconception, I will have suggested a means of countering it.

Part of my argument, then, will be that the “new realism” is in fact based in fantasy; and that those thinkers (mostly liberal-minded philosophers) who, like Martha Nussbaum, announce that they ‘don’t think any sensible moral position would deny that there might be some imaginable situations in which torture [of a particular individual] is justified’ are being intellectually and politically irresponsible. For as Jean Arrigo points out in his excellent demolition of much of Dershowitz’s “modest proposal”, ‘the ticking bomb scenario itself does not afford judicial consideration of torture warrants for specific individuals on specific occasions’.

The other part of my argument will be that Dershowitz, Levinson et al. pay far too little attention to the issue of institutionalisation. Whether that is because they have failed properly to think the matter through or have deliberately chosen to make light of it I leave to others to determine: suffice to say that Dershowitz’s own argument, originating in his role in the legal debate in Israel which


8 For the former, see fn. 59. Regarding the latter, Kreimer cites the following case: ‘The brief for the petitioner, seeking to exonerate the police officer who persisted in questioning the wounded and screaming suspect, invoked the image of an official questioning a “suspect [who] has been arrested for kidnapping [sic] a small child who cannot survive without immediate adult intervention. The child is being hidden somewhere, and time is running out on his life,” and invited the Court to refer to Professor Dershowitz’s analysis.’- Seth F. Kreimer, ‘Too close to the rack and screw: constitutional constraints on torture in the war on terror’, _University of Pennsylvania Journal of Constitutional Law_ 6 (2003), 278-325, p. 291: ‘Brief for the Petitioner at 27 n.8, Chavez v. Martinez, 123 S. Ct. 1994 (2003) (No. 01-1444) …’ – ibid., fn. 44. That “[T]he Court pointedly declined these invitations” (ibid) is reassuring: but for how long?


resulted in the sanctioning of “physical pressure” and developed in his Why Terrorism Works, and offered in various summary forms elsewhere, makes remarkably little reference to relevant counter-evidence.

Some of the detail of what I have to say has of course been pointed out by others. But I think that, in addition to the task of demolishing the “ticking bomb” scenario from which the argument takes off, there is a need to bring the various arguments together; to show exactly how the issue of institutionalisation defuses the “ticking bomb” argument; and thus to show just how deeply spurious Dershowitz’s and others’ argument for the legalisation of interrogational torture is.

One more point before turning to the argument itself: the question of utilitarianism. Partly because I want to counter such popular appeal as the argument for legalisation has, and partly because I think it is anyway important to show that it is spurious even on its own consequentialist grounds, I shall restrict myself to utilitarian considerations. Of course some (like myself) might think that broadly Kantian considerations of not treating people merely as means to an end are enough to show that torture — in any situation — is wrong. Others, by contrast, doubtless think that the ticking bomb scenario is the limiting case of the Categorical Imperative: and a moral theory which would permit the death of hundreds of thousands rather than torture one thereby exposes its own absurdity (as does Kant’s own example of turning over an innocent person to their pursuers in the knowledge that they will be killed rather than lying about the person’s whereabouts). Here it will not do ‘to play the student in Philosophy 101’, as Levinson puts it, ‘where Kantian deontologists contend with utilitarians as to the propriety of lying to Nazis or killing a single innocent in order to save the world. (For) unless one is a Kantian, it is hard to understand why one would embrace this position.’ Maybe so: certainly there are many moral-theoretical ways of saying what is wrong with torture. What I am concerned to do here, however, is not that, but to counter contemporary arguments for its legalisation. I shall therefore assume a utilitarian perspective in what follows, not least because it is the (often untheorised) perspective of many supporters of the proposal. And it may anyhow be that Barrie Paskins is right to make “I wouldn’t do it to a dog” into a suitably terse summary of theory.

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12 I leave on one side also the issue of whether or not Dershowitz’s “modest proposal” squares with the American Constitution: for an excellent critique, see Kreimer, op. cit. For a summary of the legal history of torture in the USA, see Parry and White, op. cit., 748-54.

13 Sanford Levinson, ‘The debate on torture’, op. cit., 82.

1. Dershowitz’s Argument

Dershowitz’s argument, derived from Bentham,15 is in two parts. First, there are some extraordinary cases where interrogational torture is morally justifiable as the least bad option, namely variants of the “ticking bomb” scenario. Second, since torture is anyway de facto used in these, and indeed in other, cases, it is better to drop the hypocritical pretence that it is something we don’t do and legalize its use in just such cases. It would be better, he argues, for two reasons: legal regulation would as a matter of fact reduce instances of torture and restrict its use to the minimum necessary to obtain the required information; and honesty is the best policy, here as elsewhere. Others have offered detailed arguments concerning the legal demerits of Dershowitz’s case; some have offered grounds for doubting how realistic aspects of the “ticking bomb” scenario actually are, and how realistic Dershowitz’s expectations are about the likely reduction and restriction of torture resulting from legalization; and some have also pointed out what he blithely ignores, namely the need for the state to train and employ professional torturers to put his proposal into effect. Despite their various merits, however, I think these discussions do not go far enough. The “ticking bomb” scenario needs to be rejected as a starting-point at all. Its careless use as a thought experiment is irresponsible; and its misuse as the basis of a policy proposal even more so, whether or not that may be to some extent mitigated by the fact that those who thus misuse it have been misled by its careless philosophical use. Educated non-academic opinion appears sometimes to be clearer about this than are either the philosophers or the lawyers.

2. The “TICKING Bomb” Scenario: Who is the Torturer?

Dershowitz 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?16

On the basis of that, he goes on to insist that ‘[I]t 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.’17 He points out that in Israel (in the 1980s and ’90s)

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”

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16 Why Terrorism Works, op. cit., 132.
17 Ibid., 137.
position against torture in the ticking bomb case …;

and goes on to conclude 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”?18

He 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’19 is that in such a case torture is permissible. But that is all that he is right about. So let me start with that issue. Here is Henry Shue:

Nevertheless, it cannot be denied that there are imaginable cases in which the harm that could be prevented by a rare instance of pure interrogation 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.20

And while Shue goes on to argue that ‘[I]f the example is made sufficiently extraordinary, the conclusion that the torture is permissible is secure’, but that ‘one cannot easily draw conclusions for ordinary cases from extraordinary ones’21 and also that ‘the possibility that torture might be justifiable in some of the rarefied situations which can be imagined’ does not ‘provide any reason to consider relaxing the legal prohibitions against torture, Dershowitz and others are considerably less impressed by the ‘extraordinary’ nature of the philosophical example. Indeed, the extraordinary, they argue, has become all too everyday. Or consider Jonathan Allen, an otherwise clear and robust critic of the “modest proposal”: ‘[I]n 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

18 Ibid., 140-1.
19 Ibid., 140.
21 Ibid.
22 Ibid., 143.
presumably be suspended, or would be minimal, or pardons would be granted. But the general prohibition against torture would be upheld.\textsuperscript{23}

But if, as Allen agrees with Dershowitz, there really are some circumstances where torture is justifiable, does not the ‘general prohibition’ survive only thanks to the hypocrisy that Dershowitz rightly condemns? Of course, one might argue that the (continuing) illegality of something morally justifiable is itself justifiable on grounds of the likely consequences of its legalization: consider voluntary euthanasia, for example. As things currently stand, it might perhaps be plausibly thought, it is better that the practice, while morally right — even laudable — remain illegal, for fear of embarking on a slippery slope, and that we 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. That seems to be Antony Flew’s thinking: ‘[I]f 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.’\textsuperscript{24} Shue’s position is similar: ‘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 mortally in order to defend himself or herself legally. The torturer should be in roughly the same position as someone who commits civil disobedience.’\textsuperscript{25} There is no hypocrisy here: for Flew and Shue think that while torture is in this particular case morally justified its remaining illegal is also morally justified — in fact demanded — and on similarly consequentialist grounds. Their assessment of the likely consequences is what is different from Dershowitz (see 4.2.2, below).

The first question then is this: is the so-called ticking bomb scenario in fact comparable with the train-driver example? I think a stronger case can be made than Shue\textsuperscript{26} or Allen allow: as their case stands, it is both vulnerable to Dershowitz’s accusation of hypocrisy and, more important, it overlooks a sort of consideration which is decisive against his case and which deserves to be invoked more often than it is against ‘the ultimate shortcut’,\textsuperscript{27} as Shue rightly describes torture. The scenario is fundamentally flawed, for all that philosophers have lined up to offer it. 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


\textsuperscript{24} Antony Flew, ‘Torture: could the end justify the means?’, Crucible January 1974, 19-23, p. 23.

\textsuperscript{25} Shue, op. cit., 143. Cf.

\textsuperscript{26} Shue also argues (op. cit., 143) that ‘[A]n 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. Anyone who thinks an act of torture is justifies should have no alternative but to convince a group of peers in a public trial that all necessary conditions for a morally permissible act were indeed satisfied.’

\textsuperscript{27} Shue, op.cit., 141.
had in mind when I said earlier that I thought torture could be justifiable.\footnote{28}

Oddly, he 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, then anything their employment is likely to prevent’; but that, ‘[I]f a society does not professionalise 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’:\footnote{29} it rules 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 not a trained torturer. Nor are the students in Dershowitz’s hypothetical “tragic choice” scenario. Nor, I surmise, is Dershowitz. Nor are you. Nor am I. Or consider Fritz Allhoff, who also, in a recent article, simply ignores the issue of who is to do the torturing:

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.\footnote{30}

But who are the ‘we’ who have captured this person and asked them where the bomb is? Is it the same ‘we’ who will carry out the torture or not? Less systematic than Shue’s or Allen’s, these treatments make the same fundamental error of overlooking that central issue. Perhaps Walzer’s is the most galling example. He objects to Dershowitz’s use of his 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 generalise from cases like that; I don’t want to rewrite the rule against torture to incorporate this exception.’\footnote{31} Or has Walzer recently undertaken torture training?

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\footnote{28} Anthony Quinton, ‘Views’, The Listener, 2 December 1971, 757-8, p. 758.
\footnote{29} Ibid. (my emphasis).
\footnote{30} Fritz Allhoff, op. cit., 129.
Nor is it just philosophers who indulge their thinking in this way. Here is Roy Hattersley, a government Minister later to become Deputy Leader of the Labour Party: ‘[L]et’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.’ At least Hattersley might be interpreted as half-seeing the problem, however. Despite the empirical oddities of his example, he distinguishes — whether knowingly or not -- between the man’s telling ‘me’ and not saying, presumably to someone else, ‘don’t bring any pressure to bear…’.

The systematic acceptance of the ticking bomb scenario without distinguishing between what you or I might do in that imagined case and what you or I could do in an actual case has been both disastrous and unnecessary. 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. 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.

3. The Fantasy of the “Ticking Bomb” Scenario

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.

If the unreality of these discussions sounds familiar, it is because they are watered by the same streams of romanticism that course in and out of the White House. Notwithstanding Dershowitz’s warrants and Levinson’s addenda, the essays endorsing torture here are filled with hostility to what Elshtain variously calls ‘moralistic code fetishism’ and ‘rule-mania’, and what we might simply call the rule of law.

What Elshtain objects to in Dershowitz’s proposal is not the routinising of torture; it is the routinising of torture, the possibility of reverting to the ‘same moralistic-legalism’ she hoped violations of the torture taboo would shatter. This argument too is redolent of the Counter-Enlightenment, which always suspected, again quoting Berlin, that ‘freedom


Corey Robin is right. We have seen how unreal the “ticking bomb” scenario is: for if the bomb is to be defused as a result of torturing the person who knows where it is, there has to be someone who does the torturing; and that is not going to be Dershowitz, Dershowitz’s student, you or me. The institutionalisation 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 section. First, however, there are five other basic flaws in Dershowitz’s “ticking bomb” scenario in particular that need to be exposed.

3.1. Effectiveness

Dershowitz argues that ‘[I]t 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’.

Or consider Dershowitz’s explicit defence of his claim ‘that torture sometimes works, even if it does not always work’.

The first example -- to which I shall return -- is obviously not one where the suspect of the ticking bomb scenario is tortured; and the second is equally obviously not one where the ticking bomb is defused as a result of torture. Yet again, one wonders at the sheer carelessness of Dershowitz’s argument. Even more bizarre in the context of a “ticking bomb” is his citing this report -- I assume for the sake of argument that it 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 … .

34 Ibid., 138.
35 Ibid., 152.
36 Ibid., 137.
37 Ibid., fn. 11.
38 Ibid., 137. Allhoff similarly contradicts his own “ticking bomb” claim when he all too briefly considers the issue of effectiveness: ‘… there is no evidence that anyone can resist torture-laden interrogations indefinitely’ (my emphasis) – op. cit., 130.
Sixty-seven days? So what has this report to do with any ticking bomb, for heaven’s sake?

3.2 Proficiency
Closely related to the earlier point about the scenario’s being a fantasy is the fact that Dershowitz et al also blithely assume proficiency on the part of the ‘you’ who answers the question, “What would you do?”; and again, even many opponents of torture warrants overlook the point. But as Ronald Crelinsten points out in *The Politics of Pain*, what ought surely to be perfectly obvious is that torturing requires training and that that is not something the armchair philosopher or lawyer is likely to have undertaken. And that is another reason why the “ticking bomb” scenario is not simply the fantasy that it is, but so blatantly misleading a fantasy that I cannot help but wonder at its ubiquity in the literature and at the apparent disingenuousness of writers who, like Dershowitz, make use of it in their public policy proposals. Even if ‘you’ were there when the person whom you knew to know where the bomb was, ‘you’ would not know what to do. So I have say that if ‘you’ were Dershowitz, you might have been expected to acquaint yourself with such basic factual considerations; and that Crelinsten and Schmid’s collection, for instance, is conspicuous by its absence from the pages of ‘Should the ticking bomb terrorist be tortured?’

3.3. Knowledge
Proponents of interrogational torture also assume knowledge which is, at best, extremely highly unlikely. Here again is Dershowitz: “… it is surely better to inflict nonlethal pain on one guilty terrorist who is illegally withholding information needed to prevent an act of terrorism than to permit a large number of innocent victims to die’. The ‘terrorist’, note, is already ‘guilty’. Now of course it is possible that the person concerned has in fact admitted planting the bomb or whatever; or at least that we do know in some other way that ‘[T]he evidence in support of the contention that he has the relevant information would satisfy the requirements of evidence for convicting him of an offence.’ But as we are dealing with reality and not a thought-experiment, we have to take into account just how likely it is that ‘we’ in fact have such knowledge. Jonathan Allen puts the point 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.

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40 Dershowitz, op. cit., 144.
41 Twining and Twining, op. cit., 346. If the situation really is one where, to quote Quinton, op. cit., 758, ‘there was no doubt of the bomb-planter’s responsibility for, or capacity to produce’ the imminent explosion, then how likely is it that, while we know that, we do not know where the bomb is? See sections 3.4, 3.5.
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.42

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’.43 Even Levinson, who reluctantly semi-endorse Dershowitz’s proposal — since ‘[W]e are staring into an abyss, and no one can escape the necessity of a response’44 — 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’.45 Nor, as we have already seen, does Dershowitz actually cite any firm counter-evidence. What he offers is the claim that in Israel ‘[T]here 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.’46 Yet again, one wonders how Dershowitz can allow himself to make his proposal on what can at best be hearsay, especially as a few pages later (see quotation referenced in fn. 56) he quite rightly qualifies even this claim. The point to be taken from this is that, as Roger Trigg points out, ‘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.’47 And if the case is really

42 Allen, op. cit., 9. Cf. Twining and Twining, who say that, for Bentham, the conditions that would have to be satisfied for torture to be justified in a particular case are these: ‘(1) 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. (2) There are reasonable grounds for believing that he is likely to tell the truth if severe torture is threatened, and, if necessary, applied to him. (3) There are reasonable grounds for believing that no other means would have the effect of compelling him to tell the truth. (4) There are reasonable grounds for believing that if the information is obtained quickly, there is a good chance of defusing the bomb before it goes off. (5) There are reasonable grounds for believing that the likely damage to be caused by the bomb will include death of many citizens, the maiming of others, including the infliction of much more severe pain on others with much more lasting effect than will be the effect of the infliction of torture on the person who has been captured. (6) There are reasonable grounds for believing that the torturing will not have consequences (e.g. retaliation by X’s friends) which would be worse than the damage likely to result from the bomb going off.’ — op. cit., 346-7.

43 Ibid.

44 Levinson, ‘The debate on torture’, op. cit., 90.


46 ‘Should the ticking bomb terrorist be tortured?’, op. cit., 140. Consider Alisa Solomon, ‘The case against torture’, Village Voice November 28 – December 4, 2001, 2: ‘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.’ Available at http://www.villagevoice.com/news/0148,lsoolomon,30292,1.html

47 Roger Trigg, Morality Matters (Oxford: Blackwell, 2005), 64.
intended to be limited to one where we are certain, then how we may achieve such certainty is something that needs to be established by the proponent of the interrogational torture of the perpetrator or of the person known to have the information — not of the “suspect”. Neither Dershowitz nor, so far as I know, anyone else has done so.

3.4. Time
I have already raised the issue of time in respect of effectiveness, questioning the relation of such real examples as Dershowitz gives to the “ticking bomb” scenario of the ubiquitous thought-experiment. But there is more to be said about the “realism” of the reality.

First, there is the matter of how long “we” might have before the bomb goes off; and that is likely to be rather short. After all, and unsurprisingly, bombers leave as little time as possible between planting the bomb and its going off, precisely so avoid discovery, so that the ‘chances of being able to pick up a terrorist who knows about the bomb, in the time between its being planted and its going off, are minuscule’. Second, and even allowing discounting that obvious constraint, ‘most dedicated tough guys will be able to hold out for a couple of hours no matter what you do to them (bear in mind that if they know about the bomb, they’ll know how long they have got to hold out, which gives them an important psychological advantage)’. The already “guilty terrorists” Dershowitz has in mind are, after all, likely to be rather more determined than you or I. So what if the person under torture were being recalcitrant; courageous, even -- and the clock kept on ticking? When would ‘you’ decide that you needed to try something else, such as torturing the suspect’s children (see below, 4.2.1)? On what empirical evidence is Dershowitz’s confidence based that the “success rate” that might be anticipated is sufficiently high to justify what he himself regards as justified only in the very last resort?

On the other hand, if there really is good reason to suppose that there is a bomb about to go off 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 the rapid success necessary to prevent the catastrophe, then, as Levinson again 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’. Again, it is curious that Dershowitz does not address this point in his book. If, furthermore, the real crisis really were relevantly similar to the scenario of the thought experiment, 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 ) [If] 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)’. One has to ask if it is it also Dershowitz’s lack of realism about time in real cases that allows him not to consider empirical issues about the efficacy of

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50 He may of course have addressed it elsewhere; but if so, I have failed to find it.
51 Allen, op. cit., 10.
other methods of interrogation?\textsuperscript{52}

The more closely one tries actually to specify the conditions under which Dershowitz’s “modest proposal” is intended to apply, the more the reality obtrudes against the fantasy of the thought experiment. Unsurprisingly, perhaps, it is a serving American soldier who makes the central point of which Dershowitz and others appear so oddly unaware: ‘[T]he 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).’\textsuperscript{53}

3.5. Necessity

The whole point of the ticking bomb scenario is to engender a sense of necessity: torturing “the terrorist” (or, more likely, “terrorists”) is needed to prevent the death of thousands of innocent people. But what sort of necessity is this? Even at the risk of repeating earlier points, I think it worth focussing on this. How do we know that the torture is necessary, that the disaster is imminent -- or rather, as imminent as my earlier qualifications allow? Those who countenance torture in extremis are somewhat vague about this. Walzer, for example, whom Dershowitz quotes,\textsuperscript{54} writes of authorising ‘the torture of a captured rebel leader who knows or probably knows the location of a number of bombs...’\textsuperscript{55}(my emphasis). Dershowitz goes on to quote Bentham: ‘[S]uppose 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....’\textsuperscript{56} The point is, of course, that the situations Dershowitz describes as warranting torture warrants are very likely indeed to be underdetermined in respect of our knowing whether or not the person to be tortured actually does know what we propose 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: Quinton, for example, invites us to ‘[C]onsider a man caught planting a bomb in a large hospital, which no one dare touch for fear of setting it off.’\textsuperscript{57} But the knowledge which is a necessary condition of the

\textsuperscript{52} A useful summary is to be found in Parry and White, op. cit., 754-7.

\textsuperscript{53} Major (USAF) William D. Casebeer, ‘ Torture interrogation of terrorists: a theory of exceptions (with notes, cautions, and warnings)’, available at http://atlas.usaf.af.mil/jscope/JSCOPE03/Casebeer03.html Or as Henry Shue puts it, more cautiously, ‘one cannot easily draw conclusions for ordinary cases from extraordinary ones, and as situations described become more likely, the conclusion that torture is permissible becomes more debatable’. – Shue, Torture’, op. cit., 141-2. Unfortunately, his own position does not take sufficient account of just that sort of point, ‘since it offers the retrospective guarantee of success to justify torture (although only in such a case), yet includes the fanatic, whose willingness to die rather than submit would act to undermine that very guarantee of success. This inconsistency may stem from Shue’s only half-hearted adoption of the hard case.’ – Tindale, op. cit., 367. I suspect he confusion arises from Shue’s being over-impressed by that apparent case.

\textsuperscript{54} Dershowitz, Why Terrorism Works, op. cit., 140.

\textsuperscript{55} Walzer, ‘Political action: the problem of dirty hands’, op. cit., 167.

\textsuperscript{56} Dershowitz, op. cit., 142-3, quoting Bentham, as quoted by Twining and Twining, op. cit., 347: compare their own specification of the first of the conditions Bentham has in mind, fn. 40.

\textsuperscript{57} Quinton, op. cit., 758, fn. 5.
necessity of torture precludes the relevance of the example: how likely is it that ‘no one’ — not even the bomb disposal unit — dare touch the bomb? And if it really were the case that only this man can defuse the bomb, then it is not for information that he would be tortured, but rather to force him to defuse the bomb; and that is a different matter, raising obvious issues of even greater implausibility.

There are two aspects of the case where the necessity of torture in a particular instance 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, implies two things. First, there cannot but be some risk of torturing the wrong person, or of torturing a person when torture might not have been necessary after all. Second, we cannot be sure that the torture will work: ‘success is being assumed and not demonstrated’, since, as again Tindale points out, “[V]iewed 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.” The “necessity” which is what gives the thought experiment its force is precisely something that cannot be present in the real case. In the 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 judgment, 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.” 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, this problem is one that Dershowitz certainly recognises: “[W]ether this claim is true, false, or somewhere in between is difficult to assess.” But what he does not recognise is the impact that that admission should have on his argument.

He argues 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: ‘no technique of crime prevention always works’. And certainly, he is right to point out that ‘[I]n the United States we execute convicted murderers, despite compelling evidence of the unfairness and ineffectiveness of capital punishment.” Or again, ‘imprisoning a witness who refuses to testify after being given immunity is

58 Tindale, op. cit., 365.
59 Anat Biletzki, ‘The judicial rhetoric of morality: Israel’s High Court of Justice on the legality of torture’, unpublished paper, January 2001, 12: available from the Center for Advanced Study, Princeton University. {website?}. See also Lippman, op. cit., 31-2, for an account of what the UK Parker Committee recommended regarding ‘legal regulation and institutionalization of such techniques’ (of ‘torture and harsh treatment’) in response to what British troops were doing in Northern Ireland the late 1960s and early ’70s.
60 Dershowitz, op. cit., 150. Again, it is of course possible that he has since offered better evidence elsewhere.
61 Ibid., 137.
62 Ibid., 155.
designed to be punitive – that is painful’, and success cannot be assured. Nor need we go as far as Dershowitz: we know that in the UK the success rate of prison sentences in preventing youths’ re-offending is only round about 25%, and that all too often innocent people are jailed; yet that does not lead us to argue that these practices should be abandoned. (At least, it does not lead the vast majority to do so.) But what Dershowitz does not acknowledge is the impact that this realistic admission should have on the basis of his argument, the “ticking bomb” scenario. Such force as that thought-experiment has derives from the apparent but impossible necessity in advance of doing whatever is needed to prevent the tragedy. And that, again, is quite different from the uncertainty of the necessity of torture in the real case.

3.6. Fantasy: a 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. Jean Arrigo brings to the unreality underlying so much of the debate, and Dershowitz’s case in particular, a much-needed empirical realism: 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.”

The answer to the “tragic scenario” is that we need to do what we can to ensure that we never get anywhere near it. Deshowitz’s proposal, in addition to all its other demerits, stands in the way of our succeeding in doing exactly that. His short cut would help deter us from the hard task of eliminating the causes of the putative incident where he urges ‘us’ to resort to legal torture. Despite his claim to the “realist” high ground, Dershowitz’s argument is based on fantasy: for ‘[I]n reality, there is no such thing as a clear case of the ticking bomb’. While, as Shue and others argue, hard cases make bad law, fantasy

63 Ibid., 147.
64 Arrigo, op. cit., 9 (quoting Alistair Horne, A Savage War of Peace (1977, no publisher given), 204-5).
65 Ruchama Marton, cited by Solomon, op. cit., 2. Compare Sanford Levinson’s admission (despite his own reluctant semi-endorsement of Dershowitz’s proposal, which seems all the odder in its light) that ‘there is no known example of this [a “tick time bomb” hypothetical] actually occurring, in the sense of having someone in custody who knew of a bomb likely to go off within the hour.’ – ‘The torture warrant’, op. cit., 88, fn.
makes something even worse.

It may be the case that ‘[W]e 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 Paskins is right in his first claim, his being right about 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’. Perhaps it is finally Leon Sheleff’s endorsement avant la lettre of Dershowitz which best exposes the illogicality of its basis: ‘to deny outright the possibility of any exception [to torture] is to block the potential wisdom of the law in an unforeseeable situation’ — needless to say, the emphasis is mine.

4. Institutionalisation

The most important thing that the fantasy of the “ticking bomb” scenario shows is the peculiar artificiality of asking what ‘you’ would do in the relevant situation, as if ‘you’ were a fully trained torturer. For it reminds us is that, for Dershowitz’s proposal to work, torture would have to be institutionalised. Of course, he himself is entirely clear about institutionalisation as an issue: indeed, his proposal is precisely that institutionalisation would be preferable to the current state of affairs, where torture goes on but is unregulated. What he is less clear about is the form that such institutionalisation would be likely to take, leaving unexplored a whole range of likelihoods and/or possibilities — despite his own objection to what he takes to be Bentham’s act-utilitarian approach, arguing that what is required is rule-utilitarianism:

The reason this kind of single-case utilitarian justification is simple-minded is that it has no inherent limiting principle. If non-lethal torture of one person is justified to prevent the killing of many important people, then what if it were necessary to use lethal torture — or at least torture that posed a substantial risk of death? What if it were necessary to torture the suspect’s mother or children to get him to divulge the necessary information? What if it took threatening to kill his family, his friends, his entire village? Under a simple-minded quantitative case utilitarianism, anything goes as long as the number of people tortured or killed does not exceed the number that would be saved.

I shall pass over, again, the nonsense of ‘lethal torture’ in order to obtain information; and also ignore Dershowitz’s mistaken characterisation of act-utilitarianism as concerned solely with numbers. I shall also postpone until later the part issue of whether or not his “modest proposal” can be limited to ‘the suspect’. Rather, I shall focus on his argument that institutionalising interrogational torture would lead to a better moral state of affairs than the current hypocrisy of pretending that it does not happen, and especially that it

67 Sheleff, op. cit., 309.
68 Dershowitz, op. cit., 146.
would lead to a diminution of torture, as it would consist precisely in imposing ‘some limits on the use of torture or other barbaric tactics that might be of some use in preventing terrorism’, since on Bentham’s ‘simple-minded’ view ‘we risk hurtling down a slippery slope into the abyss of amorality and ultimately tyranny.’

4.1 Dershowitz’s own case
Since his case is not particularly systematically developed in ‘Should the ticking bomb terrorist be tortured?’, I shall reconstruct Dershowitz’s case, as generously as I can. First, the present situation, where torture is illegal but both practised and condoned, is not only hypocritical but also one where far more torture is carried out than it would be under his proposal. The ‘goal’ of his ‘controversial proposal’ ‘was, and remains, to reduce the use of torture to the smallest amount and degree possible, while creating public accountability for its rare use’, something he sees as ‘not as a compromise with civil liberties but rather as an effort to maximize civil liberties in the face of a realistic likelihood that torture would, in fact, take place below the radar screen of accountability’.

But ‘[I]t does not necessarily follow from this understandable fear of the slippery slope that we can never consider the use of nonlethal infliction of pain, if its use were to be limited by acceptable principles of morality’ — although it is nonetheless the case that ‘[I]f we create a legal structure for limiting and controlling torture, we compromise our principled opposition to torture in all circumstances and create a potentially dangerous and expandable situation.’ While ‘[T]he strongest argument against any resort to torture’, is ‘that if torture, which has been deemed illegitimate by the civilized world for more than a century, were now to be legitimized — even for limited use in one extraordinary type of situation — such legitimation would constitute an important symbolic setback in the worldwide campaign against human rights abuses’, this is offset by the advantages of legalisation. So how serious are the dangers?

Dershowitz makes four positive claims for his proposal.

First, it would lead to fewer, not more, instances of torture: ‘I believe, though I certainly cannot prove, that a formal requirement of a judicial warrant as a prerequisite to nonlethal torture would decrease the amount of physical violence directed against suspects.’ For while one might argue that ‘if the courts authorize it [torture], it becomes a precedent’, ‘[T]olerating an off-the-book system of secret torture can also establish a dangerous precedent.’ He cites, while admitting that it ‘is always difficult to extrapolate from history’, Langbein’s study of ‘legalized torture during the sixteenth and seventeenth centuries, Torture and the Law of Proof, in which Langbein claims that ‘when torture warrants were abolished, “the English experiment with torture left no traces”’, since ‘it was under centralized control, [and so] it was easier to abolish than in France, where it persisted for many years’. There are two difficulties here. How well-founded is

69 Ibid.
70 Ibid., 141.
71 Ibid., 147.
72 Ibid., 153.
73 Ibid., 145.
74 Ibid., 158.
75 Ibid., 162.
76 Ibid., 158. The quotation from Langbein’s Torture and the Law of Proof (Chicago: Chicago
Dershowitz’s confidence that ‘[R]equiring that decision [to torture] to be approved by a judicial officer will result in fewer instances of torture even if the judge rarely turns down a request’?77 (an admirably candid admission)? I certainly cannot share his confidence; and as we shall see when considering the likely impact of legalisation in more detail below, the fact that Dershowitz does no more than to state his confidence is hardly reassuring. Nor, and this is the second difficulty, is the structure of his historical argument. For he appears to be suggesting that since legalising torture hastened its abolition, we should legalise it – even though it has been abolished … thanks to legalisation. The circularity is too obvious to need detailing. However, it might go some way towards explaining how otherwise paradoxical ‘personal hope [is] that no torture warrant would ever be issued, because the criteria for obtaining one would be so limited and rigorous’. 78

Second, ‘most judges would require compelling evidence’ and ‘law enforcement officials would be reluctant to seek a warrant unless they had compelling evidence that the suspect had information needed to prevent an imminent terrorist attack’; and ‘the rights of the suspect would be better protected with a warrant requirement’.79 Thus the danger Dershowitz acknowledges, that, since the ‘suspected terrorist we may choose to torture is a “they” – an enemy with whom we do not identify … [there is a] risk of making the wrong decision, or of overdoing the torture … ’80 would be diminished. But again, what evidence is there that Dershowitz’s optimism is realistic? Judging by the efforts both US and UK governments continue to make to ensure judicial compliance, it seems to me rather more likely that the opposite would happen — just because the fact that judges would have to be persuaded that the alleged danger was imminent would (a) lead the police or whoever to do their very best to persuade them and (b) lead the judges concerned to seek to avoid the risk of “getting it wrong”, namely refusing the warrant. It would take a brave judge to risk the imminent disaster by not granting a warrant to do what, after all, it had been agreed was justifiable. Of course, my prognostications are not based on any firmer evidence than Dershowitz’s contrary ones, and it is to be hoped that the necessary evidence to settle the issue will remain unavailable. Still, we should remember that such evidence as there is around the world of professionals’ compliance with torture suggests that Dershowitz’s optimism must be predicated on a conviction that the US judiciary (and by extension the judiciaries of all the western democracies) is and will remain qualitatively different from the judiciary in those countries where torture is or has recently been routine. How long would torture remain, in the minds of the judiciary, the secret services, the government or indeed people at large the last resort that Dershowitz intends it to be? The Twinings’ scepticism seems to me more realistic than Dershowitz’s “realism”:

Even an out-and-out utilitarian can support an absolute prohibition against institutionalised torture on the ground that no government in the world can be trusted not

77 Ibid.
79 Ibid., 159.
80 Ibid., 155.
to abuse the power and to satisfy in practice the conditions he [Bentham] would impose.\textsuperscript{81} Third, and closely related to his second claim, is Dershowitz’s insistence that ‘[N]o legal system operating under the rule of law should ever tolerate an “off-the-books” approach to necessity’, since ‘[T]he road to tyranny has always been paved with claims of necessity made by those responsible for the security of a nation.’\textsuperscript{82} Here I entirely concur. But I am not so sanguine that the judiciary would just obviously be a better safeguard against such claims than the politicians, not least because, as I suggested above, the pressure on the judiciary under Dershowitz’s proposal would be so much greater than they are now. Legalizing interrogational torture, even in the narrowest of circumstances, would radically alter the moral climate within which (among other things) the judiciary would be operating. As Langbein recounts and Dershowitz himself acknowledges, it was precisely the judiciary who authorised torture in the past: so why should we expect its legalisation, and thus its judicial control, not to lead to the very expansion of torture that he opposes, rather than to its diminution? Far from serving as a defence, at least in principle, against ‘claims of necessity made by those responsible for the security of a nation’ the judiciary would be drawn into precisely that responsibility. Again, Dershowitz’s consideration of the issue of institutionalisation is cursory in the extreme; and his confidence that it is just plain obvious that it is worse that ‘the decision to torture a ticking bomb terrorist … be relegated to a local policeman, FBI agent, or CIA operative, rather than to a judge, the attorney general, or the president’\textsuperscript{83} at best far too quick, at worst naïve.

Fourth, Dershowitz is concerned, as a general principle, to ensure ‘open accountability and visibility in a democracy’, since, citing Watergate and the Iran-Contra scandals, ‘the lesson of history [is] that off-the-book actions can produce terrible consequences’.\textsuperscript{84} Not surprisingly, I agree with him; when government resorts to secrecy and to lying, hypocrisy is often the least we have to worry about, whether in the short or the longer term. But that is not of course to show that the best way to put an end to the pretence is to legalise interrogational torture, since the institutional damage done by the deceit concerned can be prevented either by doing that or by ceasing the hypocritical practice. And as Dershowitz himself makes clear, which is preferable depends on the independent grounds that there are for supposing it morally justifiable or not. But he also undermines exactly that point a page earlier, when he insists that ‘[T]he real issue (therefore) is not whether some torture would or would not be used in the ticking bomb case — it would. The question is whether it would be done openly, pursuant to a previously established legal procedure, or whether it would be done secretly, in violation of existing law.’\textsuperscript{85} To say that a practice cannot be eradicated does not constitute an argument, or even the slightest evidence, that it is morally justifiable. The best it could do would be to suggest (if at least probably correct) that the issue of legality needs to be considered in terms of whether legalisation would or would not lead to less institutional harm than that caused

\textsuperscript{81} Twining and Twining, op. cit., 348-9; for their utilitarian arguments against legalisation see ibid., 352-3. Cf. W. Twining, op. cit., 147., where he emphasises the distinction ‘between an isolated act and an institutionalised practice of torturing’.

\textsuperscript{82} Ibid., 153.

\textsuperscript{83} Ibid., 154.

\textsuperscript{84} Ibid., 152.

\textsuperscript{85} Ibid., 151.
by prohibition; and that returns us to the substantive argument. It is important to be clear about this, so let us briefly consider an analogous example. The Dutch and the Swedish governments both agree that, while prostitution is morally at least questionable (for all sorts of reasons, and whether rightly or wrongly), it cannot, practically, be outlawed by a simple legal prohibition on the sale of sexual services. But while the Dutch have therefore legalised both the sale and the purchase of sexual services, in Sweden their sale is legal but their purchase is not. That is to say, the Swedish government is trying to stop demand rather than supply, because it thinks that it is the demand that is morally problematic. Now, Dershowitz is convinced that the analogous legal ban on torture — what is in fact the case — cannot prevent it being carried out, illegal though it is. However, even supposing his pessimistic prognosis is right (and I have no doubt it is, at least as things currently stand in both the USA and the UK) that does not imply that torture is morally justifiable. It is as if the Dutch and Swedish governments’ conviction that prostitution cannot be eradicated by a legal ban were thought to imply that prostitution was morally justifiable — but of course whether it is or not does not depend on the likely efficacy of legal prohibition.

Dershowitz’s own evaluation of the likely impact of institutionalising interrogational torture appears rather thin. That is because it is. But it becomes still thinner when we consider issues he himself ignores.

4.2 Further slippery slope considerations
For an extremely serious policy proposal, and one whose seriousness he does not hesitate himself to emphasise, Dershowitz’s treatment of issues of institutionalisation is strangely silent about a considerable range of relevant considerations. I shall group these under four heads: (1) the range and scope of the acknowledged danger of a slippery slope regarding the suspect; (2) the legislative impact of legalisation; (3) issues of professionalisation; and (4) the impact on those who might in fact carry out the acts of terror he is seeking to prevent.

4.2.1 The range and scope of the acknowledged danger of a slippery slope regarding the suspect
If interrogational torture were successful in preventing “the ticking bomb” from exploding, why not extend it to other, albeit less dramatic or extreme, cases? After all, if utilitarian considerations justify torture in the former case, since, say, hundreds of thousands of innocent people would be saved, why not employ torture to save, say, a hundred; or even the single kidnap victim? In what way would be the institutional impact of doing so differ from restricting torture to the extreme case? But as Arrigo asks,

[W]hat 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.

This is no less obvious than uncontroversially relevant; and yet Dershowitz is silent about

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86 My thanks to Vanessa Munro for serendipitously suggesting the example to me.
87 Arrigo, op. cit., 10.
it. If he thinks the point can be countered, why does he not do so? He is not silent, however, on the related matter of extending the range of those whom it is to be permitted to torture; not silent, but contradictory. Having raised the issue — ‘What if it were necessary to torture the suspect’s mother or children to get him to divulge the necessary information? What if it took threatening to kill his family, his friends, his entire village?’\(^{88}\) — and insisted in a footnote that ‘this is not just in the realm of the hypothetical’\(^{89}\) — he simply assumes that ‘acceptable principles of morality’\(^{90}\) would rule it out; and that despite, as we have already seen, his telling us that ‘Jordan apparently broke the most notorious terrorist of the 1980s, Abu Nidal, by threatening his mother’.\(^{91}\) On the utilitarian view that Dershowitz espouses, why not? As a recent *Economist* leader points out,

If torture is to be allowed, then how much cruelty would be permitted? Would threats against the prisoner’s family be all right? His neighbours? His country? Even the extreme circumstances of a “ticking-bomb” threat offers no clear guidance to how far you might go.\(^{92}\)

Dershowitz offers no answer other than appealing to unspecified and unargued principles. That is not enough, and for a utilitarian in particular such insouciance is remarkable.

4.2.2 The legislative impact of legalisation

Dershowitz’s fundamental objection to keeping interrogational torture illegal is that ‘we should not want our soldiers or our president to take any action that we deem wrong or illegal’, because ‘[N]o legal system operating under the rule of law should ever tolerate an “off-the-books” approach to necessity’: that is a ‘road to tyranny’.\(^{93}\) Opponents such as Allen and Shue, however disagree about illegal actions. But is that not hypocritical, as Dershowitz insists? Here is Allen:

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

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88 See fn. 65.
89 Dershowitz, op. cit., 250, fn. 19.
90 Ibid., 147.
91 See fn. 35. This is not an accidental oversight. In ‘The US is now, [sic] currently engaged in torturing people’, op. cit., he repeats the example, saying only that ‘we would not permit that in a democratic country under any circumstances, the torturing of innocent relatives’. As Biletzki comments, ‘the “slippery slope” claim … when abetted by a utilitarian argument, leads to torture of not only the terrorist, but perhaps his wife, or his daughter, if so many lives are to be saved …’ - op. cit., 9.
93 Dershowitz, op. cit., 152, 153.
granted. But the general prohibition against torture would be upheld.\textsuperscript{94}

If, as Allen agrees with Dershowitz, there really are some circumstances where torture is justifiable, does not the ‘general prohibition’ survive only thanks to the hypocrisy that Dershowitz rightly condemns? No. It might be the case that the (continuing) illegality of something morally justifiable is itself justifiable on grounds of the likely consequences of its legalization: consider voluntary euthanasia, for example. As things currently stand, it might perhaps be plausibly thought, it is better that the practice, while morally right — even laudable — remain illegal, for fear of embarking on a slippery slope, and that we 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. That seems to be Antony Flew’s thinking: ‘[I]f 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.’\textsuperscript{95} Shue’s position is similar: ‘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 mortally in order to defend himself or herself legally. The torturer should be in roughly the same position as someone who commits civil disobedience.’\textsuperscript{96} There is no hypocrisy here: for Allen, Flew and Shue all think that while torture is in this particular case morally justified its remaining illegal is also morally justified — in fact demanded — and on similarly consequentialist grounds. The disagreement between them and Dershowitz is not about the need for hypocrisy at all, but about the likely consequences of legalising interrogational torture.\textsuperscript{97}

Let us think about what might reasonably be expected to occur. The obvious issue is the likelihood or otherwise of the spread of torture. Would torture, whether illegal or legal, be likely to spread from the “ticking bomb” case to others, once it had been legalised in one particular instance? Would the legal constraints, however tightly drawn, be gradually relaxed to include some of the latter? Would the judiciary always stick to the letter of the rules?

The \textit{Economist} thinks not:

How will the counterterrorist program uphold a monopoly on the use of torture? Investigators of many other crimes — narcotics trafficking, serial murder, sabotage of information systems, espionage, financial scams — will consider their own pursuits compelling … . Both U.S. and British judicries have struggled for


\textsuperscript{95} Antony Flew, ‘Torture: could the end justify the means?’, \textit{Crucible} January 1974, 19-23, p. 23.

\textsuperscript{96} Shue, op. cit., 143. Cf.

\textsuperscript{97} That is why Levinson’s response to Shue that an appeal to the alleged necessity of hypocrisy is not a strong enough bulwark against the legalisation of interrogational torture is misplaced: ‘Sanford Levinson replies’, op. cit. He is right, however, to point out that Shue’s retrospective approach overlooks that likelihood that ‘potential torturers [would] realize that the actual prospects of punishment are very low indeed’, ibid., 93.
If the survival of the thousands of people whose lives are at stake if the bomb goes off justifies torture, then why not the location of the terrorists’ leaders, the survival of all those whose lives are threatened by drugs, or by all sorts of other things? After all, the seriousness of “the war on terrorism” is matched only by that of “the war on drugs”, and ought perhaps to be matched by “wars” on various others who make money at the cost of others’ lives.99 Dershowitz would doubtless claim that the widespread use of torture by the Israeli security services did not cease during the twelve years between the Landau Commission’s legitimating torture100 -- when ‘the use of torture to prevent terrorism’ in Israel “was very real and recurring”101 -- because it remained unregulated by judicial warrants of authorisation. But even so, might one not have expected cases of non-interrogational, non-“ticking bomb”, torture at least slightly to diminish when interrogational torture ceased to be regarded as illegal? Well, perhaps the security situation in Israel was such as to outweigh such an expectation; but then Dershowitz’s case would depend on dissimilarities between that and the current situation of the USA, and, crucially, on the assumption that his “modest proposal” would not exacerbate it (see 4.2.4, below). As it is, Allen is indeed right to remind us that the ‘contemporary Israeli experience with torture is (also) instructive’, and in particular that, as Biletzki argues, ‘far from reducing torture, these official reports and court decisions may have had the effect of legitimizing it’.102

Furthermore, the need to resolve the ‘administrative issues’ that would arise would also be more likely to serve to increase torture rather than diminish it. As Parry and White point out (in the American context) ‘Congress would have to craft legislative standards for when and how to torture … delegate that task to the executive, or entrust the torture decision to executive branch discretion. If the executive branch drafted regulations, the courts’ would have to engage in reviews, with the result that ‘all three branches (of government) would become complicit’. Furthermore, for fear of letting the one “ticking bomb terrorist” slip through the net, ‘the resulting standards would inevitably be over-inclusive, resulting in unnecessary torture’.103

98 Ibid., 10-11.
99 See fn.8.
100 For details see Biletzki, op. cit., 8. The Israeli Supreme Court’s 1999 ‘Judgement on the interrogation methods applied by the GSS clearly and unambiguously admits this. It states, for example, that ‘the GSS also investigates those suspected of hostile terrorist activities. The purpose of these interrogations is, among others, to gather information regarding terrorists and their organizing methods for the purpose of thwarting and preventing them from carrying out these terrorist attacks.’ – 3, my emphasis. The judgement is available at http://www.derechos.org/human-rights/mena/doc/torture.html. What appear to Biletzki and others to be its ambiguities regarding ‘Physical Means and the “Necessity” Defence’ (17 ff.), for all that it was popularly taken to have stopped torture tout court, are explored in detail in Biletzki, op. cit., among other things an excellent critique of much of Dershowitz’s case.
101 Dershowitz, ‘Should the ticking bomb terrorist be tortured?’, op. cit., 140.
102 Allen, op. cit., 11. See also Parry and White, op. cit., 757-60.
103 Parry and White, op. cit., 762: see 763 for a summary of further undesirable practical
In short, a likely outcome of legalising interrogationontal torture is the normalization of torture: ‘having been regularized, the practice will become regular’, as Richard Posner puts it (despite his own insistence that if ‘the stakes are high enough, torture is permissible’ and ‘[N]o one who doubts that this is the case should be in a position of responsibility’104). State functionaries who as things currently stand can refuse to torture because it is illegal will no longer have that defence. Furthermore, judges will both be pressured into issuing torture warrants for fear of failing to have prevented an allegedly preventable catastrophe and become increasingly reliant ‘on the showings made by the officials who seek the warrants’105 — and one has only to recall how the secret services’ “information” was “embellished” in the run-up to the Iraq war to appreciate the seriousness of that danger.

The line having been drawn beyond, rather than before, interrogationontal torture, torturers will also be quicker to go beyond it. As Kreimer observes, ‘[I]f torture is permitted with a warrant, it will become increasingly difficult to refrain from torture without one.’106 Nor is this simply a matter of my, or Kreimer’s, pessimism vs. Dershowitz’s optimism. Such empirical evidence as there is from Israel for instance, suggests that the latter is unjustified: as the Economist puts it, ‘[T]o legalise is to encourage. Israel tried to limit use of physical coercion to extreme cases, but its security forces have ended up using such methods far more widely than was initially foreseen’.107

During this past decade [circa 1990-2000], the High Court has heard hundreds of appeals by Palestinian detainees complaining of physical and psychological methods of “pressure”. The court has often issued orders nisi and interim injunctions against these measures. Still, when the State has appealed against such injunctions, the court has almost invariably accepted the ticking time-bomb argument, citing security as its overriding concern. In almost all cases in which the court was petitioned to intervene and put a stop to inhuman treatment, and in which the state, i.e., the security forces, demanded continuance, the court shied away from taking a firm stand for human rights, claiming either unjusticiability or permitting the atrocities to continue as “necessary”.108 Or consider the statement of a soldier in Zimbabwe when it was still Rhodesia: ‘[W]hen you do it [torture], you are in that condition of “conscience-narrowing” and strangely obsessed to get information. So you inflict pain, maim and kill to get what you want.’109 If only because terroristic torture is — as Dershowitz himself insists — an effective weapon, so the legalisation of interrogational torture would be likely lead to the spread of torture from interrogation to prevention of the states of affairs that require interrogation. After all, it is surely better to prevent the “ticking bomb” scenario from occurring in the first place than to have to deal with it when it arises.

consequences Parry and White think likely.

105 Kreimer, ibid., 319.
106 Ibid., 322.
107 ‘Is torture ever justified?’, op. cit.. For details see the Israeli Supreme Court Judgement cited in fn. 88; and cf. Crelinsten, op. cit., 36-7.
109 Interview cited by Crelinsten, ibid., 51.
Allen, Shue and Flew oppose the legal institutionalisation of interrogational torture, although it is in certain cases morally justified, because of its likely consequences. I oppose it because I think its likely consequences show that it is not morally justified. One reason why my expectations about those consequences are so different from Dershowitz’s is that I disagree with him about what torture is. As Naomi Klein puts it, this ‘is torture’s true purpose: to terrorise — not only the people in Guantanamo’s cages and Syria’s isolation cells but also, and more importantly, the broader community that hears about these abuses. Torture is a machine designed to break the will to resist — the individual prisoner’s will and the collective will.’

4.2.3 Professionalisation

The ‘torturer is doing a job, he [or she] is “doing torture”’; and he [or she] is supposed to do it well, “mastering torture”. I have already argued that Dershowitz’s proposal requires the professionalisation of torture. That, some might think, is sufficiently problematic: what sort of society is it which regards the profession of torturer as a key public service? Still, as Dershowitz insists, our society in fact does just that, but pretends not to. One might reply, however, that actually enforced prohibition is a better response to hypocrisy. To evaluate these alternatives in terms of their consequences — which I have committed myself to doing — one has to be realistic about that professionalisation. So let us consider the issue in a little more detail.

Crelinsten’s paper graphically exposes ‘the routine of torture’ and emphasises its internal dynamic. It is uncontroversial that every profession develops such a dynamic: it seeks to expand its own scope, to protect its members and so on. In this case the deformations of professionalisation (outlined above) are even more than usually serious. For as he concludes, ‘the very process of routinization of torture involves a kind of continuous and dynamic distortion of facts and events which, in the end, amounts to the construction of a new reality’. The inculcation of obedience to authority; the creation of “enemies”; the need to achieve “results” to justify resources, leading to finding evermore such “enemies”; and the expansion of what counts as information — all these lead to a state of affairs (as witnessed in, for example, Turkey and Colombia) where “[T]his socially constructed reality — the routine of torture — replaces objective reality with one that is presumed to exist. In doing so, it also supplants conventional morality, substituting in its place the ideological dictates of the authority structure within which torture occurs.” Dershowitz’s (implied) confidence that legalising interrogational torture in western democracies would not lead to what widespread illegal, but legally tolerated, torture has led to elsewhere is disingenuous. As a Brazilian torturer is reported to have told a prisoner, ‘I’m a serious professional. After the revolution, I will be at your disposeal to torture whom you like.’

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111 Ibid., 36.
112 Ibid., 51-4.
And what about the training required for the profession of torturer? The proposal to legalise interroga
tional torture requires that “we” ask people to be trained, and ask others to train them, to act in ways which, as I have argued, “we” would not ourselves. Again, Crelinsten offers a summary account of what is required.\(^\text{115}\) On whom should trainee torturers practice? On whom should their trainers practice? How can “we” justify asking others to undergo the necessary abuse, humiliation, and blunting -- to say the least -- of moral sensibility? How can “we” ask others on our behalf to give “[S]pecial classes … where new torturers are shown what torture looks like, either in filmed demonstrations or even live demonstrations on actual prisoners”?\(^\text{116}\) Yet that is what Dershowitz’s “modest proposal” demands.

Nor are torturers the only professionals to require appropriate training. Perhaps doctors and researchers might be permitted a conscience clause on the basis of which they would not need to take part, whether indirectly or directly.\(^\text{117}\) Or should all the professional medical bodies which insist that their members not “assist” in torture (for all that this is all too often honoured only in the breach) withdraw that instruction from what would now be a legally permitted activity?\(^\text{118}\) And what would that do to the ethics of health care? Even if one is convinced, as Dershowitz by implication must be, that a doctor’s responsibility is not always to their patient but is at least in some circumstances to society as a whole (if not to the state), nonetheless an exception here might be thought likely to lead to exceptions elsewhere. Well, which exceptions; and where? Once again, the “modest proposal” is irresponsible in its simply ignoring the issue.\(^\text{119}\)

To sum up: what grounds does Dershowitz offer for supposing that the sort of impact that the institutionalisation of legal torture would have on our society would be the opposite of the sort of impact that the institutionalisation of illegal torture has had on all those societies where that has in fact been institutionalised? None.

\[4.2.4\] The impact on potential “bombers”

Finally, how are potential “terrorists” likely to react to Dershowitz’s “modest proposal”? Are there likely to be more or fewer “ticking bombs”? I do not think we can do more than offer a guess. But it seems to me at least as plausible to suppose that the “martyrdom to torture” of a member or members of a terrorist organisation would probably lead to more rather than to fewer volunteers. There appears to be no shortage of volunteers for so-


\(^{116}\) Ibid., 49. For a disturbingly graphic set of details of the training required, based on interviews with members of the Greek junta after its collapse, see Mika Haritos-Fatouros, ‘The official torturer’, ch. 8 of eds Crelinsten and Schmid, op. cit., 129-46.

\(^{117}\) See Arrigo, op. cit., 3-7.

\(^{118}\) For a defence of professional prohibition see Alfred Heijder and Herman van Geuns, Professional Code of Ethics (London: Amnesty International Publications, 1976); and for the difficulties that arise ‘in operationalizing professional codes of conduct’, see Matthew Lippman, op. cit., 46ff. For a detailed case study focussing on Israel (and which also has a good deal of material on the general issue of torture), see eds Neve Gordon and Ruchama Marton, Torture: Human Rights, Medical Ethics and the Case of Israel (London: Zed Books, 1995).

\(^{119}\) Again, I am not aware of Dershowitz or any who agree with him discussing the matter: I may be wrong.
called suicide bombing. More immediately, perhaps, what reason has Dershowitz to suppose that either the foreknowledge of likely torture or its actual instantiation would lead to the person concerned telling the truth about the location of the “ticking bomb” rather than deliberately seeking to buy time for the explosion to occur by lying about it? Even if torture worked in some cases — and I have already raised the issue of the balance between the likelihood of rapid confession and that of holding out till the “imminent” explosion\textsuperscript{120} — its legal institutionalisation is likely to have its own consequences. Renewed determination, perhaps in the context of greater rather than less sympathy for the cause that such institutionalisation would bring about, whether directly or indirectly, seems at least as likely as loss of morale on the part of the “terrorists”. So one cost of legally permitting torture to obtain information needed to avoid an imminent catastrophe might well be more such catastrophes.

I shall leave the last word on this to Seth Kreimer:

Professor Dershowitz asserts that ‘sometimes’ torture will be ineluctably necessary: the converse of this assertion is that ‘sometimes’ torture will wreak human havoc without any discernable, much less proportionate public benefit, and ‘sometimes’ the benefits sought could be achieved without torture. It is far from clear that an institutional structure that contemplates ‘torture warrants’ would minimize those latter ‘times’. Indeed, under current circumstances, such an institution is likely to encourage officials to yield to … the ‘mortal temptation of instantaneous efficacy’.\textsuperscript{121}

5 A Conclusion

Dershowitz’s assumption, and it is one shared by other proponents of his proposal, is that “[P]ain is a lesser and more remediable harm than death”.\textsuperscript{122} But is it? Many, and among them survivors of torture, disagree. I shall let Jean Améry speak for them:

Only in torture does the transformation of the person into flesh become complete. Frail in the face of violence, yelling out in pain, awaiting no help, capable of no resistance, the tortured person is only a body, and nothing else besides that.\textsuperscript{123}

Is death -- in war for instance -- obviously worse than that, as Derhowitz, among others, assumes?\textsuperscript{124} Améry famously wrote that the person who is tortured remains tortured; and who is Dershowitz to insist otherwise, and without reference to that claim, when he writes of ‘judicially monitored physical measures designed to cause excruciating pain without leaving any lasting damage”?\textsuperscript{125} Turning from tortured to torturer, consider what

\textsuperscript{120} If the “answer” is repeated or longer drawn-out torture, then, \textit{a fortiori}, we are not dealing with an imminent catastrophe but with torture as punishment.

\textsuperscript{121} Kreimer, op. cit., 319.

\textsuperscript{122} Dershowitz, op. cit., 144.


\textsuperscript{124} Eg Levin, op. cit., 13.

\textsuperscript{125} Dershowitz, op. cit., 159.
Elaine Scarry says:

Pain and interrogation inevitably occur together in part because the torturer and the prisoner each experience them as opposites. The very question that, within the political pretense, matters so much to the torturer that it occasions his grotesque brutality will matter so little to the prisoner experiencing the brutality that he will give the answer. For the torturers, the sheer and simple fact of human agency is made invisible, and the moral fact of inflicting that agony is made neutral by the feigned urgency and significance of the question. For the prisoner, the sheer, simple, overwhelming fact of his agony will make neutral and invisible the significance of any question as well as the significance of the world to which the question refers. … It is for this reason that the whole content of the prisoner’s answer is only sometimes important to the regime, the form of the answer, the fact of his answering, is always crucial.\(^{126}\)

I have already raised the obvious ‘slippery slope’ issue. Leaving that aside, however, is not inflicting torture — and remember the training it requires -- even if in order to avert a catastrophe not arguably worse than killing a person in the course of, say, “normal” warfare? For torture is the ‘deliberate infliction of pain in order to destroy the victim’s normative world and capacity to create shared realities…’;\(^{127}\) it is ‘the systematic and deliberate infliction of acute pain in any form by one person on another …’.\(^{128}\) Is it really just an aesthetic squeamishness that has misled people into supposing that it is no worse to do that than to engage in war?

The unexamined assumption that death is just obviously worse than torture underlies also Dershowitz’s use of the fact of the death penalty (in the USA) to bolster his argument. ‘What moral principle,’ he asks, ‘could justify the death penalty for past individual murders and at the same time condemn nonlethal torture to prevent future mass murders?’\(^{129}\) One obvious response, of course, is to remind him that not everyone thinks the death penalty is justifiable. But the underlying assumption that death is always the worst possible fate needs also to be questioned.

Finally, if Dershowitz’s argument succeeded at all, then it would succeed in establishing a stronger conclusion than his. If the grounds on which interrogational torture are exigency, the necessity to obtain the required information, then it is not permitted, but required. It becomes “our” -- or our delegated surrogates’ -- duty to torture. Dershowitz is not alone in failing to notice this; many of his opponents do too.\(^{130}\) If the only way of avoiding consequences that on moral grounds must be avoided is to torture, then such torture is not merely permitted, but required: the end is, by definition, something we have to try to attain; torture is, again by definition, the only means available and one which is

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\(^{128}\) Paskins, ‘What’s wrong with torture?’, op. cit., 138

\(^{129}\) Dershowitz, op. cit., 148; and cf. 155. Levinson, however, is clear that the analogy with the death penalty is misplaced: see ‘The debate on torture’, op. cit., 83-4. For comment, see Allen, op. cit., 4, 8.

\(^{130}\) E.g. Shue, ‘Torture’, op. cit., 141. Paskins, op. cit., 142, is an exception.

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morally justifiable; we must, therefore, adopt the means.

And that takes us back to the issue of agency. Whose duty exactly do Dershowitz and his supporters think it is to torture? Yours? Mine? Theirs? On what grounds are we justified in urging a moral duty upon others which we ourselves are not prepared either to improvise or to undergo the required “moral training” adequately to fulfil? I shall close with a professional torturer:

Finally, I went forward to look at his face and closely examined his condition. I realized that he had lost his mental balance. We removed him from the torture bench and instead hung him from special handcuffs installed on the wall.\textsuperscript{131}

How dare anyone seek to impose such a duty on others, whether legal theorists or those ‘audiences’ asked ‘for a show of hands’\textsuperscript{132} to indicate support for Dershowitz’s “modest proposal”? And how can serious thinkers be so disingenuous as are those who argue for it?

\textsuperscript{131} Pieter H. Kooijmans, ‘Torturers and their masters’, ch. 2 in eds Crelinsten and Schmid, op. cit., 13-18, p. 13, citing ‘a document that I received in October 1991. It contains an elaborate description of the torture methods practiced in a country which has become notorious for the widespread use of torture. I do not know whether the document is genuine or fake.’ – 14. Whether genuine or not, it corresponds all too closely to many genuine reports, and it is for that reason that I quote it.

\textsuperscript{132} Dershowitz, op. cit., 150.