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## TORTURE IN DREAMLAND: DISPOSING OF THE TICKING BOMB

Henry Shue †

“Nothing has changed. The body still trembles as it trembled before Rome was founded and after, in the twentieth century before and after Christ. Tortures are just what they were, only the earth has shrunk and whatever goes on sounds as if it’s just a room away.”<sup>1</sup>

Torture is wrong.<sup>2</sup> But sometimes we feel justified in doing what we know is wrong because the stakes are so very high. So the next question is: is torture so wrong that it is inexcusable no matter how high the stakes are? I will argue that all actual arrangements for torture are inexcusable, in spite of the fact that we can imagine hypothetical cases, like the notorious ticking-bomb cases in which it seems excusable.<sup>3</sup> Why are imaginary examples like ticking-bomb hypotheticals so badly misleading about how to plan for real cases? They mislead in two different ways that compound the error: idealization and abstraction.<sup>4</sup> Idealization is the addition of positive features to an example in order to make the example better than reality, which lacks those features. Abstraction is the deletion of negative features of reality from an example in order to make the example still better than reality. Idealization adds sparkle, abstraction removes dirt. Together they make the hypothetical superior to reality and thereby a disastrously misleading analogy from which to derive conclusions about reality.

The advocates of torture love a ticking bomb. But even the honest and thoughtful are mesmerized and bedeviled by the ticking-bomb hypo-

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<sup>1</sup> WISLAWA SZYMBORSKA, *Tortures*, in WISLAWA SZYMBORSKA, *VIEW WITH A GRAIN OF SAND: SELECTED POEMS* 151 (Stanislaw Baranczak & Clare Cavanagh trans., 1995).

<sup>2</sup> David Sussman provides a powerful explanation of why torture is wrong in his article in this volume. David Sussman, *Defining Torture*, 37 *CASE W. RES. J. INT’L L.* (2006).

<sup>3</sup> David Luban, *Torture, American-Style: This Debate Comes Down to Words vs. Deeds*, *WASH. POST*, Nov. 27, 2005, at B1 (illustrating what a serious distraction from reality ticking-bomb cases are in the current U.S. debates).

<sup>4</sup> My account of these two intellectual processes is roughly derived from Onora O’Neill, *Ethical Reasoning and Ideological Pluralism*, 98 *ETHICS* 705, 711-12 (1988).

thetical, with its suggestion of a catastrophic outcome avoidable only through torture. In a recent article Oren Gross writes:

The foregoing discussion still leaves us with the question of what constitutes a truly "catastrophic case." I will attempt to answer this question, which clearly is significant to the overall tenability of my project, on a different occasion. For now, it is sufficient to acknowledge that *some* catastrophic case is possible.<sup>5</sup>

Two paragraphs earlier Gross has quoted Carl Schmitt, who declared in Germany in 1922, "For a legal order to make sense, a normal situation must exist,"<sup>6</sup> then concluded: "General norms are limited in their scope of application to those circumstances in which the normal state of affairs prevails. Catastrophes undermine this factual basis."<sup>7</sup>

Now, one problem is the easy assumption that no catastrophes occur in normal times. This is one of many reasons it is not true that "it is sufficient to acknowledge that *some* catastrophic case is possible."<sup>8</sup> We need to know a great deal about a specific catastrophe, especially one that has not actually happened yet, in order to determine whether it is evidence that times are not normal to such a degree that legal order does not make sense. But there are deeper problems here than circular definitions of 'normal' and 'catastrophe.'

Gross is sometimes flattering about my 1978 article, *Torture*,<sup>9</sup> but what he says about possible catastrophes possibly avoided by torture suggests that my fundamental methodological point concerning how to think about torture has not come across.<sup>10</sup> This emboldens me to repeat myself, attempting to be more lucid about argumentative methodology. I will not rehearse all the perfections built into the artificial case.<sup>11</sup> But note a few of the respects in which the standard hypothetical departs from reality through idealization.

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<sup>5</sup> Oren Gross, *The Prohibition on Torture and the Limits of the Law*, in TORTURE: A COLLECTION 229, 239 (Sanford Levinson ed., 2004).

<sup>6</sup> *Id.* (quoting CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 13 (George Schwab trans., 1985).

<sup>7</sup> *Id.*

<sup>8</sup> Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481, 1487 n.26 (2004).

<sup>9</sup> Henry Shue, *Torture*, 7 PHIL. & PUB. AFF. 124 (1978).

<sup>10</sup> *See id.*

<sup>11</sup> *See id.* at 141-42.

## IDEALIZATION

*The right man.* The ticking bomb hypothetical is supposed to be the case in which the disaster that torture might prevent is so catastrophic that only the naive and the utopian would dream of choosing not to torture the person who is somehow known with certainty actually to be the person who planted the ticking bomb. He is not a suspected terrorist; it is built into the hypothetical that he *is a terrorist*—indeed, the terrorist—thus eliminating messy aspects of reality like uncertainty and probability. It is not that Central Intelligence Agency has kidnapped 100 people, some of whose names sound like the name of the bomber, which, luckily, they somehow happen to know. It is not that agents have arrested a Navajo who, they thought, “looked like an Arab.”

*Prompt and accurate disclosure.* The torture victim talks in a timely and accurate fashion—he quickly divulges the crucial information before the bomb has had time to explode. He does not have a heart attack and pass out; he does not vomit on himself and have a psychotic break; he does not tell a plausible diversionary lie that wastes the time available.

*Rare, isolated case.* “Most important, such incidents [of torture] do not continue to happen.”<sup>12</sup> Once the original ‘right man’ becomes too hysterical to provide coherent information, the torturers do not simply move on to, as it were, the second-best ‘right man.’ And the torturers do not, operating on the principle that practice makes perfect, circulate from, say, Guantanamo to Bagram to Abu Ghraib to Romania to Poland.

Implicit in *Torture* were two different methodological theses that I did not explicitly separate. The weaker thesis was: do not base general policy on exceptional cases—roughly, hard cases make bad law. The stronger thesis was: do not base any institutional preparations on imaginary cases. Having quoted my proposed dictum, “artificial cases make bad ethics,”<sup>13</sup> Gross argues as follows:

[I]ts problem lies in the fact that ticking bomb cases are not “artificial.” They are real, albeit rare. Ignoring them completely, by rhetorically relegating them to the level of “artificial,” is utopian or naive, at best. There is a difference between ignoring completely the truly catastrophic cases and focusing our attention elsewhere when designing general rules and policies.<sup>14</sup>

Because he earlier writes that we “must be mindful of the risk of creating bad law (and ethics) to answer to the particular needs of the hard

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<sup>12</sup> *Id.* at 142.

<sup>13</sup> Gross, *supra* note 5, at 234 (quoting Henry Shue, *Torture*, 7 PHIL. & PUB. AFF. 124 (1978)).

<sup>14</sup> *Id.* at 234.

case,”<sup>15</sup> I take it that Gross and I agree on the weaker thesis: do not base general policy on exceptional cases. But we disagree about the stronger thesis. We disagree about what else besides general policy, if anything, to base on the alleged exceptional case.

In part thanks to Gross' critique the multiple reasons why ticking-bomb hypotheticals seem “artificial” are clearer to me now. One reason is that they are idealized. They are not simply imaginary but unrealistic, like an imaginary alcoholic who drinks two beers only a night. There are former alcoholics, who do not drink at all, and active alcoholics. To think that there may be rare alcoholics who drink moderately is to fail to understand alcoholism. Similarly, history does not present us with a government that used torture selectively and judiciously.<sup>16</sup> Are we to believe that America is likely to be the first alcoholic in history who can take only one drink? The first state apparatus that will use torture judiciously and selectively? Are American politicians so superior to mere mortals?

Gross is confident that what he calls “catastrophic cases” are “real, albeit rare.”<sup>17</sup> If catastrophic cases had only the one feature of involving extremely high stakes in human life, yes, catastrophic cases would be “real, albeit rare”—perhaps not even so rare. But the high stakes are the only realistic feature in the ticking-bomb hypothetical. Its other features are all too good to be true, especially to be true in conjunction: the right man and the prompt right result and the judicious decision to refrain from all further torture until the next genuine catastrophe almost certainly looms. This happy conjunction is not rare—it is virtually impossible given the kind of people who rise to the top in politics. What would be “utopian or naive” would be to believe that the kind of people who are running the so-called “War on Terrorism” would, if they had discretion about using torture in secret—against “ghost detainees” in “black sites,” say—choose to restrain themselves in spite of the impossibility of accountability.

The Alice-in-Wonderland character of the assumption that the use of torture will not be widespread throws into doubt the location of the catastrophe. Gross, along with most people who appeal to the ticking-bomb hypothetical, take it to be beyond dispute that the catastrophe lies on the side of not torturing: we are too squeamish to torture the terrorist who planted the bomb, and the bomb explodes, bringing the catastrophe of death and destruction. One other possibility is that catastrophe lies on the side of undermining the taboo against torture. Then other nations will reason that if the superpower with its thousands of nuclear weapons and high-tech conventional forces cannot maintain its own security without the liberal use of

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<sup>15</sup> *Id.*

<sup>16</sup> If anyone knows a case, I would appreciate an e-mail giving its name.

<sup>17</sup> Gross, *supra* note 5, at 234.

secret torture, they can hardly be expected to defend their security without far more torture. And what currently passes for civilization may then slide backward in the general direction of the eighth century. That too would be a catastrophe, a civilizational catastrophe. I am not predicting a full return of barbarism. Yet it is clear that idealizations that cause the epidemic nature of torture to evaporate from view are no guide for practical action. My honest judgment is that stories that are too good to be true are not true rarely, but false. The ticking-bomb hypothetical is too good to be true—it is torture conducted by wise, self-restrained angels.

But what if I am mistaken in doubting that the perfect time for torture will arrive. I am certainly not appealing to conceptual necessities, but instead making empirical judgments about the nature of human beings and the effects of power without accountability, secret torture hidden from the citizens in whose name it is inflicted. What if I have the facts wrong?

Ironically, here Gross and I—at least as I reasoned in 1978—share a common problem. I think the exceptional case is probably in fact impossible, especially the feature stipulating that the torture does not metastasize throughout the body politic. Gross thinks the exceptional case is rare but clearly practically possible. Neither of us claims to have ruled it out. If it comes, what do we recommend? Here is where the unreality of abstraction, as distinguished from idealization, haunts us both.

#### ABSTRACTION

Gross and I both think, it seems, that torture should remain, as it is, absolutely non-derogably illegal. But we both also wished that if a public official honestly, upon careful reflection, judged that the ultimate catastrophe loomed but that it could be prevented if and only if some one person—or even some small number of persons—were tortured, he could act on his conviction and conduct the torture outside the law. I say “outside the law” in order to fudge some differences between us that, although they are important, I do not want to pursue very far here. As his comments regarding the quotation from Carl Schmitt that I introduced at the beginning of this piece indicate, Gross believes that the arrival of what he calls the “catastrophic case” heralds, or perhaps simply constitutes, the suspension of normality that, Schmitt claimed, is a necessary condition for the rule of law. Schmitt seems to me to have matters backwards. It is when conditions are eroding that one really needs the rule of law. But that is a long story for another time.

Gross characterizes the non-normal situation as “extra-legal,”<sup>18</sup> which is worrisome because it seems much too wholesale. To be fair to him, however, he insists that any entry into the extra-legal be considered for “ex

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<sup>18</sup> *Id.* at 240.

*post* ratification.”<sup>19</sup> In his hypothetical, if the move to the extra-legal is not granted *ex post* ratification, then any official who ordered torture as an act of “official disobedience” may be punished criminally and sued civilly for violating the laws against torture.<sup>20</sup> My 1978 proposal was much more limited and simple: essentially, that the torture would be like an act of civil disobedience at least in the respect that the conscientious torturer would willingly submit to charges and trial. If the torture had demonstrably prevented the end of the world, the charges would presumably be dropped or the sentence suspended.

The difficulty, which seems equally severe for Gross’s suggestion and mine, is that our reluctant torturer would probably also be an incompetent torturer, most unlikely to succeed at what might well be his first try at extracting information. Successful torturers must avoid sympathy and empathy, or they will go too easy. But they must also avoid anger and cruelty, or they will go too hard and merely knock the victim senseless, or drive him into a dissociative state, and learn nothing useful for the prevention of catastrophe. Torture is not for amateurs—successful torturers need to be real “pros”, and no one becomes a “pro” overnight. At a minimum, one must practice—perhaps do research, be mentored by the still more experienced. In short, torture needs a bureaucracy, with apprentices and experts, of the kind that torture in fact always has. Torquemada was not an independent consultant. Torture is an institution.<sup>21</sup>

Arrigo sums it up this way:

The use of sophisticated torture techniques by a trained staff entails the problematic institutional arrangements I have laid out: physician assistance; cutting edge, secret biomedical research for torture techniques unknown to the terrorist organization and tailored to the individual captive for swift effect; well trained torturers, quickly accessible at major locations; pre-arranged permission from the courts because of the urgency; rejection of independent monitoring due to security issues; and so on. These institutional arrangements will have to be in place, with all their unintended and accumulating consequences, *however rarely* terrorist suspects are tortured. . . . [T]he harm to innocent victims of the terrorist should be

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<sup>19</sup> *Id.* at 242.

<sup>20</sup> *Id.* at 240-41. I do not entirely follow this reasoning. If the situation is extra-legal, the law has presumably been suspended; consequently it is difficult to see what violation the official could fairly be punished for. Nevertheless, I am glad the torturer will be punished if he gets it wrong.

<sup>21</sup> See Jean Maria Arrigo, *A Utilitarian Argument Against Torture Interrogation of Terrorists*, 10 SCIENCE & ENGINEERING ETHICS 543 (2004) (portraying a realistic account of the practical prerequisites of torture based on serious research). See also Jessica Wolfendale, *Training Torturers: A Critique of the ‘Ticking Bomb’ Argument*, in 32 SOCIAL THEORY AND PRACTICE (forthcoming 2006) (providing complementary arguments to a similar conclusion).

weighed against the breakdown of key social institutions and state-sponsored torture of many innocents.<sup>22</sup>

Now this actually further buttresses the earlier point about idealization: it is simply dreamy to think that all of a sudden we are simply going to stumble upon someone who happens to have the skills to make a man who planted a ticking bomb reverse the direction of his life and assist us in defusing his bomb. But this is very bad news for my attempt in 1978 and Gross's attempt now to allow the exceptional case. Our common problem is abstraction: we have abstracted from the social basis—the institutional context—necessary for the practice of torture. For torture is a practice. Practitioners who do not practice will not be very good at what they do. Who are we imagining that they will practice on? Practitioners without the best equipment will also not be very good. Where will they obtain their “cutting edge” equipment?<sup>23</sup> How will they test it in order to be sure it will work when the catastrophe looms?

Either “torturers” are just thugs who have no clue what they are doing, in which case we need not allow for exceptional cases in which they rapidly and effectively extract invaluable catastrophe-preventing information, or some can have genuine expertise. Arrigo cites one of her U.S. informants: “The Air Force interrogator said he tried to interview terrorist suspects ‘before any heavy-handed ex-Turkish farmer slapped them around.’”<sup>24</sup> If expertise is available, we would certainly want it at hand in the exceptional, potentially catastrophic case. If we want it ready, we need to maintain, even nourish, the organizations and networks in which the expertise resides.

Here, then, is the really bad news. The moderate position on torture is an impractical abstraction—it is torture in dreamland. The only operationally feasible positions are toward the extremes. Gross and I (in 1978)—doubtless because we are moderate and reasonable people—have been trying to have it both ways.<sup>25</sup> I—and I leave Professor Gross to speak for him-

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<sup>22</sup> *Id.* at 564 (emphasis added). See Michael Hanna et al., *The War on Medical Morality* (forthcoming) (discussing the corrupting effects on the medical profession of physician assistance).

<sup>23</sup> *Id.* at 552 (noting that the United States is “the largest international supplier of electro-shock weapons--stun guns, electro-shock batons, and the like--to governments that practice electro-shock torture”) (citing AMNESTY INTERNATIONAL, STOPPING THE TORTURE TRADE 34 (2001)). This is of course the crude stuff.

<sup>24</sup> *Id.* at 549 (withholding the identity of the Air Force interrogator).

<sup>25</sup> Where violence and brutality seem necessary in a good cause, this is a constant, but often fatal, attraction. See Henry Shue, *Having It Both Ways: The Gradual Wrong Turn in American Strategy*, in NUCLEAR DETERRENCE AND MORAL RESTRAINT: CRITICAL CHOICES FOR AMERICAN STRATEGY 13 (Henry Shue ed., 1989) (presenting an analogous problem concerning nuclear weapons).



self—was like the recovering alcoholic dreaming of avoiding the extreme of total abstinence through the ‘moderate’ strategy of only a drink or two a night. That is not an option, and the alcoholic has only the extremes between which to choose. In the quarter-century since 1978 we have also learned that there is no moderate position on torture either. Torture is now rampant, and high-officials in the U.S. government are its poster-children. You cannot be a little bit pregnant, you cannot—if you are an alcoholic—have a drink only on special occasions, and you cannot—if your politicians are not angels—employ torture only on special occasions.

Michael Ignatieff, another reasonable and moderate person, hopes like Gross and me to have it both ways: “[A]n outright ban on torture creates the problem of the conscientious offender. This is a small price to pay for a ban on torture.”<sup>26</sup> If the conscientious offender is to be an effective and competent torturer, or to have them on call, he must, because of the cascading corruption of key social institutions, like medicine and the courts, that Arrigo suggests, be the tip of a bureaucratic iceberg of institutionalized torture, an iceberg that will probably be replicated nation by nation around the world—not such a small price in fact. To try to leave a constrained loophole for the competent “conscientious offender” is in fact to leave an expanding loophole for a bureaucracy of routinized torture, as I misguidedly did in the 1978 article. What is truly “utopian or naïve” is trusting the state and its subservient lawyers not to exploit every loophole zealously, a lesson we should have learned from Orwell’s *1984*. The textbook for our remedial course is *The Torture Papers*.<sup>27</sup> One can imagine rare torture, but one cannot institutionalize rare torture. The suggestion of rare torture has no place in the real world of politics. It is an optimistic thought with no social embodiment.

As David Luban recently put it:

The real torture debate, therefore, isn’t about whether to throw out the rulebook in the exceptional emergencies. Rather, it’s about what the rulebook says about the ordinary interrogation . . . [Senator] McCain has said that ultimately the debate is over who we are. We will never figure that out until we stop talking about ticking bombs, and stop playing games with words.”<sup>28</sup>

So I now take the most moderate position on torture, the position nearest to the middle of the road, feasible in the real world: never again. Never, ever, exactly as international law indisputably requires. If the perfect

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<sup>26</sup> Michael Ignatieff, *Moral Prohibition at A Price*, in *TORTURE: DOES IT MAKE US SAFER? IS IT EVER OK?* 25 (Kenneth Roth et al. eds., 2005).

<sup>27</sup> *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* (Karen J. Greenberg and Joshua L. Dratel eds., 2005).

<sup>28</sup> Luban, *supra* note 3.

time for torture comes, and we are not prepared to prevent a terroristic catastrophe, we will at least know that we have not sold our souls and we have not brutalized the civilization. These are catastrophes we actually can avoid. Some of us may, or may not, as a result of our refusal to tolerate secret torture bureaucracies and their gulags, die in some other catastrophe, but civilized principles will survive for members of future generations, who may be grateful for our sacrifice so that they could lead decent lives. About this price Ignatieff is correct: "Those of us who oppose torture should also be honest enough to admit that we may have to pay a price for our own convictions. Ex ante, of course, I cannot tell how high this price might be. . . . This is a risk I am prepared to take . . . ." <sup>29</sup> Meanwhile, our taxes fund secret detention centers into which people disappear but in which, we are assured on highest authority, in spite of a total lack of accountability no torture ever occurs.

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<sup>29</sup> Ignatieff, *supra* note 26, at 27.

