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Is Torture Justified in Terrorism Cases?: Comparing U.S. and European Views

STEPHEN HOFFMAN*

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I. INTRODUCTION

Desperate times call for desperate measures. Few statements say so much in the span of so few words. However, this short phrase lacks any direction on how it applies to protecting others. When it comes to the concept of torture and whether it is acceptable, it provides equally little advice.

This Article discusses issues of torture and several philosophical underpinnings. First, it defines torture as used in international and human rights law. Then, it discusses three of the primary theories of torture: deontology, consequentialism, and threshold deontology. After setting this groundwork, it introduces particular issues in terrorism cases such as the “ticking bomb” scenario, which argues that torture may be appropriate and possibly required when done to save many lives. This invariably must include a discussion of the necessity doctrine, the legal doctrine allowing extraordinary measures when necessary to avoid greater harm. Then, this Article sets forth arguments against torture in the case of the “ticking bomb” scenario. In conclusion, it argues that, based on the consequentialist theory, torture may be warranted and acceptable in terrorism cases.

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II. DEFINING TORTURE

The first issue is to define what torture is. This Article does not use torture in the sense of “I saw that movie *The Devil Wears Prada*, and it was torture!,” even though it may have been an unwelcome experience. Indeed, even commentators and courts have noted that “torture” is a loaded term, but not one with a bright-line definition.¹ An additional wrinkle is further distinguishing torture from the concept of “cruel, inhuman or degrading treatment,” or CIDT, which does not rise to the level of torture.² For example, in *Ireland v. United Kingdom*, the European Court of Human Rights found that five interrogation techniques, including sensory disorientation and deprivation, qualified as inhuman and degrading treatment.³ “[A]lthough [the objective of the techniques] . . . was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.”⁴

Some commentators have pointed out that each nation tends to define “torture” so that it does not violate its own ban on torture.⁵ Because of the

1. See Michael W. Lewis, *A Dark Descent into Reality: Making the Case for an Objective Definition of Torture*, 67 WASH. & LEE L. REV. 77, 98-105 (2010); Mary-Hunter Morris McDonnell, Loran F. Nordgren & George Loewenstein, *Torture in the Eyes of the Beholder: The Psychological Difficulty of Defining Torture in Law and Policy*, 44 VAND. J. TRANSNAT'L L. 87, 96-102 (2011). To remedy this issue, many national governments have attempted to guide their agencies and courts by providing narrower definitions in regulations, laws, or other treaties. See, e.g., 8 C.F.R. § 208.18(a) (U.S.); International Criminal Court Act, 2001, c. 17, sch. 8, art. 7, § 2(e) (U.K.); Organization of American States, Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, O.A.S.T.S. No. 67. However, even these narrower definitions can present problems. See, e.g., David Luban & Henry Shue, *Mental Torture: A Critique of Erasures in U.S. Law*, 100 GEO. L.J. 823 (2012) (criticizing the United States' statutory definition of mental or psychological torture as “cramped, convoluted, and arbitrary”).

2. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 16.1, Dec. 10, 1984, 1465 U.N.T.S. 85, available at http://www.un.org/ga/search/view_doc.asp?symbol=a/res/39/46 [hereinafter Convention Against Torture]. While this is also commonly referred to as “cruel, inhuman or degrading treatment or punishment” and CIDTP, CIDT is much more commonly used by legal and medical scholars and human rights organizations.

3. *Ireland v. United Kingdom*, App. No. 5310/71, Eur. Ct. H.R. (1978).

4. *Id.* ¶ 167 (emphasis added). Former Assistant Attorney General Jay Bybee interpreted this distinction generously in the now-infamous “torture memos,” drafted in 2002. Memorandum for Alberto R. Gonzales, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A, at 1 (Aug. 1, 2002) (“We further conclude that certain acts may be cruel, inhuman, or degrading, but still not produce pain and suffering of the requisite intensity to fall within Section 2340A’s proscription against torture.”).

5. See Catherine M. Grosso, Note, *International Law in the Domestic Arena: The Case of Torture in Israel*, 86 IOWA L. REV. 305, 308 (2000); J. JEREMY WISNEWSKI & R.D. EMERICK, THE ETHICS OF TORTURE 1 (2009); Angus Grierson, *Understanding the Evil of*

international significance of torture, especially in terrorism cases, conventions and treaties discussing it are usually very broad regarding the conduct prohibited. For instance, the United Nations (UN) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) defines “torture” as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.⁶

While such vague terminology might seem counterproductive, Professor Jeremy Waldron posits that this vagueness in treaties and conventions makes them effective.⁷ If there were more concrete definitions, lawyers would design new torture protocols and strategies that do not fall within the definitions.⁸ Actions falling short of “torture” can still be cruel, inhuman, or degrading treatment under Article 16 of the UN CAT.⁹ Unlike torture, the UN CAT does not define CIDT even in broad terms.¹⁰ In fact, other UN documents define torture as “an aggravated and deliberate form of cruel,

Torture and Defusing the Ticking Bomb: Torture in Defence of Rights, 13 U.C. LONDON JURISPRUDENCE REV. (2007 SUPPLEMENT) 155, 156 (2007).

6. Convention Against Torture, *supra* note 2.

7. See Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1687 (2005).

8. See *id.*

9. See Convention Against Torture, *supra* note 2, art. 16.1 (“Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by . . . or with the consent . . . of a public official or other person acting in an official capacity.”).

10. See Karima Bennouna, *Terror/Torture*, 26 BERKELEY J. INT’L L. 1, 29 (2008). In the European Union, certain interrogation techniques are not considered “torture” on their own. For example, in the EU case of *Ensslin, Baader & Raspe v. Germany*, the European Commission on Human Rights found that “[c]omplete sensory isolation coupled with complete social isolation can no doubt ultimately destroy the personality,” but it was a form of “inhuman treatment” and not actually torture. *Ensslin, Baader & Raspe v. Germany*, App. No. 7572/76, 14 D.R. 91, 109 (1978).

inhuman or degrading treatment or punishment” but shed no light on what qualifies as CIDT.¹¹ This distinction between torture and CIDT is further complicated by changing social values,¹² and courts have recognized “that certain acts which were classified in the past as ‘inhuman and degrading treatment’ as opposed to ‘torture’ could be classified differently in [the] future.”¹³ Additionally, the Committee Against Torture—recognizing that this distinction is unclear—proscribes CIDT under Article 16 of the UN CAT,¹⁴ and both bans are non-derogable.¹⁵

While international law prohibits torture in broad, sweeping terms, Harvard Professor Alan Dershowitz points out that “[t]he tragic reality is that torture sometimes works, much though many people wish it did not.”¹⁶ Under U.S. federal law, the main element of the crime of torture is that the torturer “specifically intend[s] to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions)” — there is no requirement that this be done for any specific purpose (such as obtaining a confession).¹⁷

Public opinion of torture in the United States has changed significantly since the terrorist attacks of September 11, 2001. According to a poll of

11. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, art. 1.2, U.N. Doc. A/10034 (Dec. 9, 1975), available at www.ohchr.org/EN/ProfessionalInterest/Pages/DeclarationTorture.aspx.

12. This has particularly been an issue in the aftermath of the September 11th attacks. In his report, “[t]he Special Rapporteur observes that an increasing number of Governments, in the aftermath of 11 September 2001 and other terrorist attacks, have adopted a legal position which, while acknowledging the absolute nature of the prohibition on torture, brings the absolute nature of the prohibition of cruel, inhuman or degrading treatment or punishment (CIDT) into question.” Special Rapporteur on the Question of Torture, *First Rep. on Torture and Other Cruel, Inhuman or Degrading Treatment*, ¶ 34, Comm’n on H.R., U.N. Doc. E/CN.4/2006/6 (Dec. 23, 2005) (by Manfred Nowak), available at <http://www2.ohchr.org/english/bodies/chr/sessions/62/listdocs.htm> [hereinafter Report of Special Rapporteur].

13. *Selmouni v. France*, App. No. 25803/94, 29 E.H.R.R. 403, ¶ 101 (2000).

14. “In practice, the definitional threshold between ill-treatment and torture is often not clear. Experience demonstrates that the conditions that give rise to ill-treatment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent ill-treatment.” *Id.* ¶ 3.

15. *See id.* (“Accordingly, the Committee has considered the prohibition of ill-treatment to be likewise non-derogable under the Convention . . .”). Absolute bans against torture and CIDT can also be found in Article 7 of the International Covenant on Civil and Political Rights (ICCPR), 999 U.N.T.S. 171 (1976). While Article 4 of the ICCPR allows state parties to derogate from their covenant obligations when exigencies require, it provides that this exception does not apply to torture and CIDT. As a result, even a national emergency will not allow torture or CIDT.

16. ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 137 (2002).

17. 18 U.S.C.A. § 2340(1) (West 2004).

1,000 Americans by the Associated Press, seventy percent said torture is justified in at least some instances where terrorism is involved, and twenty percent of those people voted that torture “is often justified.”¹⁸ David Luban, a legal philosopher and professor at Georgetown University Law Center, believes the social acceptance of modern torture stems from the liberalization of society.¹⁹ In contrast, the UN’s ban on torture is explicit, and the CAT states there are “[n]o exceptional circumstances whatsoever” where torture may be justified.²⁰ “This includes any threat of terrorist acts or violent crime as well as armed conflict, international or non-international.”²¹ In its 2007 General Comment No. 2, the UN CAT reiterated its stance that, even “[i]n the aftermath of the attacks of 11 September 2001,” its prohibition against torture and CIDT “must be observed in all circumstances.”²² Nonetheless, even though a sizeable proportion of Americans would advocate for the use of torture in terrorism cases, international treaties and human rights laws will not. Whether an individual believes torture is justifiable usually depends on the underlying theory to which he or she subscribes.

III. THEORIES OF TORTURE

In considering whether torture is valid in some situations, one must understand its theories. The arguments and theories for and against torture, even in cases of terrorism or “necessity,” are diverse.²³ However, this Article will focus on three general theories: deontology, consequentialism, and threshold deontology.

18. Associated Press-GfK Custom Research, *Poll—Political Tracking, Terrorism, Torture*, AP.ORG, 5 (June 3, 2009), <http://surveys.ap.org/>.

19. See David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1429 (2005). Dr. Luban draws a significant distinction between ancient torture methods (e.g., flayings and mutilation) and more modern acts of torture (e.g., sleep deprivation, withholding pain medication, waterboarding). *Id.* at 1437-38.

20. Convention Against Torture, *supra* note 2, art. 2.2.

21. Comm. Against Torture, General Comment No. 2 to The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶ 5 (Jan. 24 2008), available at <http://www2.ohchr.org/english/bodies/cat/comments.htm>.

22. *Id.* ¶ 6.

23. See, e.g., WISNEWSKI & EMERICK, *supra* note 5, at 9-11. In their book, Wisniewski and Emerick do an excellent job of distinguishing these theories further. As an example, the authors separate torture theories based on whether they posit that torture is *legally wrong* (i.e., torture cannot be used to extract evidence or confessions in legal proceedings) or *morally wrong* (the act of torture is itself morally reprehensible). *Id.*; see also Sangeeta Mendhir, *Basing Arguments for Legalising Torture on Moral Justifications*, 13 U.C. LONDON JURISPRUDENCE REV. (2007 SUPPLEMENT) 135 (2007).

A. DEONTOLOGICAL THEORY

The deontological view places a near-absolute ban on torture.²⁴ Under this theory, no conduct, no matter how deplorable, will permit torture.²⁵ Deontology generally follows Kantian philosophy, which states that human dignity is inviolable even in extreme circumstances.²⁶ Even though the theory requires strict compliance, it has many followers because of its aim of complete personal autonomy.²⁷

B. CONSEQUENTIALISM

The consequentialist, commonly known as the utilitarian, theory of torture states that torture may be acceptable or even mandated if society receives a net benefit that outweighs the harm of torture.²⁸ This not only considers the harm experienced by the individual victim but also by society in general.²⁹ Contemplating social harm is even more important nowadays with the advent of twenty-four-hour news channels and the internet making information available worldwide in real time, meaning the harm can affect more people in more remote areas.

C. A MIDDLE GROUND: THRESHOLD DEONTOLOGY

There is an additional theory for justifying torture that differs slightly from the deontologist and consequentialist theories.³⁰ Threshold deontolo-

24. Alon Harel & Assaf Sharon, *What Is Really Wrong with Torture?*, 6 J. INT'L CRIM. JUST. 241, 244 (2008). However, as a practical matter, most proponents of deontology adhere to a more moderate version of the theory, eschewing absolutism. See JEREMY WALDRON, *TORTURE, TERROR, AND TRADE-OFFS: PHILOSOPHY FOR THE WHITE HOUSE* 216-17 (2010). Professor Waldron further asserts that, "[i]n these troubled times, it is not hard to make the idea of an absolute prohibition on torture or any absolute prohibition look silly, as a matter of moral philosophy." *Id.* at 216.

25. Harel & Sharon, *supra* note 24, at 244-45; John Alan Cohan, *Torture and the Necessity Doctrine*, 41 VAL. U. L. REV. 1587, 1599 (2007).

26. See RONALD M. DWORKIN, *TAKING RIGHTS SERIOUSLY* 198 (1978). Kant asserted that even lying, while not a wrong committed against a person compelling the false statement, "is a wrong inflicted upon humanity generally." Immanuel Kant, *On a Supposed Right to Lie from Philanthropy*, in *PRACTICAL PHILOSOPHY* 605, 612 (Mary J. Gregor & Allen Wood eds. & trans., 1996).

27. See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOL. I: THE RULES* 315-19 (2005) (listing several courts and organizations adhering to absolute or near-absolute bans on torture due to personal dignity and autonomy concerns).

28. YUVAL GINBAR, *WHY NOT TORTURE TERRORISTS?: MORAL, PRACTICAL AND LEGAL ASPECTS OF THE "TICKING BOMB" JUSTIFICATION FOR TORTURE* 15-16 (2008).

29. See RUSS SHAFER-LANDAU, *ETHICAL THEORY: AN ANTHOLOGY* 471-72 (2007).

30. See Harel & Sharon, *supra* note 24, at 246.

gy, as it is termed, assumes that some acts—such as torture—are inherently, morally wrong.³¹ This fits directly with standard deontological thought.³² However, threshold deontologists believe that if there is enough of a positive benefit from the act, “then one is morally permitted, and perhaps required, to engage in those acts that are otherwise morally prohibited.”³³

This viewpoint is very similar to consequentialism, but threshold deontologists are generally much stricter regarding when torture is permitted.³⁴ In addition, consequentialists avoid identifying acts as inherently wrong or immoral since an act’s wrongness will depend on the comparative harm of another act.³⁵ For instance, if torturing one person causes less social harm than the death of 100 people, torture would be morally correct to a consequentialist, whereas a threshold deontologist would only find torture morally permissible. It can mean the difference between permitting torture although it is wrong and advocating for it as the most appropriate option. This demarcation becomes especially important in the context of terrorism, where moral outrage and emotion receive much focus.

IV. PARTICULAR ISSUES IN TERRORISM CASES AND THE “TICKING BOMB” SCENARIO

“Like the term ‘torture,’ it is difficult to classify the term ‘terrorism’ or provide it with a clear definition or interpretation.”³⁶ Generally, “terrorism” refers to the use of fear, intimidation, or violence to achieve a particular goal.³⁷ However, nations typically have additional idiosyncrasies in their definitions or in their application. For example, in *McKee v. Chief Constable of Northern Ireland*, which predates the current UK terrorism statutes, the Northern Ireland Court of Appeal held that passive membership in a terrorist organization is not enough to deem the person a “terrorist.”³⁸ The Terrorism Act of 2006, the most recent UK antiterrorism statute, has since effectively eliminated a need for active involvement.³⁹ Additionally, the Act

31. See Larry Alexander, *Deontology at the Threshold*, 37 SAN DIEGO L. REV. 893, 894 (2000).

32. See *supra* Part III.A and accompanying text.

33. Alexander, *supra* note 31, at 894.

34. See, e.g., Harel & Sharon, *supra* note 24, at 246-47.

35. See GINBAR, *supra* note 28, at 15-16.

36. Emanuel Gross, *Legal Aspects of Tackling Terrorism: The Balance Between the Right of a Democracy to Defend Itself and the Protection of Human Rights*, 6 UCLA J. INT’L L. & FOREIGN AFF. 89, 97 (2001).

37. *Id.*

38. See CLIVE WALKER, *THE PREVENTION OF TERRORISM IN BRITISH LAW* 9 (1992).

39. See, e.g., Counter-Terrorism Act of 2006, c. 28 (U.K.); see also CLIVE WALKER, *TERRORISM AND THE LAW* 141 (2011). While it is arguable that the Counter-Terrorism Act of 2008 is the most recent statute on the issue, it specifically deals with the gathering and shar-

is not restricted to people in the United Kingdom.⁴⁰ Other countries, such as the United States, also allow for extraterritorial application of their antiterrorism laws,⁴¹ which means that a person can violate U.S. law without directly influencing the United States or its citizens.

One thing these treaties have in common is that they specify that torture is only committed by someone acting under the color of law⁴² or “acting in an official capacity.”⁴³ This is particularly interesting in the United States where it is not an element of the crime that the victim be tortured to elicit a confession or to punish him.⁴⁴ This highlights one of the key purposes of torture that is particularly relevant in terrorism cases: gathering information and intelligence for preventing imminent harm.⁴⁵ Some jurisdictions use torture to elicit confessions and information for criminal prosecutions, where the victim’s statements may be used against him.⁴⁶ However, the primary focus in this Article is torture used to gather information to prevent impending harm.

Humans and their psychological make-up are unique and amazing. Humans are extremely resilient, which causes difficulties when designing a plan of torture. Permanent damage, either emotionally, physically, or both, is possible and perhaps even probable with human subjects. According to a recent study on Guantanamo Bay detainees, “[t]wo-thirds of the former detainees [interviewed] report residual psychological and emotional trauma.”⁴⁷ But, the broader purpose of torture is to compel the victim to give sensitive information—if there was no downside to withholding that information, sensitive information would probably not be divulged.⁴⁸ As U.S.

ing of counter-terrorism information by state actors. See Counter-Terrorism Act of 2008, c. 28 (U.K.). It does not provide insight into what constitutes “terrorism” other than that which the 2006 Act does. Instead, it provides administrative direction on the duties and abilities of the State.

40. Terrorism Act of 2006, c. 11, § 20, cl. 3 (U.K.).

41. See, e.g., 18 U.S.C.A. § 2332b(e) (West 1996) (United States); Terrorism Act, 2006, c. 11, § 17 (U.K.); Canada Criminal Code, R.S.C. 1985, c. C-46 § 7(3.73)-(3.74) (Canada); see also David Freestone, *International Cooperation Against Terrorism and the Development of International Law Principles of Jurisdiction*, in *TERRORISM AND INTERNATIONAL LAW* 43-44 (1997).

42. 18 U.S.C.A. § 2340(1) (West 2004); see also Jeffrey F. Addicott, *Into the Star Chamber: Does the United States Engage in the Use of Torture or Similar Illegal Practices in the War on Terror?*, 92 KY. L. J. 849, 857 (2004).

43. Convention Against Torture, *supra* note 2.

44. See 18 U.S.C.A. § 2340(1) (West 2004) (criminalizing torture without mention of the purpose for the torture).

45. DARIUS REJALI, *TORTURE AND DEMOCRACY* 22 (2007).

46. See *id.*

47. LAUREL E. FLETCHER & ERIC STOVER, *THE GUANTANAMO EFFECT: EXPOSING THE CONSEQUENCES OF U.S. DETENTION AND INTERROGATION PRACTICES* xii (2009).

48. This Article restricts the discussion to situations where torture is used to produce valuable information regarding pending or potential illegal acts, not to obtain confes-

Senator Trent Lott once said: “Interrogation is not a Sunday-school class. You don’t get information that will save American lives by withholding pancakes.”⁴⁹

Many criminal law scholars have focused on an objective theory for structuring torture based on a cost-benefit analysis.⁵⁰ In fact, the world-renowned criminal law scholar Alan Dershowitz specifically describes this as a requirement for the real world, and common law jurisdictions, such as the United States and much of Western Europe, allow for such an analysis.⁵¹ He recently proposed extending such “torture by necessity” with judicial torture warrants, where a judge would be required to sign off on torture much like a search warrant.⁵² It would specify who to torture and what information they may have.⁵³ Professor Dershowitz suggests that these torture warrants would be useful since torture will occur at any rate, but would be

sions regarding previous acts. In its infamous KUBARK interrogation manual, the CIA specifically focuses on this purpose of torture:

Unlike the police interrogation, the CI [counterintelligence] interrogation is not aimed at causing the interrogatee to incriminate himself as a means of bringing him to trial. Admissions of complicity are not, to a CI service, ends in themselves but merely preludes to the acquisition of more information.

CENT. INTELLIGENCE AGENCY, KUBARK COUNTERINTELLIGENCE INTERROGATION 5 (1963), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/index.htm#kubark>. Many scholars focus on this purpose as well. See, e.g., Michael Welch, *American ‘Painology’ in the War on Terror: A Critique of ‘Scientific’ Torture*, 13 THEORETICAL CRIMINOLOGY 451, 452 (2009).

49. GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 436 (2010).

50. For example, as Professor Alan Dershowitz points out:

The simple cost-benefit analysis for employing such nonlethal torture [sterilized needles inserted under the fingernails or drilling an unanesthetized tooth] seems overwhelming: 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.

DERSHOWITZ, *supra* note 16, at 144.

51. *Id.* at 148. According to Dershowitz, an absolute ban on torture is understandable “if made by a Quaker who opposes the death penalty, war, self-defense, and the use of lethal force against fleeing felons.” *Id.* But, he adds, “for anyone who justifies killing on the basis of a cost-benefit analysis, the case against the use of nonlethal torture to save multiple lives is more difficult to make.” *Id.*; see also Alexander, *supra* note 31, at 895 (“After all, if one can kill or torture to prevent the killing or torturing of N, it is hard to see why one should not kill or torture to prevent the killing or torturing of N-1, or N-2, and so on, right down to the point where the number saved is only slightly larger than the number harmed.”).

52. See Barbara Hudson, *Justice in a Time of Terror*, 49 BRIT. J. CRIMINOLOGY 702, 710 (2009).

53. *Id.*

reviewable by courts to provide accountability.⁵⁴ His arguments, though interesting, have not gained widespread acceptance.

While philosophy aids in our moral value judgments regarding torture and if it is ever permissible, a real-life situation requires a real-life response. In the oft-cited “ticking bomb” scenario, terrorists set a bomb to explode in the heart of a major city. If the bomb detonates, hundreds, thousands, or even millions of people may die. The police/military/government agency has a suspect in custody that might have information about the bomb. All the suspect has said is that the bomb will explode within twenty-four hours unless defused. In this situation, failing to find the bomb has obvious consequences: a large but unknown number of people will die.

Some commentators allege that the “ticking bomb” argument is the primary argument supporting the consequentialist theory and consequently dismiss it as an extreme and unrealistic possibility.⁵⁵ One scholar decries the economic cost-benefit analysis in such a situation, saying “it is the question about whether a responsible citizen must unblinkingly think the unthinkable and accept that the morality of torture should be decided purely by totaling up costs and benefits. Once you accept that only the numbers count, then anything, no matter how gruesome, becomes possible.”⁵⁶ This slippery slope argument does have some truth to it, but the current torture debate indicates that such an extreme interpretation is unlikely to happen. At any rate, when considering the recent terrorist attempts particularly in the United States, the “ticking bomb” scenario may not be as unrealistic as those scholars believe. If such a situation occurs, the jurisdiction may have to invoke a necessity defense to respond effectively to the threat.

A. THE NECESSITY DOCTRINE

The doctrine of necessity applies when an illegal or harmful behavior may be used to prevent or correct a greater harm.⁵⁷ It provides a legal justification for the necessary action, allowing people to avoid or reduce liability.⁵⁸

The necessity doctrine, like many common law doctrines, has found its way into U.S. law. In *Leon v. Wainwright*,⁵⁹ Florida police officers “threat-

54. *Id.*

55. WISNEWSKI & EMERICK, *supra* note 5, at 15; Luban, *supra* note 19, at 1440. However, even Dr. Luban does not believe that “the time-bomb scenario is completely unreal.” Luban, *supra* note 19, at 1441 (citing a 1995 example similar to an actual “ticking bomb” scenario).

56. Luban, *supra* note 19, at 1444 (footnotes omitted).

57. Cohan, *supra* note 25, at 1607-08.

58. *Id.*

59. *Leon v. Wainwright*, 734 F.2d 770 (11th Cir. 1984).

ened and physically abused” the defendant, “choking him until he revealed where [the kidnapped victim] was being held.”⁶⁰ After they secured the victim, police transported the defendant to the police station where they questioned him normally and he eventually confessed.⁶¹ The Florida appeals court ruled that, while the defendant’s initial statements were inadmissible as evidence against him, his later confession was voluntary and therefore admissible.⁶² As the court recognized, “interrogational” torture may be necessary—or at least legally acceptable—in extreme circumstances.⁶³ Here, the defendant was abused to find his sole victim,⁶⁴ whereas the “ticking bomb” argument involves a larger and possibly fatal result.

V. ARGUMENTS AGAINST THE “TICKING BOMB”

It should be clear from the earlier discussion of theories regarding torture that some schools of thought forbid torture in all cases. The UN, through the CAT, specifically denounces torture in the “ticking bomb” scenario,⁶⁵ although factors may be considered in determining if the treatment was lawful.⁶⁶ The primary argument against torture in “ticking bomb” situations is that utilitarianism is founded on a faulty assumption—namely, that human life or fundamental rights have an economic value.⁶⁷ Eliminating that consideration, there is no inherent value in saving a thousand lives at the expense of one. In fact, torturing even one individual would have a deleterious effect on human dignity regardless of how many are saved, harking back to an absolutist theory of deontology

60. *Id.* at 771.

61. *Id.* at 771-72.

62. *Id.* at 773.

63. By emphasizing that “[t]his was instead a group of concerned officers acting in a reasonable manner to obtain information they needed in order to protect another individual from bodily harm or death,” the court seemed to indicate that the officers’ reasonableness in acting to prevent death or bodily harm was paramount. *Id.* Here, the police “threatened and physically abused [Leon] by twisting his arm behind his back and choking him until he revealed where [the victim] was being held. *Id.* (quoting *Leon v. Florida*, 410 So. 2d 201, 202 (Fla. Dist. Ct. App. 1982)). If this conduct was reasonable in order to save one person, it would seem quite difficult to rule out torture as an acceptable means of interrogation if the circumstances are sufficiently compelling.

64. *Leon*, 734 F.2d at 771. Although abuse and torture may be acceptable for the purpose of obtaining information (such as the location of Leon’s victim), courts will generally not allow the information to be used as evidence against the defendant due to the Fifth Amendment’s privilege against self-incrimination. See *Cohan*, *supra* note 25, at 1604-06.

65. Report of Special Rapporteur, *supra* note 12, ¶ 36.

66. The UN states that the lawfulness of such treatment is determined by the proportionality of the exercise of police powers as well as the powerlessness of the victim. *Id.* ¶¶ 38-40.

67. See, e.g., SHAFER-LANDAU, *supra* note 29, at 471-73 (discussing the difficulties in valuing an act’s utility and problems with the subjective valuations of “goodness”).

However, this argument is difficult to accept. Human behavior incorporates our perception of economic value. Our markets respond to supply and demand whether it helps a particular individual or bankrupts his business. The law, in its formal and philosophical bases, embraces this concept of psychology by excusing or justifying crimes and violations.⁶⁸ When defending his family against serious harm, a man may escape legal and moral liability for killing the attacker. This doctrine likely stems from the instinctual desire to protect loved ones, but courts review it on an economical basis in hindsight.⁶⁹ Economic comparisons color much of our everyday lives. If you ask yourself, “should I go to work today,” you will balance the benefits (or negatives) of going against the benefits (or negatives) of not going, for example: “If I don’t go, I may get fired, but if I go, then I’ll have to get out of my warm bed.” By comparing the options and rationalizing the decision, the individual uses economic reasoning.

Another argument against the torture of terrorists is that it deprives a person of his fundamental rights and freedoms, generally in order to allow others to enjoy those rights unfettered.⁷⁰ This leads to one of the most difficult issues in determining when “torture” or torture-like techniques outweigh the benefits: Are these rights and freedoms truly “fundamental” if they can be disregarded? Patrice Jean states the protective extreme of this argument, opining that “[t]he *protection* of the fundamental rights of the terrorists who are arrested is necessary, for without it they have won.”⁷¹ This is an interesting point, mainly on the basis that the terrorist may succeed in his goal of causing such fear that an otherwise “civilized” society devolves into barbarism. Arguing against torture, Professor Waldron states that “torture is utterly repugnant to the spirit of [American] law.”⁷² If such fear is the terrorists’ aim, then they may very well be successful; on the other hand, if the purpose is to upend democracy as an institution, they may not be. Other commentators argue that by committing or supporting terrorism, the terrorist has in effect given up those rights.⁷³ By committing a seri-

68. Cohan, *supra* note 25, at 1607.

69. *Id.* at 1608-09.

70. See SHAFER-LANDAU, *supra* note 29.

71. Patrice Jean, *The Jurisprudence of the European Commission and Court of Human Rights with Regard to Terrorism*, in *TERRORISM AND INTERNATIONAL LAW* 217 (1997). Dr. Luban eloquently describes this argument: “Torture aims to strip away from its victim all the qualities of human dignity that liberalism prizes.” Luban, *supra* note 19, at 1430. However, other scholars debate what human dignity and autonomy are or why they are so important. See, e.g., Grierson, *supra* note 5, at 158.

72. Waldron, *supra* note 7, at 1687.

73. See, e.g., Adam Brodsky, “Torture” *Regrets Cheer Our Enemies*, N.Y. POST, May 1, 2009 (“[T]errorists forfeit any claim to civilized treatment when they abandon it themselves.”).

ous crime, the terrorist gives up his personal autonomy much as if he were imprisoned.

As a practical matter, human dignity cannot exist if humans do not exist. Terrorism introduces a frightening factor: the terrorist disregards his own life. Much of biology and psychology is based on our “fight or flight” instinct. This instinct to protect ourselves from harm is engrained in us and, even more importantly, we presume that every other human being has the same instinct. This is primarily why suicide bombings shock us so much—the terrorist has disregarded the most fundamental instinct of self-preservation. If the terrorist is willing to take his own life in achieving his goal, it is almost impossible to predict what he is capable of and to what extent he will go to create his “reality.” Thus, infliction of extreme stress physically or mentally may be the only method for affecting the terrorist.

VI. CONCLUSION

While torture and terrorism are complex and ill-defined concepts, they also lead to a complex decision: whether terrorism allows or even mandates the use of torture to save many lives. According to the consequentialist theory, a moral wrong such as torture is acceptable when done to avoid a greater social harm. In contrast, deontologists argue that torture is morally wrong and therefore cannot be justified in any circumstance. The “ticking bomb” scenario offers an unlikely but relevant case where torturing a terrorist might be the only way to prevent the deaths of thousands of people. Although consequentialists would support the use of torture in this situation, deontologists would not allow it regardless of the number of people potentially saved. Such a philosophy might be workable in the abstract, but a real-world situation requires a real-world solution. As a result, necessity requires a consequentialist approach where the benefit of saving lives may outweigh the costs, both personal and social, of torturing terrorist suspects. This approach does not automatically allow governments to use torture, but it recognizes that torture may be justified by necessity depending on the circumstances, such as those present in the “ticking bomb” scenario.