

# Two Narratives of Torture

John Ip\*

## INTRODUCTION

¶1 Upon taking office in January 2009, one of President Obama's first official acts was to issue an executive order requiring that all persons detained by the United States be treated humanely, and that the Central Intelligence Agency (CIA) close all of its detention facilities.<sup>1</sup> Together with another executive order directing the closure of the detention facility at Guantánamo Bay,<sup>2</sup> this order marks the beginning of the end of a controversial chapter of American counterterrorism policy.

¶2 At this time, the beginning of a new presidency, it is instructive to look back at the period just past, a period in which torture and coercion were openly sanctioned as tools of interrogation at the highest levels of the Bush administration.<sup>3</sup> This article is about the normalization of interrogational torture and coercion from 2001 to 2008. In particular, the discussion focuses on a key device in the normalization process: the ticking bomb scenario. Long a philosophy professor's staple, the ticking bomb scenario post-9/11 received renewed attention from legal academics, who have invoked it in questioning the status of the absolute legal prohibition on torture. Versions of the ticking bomb scenario have also appeared in Bush administration documents and official statements that asserted the legality of torture and various coercive interrogation techniques. Additionally, the scenario has been replicated in the media and popular culture, the most notable example being Fox's high-rating television show, 24. Together, these various manifestations of the ticking bomb scenario constitute the first narrative or account of torture.

¶3 However, this narrative has been contested by a second account of torture that challenges the logic of the ticking bomb scenario. Academic commentators have highlighted the assumptions underlying the scenario that render it a suspect guide to policy. Certain government actors, most notably the Federal Bureau of Investigation (FBI) and military lawyers, consistently rejected its logic, and opposed the use of torture and coercion in interrogation. This second account also has a popular culture

---

\* Faculty of Law, University of Auckland, New Zealand. My thanks to An Hertogen and Kevin Jon Heller, for their comments on earlier drafts. Any errors remain my own.

<sup>1</sup> Exec. Order No. 13,491, Ensuring Lawful Interrogations, 74 Fed. Reg. 4893 (Jan. 27, 2009), *available at* <http://edocket.access.gpo.gov/2009/pdf/E9-1885.pdf>.

<sup>2</sup> Exec. Order No. 13,492, Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities, 74 Fed. Reg. 4897 (Jan. 27, 2009), *available at* <http://edocket.access.gpo.gov/2009/pdf/E9-1893.pdf>. *See also* Scott Shane, Mark Mazzetti & Helene Cooper, *Obama Reverses Key Bush Policy, but Questions on Detainees Remain*, N.Y. TIMES, Jan. 23, 2009, at A16, *available at* [http://www.nytimes.com/2009/01/23/us/politics/23obama.html?\\_r=1](http://www.nytimes.com/2009/01/23/us/politics/23obama.html?_r=1).

<sup>3</sup> This typically involved an official admission that a particular coercive interrogation technique had been used, while at the same time denying that the use of that technique amounted to torture. This pattern of admission and denial is illustrated by the Bush administration's defense of waterboarding. *See infra* text accompanying notes 84-85.

representative in the form of Sci-Fi Channel's *Battlestar Galactica*. Thus, the same battles that have been fought over the treatment of detainees in the "war on terror" in the legal and political arenas by real world actors in the years since 9/11 have also been fought at a discursive level in popular culture.

¶4 The article begins in Part I by laying out the law in relation to torture. The law in this area is clear: torture and various other forms of mistreatment are illegal. However, soon after 9/11, there were calls to loosen the reins and allow counterterrorist agencies greater flexibility. Parts II and III discuss the two narratives of torture identified above, and particularly their appearances in academic literature, official discourse, and popular culture. If the previous two parts consider how art has imitated life, Part IV deals with how life has imitated art. The popular culture representatives of each narrative, 24 and *Battlestar Galactica*, are reflections of post-9/11 American society. At the same time, both shows have the potential to shape and influence the debate about torture in the United States. 24, in particular, being representative of the dominant or hegemonic narrative of torture during the period under consideration, has already done this in several different ways.

## I. THE NEW NORMAL

¶5 The prohibition on torture features prominently in international law. It is widely accepted as a peremptory norm of international law (*jus cogens*).<sup>4</sup> The right to be free from torture can also be found in numerous human rights treaties. The International Covenant on Civil and Political Rights, for example, states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."<sup>5</sup> The Covenant permits derogation from certain rights during exceptional situations of emergency, but the right to be free from torture is not one of these rights.<sup>6</sup> The Convention against Torture (CAT) further clarifies this point in unequivocal terms: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."<sup>7</sup> The CAT, in addition to prohibiting torture,<sup>8</sup> also obliges states to take measures to prevent acts, which, although falling short of the threshold for torture, nevertheless amount to "cruel, inhuman or degrading treatment or punishment."<sup>9</sup>

¶6 The law of armed conflict protects against torture and coercion as well. The prohibition on torture here can be found as far back as the Lieber Code of 1863.<sup>10</sup> It also

<sup>4</sup> See *A v. Sec'y of State for the Home Dep't* (No. 2) [2005] UKHL 71, [2006] 2 A.C. 221, paras. 33-34.

<sup>5</sup> International Covenant on Civil and Political Rights art. 7, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR], available at [http://www.unhcr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhcr.ch/html/menu3/b/a_ccpr.htm).

<sup>6</sup> *Id.* art. 4.

<sup>7</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT].

<sup>8</sup> 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." *Id.* art. 1.

<sup>9</sup> *Id.* art. 16.

<sup>10</sup> See Instructions for the Government of Armies of the United States in the Field, Gen. Order No. 100

finds expression in the more recent Geneva Conventions. For example, article 17 of the Third Geneva Convention states, “No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatsoever.”<sup>11</sup> It further states that prisoners of war who refuse to answer questions “may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.”<sup>12</sup> Article 31 of the Fourth Geneva Convention provides that “[n]o physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.”<sup>13</sup> Both the Third and Fourth Geneva Conventions explicitly state that torture is a grave breach of the Conventions.<sup>14</sup> Additionally, common article 3 of the Geneva Conventions, which appears in all four Conventions, protects against “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture.”<sup>15</sup> Finally, Article 75 of Additional Protocol I to the Geneva Conventions, which applies as a backstop to detainees who are not entitled to more favorable treatment under the Conventions or the Protocol, prohibits “torture of all kinds, whether physical or mental.”<sup>16</sup>

In terms of domestic law, the prohibition on the infliction of torture has long been considered a touchstone of the common law.<sup>17</sup> Torture is plainly prohibited under American law as well. The general criminal law would apply to acts amounting to torture committed inside the United States.<sup>18</sup> Further, the Torture Statute, enacted by Congress in order to implement obligations under CAT, criminalizes acts of torture committed outside the United States.<sup>19</sup> Moreover, prior to changes wrought by the Military Commissions

---

(Apr. 24, 1863), art. 16, available at [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp).

<sup>11</sup> Geneva Convention Relative to the Treatment of Prisoners of War, art. 17, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GCIII].

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

<sup>13</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 31, Aug. 12, 1949, 6 U.S.T. 3516, 3538, 75 U.N.T.S. 287, 308.

<sup>14</sup> *See id.* art. 147; GCIII, *supra* note 11, art. 130.

<sup>15</sup> GCIII, *supra* note 11, art. 3. Although applicable on its terms to “armed conflict not of an international character,” common article 3 also states the minimum protection applicable to international armed conflicts as a matter of customary international law. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 113-15, paras. 218-20 (June 27); *see also* George H. Aldrich, *The Laws of War on Land*, 94 AM. J. INT’L L. 42, 60 (2000); Adam Roberts, *The Laws of War in the War on Terror*, 32 ISR. Y.B. ON HUM. RTS 193, 230 (2002).

<sup>16</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 75, June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 [hereinafter Protocol I]. Although the United States has not ratified the two Additional Protocols of 1977, article 75 of Protocol I is applicable as the United States accepts that it is declaratory of customary international law. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 633 (2006) (citing William H. Taft IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT’L L. 319, 322 (2003)).

<sup>17</sup> *See* Sec’y of State for the Home Dep’t (No. 2) [2005] UKHL 71, [2006] 2 A.C. 221, para. 11 (“[F]rom its earliest days the common law of England set its face firmly against the use of torture.”).

<sup>18</sup> Michael Garcia, *U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques*, CRS Rep. for Congress, at CRS-8 (Jan. 26, 2009), available at <http://www.fas.org/sgp/crs/intel/RL32438.pdf>.

<sup>19</sup> *See* 18 U.S.C. §§ 2340–2340A (2000):

§ 2340. Definitions

As used in this chapter--

(1) “torture” means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;

(2) “severe mental pain or suffering” means the prolonged mental harm caused by or resulting from—

Act of 2006,<sup>20</sup> the War Crimes Act of 1996 made it a serious criminal offense for anyone, whether inside or outside the United States, to commit either grave breaches of the Geneva Conventions or breaches of common article 3.<sup>21</sup>

This impressive edifice of legal prohibitions came under pressure soon after the September 11 attacks as the notion that “9/11 changed everything” gradually became conventional wisdom.<sup>22</sup> In this new reality, basic commitments to certain values, even the right to be free from torture and coercion, were called into question. In the face of an apparently novel societal threat, adherence to the old rules was seen as being characteristic of a naïve pre-9/11 mindset. And thus, what was previously unthinkable was no longer so: torture and its close cousins would once again be on the discussion table as an instrument of state. This change was exemplified by Vice President Cheney,

- 
- (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
  - (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
  - (C) the threat of imminent death; or
  - (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality; and
- (3) “United States” means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.

§ 2340A. Torture

(a) Offense.--Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

(b) Jurisdiction.--There is jurisdiction over the activity prohibited in subsection (a) if--

(1) the alleged offender is a national of the United States; or

(2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.

(c) Conspiracy.--A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

The definition of torture in the Torture Statute is narrower than that of CAT. This reflects the reservations, understandings and declarations attached by the Senate during the ratification process. See U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 Cong. Rec. S17,486-01 (1990), also available at <http://www.unhcr.ch/html/menu2/6/cat/treaties/convention-reserv.htm>. The flexibility afforded by the Torture Statute’s narrower definition was later exploited by the Bush administration. See *infra* text accompanying notes 62-69. See also John T. Parry, *Torture Nation*, *Torture Law*, 97 *GEO. L.J.* (forthcoming 2009) (manuscript at 54), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1265124](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1265124).

<sup>20</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 2601-02 (codified at 10 U.S.C. §948a).

<sup>21</sup> War Crimes Act, 18 U.S.C. §2441 (2000). The Military Commissions Act narrowed the War Crimes Act’s coverage from breaches of common article 3 to specified “grave” breaches of common article 3. See James G. Stewart, *The Military Commissions Act’s Inconsistency with the Geneva Conventions: An Overview*, 5 *J. INT’L CRIM. JUST.* 26, 33 (2005).

<sup>22</sup> Vice President Richard Cheney, Remarks at McChord Air Force Base (Dec. 22, 2003), transcript available at <http://georgewbush-whitehouse.archives.gov/news/releases/2003/12/20031223-1.html> (“In a sense, 9/11 changed everything for us.”); President George W. Bush, Press Conference (Sept. 23, 2004), transcript available at <http://georgewbush-whitehouse.archives.gov/news/releases/2004/09/20040923-8.html> (“See, 9/11 changed everything.”); see also Daniel Henninger, *Wonder Land: 20th Century Rules Will Not Win A 21st Century War*, *WALL S. J.*, Apr. 7, 2006, at A12.

who ominously spoke of “hav[ing] to work . . . sort of the dark side” soon after the attacks.<sup>23</sup>

¶9 Those closer to the counterterrorism coalface seemed to take this tough talk from above to heart. As one anonymous official involved in the capture and transfer of terrorist detainees stated, “If you don’t violate someone’s human rights some of the time, you probably aren’t doing your job.”<sup>24</sup> The same official also opined that the CIA had for too long promoted a “view of zero tolerance” on torture.<sup>25</sup> Cofer Black, Director of the CIA’s Counterterrorist Center from 1999 until 2002, summed up this brave new world of interrogation in his Congressional testimony: “All I want to say is that there was ‘before 9/11’ and ‘after 9/11’. After 9/11 the gloves came off.”<sup>26</sup>

¶10 The end result was that torture and coercion became acceptable or at least tolerable to some degree. As John Parry suggests, elite opposition to the excesses of American counterterrorism policy, particularly in relation to the (mis)treatment of detainees, did not translate into similar opposition from the general public.<sup>27</sup> David Luban agrees, observing a new tolerance for torture, at least when inflicted on terrorists.<sup>28</sup> He notes the lack of public outrage upon the disclosure of the CIA’s torturing of high-value al Qaeda detainees, and the disinterest of the American media in the torture of al Qaeda leader Khalid Sheikh Mohammed and the disappearing of his two sons.<sup>29</sup> Even official admissions in 2008 that the United States had subjected three high-value detainees to a form of torture known as waterboarding met with a similarly apathetic public response.<sup>30</sup> This state of affairs was encapsulated by Mark Danner’s 2005 remark: “[t]he system of torture has . . . survived its disclosure.”<sup>31</sup>

<sup>23</sup> Meet the Press (NBC television broadcast Sept. 16, 2001) (remarks of Vice President Richard Cheney), transcript available at <http://georgewbush-whitehouse.archives.gov/vicepresident/news-speeches/speeches/vp20010916.html>.

<sup>24</sup> Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, at A01.

<sup>25</sup> *Id.*

<sup>26</sup> Mark Bowden, *The Dark Art of Interrogation*, THE ATLANTIC MONTHLY, Oct. 2003, at 56.

<sup>27</sup> John T. Parry, ‘Just for Fun’: *Understanding Torture and Understanding Abu Ghraib*, 1 J. NAT’L SEC. L. & POL’Y 253, 282 (2005).

<sup>28</sup> David Luban, *Unthinking the Ticking Bomb* 2-3 (Georgetown Public Law Research Paper No. 1154202), available at <http://ssrn.com/abstract=1154202> (“[T]he American public has become decidedly tolerant of torture, provided that the subjects are described as terrorists.”); see also Will Lester, *Most Say Torture OK in Rare Cases*, WASH. POST, Dec. 6, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/06/AR2005120600110.html> (noting that 61 percent of Americans surveyed agreed that torture was justified at least on rare occasions; by comparison, almost 90 percent of respondents in South Korea and about half of respondents in France and Britain agreed).

<sup>29</sup> Luban, *supra* note 28, at 3.

<sup>30</sup> See Richard Esposito & Jason Ryan, *CIA Chief: We Waterboarded*, ABC NEWS, Feb. 5, 2008, <http://abcnews.go.com/print?id=4244423>; *Poll results: Waterboarding is Torture*, CNN.COM, Nov. 6, 2007, <http://www.cnn.com/2007/POLITICS/11/06/waterboard.poll/index.html> (noting that 69 percent of respondents agreed that waterboarding was a form of torture, and that 40 percent of respondents agreed that the U.S. government should be allowed to use waterboarding for interrogation) (last visited Apr. 1, 2009). See generally Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 COLUM. J. TRANSNAT’L L. 468 (2007).

<sup>31</sup> Mark Danner, *We Are All Torturers Now*, N.Y. TIMES, Jan 6, 2005, at A27.

## II. ART IMITATES LIFE: TICKING BOMBS AND 24

¶11 At the heart of the rise of this tolerance for torture was the ticking bomb scenario. Typically, this scenario posits that terrorists have planted a bomb in a major city that is due to detonate in a relatively short and finite period of time. If the bomb explodes, a large number of people will be killed. Authorities have, however, captured one of the terrorists, who has critical information that would allow authorities to defuse the bomb. The terrorist, however, refuses to talk, leaving the interrogator with the unenviable choice of either allowing the bomb to explode or obtaining the information through torture.

¶12 The ticking bomb scenario is, as Luban observes, “a remarkably effective propaganda device. . . . [I]t is simple, easy to grasp, emotionally powerful, and—above all—it seems to have only one right answer, the pro-torture answer.”<sup>32</sup> In addition to its one-sidedness, the ticking bomb scenario is pervasive in discussions about torture and coercion:<sup>33</sup>

It is a remarkable fact that everyone argues the pros and cons of torture through the ticking time bomb. Senator Schumer and Professor Dershowitz, the Israeli Supreme Court, indeed every journalist devoting a think-piece to the unpleasant question of torture, begins with the ticking time bomb and ends there as well.<sup>34</sup>

¶13 The ticking bomb scenario’s ubiquity extends to academic discussions about torture, as well as documents and official statements from the Bush administration concerning the interrogation of terrorist suspects. It is also the leitmotif of Fox’s counterterrorism drama, 24. These varied sources constitute a consistent narrative about torture centered on the ticking bomb. The underlying message is clear: torture is an effective and sometimes necessary tool for extracting crucial, lifesaving information.

*A. The academic debate over torture and the ticking bomb*

¶14 The debate here has generally not been whether torture is an evil, but whether, in spite of this, torture could under certain circumstances be a necessary or lesser evil.<sup>35</sup> Invariably, the device used to dislodge all but a hardy few deontologists from the absolutist no-torture-ever position was the ticking bomb scenario.

¶15 The use of the ticking bomb scenario in the context of torture was not entirely new. Jeremy Bentham constructed a version of it in the early nineteenth century.<sup>36</sup> Michael Walzer discussed it in 1973.<sup>37</sup> It also appeared in several law review articles written

<sup>32</sup> Luban, *supra* note 28, at 4.

<sup>33</sup> *Id.*

<sup>34</sup> David Luban, *Liberalism, Torture, and the Ticking Bomb*, in *THE TORTURE DEBATE IN AMERICA* 35, 44 (Karen J. Greenberg ed., 2006).

<sup>35</sup> For a useful description of the debate, see Sherry F. Colb, *Why is Torture 'Different' and How 'Different' is it?* 7-14 (Columbia Public Law Research Paper No. 08-171), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1099061](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1099061).

<sup>36</sup> See W. L. Twining & P. E. Twining, *Bentham on Torture*, 24 N. IR. L. Q. 305, 347 (1973).

<sup>37</sup> Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 PHIL. & PUB. AFFAIRS 160, 167 (1973).

before the September 11 attacks.<sup>38</sup> But after 9/11, the ticking bomb scenario acquired a new salience. Journalists began posing the ticking bomb scenario in discussions about whether torture should now be permissible.<sup>39</sup> The academic debate followed suit. Faced with the scenario, few academic commentators maintained the position that torture should be prohibited absolutely and under all circumstances.<sup>40</sup> Most argued that torture could be justified in certain exceptional circumstances. However, there were differing views as to what this entailed for the interrogator in the ticking bomb scenario and for the absolute legal prohibition on torture. Some adhered to the absolute legal prohibition for pragmatic reasons, and found some ex post means of dealing with the interrogator faced with a ticking bomb.<sup>41</sup> Parry, for example, argues that an interrogator who had truly resorted to torture as a last resort to save lives would have access to the criminal law defense of necessity.<sup>42</sup> Oren Gross, the foremost exponent of this view, advocates official disobedience and, where appropriate, ex post ratification. Thus, an interrogator who tortured would violate the law, but it would then be up to society to decide how to respond. The interrogator might be subject to sanction if society regarded the interrogator's action as unjustifiable or inexcusable. Conversely, societal ratification might occur by utilizing measures such as prosecutorial discretion, jury nullification, or executive clemency.<sup>43</sup>

¶16 Others, seeking to de-moralize the issue of torture, were less attached to the absolute legal prohibition on torture, and advocated a more transparent ex ante approach that accommodated a ticking bomb situation. This included the most notable academic proponent for the use of torture since September 11, Alan Dershowitz.<sup>44</sup> Dershowitz

<sup>38</sup> See, e.g., Sanford H. Kadish, *Torture, The State and the Individual*, 23 *ISR. L. REV.* 345, 345 (1989); Michael S. Moore, *Torture and the Balance of Evils*, 23 *ISR. L. REV.* 280, 333-34 (1989); Winfried Brugger, *May Government Ever Use Torture? Two Responses From German Law*, 48 *AM. J. COMP. L.* 661, 677 (2000). See also Gunter Frankenberg, *Torture and Taboo: An Essay Comparing Paradigms of Organized Cruelty*, 56 *AM. J. COMP. L.* 403, 404-5 (2008) (noting various discussions of torture in German legal literature before September 11, 2001).

<sup>39</sup> Vicki Haddock, *The Unspeakable*, *S.F. CHRON.*, Nov. 18, 2001, at D1 (“The strongest argument for rougher interrogations of those now custody [sic] is that getting them to talk, by whatever means, might foil future attacks—possibly even a cataclysmic assault with a biochemical weapon or radioactive ‘dirty bomb’ that could kill tens of thousands of Americans.”); Jonathan Alter, *Time to Think About Torture*, *NEWSWEEK*, Nov. 5, 2001, available at <http://www.newsweek.com/id/76304> (“Israeli law leaves a little room for ‘moderate physical pressure’ in what are called ‘ticking time bomb’ cases, where extracting information is essential to saving hundreds of lives.”). See also Jim Rutenberg, *Torture Seeps Into Discussion By News Media*, *N.Y. TIMES*, Nov 5, 2001, at C1.

<sup>40</sup> Henry Shue, *Torture in Dreamland: Disposing of the Ticking Bomb*, 37 *CASE W. RES. J. INT’L L.* 231, 238-39 (2006) (“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.”); Jeremy Waldron, *Torture and Positive Law: Jurisprudence and the White House*, 105 *COLUM. L. REV.* 1681, 1714-15 (2005) (“Might we be willing to allow the authorization of torture at least in a ‘ticking bomb’ case . . . ? For what it is worth, my own answer to this question is a simple ‘No.’ I draw the line at torture.”). See also Ariel Dorfman, *The Tyranny of Terror: Is Torture Inevitable in Our Century and Beyond?*, in *TORTURE: A COLLECTION 3* (Sanford Levinson ed., 2004).

<sup>41</sup> See John T. Parry, *Escalation and Necessity: Defining Torture at Home and Abroad*, in *TORTURE: A COLLECTION 145* (Sanford Levinson ed., 2004); Oren Gross, *The Prohibition on Torture and the Limits of the Law*, in *TORTURE: A COLLECTION 229* (Sanford Levinson ed., 2004); Kadish, *supra* note 38.

<sup>42</sup> Parry, *supra* note 41, at 158.

<sup>43</sup> Gross, *supra* note 41, at 240-41.

<sup>44</sup> ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS* (2002). Dershowitz also sets out his position on torture in various newspaper columns. See Alan M. Dershowitz, *Is There a Torturous Road to Justice?*, *L.A. TIMES*, Nov. 8, 2001, available at <http://ontology.buffalo.edu/smith/courses01/rtrw/Dershowitz.htm>

argues that since torture sometimes works, the use of torture in interrogation is a moral dilemma that must be faced.<sup>45</sup> Dershowitz accepts that in the case of a ticking bomb torture is justified on utilitarian grounds: “[I]t is surely better to inflict nonlethal pain on one guilty terrorist than to permit a large number of victims to die.”<sup>46</sup> His suggested methods for inflicting pain are a sterilized needle under the fingernails, or a dental drill into an unanaesthetized tooth.<sup>47</sup>

¶17 Dershowitz further suggests that the infliction of pain should be regulated by a system of judicial warrants in order to minimize the instances of torture. Under this system, an executive official would present evidence to a judge that a suspect had information needed to thwart an impending terrorist attack. Assuming that the judge granted the warrant, the suspect would then be granted immunity and told that he was compelled to testify. If the suspect refused, he would then be threatened with torture, and if necessary, subjected to non-lethal torture, as authorized by the warrant.<sup>48</sup> Dershowitz contends that torture is inevitable in a ticking bomb situation; the only question is whether it is going to be done openly or secretly and illegally.<sup>49</sup> His position is that his system of judicial torture warrants will enhance the transparency and accountability of torture, and therefore limit its occurrence to truly exceptional cases.<sup>50</sup>

¶18 Mirko Bagaric and Julie Clarke go further than Dershowitz, who is opposed to torture as a general moral matter.<sup>51</sup> They argue that “torture is indeed morally defensible, not just pragmatically desirable.”<sup>52</sup> In their view, torture is morally justifiable on utilitarian grounds, namely “when more grave harm can be avoided by using torture as an interrogation device.”<sup>53</sup> They then proceed to set up their version of the ticking bomb scenario.<sup>54</sup> Bagaric and Clarke conclude that the absolute prohibition against torture is

---

(“[T]orture in general certainly shocks the conscience of most civilized nations. But what if it were limited to the rare ‘ticking bomb’ case—the situation in which a captured terrorist who knows of an imminent large-scale threat refuses to disclose it? Would torturing one guilty terrorist to prevent the deaths of a thousand innocent civilians shock the conscience of all decent people?”); Alan M. Dershowitz, *Want to torture? Get a Warrant*, S.F. CHRON., Jan. 22, 2002, at A19 (“The Israeli Supreme Court left open the possibility, however, that in an actual ‘ticking bomb’ case—a situation in which a terrorist refused to divulge information necessary to defuse a bomb that was about to kill hundreds of innocent civilians—an agent who employed physical pressure could defend himself against criminal charges by invoking ‘the law of necessity.’ No such case has arisen since this court decision, despite numerous instances of terrorism in that troubled part of the world. Nor has there ever been a ticking bomb case in this country. But inevitably one will arise, and we should be prepared to confront it. It is important that a decision be made in advance of an actual ticking bomb case about how we should deal with this inevitable situation.”).

<sup>45</sup> DERSHOWITZ, *supra* note 44, at 137.

<sup>46</sup> *Id.* at 144.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 158-59.

<sup>49</sup> *Id.* at 151.

<sup>50</sup> *Id.* at 158-59.

<sup>51</sup> Alan M. Dershowitz, *Tortured Reasoning*, in TORTURE: A COLLECTION 257, 266 (Sanford Levinson ed., 2004).

<sup>52</sup> Mirko Bagaric & Julie Clarke, *Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable* 39 U.S.F. L. REV. 581, 582-83 (2005). A similarly enthusiastic view is put forward by columnist Charles Krauthammer, who sets up the ticking bomb scenario where the choice is to torture or have one million people die: “Not only is it permissible to hang this miscreant by his thumbs. It is a moral duty.” See Charles Krauthammer, *The Truth About Torture*, THE WEEKLY STANDARD, Dec. 5, 2005, at 21, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/006/400rhqav.asp>.

<sup>53</sup> Bagaric & Clarke, *supra* note 52, at 583.

<sup>54</sup> *Id.* (“Consider the following example: A terrorist network has activated a large bomb on one of hundreds

untenable, and that a legal framework that sanctions the use of torture in certain exceptional circumstances should be devised.<sup>55</sup>

¶19 Eric Posner and Adrian Vermeule also argue for the legalization and regulation of what they term “coercive interrogation,” a label that encompasses torture as well as cruel, inhuman and degrading treatment.<sup>56</sup> In their view, there is nothing exceptional about coercive interrogation, meaning that it should be dealt with like any other coercive state practice. Consequently, they recommend subjecting coercive interrogation to ex ante legal regulation, which would include Dershowitz-style warrants.<sup>57</sup> In the course of their argument, they also invoke the ticking bomb scenario to overcome the absolute deontological position.<sup>58</sup>

### B. *The ticking bomb scenario in official discourse*

¶20 The invocation of the ticking bomb was not limited to academics. Versions of it became a part of the official discourse on torture; the ticking bomb scenario can be found in various memoranda concerning the treatment of detainees, as well as in official statements made by various members of the Bush administration on the same issue. An early memorandum, attributed to then-Attorney General Alberto Gonzales but reportedly the work of long-time Cheney aide, David Addington,<sup>59</sup> set the tone for the administration’s treatment of detainees in the “war on terror.” It asserted that the Geneva Conventions did not apply to either the conflict with al Qaeda or the Taliban, a view that President Bush subsequently would largely endorse.<sup>60</sup> Elements of the ticking bomb scenario are immediately apparent:

As you have said, the war against terrorism is a new kind of war... The nature of the new war places a high premium on other factors, such as the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities against American civilians... In my judgment, this new paradigm renders obsolete Geneva's strict

---

of commercial planes carrying over three hundred passengers that is flying somewhere in the world at any point in time. The bomb is set to explode in thirty minutes. The leader of the terrorist organization announces this intent via a statement on the Internet. He states that the bomb was planted by one of his colleagues at one of the major airports in the world in the past few hours. No details are provided regarding the location of the plane where the bomb is located. Unbeknown to him, he was under police surveillance and is immediately apprehended by police. The terrorist leader refuses to answer any questions of the police, declaring that the passengers must die and will do so shortly.”)

<sup>55</sup> *Id.* at 616.

<sup>56</sup> ERIC POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE* 184 (2007).

<sup>57</sup> *Id.* at 185.

<sup>58</sup> *Id.* at 187 (“One might hold that coercive interrogation is absolutely impermissible, as a violation of rights rooted in human dignity or autonomy. This position is held by a very few moral philosophers. Here, the ticking-bomb hypotheticals are important: while it is possible to argue that such cases are so rare that they should be ignored by a rule-consequentialist calculus ex ante, an argument we consider below, it is fanatical to argue on deontological grounds that rights against coercive interrogation should not be overridden to prevent serious harms to others.”).

<sup>59</sup> JANE MAYER, *THE DARK SIDE* 124 (2008).

<sup>60</sup> Memorandum from President George W. Bush to the Vice President, the Sec’y of State, the Sec’y of Def., et al., *Humane Treatment of al Qaeda and Taliban Detainees* (Feb. 7 2002), *available at* [http://www1.umn.edu/humanrts/OathBetrayed/Bush 2-7-02.pdf](http://www1.umn.edu/humanrts/OathBetrayed/Bush%202-7-02.pdf) (stating that GCIII did not apply to the conflict with al Qaeda and that, although GCIII did apply to the conflict with the Taliban, the Taliban detainees did not satisfy the requirements for prisoner of war status).

limitations on questioning of enemy prisoners and renders quaint some of its provisions.<sup>61</sup>

¶21 The ticking bomb scenario is also evident in the most infamous of the Bush administration's "torture memos,"<sup>62</sup> the Bybee memorandum.<sup>63</sup> This memorandum was written because of the concerns of the Central Intelligence Agency (CIA) about the legality of its interrogators' actions. Soon after 9/11, the CIA had been given a broad mandate to track down, detain and kill certain terrorists.<sup>64</sup> Thus began the High-Value Detainee (HVD) program.<sup>65</sup> The CIA subsequently interrogated a number of high-level al Qaeda operatives using various coercive interrogation techniques. CIA officials disagreed about the propriety of such techniques: some thought more latitude was appropriate, while others were concerned about potential legal exposure.<sup>66</sup> The CIA consequently sought clarification from the Department of Justice. This led to internal discussions amongst high-level decision-makers, and eventually the creation of the Bybee memorandum of August 2002,<sup>67</sup> now widely acknowledged to be the work of John Yoo,<sup>68</sup> which tendentiously interpreted its way around the Torture Statute<sup>69</sup> by various means. In the course of a discussion about the potential availability of the criminal law defense of necessity to an interrogator, the ticking bomb scenario appears:

[A] detainee may possess information that could enable the United States to prevent attacks that potentially could equal or surpass the September 11 attacks in their magnitude. Clearly, any harm that might occur during an interrogation would pale to insignificance compared to the harm avoided by preventing such an attack, which could take hundreds or thousands of lives.<sup>70</sup>

¶22 Around the same time, military commanders at Guantánamo Bay were under pressure to obtain more intelligence from their captives. This eventually resulted in a push to loosen the restrictions on the use of coercive interrogation techniques.<sup>71</sup> The

<sup>61</sup> Memorandum from Alberto R. Gonzales, Att'y Gen., to the President of the United States, Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf>.

<sup>62</sup> *A Guide to the Memos on Torture*, N.Y. TIMES, <http://www.nytimes.com/ref/international/24MEMO-GUIDE.html>.

<sup>63</sup> Memorandum from Jay S. Bybee, Assistant Att'y Gen., to Alberto R. Gonzales, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A 41 (Aug. 1, 2002), available at <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/doj/bybee80102mem.pdf> [hereinafter Bybee Memo].

<sup>64</sup> Jane Mayer, *The Black Sites*, THE NEW YORKER, Aug. 13, 2007, available at [http://www.newyorker.com/reporting/2007/08/13/070813fa\\_fact\\_mayer](http://www.newyorker.com/reporting/2007/08/13/070813fa_fact_mayer).

<sup>65</sup> Parl. Assem. of the Council of Eur. [PACE], Comm. on Legal Affairs & Human Rights, *Secret Detentions and Illegal Transfers of Detainees Involving Council Of Europe Member States: Second Report*, ¶¶ 51-71, AS/Jur (2007) 36 (June 7, 2007), available at [http://www.bernan.com/images/PDF/EMarty\\_20070608\\_NoEmbargo.pdf](http://www.bernan.com/images/PDF/EMarty_20070608_NoEmbargo.pdf).

<sup>66</sup> ALFRED W. MCCOY, A QUESTION OF TORTURE 120-21 (2006).

<sup>67</sup> *Id.* at 121.

<sup>68</sup> JACK GOLDSMITH, THE TERROR PRESIDENCY 142 (2007).

<sup>69</sup> 18 U.S.C. §§ 2340-2340A (2000).

<sup>70</sup> Bybee Memo, *supra* note 63, at 40-41.

<sup>71</sup> See *infra* text accompanying notes 188-192.

military leadership at Guantánamo sought and obtained high-level authorization: in December 2002, Defense Secretary Rumsfeld authorized the use of certain additional interrogation techniques such as forced standing.<sup>72</sup> This and other coercive techniques were used on Mohamed al-Qahtani, one of several possible 20th September 11 hijackers.<sup>73</sup> However, in January 2003, Secretary Rumsfeld rescinded his earlier authorization, and convened a special Defense Department Working Group to consider the issue of interrogation. The final Working Group memorandum authorized the use of most of the same techniques that had earlier been authorized by Secretary Rumsfeld.<sup>74</sup> These included techniques euphemistically described as “environmental manipulation” and “reversing sleep cycles from night to day” and “isolation.”<sup>75</sup> The ticking bomb scenario appears once again in relation to the necessity defense:

According to public and governmental reports, al Qaeda has other sleeper cells within the United States that may be planning similar attacks [to 9/11]. Indeed, al Qaeda’s plans apparently include efforts to develop and deploy chemical, biological, and nuclear weapons of mass destruction. Under these circumstances, a detainee may possess information that could enable the United States to prevent attacks that potentially could equal or surpass the September 11 attacks in their magnitude. Clearly, any harm that might occur during an interrogation would pale to insignificance compared to the harm avoided by preventing such an attack, which could take hundreds or thousands of lives.<sup>76</sup>

¶23

In September 2006, just prior to the fifth anniversary of the 9/11 attacks, President Bush requested that Congress enact legislation to authorize military commissions to try terrorists.<sup>77</sup> In the course of this speech, President Bush revealed that a small number of terrorist suspects had been detained and interrogated outside the United States by the CIA.<sup>78</sup> This was the first official acknowledgement of the CIA’s HVD program and its

<sup>72</sup> MCCOY, *supra* note 66, at 127.

<sup>73</sup> Adam Zagorin & Michael Duffy, *Inside the Interrogation of Detainee 063*, TIME, June 12, 2005, at 26, available at <http://www.time.com/time/magazine/article/0,9171,1071284,00.html>. A Bush administration official, Susan Crawford, later concluded that al-Qahtani had been tortured. See Bob Woodward, *Detainee Tortured, Says U.S. Official*, WASH. POST, Jan. 14, 2009, at A1.

<sup>74</sup> MCCOY, *supra* note 66, at 128-29.

<sup>75</sup> *Id.* at 129.

<sup>76</sup> U.S. Dep’t of Def., Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations 26 (Apr. 4, 2003), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.04.pdf>; see also Memorandum from John Yoo, Deputy Assistant Att’y Gen., to William J. Haynes, Gen. Counsel of the Dep’t of Def., Military Interrogation of Alien Unlawful Combatants Held Outside the United States 62 (March 14, 2003), available at <http://www.fas.org/irp/agency/doj/olc-interrogation.pdf> (“So, if officials had credible threat information that a U.S. city was to be the target of a large-scale terrorist attack a month from now and the detainee was in a position to have information that could lead to the thwarting of that attack, physical contact such as shoving or slapping the detainee clearly would not be disproportionate to the threat posed. In such an instance, those conducting the interrogations would have acted in good faith rather than maliciously and sadistically for the very purpose of causing harm.”).

<sup>77</sup> Congress would eventually accede to this request. See Military Commissions Act of 2006, *supra* note 20.

<sup>78</sup> President George W. Bush, Discussing Creation of Military Commissions to Try Suspected Terrorists (Sept. 6, 2006), transcript available at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html>.

associated “black sites,” interrogation facilities located at various places around the world.<sup>79</sup> President Bush also defended the CIA’s use of “an alternative set of procedures”<sup>80</sup> for interrogating the high-value al Qaeda detainees in the familiar terms of the ticking bomb scenario. He emphasized the success of these alternative procedures in broad terms, but adhered to the position that the United States did not engage in torture: these alternative procedures, while tough, were “safe, and lawful, and necessary.”<sup>81</sup> The CIA’s special program was necessary because these detainees were “dangerous men with unparalleled knowledge about terrorist networks and their plans for new attacks.” Accordingly, it was imperative that CIA agents have the operational flexibility to unlock these men’s secrets: “The security of our nation and the lives of our citizens depend on our ability to learn what these terrorists know.”<sup>82</sup> Even though he stated that there were no longer any detainees in the HVD program, President Bush reserved the right to start it up again if the need arose:

[W]e will continue working to collect the vital intelligence we need to protect our country. . . . But as more high-ranking terrorists are captured, the need to obtain intelligence from them will remain critical—and having a CIA program for questioning terrorists will continue to be crucial to getting life-saving information.<sup>83</sup>

¶24

Similarly, in 2008, when CIA director Michael Hayden admitted before the Senate Select Committee on Intelligence that three high-value terrorist detainees had been subjected to waterboarding,<sup>84</sup> he justified the use of this technique by alluding to the ticking bomb scenario. In his view, waterboarding could be justifiably employed if “an unlawful combatant is possessing information that would help us prevent catastrophic loss of life of Americans or their allies.”<sup>85</sup>

<sup>79</sup> The story was originally broken in 2005. See Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1. For an account of life at a black site, see Mark Benjamin, *Inside the CIA’s Notorious “Black Sites,”* SALON.COM, Dec. 15, 2007, <http://www.salon.com/news/feature/2007/12/14/bashmilah>.

<sup>80</sup> The euphemism “alternative set of procedures,” like its post-9/11 variants “torture lite,” “moderate physical pressure,” “enhanced interrogation” and “highly coercive interrogation” are reminiscent of earlier euphemisms for torture, such as the Nazis’ “sharpened interrogation,” and the “pushed interrogation” of the French in Algeria. See DARIUS REJALI, *TORTURE AND DEMOCRACY* 358 (2007).

<sup>81</sup> President Bush, *supra* note 78. Given what is known about the interrogation practices of the CIA’s HVD program, these assertions of legality strain credulity. See JAMES RISEN, *STATE OF WAR* 31-32 (2006) (describing various interrogation techniques such as confinement in confined boxes, sleep deprivation, sensory deprivation, stress positions and water-boarding, and noting that CIA officials familiar with the interrogations of high-value al Qaeda detainees have “no doubts in their minds that the CIA is torturing its prisoners.”). See also Mayer, *supra* note 64 (describing the use of similar techniques, and quoting an expert as saying that the CIA’s interrogation program is “one of the most sophisticated, refined programs of torture ever”); MAYER, *supra* note 59, at 272-78 (discussing the interrogation techniques used on Khalid Sheik Mohammed).

<sup>82</sup> President Bush, *supra* note 78.

<sup>83</sup> *Id.*

<sup>84</sup> This was the first such public admission by a high-ranking intelligence official. See Richard Esposito & Jason Ryan, *CIA Chief: We Waterboarded*, ABC NEWS, Feb. 5, 2008, <http://abcnews.go.com/print?id=4244423>.

<sup>85</sup> Terry Freiden, *CIA Director: Waterboarding Necessary, but Potentially Illegal*, CNN.COM, Feb. 7, 2008, available at <http://a.findtarget.com/CNN.php?/2008/POLITICS/02/07/mukasey.waterboarding/index.html>. See also Charlie Savage, *Bush Could Bypass New Torture Ban*, BOSTON GLOBE, Jan. 4, 2006, at A1,

¶25 In sum, the logic and rhetoric of the ticking bomb scenario features strongly and consistently in this official discourse; those being interrogated are dangerous men with information about grave threats to national security. In order to save lives, that information needs to be extracted by any means necessary.

### C. *The Ticking Bombs of 24*

¶26 Perhaps the most recognizable standard-bearer for life-saving torture from 2001 to 2008 has been the fictional Jack Bauer, hero of Fox's highly successful drama 24.<sup>86</sup> Bauer personifies the idea that effective counterterrorism requires the freedom to do whatever is necessary to ensure national security, including torture. Each season of 24 tracks a single twenty-four hour day with Bauer and his fellow agents at the fictional Counterterrorist Unit (CTU), who must protect the nation from various terrorist threats. The urgency and tension of the show is emphasized by its distinctive narrative device of a real-time digital clock that counts down each hour at the beginning and end of each episode, and after each commercial break.<sup>87</sup> Inevitably, in the course of a season of 24, Bauer forcibly interrogates various people connected to the terrorist plot for critical information. Almost invariably, these people divulge that information, allowing Bauer to eventually foil the terrorists' nefarious plans.

¶27 Popular depictions of the ticking bomb scenario are not new. For example, Darius Rejali notes that such stories have been told in many television programs, and novels such as Jean Lartéguy's *Les Centurions*, which includes a scene where a French soldier in Algeria tortures a dentist-cum-terrorist and forces him to reveal the location of 15 bombs that he has set to explode the next morning.<sup>88</sup> Likewise, Clint Eastwood's *Dirty Harry*, a maverick cop with little patience for bureaucratic niceties, was willing to torture when circumstances required it. In the eponymous 1971 film, Eastwood's character faces a situation similar to the ticking bomb scenario: he tortures Scorpio, a serial killer, in order to discover the location of a kidnapped child before she dies. He succeeds in extracting the information, but the girl is already dead. To rub salt in the wound, Scorpio is released because of the unlawful nature of *Dirty Harry*'s tactics.<sup>89</sup>

¶28 Given the news and discussion about torture after 9/11, there was an air of inevitability about torture becoming a dramatic device—a form of entertainment.<sup>90</sup> But

---

available at

[http://www.boston.com/news/nation/articles/2006/01/04/bush\\_could\\_bypass\\_new\\_torture\\_ban/](http://www.boston.com/news/nation/articles/2006/01/04/bush_could_bypass_new_torture_ban/) (discussing a senior administration official's comments that President Bush intended to reserve the right to violate the prohibition on cruel, inhuman or degrading treatment contained in the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005), in exceptional situations such as a ticking bomb scenario).

<sup>86</sup> Alessandra Stanley, *Bombers Strike, and America Is in Turmoil. It's Just Another Day for Jack Bauer*, N.Y. TIMES, January 12, 2007, available at

<http://www.nytimes.com/2007/01/12/arts/television/12twen.html> (noting that the steady increase in the show's ratings since 2001).

<sup>87</sup> See Jane Mayer, *Whatever It Takes*, THE NEW YORKER, Feb. 19, 2007, available at [http://www.newyorker.com/reporting/2007/02/19/070219fa\\_fact\\_mayer](http://www.newyorker.com/reporting/2007/02/19/070219fa_fact_mayer).

<sup>88</sup> REJALI, *supra* note 80, at 545-47.

<sup>89</sup> DIRTY HARRY (Warner Bros. Studios 1971). See also Uwe Steinhoff, *Torture—The Case for Dirty Harry and Against Alan Dershowitz*, 23 J. OF APPLIED PHIL. 337 (2006). This particular scenario has an eerie similarity to the real life case involving Frankfurt Police Vice-President Wolfgang Daschner. See Florian Jessberger, *Bad Torture—Good Torture?*, 3 J. INT'L CRIM. JUST. 1059 (2005).

<sup>90</sup> Scott Horton, *How Hollywood Learned to Stop Worrying and Love the (Ticking) Bomb*, HARPERS, March 1, 2008, available at <http://harpers.org/archive/2008/03/hbc-90002531> ("The entertainment industry latches

24, which first aired in November 2001, around the time that Alan Dershowitz began speaking of ticking bombs and torture warrants,<sup>91</sup> has taken the depiction of torture to a new level. Of course, in accordance with the ticking bomb scenario that the show wholeheartedly embraces, Bauer (and sometimes his CTU colleagues) torture only in order to uncover critical information that will forestall disaster and save lives. But given the frequency of ticking bombs in 24—indeed, the show might aptly be described as a series of ticking bomb situations contained within a season long ticking bomb scenario—graphic scenes of interrogational torture are frequent<sup>92</sup> and have become a hallmark of the show. The characteristics of 24's depiction of torture are discussed further below.<sup>93</sup>

### 1. Torture is Always a Response to an Urgent Threat

¶29 Jack Bauer only tortures when compelled to by extreme exigency. Unlike some of the evil forces in 24 (terrorists, the Chinese government), who torture sadistically or gratuitously, Bauer only tortures for the purposes of eliciting life-saving information.<sup>94</sup> For example, in season 2, Bauer interrogates Syed Ali, the terrorist leader involved in an attempt to detonate a nuclear bomb in Los Angeles. Ali refuses to give up any information. Bauer has Ali's son executed while Ali watches over a video-link, and threatens to execute the other. Ali finally relents and reveals the location of the bomb and key details of the plot. It is revealed later in the episode that in fact Bauer only staged the executions over the video-link.<sup>95</sup>

¶30 Similarly, in season 4, Sarah Gavin, a CTU employee, is framed by a mole in the agency, leading CTU to believe that she knows the location of a device that will halt the impending meltdown of several nuclear reactors. Erin O'Driscoll, the head of CTU demands that Gavin reveal the location of the device, emphasizing that “thousands of people's lives are at stake.”<sup>96</sup> Faced with Gavin's unresponsiveness and impending disaster, O'Driscoll orders that Gavin be tortured even as she expresses some doubt over Gavin's guilt. Gavin is repeatedly shocked with a taser, and injected with a pain-inducing drug.<sup>97</sup>

¶31 In the same season, Bauer suspects that his love interest's ex-husband, Paul Raines, is connected to the same terrorist plot to cause multiple nuclear reactors to melt down,

---

on to the events of the day and tries to take a ride from them. That is the simple nature of things.”)

<sup>91</sup> See Alan M. Dershowitz, *Is There a Torturous Road to Justice?*, L.A. TIMES, Nov. 8, 2001, at 19, available at <http://ontology.buffalo.edu/smith//courses01/rrtw/Dershowitz.htm>; see also PHILIPPE SANDS, TORTURE TEAM 64 (2008).

<sup>92</sup> Horton, *supra* note 90 (noting 67 torture scenes in 24's first five seasons); Adam Green, *Normalizing Torture, One Rollicking Hour At a Time*, N.Y. TIMES, May 22, 2005, § 2, at 34; Matt Feeney, *Torture Chamber*, SLATE, Jan. 6, 2004, <http://www.slate.com/id/2093269/> (last visited Apr. 1, 2009). See also Christopher J. Patrick & Deborah L. Patrick, *The Third Degree*, in JACK BAUER FOR PRESIDENT 87, 98-99 (Richard Minter ed., 2008).

<sup>93</sup> See generally Tung Yin, *Jack Bauer Syndrome: Hollywood's Depiction of National Security Law*, 17 S. CAL. INTERDIS. L.J. 279 (2008) (considering 24's depiction of torture and Arab villains).

<sup>94</sup> Sam Kamin, *How the War on Terror May Affect Domestic Interrogations: The 24 Effect*, 10 CHAP. L. REV. 693, 708 (2007); James R. Silkenat & Peter M. Norman, *Jack Bauer and the Rule of Law: The Case of Extraordinary Rendition*, 30 FORDHAM INT'L L.J. 535, 546 (2007) (“In the show, there are only hours or even minutes left to find the one crucial piece of intelligence. In reality, detainees are often tortured for months, without reference to any specific terrorist plot.”).

<sup>95</sup> 24: Day 2: 7:00 p.m. - 8:00 p.m. (FOX television broadcast Feb. 11, 2003).

<sup>96</sup> 24: Day 4: 2:00 p.m. - 3:00 p.m. (FOX television broadcast Feb. 7, 2005).

<sup>97</sup> *Id.*

because he owns a building used to plan an earlier terrorist attack that day. Bauer subjects Raines to improvisational electroshock torture with a live electrical wire pulled out of a hotel lamp. Bauer justifies his torture of Raines by emphasizing how he does not have time to obtain the information any other way, and that he has to find out what Raines, at this stage an uncooperative suspect, knows about the terrorist plot.<sup>98</sup>

## 2. Torture Rapidly Generates Important Intelligence Information

¶32 In the world of 24, torture swiftly yields critical intelligence.<sup>99</sup> In almost all cases, it goes without saying that Bauer or his colleagues have before them a factually guilty terrorist, or at least someone complicit in the terrorist plot.<sup>100</sup> Moreover, as Sam Kamin notes, “The imposition of torture on a suspect invariably and almost instantaneously forces the suspect to speak and to speak truthfully about what she knows.”<sup>101</sup> While the effectiveness of torture as an empirical matter is a highly contested issue,<sup>102</sup> one would never comprehend this from watching 24, where torture reveals critical information at a breakneck pace almost without fail. For example, Paul Raines is initially defiant, and has nothing to say in the face of Bauer’s questions. However, several electric shocks quickly persuade him to check the business records on his laptop more closely. As Bauer ominously dangles the live wires near his cheek, Raines uncovers an important link to terrorist mastermind Habib Marwan.<sup>103</sup>

¶33 In season 2, National Security Advisor Roger Stanton is revealed to be a traitor, and is interrogated about the location of a nuclear device that is to be detonated in Los Angeles. A Secret Service agent puts his feet in a bucket of water and electrocutes him with a defibrillator.<sup>104</sup> In the next episode, Stanton’s interrogation continues as the President watches on; “Everyone breaks eventually,” he observes.<sup>105</sup> Stanton manages to hold out for longer than most of 24’s villains, but eventually discloses information in the following episode.<sup>106</sup> Indeed, seemingly the only exception to the rule that everyone breaks eventually is Jack Bauer himself. As he is returned by the Chinese government after a long period of detention and torture in season 6, a Chinese official remarks, with apparent grudging admiration, that Bauer never broke his silence.<sup>107</sup>

¶34 For Joel Surnow, the co-creator and executive producer of 24, torture is more than a just a dramatic device; he clearly believes in the efficacy of torture as an article of faith.<sup>108</sup>

<sup>98</sup> 24: Day 4: 5:00 p.m. - 6:00 p.m. (FOX television broadcast Feb. 28, 2005).

<sup>99</sup> Silkenat & Norman, *supra* note 94, at 547. This is denied, however, by at least one of the show’s writers. See James Surowiecki, *The Worst Day Ever*, SLATE, Jan. 17, 2006, <http://www.slate.com/id/2134395/fr/rss/>.

<sup>100</sup> Sarah Gavin’s torture in season 4 is a notable exception. However, as Tung Yin observes, Bauer himself is never wrong. See Yin, *supra* note 93, at 284-85.

<sup>101</sup> Kamin, *supra* note 94, at 706-07; see also Yin, *supra* note 93, at 285.

<sup>102</sup> See *infra* text accompanying notes 133-160.

<sup>103</sup> 24: Day 4: 5:00 p.m. - 6:00 p.m., *supra* note 98.

<sup>104</sup> 24: Day 2: 6:00 p.m. - 7:00 p.m. (FOX television broadcast Feb. 4, 2003).

<sup>105</sup> 24: Day 2: 7:00 p.m. - 8:00 p.m. (FOX television broadcast Feb. 11, 2003).

<sup>106</sup> 24: Day 2: 8:00 p.m. - 9:00 p.m. (FOX television broadcast Feb. 18, 2003).

<sup>107</sup> 24: Day 6: 6:00 a.m. - 7:00 a.m. (FOX television broadcast Jan. 14, 2007).

<sup>108</sup> See Mayer, *supra* note 87 (quoting Surnow as saying, “We’ve had all of these torture experts come by recently, and they say, ‘You don’t realize how many people are affected by this. Be careful.’ They say torture doesn’t work. But I don’t believe that.”). John Yoo, author of many of the Bush administration’s memoranda concerning the war on terrorism, has a similar view about the use of torture and coercion. See

By contrast, Douglas Johnson, the Executive Director of the Center for the Victims of Torture, testified to the Senate Committee on the Judiciary that torture does not swiftly elicit information. It is a time-consuming process, and the information elicited is often unreliable.<sup>109</sup> Thus, the instant efficacy of torture as depicted on 24, where “Jack Bauer seems successfully to torture someone to extract crucial national security information from one commercial break to the next” bears little relation to the reality of torture.<sup>110</sup>

### 3. There are Few Adverse Consequences for the Torture Victim

¶35 Victims of torture in 24 often recover quickly and experience no long-term adverse effects. They may even cooperate and work with the person or agency that has just finished torturing them. Their experience of torture is, it seems, quite transitory.<sup>111</sup> For example, Paul Raines, just hours after being electrocuted by Bauer, assists his former torturer by using his computer database expertise to recover files from terrorist Habib Marwan’s workplace computer.<sup>112</sup> Later Raines helps Bauer fight off a team of mercenaries, and even takes a bullet for Bauer (which eventually kills him).<sup>113</sup> Similarly, Sarah Gavin willingly goes back to work for CTU after a brief period of recovery in the infirmary. Soon after returning to her workstation, she even has the presence of mind to request that O’Driscoll have her arrest expunged from her record and give her a pay raise as compensation for being wrongfully tortured.<sup>114</sup>

¶36 As Claudia Card observes, “The FOX network television serial drama ‘24,’ . . . does real torture victims a disservice by sanitizing torture and presenting victims as bouncing back from it the next day, as though it were no worse than a painful tooth extraction.”<sup>115</sup> Such swift and miraculous recoveries from torture, of course, are not reflective of the experience of actual torture victims, who may—in addition to any ongoing physical effects—experience serious psychological and emotional problems such as memory loss, depression, and posttraumatic stress disorder.<sup>116</sup>

### 4. Summary: Just leave it to Jack

¶37 24 epitomizes the dominant ticking bomb-centered narrative about torture.<sup>117</sup> The clock is counting down and time is running out; with its omniscient view, the audience

---

MAYER, *supra* note 59, at 134 (quoting Yoo as saying, “It works—we know it does. The CIA says it does and the Vice President says it does.”).

<sup>109</sup> *Hearing on the Nomination of The Honorable Alberto R. Gonzales to be Attorney General of the United States Before the Senate Comm. on the Judiciary*, 109th Cong. 154–56 (2005) (testimony of Douglas A. Johnson, Executive Director, The Ctr. for Victims of Torture), available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=1345&wit\\_id=3939](http://judiciary.senate.gov/hearings/testimony.cfm?id=1345&wit_id=3939) (“Although eventually everyone will confess to something, it takes a lot of time.”). See also *infra* text accompanying notes 133–160.

<sup>110</sup> Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 IND. L.J. 1145, 1164 (2005).

<sup>111</sup> Silkenat & Norman, *supra* note 94, at 549.

<sup>112</sup> 24: Day 4: 6:00 p.m. - 7:00 p.m. (FOX television broadcast March 7, 2005).

<sup>113</sup> 24: Day 4: 7:00 p.m. - 8:00 p.m. (FOX television broadcast March 14, 2005); 24: Day 4: 2:00 a.m. - 3:00 a.m. (FOX television broadcast May 2, 2005).

<sup>114</sup> 24: Day 4: 4:00 p.m. - 5:00 p.m. (FOX television broadcast Feb. 21, 2005).

<sup>115</sup> Claudia Card, *Ticking Bombs and Interrogations*, 2 CRIM. L. & PHIL. 1, 9 (2008).

<sup>116</sup> See Testimony of Douglas A. Johnson, *supra* note 109 (detailing the serious longer-term effects on victims of torture). See also JOHN CONROY, UNSPEAKABLE ACTS, ORDINARY PEOPLE 169–183 (2000).

<sup>117</sup> The fictional nature of the ticking bomb scenario is acknowledged by one of the show’s co-creators, Bob Cochran. See Clive Thompson, *Cruel Intentions*, N.Y. TIMES, Jan. 31, 2005 (Magazine), available at

knows the person about to be tortured has some vital clue, and that absent heroic intervention, nuclear incineration (or some equivalent horror) awaits.<sup>118</sup> The only hope of discovering the critical clue necessary to thwart the terrorist attack is someone like Jack Bauer, who is willing to torture when necessary.

¶38 Season 4's torture of Joe Prado, a man connected to the season's uber-villain Marwan, offers perhaps the paradigmatic depiction of torture in 24.<sup>119</sup> Prado is captured by CTU, but his interrogation is delayed after Marwan notifies the human rights organization, Amnesty Global, that CTU is planning to torture an innocent man.<sup>120</sup> Just as CTU agents are about to inject Prado with some type of drug, David Weiss, an attorney from Amnesty Global, shows up at CTU—protective court order in hand—and halts Prado's interrogation.<sup>121</sup> Weiss remains unmoved by appeals from various members of CTU, who argue that many lives depend on finding out what Prado knows. The President of the United States, meanwhile, is unwilling to authorize Prado's torture without consulting the Justice Department. Bauer takes matters into his own hands by resigning from CTU, and torturing the critical information about Marwan out of Prado as a private citizen.<sup>122</sup>

¶39 The audience knows that Prado is involved with Marwan, but CTU is unable to uncover this information because Weiss, the Amnesty Global lawyer, intervenes to protect Prado's legal rights. The audience also knows that Amnesty Global was tipped off by Marwan himself, making both Weiss and Amnesty Global unwitting agents of "lawfare."<sup>123</sup> Additionally, the President is gun-shy, and unwilling to act without bureaucratic cover. But in spite of all these obstacles, Bauer once again saves the day with torture.<sup>124</sup> The unapologetic message of this episode, and by extension the show, is that torture works, that torture is necessary,<sup>125</sup> and that rather being a tool of dictators and

---

<http://nymag.com/nymetro/arts/tv/10966/>.

<sup>118</sup> See Yin, *supra* note 93, at 285.

<sup>119</sup> Cf. Brett Chandler Patterson, "I Despise You for Making Me Do This," in *JACK BAUER FOR PRESIDENT* 29, 37-38 (Richard Minter ed., 2008).

<sup>120</sup> As Adam Green observes, the message in this episode is clearly that "those seeking to protect suspects' rights risk abetting terrorist activities, to catastrophic ends." See Green, *supra* note 92. A similar sentiment was expressed by real-life Deputy Assistant Secretary of Defense for Detainee Affairs, Charles Stimson. In a radio interview, Stimson identified several law firms acting for terrorist detainees and suggested that those firms' corporate clients should make the firms "choose between lucrative retainers and representing terrorists." See Neil Lewis, *Official Attacks Top Law Firms Over Detainees*, N.Y. TIMES, January 13, 2007, available at <http://www.nytimes.com/2007/01/13/washington/13gitmo.html>.

<sup>121</sup> 24: Day 4: 12:00 a.m. - 1:00 a.m. (FOX television broadcast April 18, 2005).

<sup>122</sup> *Id.*

<sup>123</sup> "Lawfare" denotes the use of legal processes as a means of achieving a military advantage. See David Luban, *Lawfare and Legal Ethics in Guantánamo*, 60 STAN. L. REV. 1981, 2020 (2008); see also National Defense Strategy of the United States of America, 5 (Mar. 2005), available at [http://www.globalsecurity.org/military/library/policy/dod/nds-usa\\_mar2005.htm](http://www.globalsecurity.org/military/library/policy/dod/nds-usa_mar2005.htm) ("Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism.").

<sup>124</sup> In season 7 of 24, Bauer faces a tough reception before a Senate hearing investigating his use of torture. Despite also facing the prospect of criminal charges, Bauer offers an unapologetic defense of his actions. His primary inquisitor is a meddlesome Senator Blaine Mayer, presumably a fictional stand-in for reporter Jane Mayer of the *New Yorker*. See 24: Day 7: 8:00 a.m. - 9:00 a.m. (FOX television broadcast Jan. 11, 2009).

<sup>125</sup> See Alessandra Stanley, *Bombers Strike, and America Is in Turmoil. It's Just Another Day for Jack Bauer*, N.Y. TIMES, Jan. 12, 2007, available at <http://www.nytimes.com/2007/01/12/arts/television/12twen.html>.

tyrants, torture is an act of rebellious heroism.<sup>126</sup> Those who would stop Jack Bauer from doing his job—smug liberals, spineless politicians, and dangerously naïve human rights groups—are to be viewed with contempt. What the real Jack Bauers of the world need is the unfettered discretion to protect national security.<sup>127</sup>

### III. ART IMITATES LIFE: SKEPTICISM ABOUT TORTURE AND BATTLESTAR GALACTICA

¶40 Overall, the first narrative of torture described above proved dominant for most of the duration of the Bush administration. But it was, and is, subject to challenge by the second and alternative narrative of torture, which challenges the validity of the first narrative's centerpiece, the ticking bomb scenario, by highlighting how it obscures several important assumptions—most significantly, that torture is actually effective—and how it ignores the long-run costs of torture.

¶41 Resistance to the first narrative was particularly pronounced in the academic arena, where academic commentators vigorously contested the validity of the ticking bomb scenario. Even where the first narrative arguably achieved its greatest dominance, amongst government actors, there was dissent from some, most notably the Federal Bureau of Investigation (FBI) and military lawyers. At the level of popular culture, Sci-Fi's *Battlestar Galactica* portrays the use of torture and coercion ambiguously, and, as will be argued below, skeptically. *Battlestar Galactica*'s account of torture thus forms an interesting counterpoint to the ticking bombs and moral certainty of 24.

#### A. Academic Counterarguments to the Ticking Bomb Scenario

¶42 Although Dershowitz's torture warrant proposal probably attracted the most attention, he was by no means the only—nor indeed the most enthusiastic—advocate of interrogational torture and coercion. His torture warrant proposal may be faulted on the basis that it will not achieve his professed goal of minimizing torture.<sup>128</sup> But a more fundamental critique can be made of Dershowitz's position, and by extension others who rely on the ticking bomb scenario to undermine the absolute prohibition on torture. Like the economist trapped on the desert island with a can of food who, according to the well-worn joke, simply assumes a can-opener, the ticking bomb scenario assumes away all the difficulties and untidiness of reality.

¶43 As Luban has thoroughly demonstrated, the ticking bomb scenario depends on a series of assumptions,<sup>129</sup> of which four are particularly important. The scenario assumes: first, that the interrogator knows that disaster is imminent unless he or she acts; second, that the interrogator has the terrorist who has the requisite knowledge; third, that torturing

<sup>126</sup> See Teresa Wiltz, *Torture's Tortured Cultural Roots*, WASH. POST, May 3, 2005, at C1 (observing the shift towards torture by heroes rather than just villains). Notably, Alan Dershowitz's torture warrant proposal does not appear to have been taken up in 24. See Alan M. Dershowitz, *24 and the Use of Torture to Obtain Preventive Intelligence*, in JACK BAUER FOR PRESIDENT 103,105 (Richard Minter ed., 2008).

<sup>127</sup> See Horton, *supra* note 90; Stanley, *supra* note 125. In many ways, this is simply an extension of the idea of an individual hero (typically a police officer) having to battle criminals as well as "the system." This is a staple of fictional accounts of policing. See generally RAY SURETTE MEDIA, CRIME, AND CRIMINAL JUSTICE (3rd ed. 2007).

<sup>128</sup> DERSHOWITZ, *supra* note 44, at 158-59.

<sup>129</sup> Luban, *supra* note 28, at 7-8.

the terrorist (and nothing else) will reveal the critical information; and fourth, that we are dealing with a one-off situation. These assumptions are examined further below.

### 1. Disaster is Imminent

¶44 The ticking bomb scenario conveniently stipulates that authorities know that a bomb is ticking somewhere; typically, the interrogator knows that terrorists have planted a bomb in a major city that will detonate with catastrophic consequences in several hours. But reality rarely, if ever, presents such black and white situations. Even if one accepts that the United States is engaged in a war on terrorism, and is faced with an ongoing terrorist threat, the decision of whether to use torture will in all likelihood have to be made under a much more uncertain set of circumstances.<sup>130</sup>

### 2. The Captive is the Terrorist Bomber

¶45 A further built-in assumption is that authorities have actually captured the right person: “it is built into the hypothetical that he is a terrorist.”<sup>131</sup> This conveniently eliminates any concerns that authorities might have the wrong person, and be at risk of torturing an innocent. Even if the captive is not the actual bomber, at the very least, it is taken for granted that the captive is part of the terrorist plot, and has enough information that, if revealed, would allow authorities to prevent disaster. However, in reality, things are unlikely to work out so neatly: a captured member of al Qaeda, for example, may not know the relevant details of the terrorist plot because of the polycentric structure of the organization.<sup>132</sup>

### 3. Torture Works

¶46 Additionally, the ticking bomb scenario crucially assumes that torture works. Whether something “works” logically presupposes a yardstick for determining success. In the case of interrogational torture, success must be the eliciting of relevant and truthful information from the person interrogated.<sup>133</sup> So the claim that torture works is the claim that torture not only makes people talk, but makes them speak the truth. The evidence put forward by the advocates of interrogational torture, however, is sketchy at best.<sup>134</sup> Dershowitz, for instance, claims that torture sometimes works, and that there are “numerous instances” to substantiate this claim.<sup>135</sup> But only one example, the interrogation of Abdul Hakim Murad, actually appears in the text.<sup>136</sup> In 1995, Philippine police arrested Murad and brutally tortured him in various ways for sixty-seven days. On Dershowitz’s account, Murad, under torture, confessed to various plots, including a plan

<sup>130</sup> Kim Lane Scheppelle, *Hypothetical Torture in the “War on Terrorism,”* 1 J. NAT’L SEC. L. & POL’Y 285, 306 (2005).

<sup>131</sup> Shue, *supra* note 40, at 233.

<sup>132</sup> Scheppelle, *supra* note 130, at 306.

<sup>133</sup> *Id.*

<sup>134</sup> See generally Philip N.S. Rumney, *Is Coercive Interrogation of Terrorist Suspects Effective? A Response to Bagaric and Clarke*, 40 U.S.F. L. REV. 479 (2006).

<sup>135</sup> DERSHOWITZ, *supra* note 44, at 137.

<sup>136</sup> *Id.*

to crash eleven commercial airliners into the ocean.<sup>137</sup> However, the Murad case has been thoroughly debunked. In reality, even though police had broken his ribs, burned him, and pumped his stomach with water for more than two months (by which time any ticking bombs would surely have detonated), Murad did not speak. For whatever reason, Murad only spoke when a new team of interrogators turned up claiming to be Mossad agents with the task of taking him to Israel.<sup>138</sup> Moreover, Murad was captured with a treasure trove of incriminating evidence, including a manual for making liquid bombs, fake passports, and a computer. Once decrypted, files on the computer revealed the same information about these various terrorist plots.<sup>139</sup>

¶47 Posner and Vermeule cite evidence from Israel that they admit is “anecdotal or impressionistic.”<sup>140</sup> However, they conclude that this evidence nonetheless “strongly suggests that coercive interrogation saves lives.”<sup>141</sup> At most, what one could safely conclude is that coercive interrogation may have been successful in those particular instances, and even that conclusion is not unproblematic.<sup>142</sup> In any case, this evidence does not demonstrate that coercive interrogation is generally an effective means of eliciting life-saving truth, or that the “claim that coercive interrogation is ineffective is a delusion.”<sup>143</sup>

¶48 Bagaric and Clarke make a similarly sweeping claim about the effectiveness of torture on the basis of limited evidence. They put forward one example before concluding that torture “is an excellent means of gathering information.”<sup>144</sup> Their example concerns the actions of Frankfurt Police Vice-President Wolfgang Daschner. On Daschner’s instructions, a police officer told a captured child kidnapper that police would inflict pain on him that “he would never forget” unless he revealed the kidnapped child’s location.<sup>145</sup> After hearing this threat, the kidnapper revealed the location of the child, who tragically was already dead.<sup>146</sup> This episode certainly appears to be an instance where threatened torture was able to elicit the truth. Even so, one example is a thin reed on which to base such an extravagant conclusion. Indeed, in a subsequent article, Bagaric and Clarke state rather more circumspectly that torture is sometimes effective, and cite some further examples, including Posner and Vermeule’s evidence from Israel, and the case of Murad.<sup>147</sup>

<sup>137</sup> *Id.*

<sup>138</sup> REJALI, *supra* note 80, at 507. *See also* MCCOY, *supra* note 66 at 111-12.

<sup>139</sup> REJALI, *supra* note 80, at 507. However, Dershowitz continues to rely on this example in more recent writing. *See* Dershowitz, *supra* note 126.

<sup>140</sup> POSNER & VERMEULE, *supra* note 56, at 196.

<sup>141</sup> *Id.*

<sup>142</sup> *See* REJALI, *supra* note 80, at 517 (noting instances of Israeli interrogators going home in the evenings and weekends in cases of supposed ticking bombs).

<sup>143</sup> *Id.* at 195. Additionally, it is difficult to know what to make of Posner and Vermeule’s arguments about coercive interrogation given their claims of non-expertise in national security matters and their professed agnosticism about national security policy. *See* Thomas P. Crocker, *Torture, with Apologies*, 86 TEX. L. REV. 569, 610-11 (2008) (reviewing ERIC POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE* (2007)); Alice Ristophe, *Professors Strangelove*, 11 GREEN BAG 2D 245, 254 (2008) (reviewing ERIC POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE* (2007)).

<sup>144</sup> Bagaric & Clarke, *supra* note 52, at 588-89.

<sup>145</sup> *See* Jessberger, *supra* note 89, at 1061-62.

<sup>146</sup> *Id.*

<sup>147</sup> Mirko Bagaric & Julie Clarke, *Tortured Responses (A Reply to our Critics): Physically Persuading Suspects is Morally Preferable to Allowing the Innocent to be Murdered*, 40 U.S.F. L. REV. 703, 716-718

¶49

President Bush's 2006 speech that revealed the CIA's HVD program advanced several further examples as evidence of the success of the CIA's "alternative set of procedures" for interrogating high-value al Qaeda detainees.<sup>148</sup> Some of these examples do not stand up to scrutiny. The President emphasized the interrogation of al Qaeda member Abu Zubaydah as being significant in the apprehension of two al Qaeda leaders. Bush claimed that Zubaydah had revealed that "mukhtar" was the nickname of 9/11 mastermind Khalid Sheikh Mohammed, and that this was an important piece of information in the pursuit of Mohammed.<sup>149</sup> However, according to the 9/11 Commission Report, this fact was known since August 2001.<sup>150</sup> Additionally, some of the information was obtained from him without coercion.<sup>151</sup> The ultimately redundant information about Khalid Sheikh Mohammed's nickname, for example, was revealed to an FBI agent who questioned Abu Zubaydah in the hospital without the use of coercion.<sup>152</sup> A careful parsing of President Bush's speech confirms that Abu Zubaydah revealed this information before coercion was used.

¶50

President Bush also claimed that Abu Zubaydah, upon being subjected to the CIA's "alternative set of procedures," identified another al Qaeda leader, Ramzi bin al Shibh.<sup>153</sup> This claim is also dubious, as al Shibh's involvement in al Qaeda and role in the 9/11 attacks were already a matter of public knowledge.<sup>154</sup> Both Ramzi bin al Shibh and Khalid Sheikh Mohammed were ultimately apprehended through information obtained

---

(2006). A number of the other examples cited by Bagaric and Clarke are also problematic. They cite as an example how authorities in the Philippines broke open the 1993 World Trade Center bombings "when they threatened to torture a suspect." *Id.* at 718. The source they rely on, however, states: "Philippine police reportedly helped crack the 1993 World Trade Center bombings (plus a plot to crash 11 U.S. airliners and kill the pope) by convincing a suspect that they were about to turn him over to the Israelis." *See* Alter, *supra* note 39. Thus, the example turns out to be the Murad case, and is subject to the same criticisms. Dershowitz appears to make the same error. *See* DERSHOWITZ, *supra* note 44, at 248 n.11. Additionally, Bagaric and Clarke cite a possibly self-serving French General's account of his use of torture during the Battle of Algiers. Rejali provides a more skeptical view about whether the Battle of Algiers demonstrates the effectiveness of torture. He convincingly argues that public cooperation and informants, rather than torture, provided the French with accurate information. *See* REJALI, *supra* note 80, at 480-92.

<sup>148</sup> President Bush, *supra* note 78.

<sup>149</sup> *Id.*

<sup>150</sup> NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 277 (2004).

<sup>151</sup> Dan Eggen & Walter Pincus, *FBI, CIA Debate Significance of Terror Suspect*, WASH. POST, Dec. 18, 2007, at A1 ("There is little dispute, according to officials from both agencies, that Abu Zubaida provided some valuable intelligence before CIA interrogators began to rough him up, including information that helped identify Khalid Sheik Mohammed"); *see also* RON SUSKIND, THE ONE PERCENT DOCTRINE 116-17 (2006) (discussing how a CIA interrogator convinced Abu Zubaydah that it was his religious obligation to cooperate).

<sup>152</sup> U.S. DEP'T OF JUSTICE, A REVIEW OF THE FBI'S INVOLVEMENT IN AND OBSERVATIONS OF DETAINEE INTERROGATIONS IN GUANTÁNAMO BAY, AFGHANISTAN, AND IRAQ 68 (May 2008), *available at* <http://www.usdoj.gov/oig/special/s0805/final.pdf>. The reference to the person identified as travelling to attack America by Abu Zubaydah is, according to Jane Mayer, regarded as referring to Jose Padilla. However, Abu Zubaydah again revealed this information without the use of coercion. *See* MAYER, *supra* note 59, at 176.

<sup>153</sup> President Bush, *supra* note 78.

<sup>154</sup> FREDERICK A. O. SCHWARZ JR. & AZIZ Z. HUQ, UNCHECKED AND UNBALANCED 89 (2007) ("[T]here are more than twenty references to al Shibh's involvement in al Qaeda in the *Washington Post* alone that predate Zubaydah's capture.") (emphasis in original); *see also* Mark Mazzetti, *Questions Raised About Bush's Primary Claims in Defense of Secret Detention System*, N.Y. TIMES, Sept. 8, 2006, at A24 ("American officials had identified Mr. bin al-Shibh's role in the [9/11] attacks months before Mr. Zubaydah's capture.").

from tip offs. The critical information in the apprehension of the former came from the Emir of Qatar; the information leading to the capture of the latter came from an anonymous informant who collected a \$25 million reward.<sup>155</sup>

¶151 Quite apart from the shaky evidence for torture's effectiveness, there is also clear evidence of the contrary; there are clear instances of torture or coercion producing unreliable evidence. For example, Shafiq Rasul, Ruhul Ahmed and Asif Iqbal, known as the "Tipton Three," were accused of having links to al Qaeda on the basis of being apparently captured on a videotape of a meeting in Afghanistan between September 11 hijacker, Mohamed Atta, and Osama bin Laden.<sup>156</sup> After a long period of multiple interrogations that included the application of various coercive techniques, Rasul confessed to being in the video,<sup>157</sup> as did Ahmed and Iqbal.<sup>158</sup> The falsity of their confessions was later confirmed by British intelligence, which demonstrated conclusively that all three had been in England at the time the video was made, as Rasul had long claimed.<sup>159</sup>

¶152 Ultimately, only narrow conclusions can be drawn from these examples and counter-examples. It is difficult to sustain the claim that torture or coercive interrogation techniques never work; but it does not follow that such techniques can be characterized as effective in eliciting truth either. All that can be said is that the effectiveness of these techniques is, at best, equivocal.<sup>160</sup> This complex reality, however, is essentially assumed out of the way by the ticking bomb scenario.

#### 4. One-off Situation

¶153 Finally, the ticking bomb scenario assumes an individual's decision to torture in a single situation of dire emergency.<sup>161</sup> But the focus on the hypothetical moral quandary faced by one interrogator again obscures reality: the decision to torture is not a one-off decision made by a single person. Rather, as Kim Lane Scheppele emphasizes, the decision to employ torture involves institutions, bureaucracies and guidelines:

The real-world question that arises is not whether you or I would torture the Manhattan nuclear terrorist personally, but instead whether we can design rules for agents in complex organizations . . . that would in fact

<sup>155</sup> Ron Suskind, *The Unofficial Story of the al-Qaeda 14*, TIME, Sept. 10, 2006, at 34, available at <http://www.time.com/time/magazine/article/0,9171,1533436,00.html>. See also David Rose, *Tortured Reasoning*, VANITY FAIR, Dec. 16, 2008, <http://www.vanityfair.com/magazine/2008/12/torture200812> (last visited Apr. 1, 2009).

<sup>156</sup> David Rose, *Revealed: The Full Story of the Guantanamo Britons*, THE OBSERVER, March 14, 2004, available at <http://www.guardian.co.uk/uk/2004/mar/14/terrorism.guantanamo>. The fate of Ibn al-Sheikh al-Libi is another notable example. See *infra* text accompanying notes 179-181.

<sup>157</sup> See JOSEPH MARGULIES, *GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER* 40-43 (2006) (outlining how Rasul was short-shackled, subjected to deafening music, and kept in prolonged isolation).

<sup>158</sup> Rose, *supra* note 156.

<sup>159</sup> MARGULIES, *supra* note 157, at 42. False confessions in the "war on terror" are not isolated incidents. See *infra* text accompanying notes 179-184 (outlining the false information extracted from Ibn al-Sheikh al-Libi and Abu Zubaydah concerning links between Iraq and al Qaeda). See also Brian J. Foley, *Guantanamo and Beyond Dangers of Rigging the Rules*, 97 J. CRIM. L. & CRIMINOLOGY 1009, 1046-48 (2007).

<sup>160</sup> See generally REJALI, *supra* note 80, at 446-518.

<sup>161</sup> Luban, *supra* note 34, at 47.

limit torture to situations like this hypothetical, where we might agree as a political community that torture would be warranted. The decision to torture is wrongly presented in the hypothetical as a personal moral choice, when the actual decision would in fact be a political judgment about standard operating procedures for a bureaucracy.<sup>162</sup>

¶54 By making the decision to torture a personal moral choice of a lone interrogator in a single exceptional situation, rather than a decision situated within a bureaucracy, attention need not be given to such matters as the treatment of one's own troops captured in future conflicts,<sup>163</sup> or the long run impact on international legitimacy.<sup>164</sup> Nor need there be concern about the possibility of the spread of the practice of torture, which was precisely what occurred after 9/11. The use of torture and other coercive interrogation techniques began with the CIA's interrogation of high-value al Qaeda detainees who were thought to have critical information about further attacks on the United States.<sup>165</sup> Soon, however, in response to demands for more intelligence, some of the same techniques came to be employed more widely, first against detainees in Guantánamo, and later in Iraq, a traditional theater of war.<sup>166</sup> As Jeremy Waldron observes, "The torture at Abu Ghraib had nothing to do with 'ticking bomb' terrorism. It was intended to 'soften up' detainees so that U.S. military intelligence could get information from them about likely attacks by Iraqi insurgents against American occupiers."<sup>167</sup> It is unsurprising that the use of torture post-9/11 spread. Indeed, this pattern is consistent with the history of attempts to confine and regulate torture.<sup>168</sup>

## 5. Summary

¶55 The ticking bomb scenario has, as Luban puts it, "displaced genuine issues in the public forum and substituted a fictitious example stacked in favor of torture-permissiveness."<sup>169</sup> This fictitious example is a clever thought experiment, but one that has a tenuous grounding in reality. The fact that one might be willing to countenance torture in a hypothetical extreme situation in order to avert catastrophe provides little guidance as to whether torture should be adopted as part of counterterrorism policy.<sup>170</sup>

<sup>162</sup> Scheppele, *supra* note 130, at 305. *See also* YUVAL GINBAR, WHY NOT TORTURE TERRORISTS 132-136 (2008).

<sup>163</sup> *See* Marci Strauss, *The Lessons of Abu Ghraib*, 66 OHIO ST. L.J. 1269, 1305 (2005).

<sup>164</sup> *See* DAVID COLE & JULES LOBEL, LESS SAFE, LESS FREE 140 (2007); Strauss, *supra* note 163, at 1303-04.

<sup>165</sup> *See* MCCOY, *supra* note 66, at 120-21.

<sup>166</sup> *Id.* at 123-43, 195 ("Orders from President Bush and Secretary Rumsfeld for the CIA to torture just a few 'high value' Al Qaeda targets quickly proliferated into the abuse of dozens at Bagram, hundreds at Guantánamo, and thousands at Abu Ghraib and other Iraqi prisons.").

<sup>167</sup> Waldron, *supra* note 40, at 1717.

<sup>168</sup> REJALI, *supra* note 80, at 526 (noting that as a historical matter, "populations liable to be tortured, however narrowly defined at first, grow over time."); Johnson, *supra* note 116 (testifying that "[t]orture has never been confined to narrow conditions. Torture has often been justified by reference to a small number of people who know about the 'ticking time bomb,' but in practice, it has always been extended to a much wider population."); EDWARD PETERS, TORTURE 61 (1996) (noting a gradual wearing away of limits as to who could and could not be tortured under Roman-Canonical procedure). *But cf.* POSNER & VERMEULE, *supra* note 56, at 201.

<sup>169</sup> Luban, *supra* note 28, at 24.

<sup>170</sup> Scheppele, *supra* note 130, at 306-7.

This is because, as detailed above, the scenario's pristine and ideal assumptions and conditions are highly unlikely ever to be met.<sup>171</sup> Even the CIA's interrogation of high-value Al Qaeda detainees falls outside the ticking bomb scenario's boundaries. These detainees were held, interrogated, and tortured over a long period of time.<sup>172</sup> As such, any imminent terrorist plots that they might have been privy to would presumably have come to fruition. Of course, such detainees might have had valuable information about al Qaeda's operations in general or other long-range plans.<sup>173</sup> But the use of torture and coercion to elicit this information, however useful, cannot be justified by the ticking bomb scenario if one takes its parameters seriously.

### B. *Dissenting Voices in Government*

¶56 Despite the pro-torture and coercion stance at the highest levels of the Bush Administration, there was not a complete consensus on either the legality or wisdom of employing aggressive interrogation techniques. Certain individuals and institutions, including notably the FBI and many military lawyers, opposed the use of torture and coercion on the basis of its inefficacy and long-run costs. In doing so, they reiterated many of the academic arguments discussed in the previous section.

¶57 The FBI was skeptical of the utility of torture and coercive interrogation techniques. This was a reflection of its traditional law enforcement role, which emphasized the importance of obtaining statements that were admissible in court.<sup>174</sup> The FBI also had experience in dealing with al Qaeda in the 1990s, including the investigation that led to the prosecutions for the first bombing of the World Trade Center. In contrast to the CIA's more aggressive attitude, the FBI advocated a patient, non-coercive, rapport-building approach to interrogation.<sup>175</sup> The FBI's approach is exemplified by Dan Coleman, a retired FBI agent who investigated the embassy bombings in Tanzania and Kenya prior to 9/11. Coleman and others succeeded in eliciting confessions from al Qaeda operatives, who later pleaded guilty to various terrorism charges.<sup>176</sup> Coleman continued to adhere to his rapport-based view of interrogation after 9/11.<sup>177</sup>

<sup>171</sup> Luban, *supra* note 28, at 7. See also Luban, *supra* note 34, at 45-46.

<sup>172</sup> See REJALI, *supra* note 80, at 526 (noting that the CIA subjected Abu Zubaydah to various forms of torture and coercion, but that he only spoke after two months). See also SUSKIND, *supra* note 151, at 228 (discussing the treatment of Ramzi bin al-Shibh: "In the six months since his capture, he'd received death threats, water-boarding, hot and cold treatments, sleeplessness, noise and more death threats. Nothing worked."). But see Scott Shane, *Inside a 9/11 Mastermind's Interrogation*, N.Y. TIMES, June 22, 2008, at A1 ("Mr. bin al-Shibh quickly cooperated.").

<sup>173</sup> Khalid Sheik Mohammed, for example, provided intelligence about al Qaeda that was later incorporated into the report of the 9/11 Commission. See Shane, *supra* note 172 ("Mr. Mohammed provided more and more detail on Al Qaeda's structure, its past plots and its aspirations.").

<sup>174</sup> U.S. DEP'T OF JUSTICE, *supra* note 152, at 47. The great majority of FBI agents continued to adhere to this position and did not participate in coercive interrogations. See *id.* at 361, 369.

<sup>175</sup> Suskind, *supra* note 155. It should be noted though that certain veterans of the CIA have been critical of the administration's approach. See Jason Vest, *CIA Veterans Condemn Torture*, NAT'L J., Nov. 19, 2005, at 3651, available at <http://nationaljournal.com/about/njweekly/stories/2005/1119nj1.htm>.

<sup>176</sup> Jane Mayer, *Outsourcing Torture*, THE NEW YORKER, Feb. 14, 2005, at 106 available at [http://www.newyorker.com/archive/2005/02/14/050214fa\\_fact6](http://www.newyorker.com/archive/2005/02/14/050214fa_fact6).

<sup>177</sup> *Id.* (quoting Coleman as stating, "Brutalization doesn't work. We know that. Besides, you lose your soul.").

¶158 The fate of one of the first high-ranking al Qaeda operatives captured by the United States, Ibn al-Sheikh al-Libi, represented a microcosm of the disagreement between the FBI and CIA over interrogating detainees. Coleman’s colleague, Jack Cloonan, urged FBI agents in Afghanistan to question al-Libi according to the usual protocols. The agents reportedly began developing a rapport with him—al-Libi even told his interrogators about a plot to attack the United States embassy in Aden, which was subsequently averted.<sup>178</sup> The CIA, however, believing that al-Libi was not being entirely forthcoming, had him rendered to Egypt.<sup>179</sup> Having been subjected to various forms of torture and coercion, he claimed that Iraq had trained al Qaeda members in the use of chemical and biological weapons.<sup>180</sup> He subsequently recanted in 2004, but not before his claim of a collaborative relationship between al Qaeda and Saddam Hussein had been used by the Bush administration as one of the justifications for the Iraq war.<sup>181</sup>

¶159 The FBI and CIA had a similar clash over the interrogation of Abu Zubaydah, who was captured in March 2002 and initially jointly questioned.<sup>182</sup> The FBI was satisfied with the headway they were making with non-coercive questioning. The CIA once again felt that Abu Zubaydah was not being forthright with them, and subjected him to coercive techniques such as forced nudity, cold and loud music.<sup>183</sup> One FBI agent described the CIA’s techniques as amounting to “borderline torture.”<sup>184</sup> The FBI’s Counterterrorism Assistant Director, Pasquale D’Amuro, subsequently ordered his agents to come home and not participate in any aggressive interrogations.<sup>185</sup> D’Amuro’s decision was later affirmed by FBI Director Robert Mueller.<sup>186</sup>

¶160 FBI agents based at Guantánamo faced similar issues.<sup>187</sup> In 2002, multiple governmental agencies, including the CIA and FBI, were present at Guantánamo. The military leadership at Guantánamo was also coming under increasing pressure from Washington to deliver actionable intelligence.<sup>188</sup> The debate focused around the interrogation of Mohammed al-Qahtani,<sup>189</sup> whose case proved to be the catalyst for the

<sup>178</sup> MAYER, *supra* note 59, at 105.

<sup>179</sup> *Id.* at 106. See also SUSKIND, *supra* note 151, at 75-76.

<sup>180</sup> MAYER, *supra* note 59, at 135 (describing al-Libi’s claims that he was beaten and locked in a small cage for over eighty hours); Brian Ross & Richard Esposito, *CIA’s Harsh Interrogation Techniques Described*, ABC NEWS, Nov. 18, 2005, <http://abcnews.go.com/WNT/Investigation/story?id=1322866> (describing CIA sources as saying al-Libi made the relevant statements after being waterboarded and being made to stand in a cold cell while being regularly doused with cold water) (last visited Mar. 13, 2009).

<sup>181</sup> REJALI, *supra* note 80, at 504-05. See also MAYER, *supra* note 59, at 136-37 (noting that al-Libi’s claim of a collaborative relationship between al Qaeda and Saddam Hussein was important in persuading Secretary of State Powell to make his February 2003 speech before the United Nations Security Council).

<sup>182</sup> U.S. DEP’T OF JUSTICE, *supra* note 152, at 67.

<sup>183</sup> Eggen & Pincus, *supra* note 151.

<sup>184</sup> U.S. DEP’T OF JUSTICE, *supra* note 152, at 68. Abu Zubaydah was also subjected to other coercive techniques, including sleep deprivation and waterboarding. Under duress, he revealed all kinds of information about various terrorist plots and targets, although their reliability is uncertain. See REJALI, *supra* note 80 at 505-06; SUSKIND, *supra* note 151, at 115-16. According to Rose, Abu Zubaydah also admitted under torture that there was a collaborative relationship between al Qaeda and Saddam Hussein. See Rose, *supra* note 155.

<sup>185</sup> U.S. DEP’T OF JUSTICE, *supra* note 152, at 69.

<sup>186</sup> *Id.* at 71.

<sup>187</sup> Between January 2002 and December 2004, more than four hundred FBI agents were deployed to Guantánamo. See *id.* at 32.

<sup>188</sup> SANDS, *supra* note 91, at 53.

<sup>189</sup> U.S. DEP’T OF JUSTICE, *supra* note 152, at 77-82.

loosening of the military's rules on interrogation. In September, a series of meetings took place to discuss new interrogation techniques.<sup>190</sup> The result was a memorandum written by Lieutenant Colonel Jerald Phifer that outlined eighteen interrogation techniques.<sup>191</sup> This memorandum was backed by a further memorandum written by Lieutenant Colonel Diane Beaver, which concluded that all the techniques were legal.<sup>192</sup> The request for approval of these techniques was sent to the Pentagon. William Haynes, General Counsel for the Department of Defense, recommended the approval of fifteen of the eighteen techniques.<sup>193</sup> Of the harshest "Category III" techniques, Haynes recommended only the blanket approval of "mild, non-injurious physical contact," although he noted that "all Category III techniques may be legally available."<sup>194</sup> Secretary of Defense Rumsfeld gave his approval on December 2, 2002.<sup>195</sup>

¶61 As the military sought to push the interrogation envelope at Guantánamo, the FBI agents present objected, as evidenced by various documents later made public. For example, an email from a FBI counterterrorism official to General Donald Ryder of the Army's Criminal Investigation Command detailed instances of "highly aggressive interrogation techniques," including apparent physical torture, which had been observed by FBI agents at Guantánamo in late 2002.<sup>196</sup> Similarly, an unnamed FBI agent based at Guantánamo sent a memorandum by facsimile on November 27, 2002 to Marion Bowman, legal counsel at the FBI.<sup>197</sup> This memorandum offered a legal analysis of various interrogation techniques that closely matched the list of techniques proposed by Phifer.<sup>198</sup> It concluded that many of the techniques were illegal, and any information obtained through the use of such methods would be inadmissible in a criminal trial. It also concluded that some of the more aggressive Category II and III methods might violate the federal Torture Statute.<sup>199</sup> Interestingly, the anonymous author also discussed the Category IV technique of extraordinary rendition—the practice of transferring

<sup>190</sup> SANDS, *supra* note 91, at 72-73.

<sup>191</sup> Jerald Phifer, Memorandum for Commander, Joint Task Force 170, Request for Approval of Counter-Resistance Strategies (Oct. 11, 2002), *available at* <http://www.globalsecurity.org/security/library/policy/dod/d20040622doc3.pdf>.

<sup>192</sup> Diane E. Beaver, Memorandum for Commander, Joint Task Force 170, Legal Review of Aggressive Interrogation Techniques (Oct. 11, 2002), *available at* <http://www.globalsecurity.org/security/library/policy/dod/d20040622doc3.pdf>.

<sup>193</sup> William J. Haynes II, Action Memo, Counter-Resistance Techniques (Nov. 27, 2002), *available at* <http://www.globalsecurity.org/security/library/policy/dod/d20040622doc5.pdf>.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* FBI agents had already noted the use of aggressive interrogation techniques on al-Qahtani by early October 2002, including "sleep deprivation, loud music, bright lights and body placement discomfort." *See* U.S. DEP'T OF JUSTICE, *supra* note 152, at 84. The use of these techniques may have begun even earlier. *See* MAYER, *supra* note 59, at 192 ("By late summer, both the FBI agents visiting Guantánamo and the investigators working on the CITF began to hear bizarre and disturbing accounts of late-night interrogations using pounding music, bright strobe lights, extremely painful temperatures, dogs, and other oddities.").

<sup>196</sup> T. J. Harrington, Re. Suspected Mistreatment of Detainees (July 14, 2004), *available at* [http://www.aclu.org/torturefoia/released/FBI\\_4622\\_4624.pdf](http://www.aclu.org/torturefoia/released/FBI_4622_4624.pdf).

<sup>197</sup> *See* SANDS, *supra* note 91, at 145-146. *See also* U.S. DEP'T OF JUSTICE, *supra* note 152, at 80-129.

<sup>198</sup> Legal Analysis of Interrogation Techniques (Nov. 27, 2002), *available at* [http://www.humanrightsfirst.org/us\\_law/etn/pdf/fbi-brief-inter-analysis-112702.pdf](http://www.humanrightsfirst.org/us_law/etn/pdf/fbi-brief-inter-analysis-112702.pdf). The author was later revealed to be an FBI agent referred to by the pseudonym of "Agent Brett." *See* U.S. DEP'T OF JUSTICE, *supra* note 152, at 106. Mayer identifies the agent as Jim Clemente of the FBI's Behavioral Analysis Unit. *See* MAYER, *supra* note 59, at 204.

<sup>199</sup> Legal Analysis of Interrogation Techniques, *supra* note 198.

detainees to third countries for harsh interrogations—and concluded that “[t]his technique [could] not be utilized without violating U.S. Federal law.”<sup>200</sup>

¶162 In 2003 and 2004, other unnamed FBI agents would document their observations of the military’s interrogations.<sup>201</sup> In one particular email, dated December 5, 2003, an FBI agent referred to the military’s practices as “torture techniques.”<sup>202</sup> The agent also noted that these tactics had produced no useful intelligence, and had made criminal prosecution of the tortured detainee impossible.<sup>203</sup> All in all, two hundred FBI agents deployed at Guantánamo reported that they had heard about or observed the use of coercive techniques such as sleep deprivation, stress positions, shackling, isolation, bright lights and loud music.<sup>204</sup>

¶163 Like the FBI, Alberto Mora, at the time the general counsel of the United States Navy, opposed the torture and mistreatment of detainees. Mora’s resistance centered on his attempt to stop the recommendations of the Defense Department Working Group from becoming military policy.<sup>205</sup> In December 2002, Mora learnt of events at Guantánamo from David Brant of the Naval Criminal Investigative Service, who supervised a team of agents working in conjunction with the FBI.<sup>206</sup> Brant passed along his agents’ reports of the military’s interrogation practices at Guantánamo. Mora later saw Secretary Rumsfeld’s approval of the various coercive interrogation techniques, as well as the underlying legal analysis of the Beaver memorandum, which Mora considered flawed. Mora met with Haynes to express his concerns.<sup>207</sup> In January 2003, Brant informed Mora that nothing had changed, which led to Mora meeting Haynes again.<sup>208</sup> In their meeting, Haynes stated that American officials believed that the interrogation techniques were needed in order to extract from the Guantánamo detainees critical information about further attacks.<sup>209</sup> Mora responded to Haynes’ invocation of the ticking bomb scenario:

<sup>200</sup> *Id.* The Inspector General’s report discusses a November 2002 interrogation plan for al-Qahtani that involved four phases. Phase IV was rendition to a third country such as Jordan or Egypt. See U.S. DEP’T OF JUSTICE, *supra* note 152, at 88-89. Margulies notes that Category IV was ultimately not included in the Phifer memorandum of October 11, 2002. See MARGULIES, *supra* note 157, at 98-99. Mayer states that the disappearance of Category IV was due to FBI resistance. See MAYER, *supra* note 59, at 220.

<sup>201</sup> Michael Isikoff & Mark Hosenball, *Terror Watch: Has the Government Come Clean?*, NEWSWEEK, Jan. 5, 2005, available at <http://www.newsweek.com/id/48419>.

<sup>202</sup> Dan Eggen & R. Jeffrey Smith, *FBI Agents Allege Abuse of Detainees at Guantanamo Bay*, WASH. POST, Dec. 21, 2004, at A01.

<sup>203</sup> *Id.*

<sup>204</sup> U.S. DEP’T OF JUSTICE, *supra* note 152, at 171. See also John Barry, Michael Hirsh and Michael Isikoff, *The Roots Of Torture*, NEWSWEEK, May 24, 2004, at 26, available at <http://www.newsweek.com/id/105387/output/print> (“Under the leadership of an aggressive, self-assured major general named Geoffrey Miller, a new set of interrogation rules became doctrine. . . . These included the use of harsh heat or cold; withholding food; hooding for days at a time; naked isolation in cold, dark cells for more than 30 days, and threatening (but not biting) by dogs. It also permitted limited use of ‘stress positions’ designed to subject detainees to rising levels of pain.”).

<sup>205</sup> See *supra* text accompanying notes 72-75.

<sup>206</sup> Jane Mayer, *The Memo*, THE NEW YORKER, Feb. 27, 2006, at 32 available at [http://www.newyorker.com/archive/2006/02/27/060227fa\\_fact](http://www.newyorker.com/archive/2006/02/27/060227fa_fact) (quoting Mora as stating “‘The debate here isn’t only how to protect the country. It’s how to protect our values.’”).

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> Alberto J. Mora, Memorandum for Inspector General, Department of the Navy, Statement for the Record: Office of General Counsel Involvement in Interrogation Issues 11 (July 7, 2004), available at [http://www.aclu.org/pdfs/safefree/mora\\_memo\\_july\\_2004.pdf](http://www.aclu.org/pdfs/safefree/mora_memo_july_2004.pdf) (emphasis added).

I acknowledged the ethical issues were difficult. I was not sure what my position would be in the classic “ticking bomb” scenario where the terrorist being interrogated had knowledge of, say, an imminent nuclear weapon attack against a U.S. city. If I were the interrogator involved, I would probably apply the torture myself, although I would do so with full knowledge of potentially severe personal consequences. But I did not feel this was the factual situation we faced in Guantanamo, and even if I were willing to do this as an individual and assume the personal consequences, by the same token I did not consider it appropriate for us to advocate for or cause the laws and values of our nation to be changed to render the activity lawful.<sup>210</sup>

¶64 On January 15, Haynes called Mora to tell him that Secretary Rumsfeld was suspending his earlier authorization of December 2, 2002, and that Rumsfeld was convening a special Defense Department Working Group to consider interrogation guidelines.<sup>211</sup> However, Haynes bureaucratically outmaneuvered Mora. Despite Mora recommending to Haynes that Rumsfeld not approve the Working Group’s draft report, which was based on another memorandum written by John Yoo,<sup>212</sup> Rumsfeld—without Mora’s knowledge—did just that.<sup>213</sup> The final Working Group memorandum included a list of thirty-five interrogation techniques.<sup>214</sup> On April 16, 2003, the Pentagon approved twenty-four of those techniques for use at Guantánamo.<sup>215</sup>

¶65 Another locus of resistance to the use of torture and coercion was the military’s own lawyers, which was in keeping with the military’s traditional policy of humane treatment of detainees and compliance with the law of armed conflict.<sup>216</sup> In debates over the treatment of detainees after 9/11, senior military lawyers consistently opposed the use of torture and coercion. In November 2002, military lawyers were already expressing reservations about the interrogation techniques proposed for use at Guantánamo. Several memoranda recorded serious concerns that the suggested interrogation techniques would be illegal and contrary to the strategic interests of the United States.<sup>217</sup> These concerns

<sup>210</sup> *Id.*

<sup>211</sup> Mayer, *supra* note 206.

<sup>212</sup> Memorandum from John Yoo to William J. Haynes, Military Interrogation of Alien Unlawful Combatants Held Outside the United States, *supra* note 76.

<sup>213</sup> Mayer, *supra* note 206.

<sup>214</sup> Working Group Report on Detainee Interrogations in the Global War on Terrorism, *supra* note 76, at 62-65.

<sup>215</sup> Donald Rumsfeld, Memorandum for the Commander, US Southern Command, Counter-Resistance Techniques in the War on Terrorism (Apr. 16, 2003), *available at* <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.16.pdf>.

<sup>216</sup> David A. Wallace, *Torture v. the Basic Principles of the US Military*, 6 J. INT’L. CRIM. JUST. 309, 310 (2008).

<sup>217</sup> See Colonel Donald E. Richburg, Memorandum for UN and Multilateral Affairs Division (J-5), Joint Staff (Nov. 4, 2002), *available at* <http://levin.senate.gov/newsroom/supporting/2008/Documents.SASC.061708.pdf>; Major Sam W. McCahon, Assessment of JTF-170 Counter-Resistance Strategies and the Potential Impact on CITF Mission and Personnel (Nov. 4, 2002), *available at* <http://levin.senate.gov/newsroom/supporting/2008/Documents.SASC.061708.pdf>; John Ley, Review—Proposed Counter-Resistance Techniques (Nov. 7, 2002), *available at* <http://levin.senate.gov/newsroom/supporting/2008/Documents.SASC.061708.pdf>.

prompted further review. But William Haynes cut this short, clearing the way for Secretary Rumsfeld's authorization in December 2002.<sup>218</sup>

¶66 The resistance of the military's lawyers continued. Notably, the leadership of the Judge Advocate General's Corps, like Alberto Mora, disagreed with the approach taken by the Defense Department Working Group. For example, Rear Admiral Michael Lohr, Judge Advocate General for the United States Navy, although not contesting the questionable conclusions about the legality of the interrogation techniques, urged caution on policy grounds:

[W]hile we may have found a unique situation in Guantánamo where the protections of the Geneva Conventions, U.S. statutes, and even the Constitution do not apply, will the American people find we have missed the forest for the trees by condoning practices that, while technically legal, are inconsistent with our most fundamental values? How would such perceptions affect our ability to prosecute the Global War on Terrorism?<sup>219</sup>

¶67 Major General Jack Rives, the Deputy Judge Advocate General of the United States Air Force, was more pointed in his analysis, and observed that several of the exceptional interrogation techniques "on their face, amount[ed] to violations of domestic criminal law and the UCMJ [Uniform Code of Military Justice]."<sup>220</sup> General Rives also urged that consideration "be given to the possible adverse effects on U.S. Armed Forces culture and self-image."<sup>221</sup> He noted that American armed forces had been "consistently trained to take the legal and moral 'high-road' in the conduct of our military operations regardless of how others may operate."<sup>222</sup> Brigadier General Kevin Sandkuhler, Staff Judge Advocate of the United States Marine Corps, expressed a similar view, suggesting that the authorization of "aggressive counter-resistance techniques" by the military would negatively impact the "Pride, Discipline, and Self-Respect within the U.S. Armed Forces."<sup>223</sup> General Sandkuhler and the other Judge Advocates General also highlighted the position of captured American service members, a matter that they did not think had been adequately considered.<sup>224</sup>

<sup>218</sup> Senate Armed Services Committee Inquiry into the Treatment of Detainees in U.S. Custody, Executive Summary xxviii (Dec. 11, 2008), *available at* <http://levin.senate.gov/newsroom/supporting/2008/Detainees.121108.pdf>.

<sup>219</sup> Rear Admiral Michael F. Lohr, Working Group Recommendations Relating to Interrogation of Detainees ¶ 3 (Feb. 6, 2003), *available at* <http://balkin.blogspot.com/jag.memos.pdf>.

<sup>220</sup> Major General Jack L. Rives, Final Report and Recommendations of the Working Group to Assess the Legal, Policy and Operational Issues Relating to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism ¶2 (Feb. 5, 2003), *available at* <http://balkin.blogspot.com/jag.memos.pdf>.

<sup>221</sup> Major General Jack L. Rives, Comments on Draft Report and Recommendations of the Working Group to Assess the Legal, Policy and Operational Issues Relating to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism ¶1(b) (Feb. 6, 2003), *available at* <http://balkin.blogspot.com/jag.memos.pdf>.

<sup>222</sup> Rives, *supra* note 220, ¶ 5.

<sup>223</sup> Brigadier General Kevin M. Sandkuhler, Working Group Recommendations on Detainee Interrogations ¶ 3 (Feb. 27, 2003), *available at* <http://balkin.blogspot.com/jag.memos.pdf>.

<sup>224</sup> *Id.* See also Lohr, *supra* note 219, ¶ 4; Rives, *supra* note 221; Major General Thomas J. Romig, Draft Report and Recommendations of the Working Group to Access the Legal, Policy and Operational Issues Related to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism ¶4 (March 3, 2003), *available at* <http://balkin.blogspot.com/jag.memos.pdf>.

¶168 The advice of these military lawyers was ignored. In May 2003, after the Working Group's report had taken effect,<sup>225</sup> several unnamed senior members of the Judge Advocate General's Corps visited Scott Horton, at the time the head of the Human Rights Committee of the New York City Bar Association.<sup>226</sup> They discussed with him the decisions that, in their view, would lead to detainee abuse and possible violations of the Geneva Conventions. They urged him to challenge the Bush administration's policies.<sup>227</sup>

¶169 The public opposition amongst senior military lawyers towards the administration's policies did not cease.<sup>228</sup> In 2006, the Senate Judiciary Committee held hearings on the legal authority to prosecute terrorists. As part of those hearings, the Judge Advocates General of the military services were asked to submit written responses to questions regarding various coercive interrogation techniques, including waterboarding.<sup>229</sup> General Rives, General Sandkuhler, Rear Major General Scott Black of the U.S. Army, and Admiral Bruce MacDonald of the U.S. Navy all concluded that waterboarding was illegal and violated common article 3 of the Geneva Conventions.<sup>230</sup> Generals Rives and Sandkuhler further stated that waterboarding would constitute torture under the Torture Statute.<sup>231</sup> Their forthright answers provide a pointed contrast to the equivocations of Attorney General Michael Mukasey on the same issue in 2008.<sup>232</sup>

### C. *Torture and Battlestar Galactica*

¶170 Sci-Fi Channel's remake of the television show *Battlestar Galactica* follows the basic contours of the 1970s original, where most of human society is wiped out in a surprise attack on the twelve colonies by the Cylons, metallic robots with the iconic oscillating red-eye. Protected by a single warship, the *Battlestar Galactica*, a fleet of the human survivors sets out in search of a mythical thirteenth colony, known as Earth.<sup>233</sup> The small band of human survivors is outgunned, on the run, and under near-constant

<sup>225</sup> Vivia Chen, *Jagged Dispute: Air Force Counsel Mary Walker Faces Questions about a Terrorist Interrogation Memo*, AM. LAW., Aug. 2004, at 22, also available at <http://www.law.com/jsp/article.jsp?id=1090180294718>.

<sup>226</sup> MCCOY, *supra* note 66, at 129. See also Barry, Hirsh & Isikoff, *supra* note 204.

<sup>227</sup> MCCOY, *supra* note 66, at 130-131.

<sup>228</sup> Top military lawyers also opposed other Bush administration policies, including proposals relating to the use of classified evidence in trials before military commissions. See R. Jeffrey Smith, *Top Military Lawyers Oppose Plan for Special Courts*, WASH. POST, Aug. 3, 2006, at A11; Kate Zernike, *Lawyers and G.O.P. Chiefs Resist Proposal on Tribunal*, N.Y. TIMES, Sept. 8, 2006, at A1. This opposition should be seen in the context of a larger struggle by the Bush administration to exert control over the JAG corps. See CHARLIE SAVAGE, TAKEOVER 279-88 (2007).

<sup>229</sup> See Letter from Retired Generals to Senator Patrick J. Leahy (Nov. 2, 2007), available at <http://leahy.senate.gov/press/200711/110207RetGeneralsOnMukasey.pdf>.

<sup>230</sup> See Question for the Record, Senate Committee on the Judiciary, Hearing on the Authority to Prosecute Terrorists under the War Crimes Provisions of Title 18 (Aug. 2, 2006), available at [http://gulcfac.typepad.com/georgetown\\_university\\_law/files/JAGS.CommonArticle3.answers.pdf](http://gulcfac.typepad.com/georgetown_university_law/files/JAGS.CommonArticle3.answers.pdf).

<sup>231</sup> *Id.*

<sup>232</sup> See Philip Shenon, *So Is Waterboarding Torture? Mukasey May Never Say*, N.Y. TIMES, Jan. 26, 2008, at A11. Eric Holder, currently the Attorney General-designate, has stated that waterboarding is torture. See Scott Shane, *Remarks on Torture May Force New Administration's Hand*, N.Y. TIMES, Jan. 17, 2009, at A12.

<sup>233</sup> See Kieran Tranter, "*Frakking Toasters*" and *Jurisprudence of Technology*, 19 LAW & LIT. 45, 47-48 (2007); see also John Hodgman, Ron Moore's Deep Space Journey, N.Y. TIMES MAGAZINE, July 17, 2005, at 32.

threat of oblivion—a milieu where the imperatives of necessity and survival coexist uneasily with legality.

¶71 The re-imagined *Battlestar Galactica* differs from its 1970s iteration in some significant ways. It eschews the modern and clean aesthetics characteristic of much science fiction in favor of a vintage, naturalistic look.<sup>234</sup> This visual presentation matches the darker tone of the re-imagined series, which lacks the escapist jauntiness of its predecessor.<sup>235</sup> Further, in a nod to the science-fiction classic *Bladerunner*,<sup>236</sup> not only are the Cylons originally human creations, but they now also have several models that appear completely human. These new Cylon models, which the humans refer to as “skin jobs,” act as spies, sleeper agents, and suicide bombers. The ability of these humanoid Cylons to effortlessly infiltrate society preys on a classic human anxiety, amplified after 9/11, of enemies lurking in our midst.<sup>237</sup> Indeed the idea of a fifth column, or enemies within, has notable echoes in American history, including the Palmer raids, the Japanese internment and the red scare.<sup>238</sup>

¶72 During the three complete seasons of *Battlestar Galactica* that have aired to date, there have been several notable depictions of coercive interrogation. The Cylons, naturally, engage in torture. They show little compunction in using torture during their occupation of New Caprica, a planet the humans have settled on at the end of season 2. Saul Tigh, a leader of the human resistance, for example, has his eye ripped out.<sup>239</sup> Later, the Cylons torture Gaius Baltar, the wonderfully narcissistic and self-serving human genius, for information about a virus that has infected them.<sup>240</sup> However, the focus of this article is on instances when humans, with whom the audience for the most part identifies, employ torture and coercion.<sup>241</sup>

¶73 *Battlestar Galactica*'s depiction of torture by humans is ostensibly ambiguous. According to the show's creators, this was a deliberate choice, the idea being to undermine the settled expectations of the audience and force them to confront difficult issues.<sup>242</sup> This moral ambiguity is a hallmark of the show.<sup>243</sup> However, as Christian Erickson argues, a morally ambiguous depiction already contains an element of subversiveness,<sup>244</sup> ambiguity is subversive because it undermines the certainty of the

<sup>234</sup> Tranter, *supra* note 233, at 48.

<sup>235</sup> Jonathan Glater, *Retooling a 70's Sci-Fi Relic for the Age of Terror*, N.Y. TIMES, January 13, 2005, E7.

<sup>236</sup> *BLADERUNNER* (Warner Bros. Pictures 1982).

<sup>237</sup> Christian W. Erickson, *Counter-Terror Culture: Ambiguity, Subversion, or Legitimization?*, 38 SEC. DIALOGUE 197, 206 (2007) (“It is evident that this series is evocative of a *zeitgeist* in which potential enemies, such as spectral Al-Qaeda sleeper cells, can attack without warning and shatter normalcy.”).

<sup>238</sup> See generally DAVID COLE, *ENEMY ALIENS* (2003).

<sup>239</sup> *Battlestar Galactica: Occupation* (Sci Fi Channel/NBC Universal broadcast Oct. 6, 2006).

<sup>240</sup> *Battlestar Galactica: A Measure of Salvation* (Sci Fi Channel/NBC Universal broadcast Nov. 10, 2006).

<sup>241</sup> In addition to the episodes discussed below, a number of other episodes contain scenes involving the interrogation of Cylons or suspected Cylons. See, e.g., *Battlestar Galactica: Scattered* (Sci Fi Channel/NBC Universal broadcast July 15, 2005); *Battlestar Galactica: Resistance* (Sci Fi Channel/NBC Universal broadcast Aug. 5, 2005); *Battlestar Galactica: Home, Part I* (Sci Fi Channel/NBC Universal broadcast Aug. 19, 2005).

<sup>242</sup> Daniel Solove, *Battlestar Galactica Interview Transcript (Part I)*, CONCURRING OPINIONS, Mar. 02, 2008, [http://www.concurringopinions.com/archives/2008/03/battlestar\\_gala\\_4.html](http://www.concurringopinions.com/archives/2008/03/battlestar_gala_4.html) (last visited Mar. 13, 2009); see also Laura Miller, *The Man Behind “Battlestar Galactica,”* SALON.COM, March 24, 2007, <http://www.salon.com/ent/feature/2007/03/24/battlestar/> (last visited Mar. 13, 2009).

<sup>243</sup> Gavin Edwards, *Intergalactic Terror*, ROLLING STONE, Jan. 27, 2006, available at [http://www.rollingstone.com/news/story/9183391/intergalactic\\_terror](http://www.rollingstone.com/news/story/9183391/intergalactic_terror).

<sup>244</sup> Erickson, *supra* note 237, at 207.

discourse of counter-terrorism.<sup>245</sup> Erickson is referring primarily to the actions of the humans at the beginning of season 3, when most of the human race remains trapped on Cylon-occupied New Caprica.<sup>246</sup> Harking back to Vichy France, and alluding more controversially to the Iraqi insurgency,<sup>247</sup> some of the humans form an underground resistance to oppose the Cylons and their puppet human government. The resistance's tactics include suicide bombing. The humans themselves do not agree on the morality of their actions: while resistance leader Saul Tigh sees suicide bombing as a necessary means to an end, Laura Roslin (the human President for most of the show) ultimately cannot countenance such action.<sup>248</sup> The correct course is left unclear.<sup>249</sup> The same point applies to *Battlestar Galactica*'s portrayal of torture and coercion. The audience is confronted with the question of whether torturing the captive is the correct course, with the result that it is often unclear whether one should empathize with the torturer or the tortured.<sup>250</sup> This contrasts with the moral certainty characteristic both of 24,<sup>251</sup> and some real-world advocates of torture.<sup>252</sup>

¶74 In addition to this subversive ambiguity, the relevant episodes of *Battlestar Galactica*, on closer inspection, reproduce some of the critiques of the use of interrogational torture and coercion discussed in the previous sections. In particular, the use of torture and coercion is depicted as ineffective and difficult (if not impossible) to contain.

### 1. Skepticism about the Efficacy of Torture

¶75 *Battlestar Galactica* consistently portrays the use of torture and coercion as being an ineffective tool of interrogation, particularly relative to non-coercive alternatives. The season 1 episode that deals with torture was prompted by the events at Abu Ghraib prison

<sup>245</sup> *Id.* at 198.

<sup>246</sup> *Battlestar Galactica: Occupation*, *supra* note 239.

<sup>247</sup> See Spencer Ackerman, *Battlestar: Iraqtica*, SLATE, Oct. 13, 2006, available at <http://www.slate.com/id/2151425/>; Brad Reed, *Battlestar Galacticons*, THE AMERICAN PROSPECT, Oct. 27, 2006, available at <http://www.prospect.org/cs/articles?articleId=12172>.

<sup>248</sup> See *Battlestar Galactica: Occupation*, *supra* note 239; *Battlestar Galactica: Precipe* (Sci Fi Channel/NBC Universal broadcast Oct. 6, 2006).

<sup>249</sup> Virginia Heffernan, *In Galactica, It's Politics as Usual. Or is it?*, N.Y. TIMES, Oct. 26, 2006, at E7; see also Laura Miller, *Space Balls*, SALON.COM, Nov. 10, 2006, <http://www.salon.com/ent/tv/review/2006/11/10/battlestar/print.html> (last visited Mar. 13, 2009).

<sup>250</sup> Solove, *supra* note 242 (quoting the show's co-creator, Ron Moore as saying "We really wanted them [the audience] to struggle (we like to do this a lot in the show)—we wanted them to struggle with [the questions]: 'Who am I supposed to be rooting for in this circumstance? Whose side am I on? I thought I was on her [Kara's] side because [Leoben has] said he's got a nuke somewhere in the Fleet, and that's a pretty scary thing, and Kara, you better do what you've got to do to get the information out of him. . . . Okay, now I'm sitting here, and now I have to watch him be smacked around, blood flowing from his mouth, and watch him be, in essence, water boarded. And I'm starting to really feel uncomfortable with that. And I'm starting to feel like she's going too far and . . . wait a minute . . . whose side am I on?").

<sup>251</sup> See Wiltz, *supra* note 126 ("If you're addicted to Fox's '24,' you probably cheered on Jack Bauer when, in a recent episode, he snapped the fingers of a suspect who was, shall we say, reluctant to talk. Maybe you hated yourself a little bit for it, but you watched, and you got it: Yessssss!!!! Torture's a no-brainer here. Jack's got to save us all from imminent thermonuclear annihilation. Never mind the Geneva Convention, bring on the electroshock machine!").

<sup>252</sup> See, e.g., Krauthammer, *supra* note 52 ("Question: If you have the slightest belief that hanging this man by his thumbs will get you the information to save a million people, are you permitted to do it? Now, on most issues regarding torture, I confess tentativeness and uncertainty. But on this issue, there can be no uncertainty: Not only is it permissible to hang this miscreant by his thumbs. It is a moral duty.").

in Iraq.<sup>253</sup> Here, one of the human-like Cylons, known as Leoben Conroy, is captured aboard a civilian ship in the fleet. Commander William Adama, who commands the *Galactica*, wants him destroyed; President Roslin wants him interrogated. Lieutenant Kara Thrace (usually referred to by her call-sign “Starbuck”) begins to interrogate Leoben, who claims to have planted a nuclear warhead somewhere in the fleet that will detonate in less than nine hours.<sup>254</sup> And so *Battlestar Galactica* sets up a classic ticking bomb scenario.

¶176 Starbuck informs Adama and Roslin about the bomb. Adama orders radiological searches throughout the fleet while Starbuck returns to interrogate Leoben further about the location of the bomb. Starbuck surmises that because Leoben is programmed to act like a human, he will respond to stimuli, such as pain.<sup>255</sup> The interrogation quickly turns violent as Starbuck has a marine beat Leoben. Although he is bloodied, Leoben reveals nothing. In the face of Leoben’s intransigence, Starbuck decides to up the torture ante: “Now the gloves come off,” she tells Leoben,<sup>256</sup> echoing the real-life words of former counterterrorism official Cofer Black.<sup>257</sup> Starbuck then has marines force Leoben underwater for increasing periods of time.<sup>258</sup> Leoben talks, but not about the location of the bomb. Near the conclusion of the episode, President Roslin arrives to halt Starbuck’s torture of Leoben, which has not revealed any useful information. She admonishes Starbuck: “You spent the last eight hours torturing this man, this machine, whatever it is. And you don’t have a single piece of information to show for it.”<sup>259</sup> After Leoben has been dried off, Roslin apologizes to him about his treatment, and attempts to reason with him instead. Leoben reveals that in fact there is no nuclear warhead. He also insinuates that Adama is a Cylon. Roslin has him ejected into space.<sup>260</sup>

¶177 The point to emphasize is that torture in this ticking bomb scenario does not work: Leoben never reveals any useful information under torture. Only after the torture has stopped does he reveal to Roslin that there is no ticking bomb. This skeptical view about the efficacy of torture continues in later seasons. In season 2, with the arrival of Admiral Helena Cain’s *Battlestar Pegasus*, the audience learns that the *Galactica* was not the only warship to survive the initial Cylon attack on the twelve colonies.<sup>261</sup> It turns out that the *Galactica* and the *Pegasus* are each holding one human-like Cylon captive. Both Cylon captives are valuable because they have general knowledge of the Cylons’ nature and tactics, although not necessarily of their imminent plans; there are no ticking bombs to be heard. Indeed, this is more closely analogous to the actual situation faced by the United States in relation to its most valuable terrorist detainees.<sup>262</sup>

¶178 The paths taken to uncover information from the two Cylon captives differ. Adama treats his Cylon captive humanely, whereas Cain is willing to use torture and coercion.

<sup>253</sup> See Tama Lever, “*Humanity’s Children*”: *Constructing and Confronting the Cylons*, in *CYLONS IN AMERICA* 131, 134 (Tiffany Potter & C.W. Marshall eds., 2008).

<sup>254</sup> *Battlestar Galactica: Flesh and Bone* (Sci Fi Channel/NBC Universal broadcast Feb. 25, 2005).

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> See *supra* text accompanying note 26.

<sup>258</sup> *Battlestar Galactica: Flesh and Bone*, *supra* note 254. For a description of different forms of water torture, see REJALI, *supra* note 80, at 279-86.

<sup>259</sup> *Battlestar Galactica: Flesh and Bone*, *supra* note 254.

<sup>260</sup> *Id.*

<sup>261</sup> *Battlestar Galactica: Pegasus* (Sci Fi Channel/NBC Universal broadcast Sept. 23, 2005).

<sup>262</sup> See generally Luban, *supra* note 34, at 46.

Their contrasting methods reflect the divergence of approach in real-life counterterrorism, highlighted, for example, by the disagreement between the FBI and CIA over the interrogation of terrorist suspects.<sup>263</sup>

¶179 The crew of the Pegasus is holding a Cylon known as Gina. Gina posed as a civilian network administrator working on the Pegasus prior to the Cylon attack. Later, she helped “upgrade” the Pegasus’ computer systems, and found an inviting Cylon target to attack.<sup>264</sup> This was in fact a trap, and the Pegasus’ weapons systems failed at the crucial moment, presumably having been sabotaged by Gina. The Cylons boarded the Pegasus, presumably aided again by Gina. During the ensuing battle inside the ship, Gina was revealed to be a Cylon after one of the Pegasus’ officers killed a duplicate copy of her. She was captured after a brief struggle.<sup>265</sup> Stunned by Gina’s betrayal, Cain subsequently orders Lieutenant Thorne to interrogate her. Cain guesses that Gina has human frailties as well. She authorizes the use of “pain . . . degradation, fear, shame.”<sup>266</sup> To drive home the point, Cain gives Thorne carte blanche: “I want you to really test its limits. Be as creative as you feel you need to be.”<sup>267</sup> Subsequently, Cain looks impassively upon an obviously beaten and bleeding Gina. Later, it is revealed that Thorne and other members of the Pegasus’ crew sexually brutalized her as well.<sup>268</sup>

¶180 By contrast, the Galactica’s Cylon prisoner, Sharon, is treated humanely. Commander Adama informs Admiral Cain that Sharon has been cooperative, and has proven to be a valuable source of intelligence.<sup>269</sup> In fact, in the previous episode, Sharon saved the Galactica after a Cylon virus had infected the ship’s computer systems.<sup>270</sup> Gaius Baltar confirms with Cain that Sharon has provided useful intelligence about Cylon systems, tactics, and strategy.<sup>271</sup> Cain is surprised that Baltar has been able to obtain this intelligence without coercion. Baltar replies that he finds “the application of coercive techniques to be counterproductive,” and that he gets greater cooperation by treating Sharon “as if it’s the human being it pretends to be.”<sup>272</sup> Although she appears to express some disdain for this apparent coddling of the enemy, Cain admits that the torture of Gina carried out by Thorne and others has proven fruitless. She requests that Baltar examine Gina.<sup>273</sup>

¶181 When Baltar first sees Gina, she is manacled and chained to the floor by the neck and feet; she appears badly beaten, and lies motionless. Baltar demands that she be given food, clothing, and be allowed to bathe.<sup>274</sup> Cain is not interested, and points out that Gina is responsible for the deaths of several hundred of her crew, suggesting that Gina’s torture may be as much about cathartic revenge as obtaining information. Baltar replies that the Cylon psyche can be manipulated like that of humans, and that it is time to try a

<sup>263</sup> See *supra* text accompanying notes 179-186.

<sup>264</sup> *Battlestar Galactica: Razor* (Sci Fi Channel/NBC Universal broadcast Nov. 24, 2007).

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Battlestar Galactica: Pegasus*, *supra* note 261.

<sup>269</sup> *Id.*

<sup>270</sup> *Battlestar Galactica: Flight of the Phoenix* (Sci Fi Channel/NBC Universal broadcast Sept. 16, 2005).

<sup>271</sup> *Battlestar Galactica: Pegasus*, Extended DVD Edition (Universal Studios 2006).

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

different approach.<sup>275</sup> Subsequently, Baltar brings Gina some food, has the guards remove her restraints, and begins talking to her. At this point, she finally shows signs of life.<sup>276</sup>

¶82 During the following episode, Cain comes to the detention cell to observe Baltar's interrogation. She looks on with obvious disgust, and at one point, kicks Gina in the face and spits on her. Cain has pictures of a mysterious Cylon ship, and asks Baltar to see whether he can find out what its function is.<sup>277</sup> Baltar later brings Gina some clothing. As she puts on the clothing, the audience sees the terrible scarring on her back, the result of the torture she has suffered.<sup>278</sup> Having gained a measure of trust in Baltar, Gina reveals what her mission was, and that she expected to die upon completion of that mission. She tells Baltar that she wants to die.<sup>279</sup> Baltar replies that she cannot die, because, as a Cylon, her consciousness will simply be downloaded into another body.<sup>280</sup> Gina discloses that if the mysterious Cylon ship is destroyed, she really can die. Gina thus reveals the function of the previously unidentified resurrection ship, which allows downloading when the Cylons are far away from their home-world.<sup>281</sup>

¶83 Once again, it is striking that the use of torture and coercion provides no useful intelligence. By contrast, it is Baltar who is successful in getting cooperation from Gina, which in turn leads to the identification of the resurrection ship. Similarly, Sharon's humane treatment has already been shown to have very tangible benefits for the Galactica. The different treatment of the two Cylons can readily be interpreted as an allegorical critique of the Bush Administration's treatment of terrorist detainees.<sup>282</sup>

¶84 Finally, in season 3, Baltar, who collaborated with the Cylons as the head of the puppet government during their occupation of New Caprica, has been held by the Cylons for a considerable amount of time. The human leadership wishes to extract any useful information that he might have about the Cylons. The audience learns that Baltar has been deprived of sleep, and in response has gone on hunger strike; he attempts suicide at the beginning of the episode.<sup>283</sup> President Roslin suggests an alternative interrogation plan. She questions him about his involvement with the Cylons, which he denies. Roslin appears to lose her cool, and to order him ejected from the airlock. This mock execution gambit proves unsuccessful.<sup>284</sup> Next, Roslin authorizes Adama's suggestion of trying an experimental hallucinogenic drug on Baltar. Having drugged Baltar, Adama and Roslin attempt to extract information from him about the Cylons and his involvement with them. But Baltar reveals nothing. The Galactica's doctor eventually calls off the interrogation once Baltar's vital signs begin to drop precipitously.<sup>285</sup> One final attempt to elicit information from Baltar is made. Lieutenant Gaeta, who previously served as Baltar's aide on New Caprica, is sent to Baltar to act as a false friend, in the hope that Baltar will

<sup>275</sup> *Battlestar Galactica: Pegasus*, *supra* note 261.

<sup>276</sup> *Id.*

<sup>277</sup> *Battlestar Galactica: Resurrection Ship Part I* (Sci Fi Channel/NBC Universal broadcast Jan. 6, 2006).

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> Cf. Rikk Mulligan, *The Cain Mutiny: Reflecting the Faces of Military Leadership in a Time of Fear*, in *CYLONS IN AMERICA* 52, 59-60 (Tiffany Potter & C.W. Marshall eds., 2008).

<sup>283</sup> *Battlestar Galactica: Taking a Break from All Your Worries* (Sci Fi Channel/NBC Universal broadcast Jan 28, 2007).

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

let something slip. But on this occasion, the non-coercive approach proves unsuccessful as well. After discussing these failures with Adama, Roslin resigns herself to giving Baltar a trial.<sup>286</sup>

¶85 Adama's use of the hallucinogenic drug recalls the CIA's search for a reliable truth serum. Beginning in the 1940s, the CIA tested over one hundred and fifty substances to determine whether they might be effective for use in interrogation.<sup>287</sup> These included substances such as coffee, alcohol, morphine, atrophine, heroin, LSD, cocaine, marijuana, peyote, and so-called "truth serums" such as sodium amytal and sodium pentothal.<sup>288</sup> Ultimately, the CIA concluded that there was no substance that could consistently cause people to tell the truth,<sup>289</sup> although the idea that such a substance exists has persisted.<sup>290</sup> Adama's fictional interrogation drug proves to be no exception. Thus, as with the other episodes discussed above, the various coercive techniques in this episode—sleep deprivation, mock execution, and the use of an interrogation drug—end up delivering nothing of substance.

## 2. The Problem of Torture's Spread

¶86 The use of torture and coercion spreads in *Battlestar Galactica*. Initially, torture is something that demarcates the boundary between human and Cylon. Humans do not torture humans; but Cylons—the mysterious, technologically superior, and apparently single-minded enemy—can be tortured, for the very reason that they are not rights-bearing humans: they are machines.<sup>291</sup> But this boundary subsequently proves unstable.

¶87 The very language the humans use to describe the Cylons emphasizes their non-human otherness. The standard moniker for a Cylon is a "toaster," a reference to the metallic appearance of earlier Cylon robotic models.<sup>292</sup> This point comes through even stronger in the episodes discussed above. Leoben Conroy is repeatedly referred to as an "it," which stresses Conroy's mechanistic otherness.<sup>293</sup> Throughout her torture of Leoben, Starbuck emphasizes his non-human status. When President Roslin puts a stop to Leoben's torture, Starbuck states the moral calculus at work: "It's a machine Sir. There's no limit to the tactics I can use."<sup>294</sup>

¶88 Likewise, Cain and crew of the *Pegasus* consider Cylons, represented by Gina, to be subhuman. Once Gina's betrayal comes to light, a shocked Cain stammers, "Get that thing off my bridge."<sup>295</sup> From that point onward, Gina is strictly an "it" or a "thing,"<sup>296</sup>

<sup>286</sup> *Id.*

<sup>287</sup> REJALI, *supra* note 80, at 388-89.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> See, e.g., Eric Schmitt, *There Are Ways To Make Them Talk*, N.Y. TIMES, June 16, 2002, at 4.1 ("William H. Webster, a former director of central intelligence and the Federal Bureau of Investigation, has urged the Pentagon to inject truth serum into defiant Qaeda and Taliban prisoners.").

<sup>291</sup> Solove, *supra* note 242 (quoting Ron Moore, one of the show's creators of as saying, "Is there anything morally wrong about beating a machine? And torturing machines?").

<sup>292</sup> See Tranter, *supra* note 233, at 47.

<sup>293</sup> *Battlestar Galactica: Flesh and Bone*, *supra* note 254.

<sup>294</sup> *Id.* By the end of the episode, however, Starbuck's earlier certainty about Leoben's status has clearly been undermined. She unsuccessfully pleads with Roslin for Leoben's life, and at the end of episode prays for his soul.

<sup>295</sup> *Battlestar Galactica: Razor*, *supra* note 264.

<sup>296</sup> *Id.*

and can therefore be treated as such by Cylon interrogator Lieutenant Thorne and others. Thorne's subsequent interrogation of Sharon, which Cain has ordered, follows the same logic. Employing his usual interrogational *modus operandi*, Thorne chokes, beats and attempts to rape Sharon. He is thwarted and accidentally killed by Helo and Chief Tyrol, two members of the *Galactica's* crew.<sup>297</sup> Colonel Fisk, the executive officer of the *Pegasus*, later rationalises Thorne's actions and dismisses Helo's concerns in the same way that Starbuck justified her treatment of Leoben: "You can't rape a machine, Lieutenant."<sup>298</sup>

¶89

The dichotomy in treatment between human and Cylon has historical parallels. In ancient Greece and Rome, torture was reserved for non-citizen outsiders, namely those who were "slaves, barbarians and foreigners."<sup>299</sup> Torture was therefore a mechanism that demarcated the citizens from everyone else. In more modern times, public attention and concern still seems to be more forthcoming when it is people like us who are being subjected to torture. Thus, accounts of the torture of the Mau Mau in Kenya met with indifference in Britain and internationally.<sup>300</sup> Reports of French torture of Algerians met with similar apathy; it was only when French police and military began to torture Europeans that there was an international outcry and the beginnings of an anti-torture movement.<sup>301</sup> After 9/11, torture and its close cousins were also largely reserved for those who were perceived as being the other. The fact that they were not like us made it permissible to treat them this way.<sup>302</sup> The Bush administration's description of its terrorist detainees was carefully chosen to accentuate this. Detainees were referred to as "aliens," "deadly enemies" and "faceless terrorists."<sup>303</sup> This dehumanizing rhetoric relegated them to the ranks of the subhuman, increasing the distance between them, the captive terrorist suspects, and us.<sup>304</sup> Thus, they did not need to be afforded the rights that we have.<sup>305</sup> Indeed, like the (literally) inhuman Cylons of *Battlestar Galactica*, they did not even need to be the subjects of our moral concern.<sup>306</sup>

<sup>297</sup> *Battlestar Galactica: Pegasus*, *supra* note 261.

<sup>298</sup> *Battlestar Galactica: Resurrection Ship Part II* (Sci Fi Channel/NBC Universal broadcast Jan. 13, 2006). This episode is significant in Sharon's character arc in that she begins to be humanized to both the audience and the crew of the *Galactica*. Doctor Cottle describes the attack on Sharon as "unforgivable"; Adama apologizes to her, and notably refers to Sharon as a "her." Sharon later becomes an officer in the colonial fleet and fights on the human side. See *Battlestar Galactica: Precipe* (Sci Fi Channel/NBC Universal broadcast Oct. 6, 2006).

<sup>299</sup> REJALI, *supra* note 80 at 56.

<sup>300</sup> *Id.* at 195.

<sup>301</sup> *Id.*

<sup>302</sup> Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481, 1509-10 (2004) ("We allow for more repressive measures when we believe they will not be used against us in the future. This is certainly true in the context of interrogational torture, where the perception is that torture is "reserved" for "others" and that the distinction between "us" and those "others," namely the terrorists, is clearest.").

<sup>303</sup> Parl. Assem. of the Council of Eur., Comm. on Legal Affairs & Human Rights, *Secret Detentions and Illegal Transfers of Detainees Involving Council Of Europe Member States: Second Report*, ¶ 233, AS/Jur (2007) 36 (June 7, 2007), available at [http://www.bernani.com/images/PDF/EMarty\\_20070608\\_NoEmbargo.pdf](http://www.bernani.com/images/PDF/EMarty_20070608_NoEmbargo.pdf).

<sup>304</sup> Gershon Shafir, *Torturing Democracies: The Curious Debate over the "Israeli Model,"* in NATIONAL INSECURITY AND HUMAN RIGHTS 92, 98 (Alison Brysk & Gershon Shafir eds., 2007) ("[T]orture is a process of dehumanization and, consequently, is most easily applied to those already dehumanized through social exclusion and racism.").

<sup>305</sup> See Parl. Assem. of the Council of Eur., *supra* note 303, ¶ 234.

<sup>306</sup> Richard Jackson, *Language, Policy and the Construction of a Torture Culture in the War on Terrorism*,

¶90 However, as noted earlier, one of the difficulties with torture is its tendency to spread in spite of attempts to confine it.<sup>307</sup> This dynamic is illustrated in *Battlestar Galactica* as torture and other coercive techniques come to be applied to humans as well. Gaius Baltar, for example, is subjected to various forms of psychological torture and coercion in season 3.<sup>308</sup> But the starkest example arises out of the death of the Pegasus' Cylon interrogator, Lieutenant Thorne, in season 2. Having accidentally killed Thorne as he was about to sexually assault Sharon, Helo and Chief Tyrol are arrested and taken back to the Pegasus, where Admiral Cain's swiftly convened court-martial sentences both to death.<sup>309</sup> While they await their fate inside the Pegasus' brig, Helo and Chief Tyrol are confronted by several crewmembers of the Pegasus, who are angry about Thorne's death.<sup>310</sup> Helo and Tyrol are overcome and restrained. They are then beaten in the stomach with a bar of soap wrapped in a towel, which is, as one of the Pegasus' crewmembers explains, very painful but leaves no marks.<sup>311</sup> Colonel Fisk interrupts the torture session soon after it begins. Despite his loyalty to Thorne, he reprimands the two torturers for assaulting two colonial officers, and for "treating those men like they were Cylons."<sup>312</sup> The subtext of Fisk's statement is simply that there are certain things that can be done to Cylons—beatings, whipping, sexual degradation—that cannot be done to humans. But in the eyes of the Pegasus' torturers, this dividing line is not so clear. Once one has begun torturing Cylons without compunction, the next logical step is to do the same to those who sympathize with them.

### 3. Summary

¶91 In sum, *Battlestar Galactica*'s account of torture is a skeptical one. Although there is no overt moralizing about the evils of torture, the lack of moral certainty about the correct course of action in itself provides a pointed contrast to the torture-is-a-no-brainer view exemplified by 24. Perhaps most significantly, torture and other coercive techniques, as depicted in *Battlestar Galactica*, are not effective in delivering instant truth. If anything, the uses of these techniques are shown to be time consuming, ineffective, and corrupting.

## IV. LIFE IMITATES ART

¶92 The previous two parts of this article have discussed two contrasting narratives of torture. Each narrative is reproduced at the level of popular culture by a television show, 24 and *Battlestar Galactica* respectively. Both these shows, then, are a reflection of post-9/11 society, where the use of torture and coercion has been a genuine topic of debate. At the same time, as part of popular culture, these shows do not simply reflect different sides of the torture debate; they may influence and shape the debate as well. Stuart Croft

---

33 REV. OF INT'L STUD. 353, 363 (2007) (noting that the dehumanization of the terrorist other contributes to the "suspension of individual empathy and social inhibitions against wanton cruelty").

<sup>307</sup> See *supra* text accompanying notes 165-168.

<sup>308</sup> See *supra* text accompanying note 283-286.

<sup>309</sup> *Battlestar Galactica: Pegasus*, *supra* note 261.

<sup>310</sup> *Battlestar Galactica: Resurrection Ship Part II*, *supra* note 298.

<sup>311</sup> On the use of "clean" beatings as torture, see REJALI, *supra* note 80, at 335-37.

<sup>312</sup> *Battlestar Galactica: Resurrection Ship Part II*, *supra* note 298.

ascribes considerable significance to popular culture in this regard; because of its accessibility and pervasiveness, popular culture is important for reinforcing the discourse of the “war on terror” throughout society.<sup>313</sup> 24 has played this role in relation to the use of torture and coercion. Most disturbingly, it has reportedly been the source of inspiration for actual interrogation techniques. Battlestar Galactica, representing a rival narrative about torture, has not so far achieved the same level of cultural influence as 24. However, Battlestar Galactica has achieved a degree of recognition as a television show that deals with issues that face societies in times of crisis, including torture, and it has managed to transcend the usual boundaries of the science fiction genre.

#### A. *The 24 effect*

¶93 The constant repetition of scenes of torture and other coercive techniques in 24 has contributed to the audience becoming desensitized to the intentional and graphic infliction of pain upon a captive victim.<sup>314</sup> Further, 24 has reinforced the view that torture and coercion is a necessary and justifiable tool in the grim struggle against terrorism. This in turn has likely solidified public apathy and indifference to the use of torture and coercion in counter-terrorism.<sup>315</sup> Indeed, Scott Horton goes so far as to suggest that 24 has been created for the very purpose of creating “a more receptive public audience for the Bush Administration’s torture policies.”<sup>316</sup> Regardless of whether Horton is right about this, 24 has certainly achieved such a level of cultural penetration that it is an instantly recognizable shorthand for the pro-torture, torture-as-common-sense narrative.

¶94 24 has been aptly described as the nearest thing to “the Official Cultural Product of the War on Terrorism,”<sup>317</sup> and has been embraced by some notable people. Senator John McCain, despite his public stance against torture, made a brief cameo in season 5 as an unnamed member of CTU.<sup>318</sup> In 2006, the Heritage Foundation held a forum entitled “24 and America’s Image in Fighting Terrorism: Fact, Fiction or Does it Matter?” Several cast members, producers, Supreme Court Justice Clarence Thomas, and Michael Chertoff, at the time the Secretary of the Department of Homeland Security, attended the forum, which was chaired by conservative radio personality Rush Limbaugh.<sup>319</sup> In the

<sup>313</sup> STUART CROFT, *CULTURE, CRISIS AND AMERICA’S WAR ON TERROR 204* (2006).

<sup>314</sup> DAVID L. ALTHEIDE, *TERRORISM AND THE POLITICS OF FEAR 70* (2006) (“The reality of torture is muted by popular-culture depictions that are important for familiarizing and desensitizing audiences to grotesque cruelty.”); see also Neil McMaster, *Torture: Algiers to Abu Ghraib*, 46 *RACE & CLASS* 1, 4 (2004) (singling out 24 for normalizing the idea of torture in the general public); Andrew Sullivan, *Torture Nation*, *THE DAILY DISH*, Feb. 13, 2007, [http://andrewsullivan.theatlantic.com/the\\_daily\\_dish/2007/02/torture\\_nation.html](http://andrewsullivan.theatlantic.com/the_daily_dish/2007/02/torture_nation.html) (arguing that the effect of 24 has been to normalize torture) (last visited Mar. 13, 2009).

<sup>315</sup> Parry, *supra* note 27, at 283-84; see also David Edelstein, *Now Playing at Your Local Multiplex: Torture Porn*, *N.Y. TIMES*, Feb. 6, 2006, Magazine, at 63, available at <http://nymag.com/movies/features/15622/> (“Our righteousness is buoyed by propaganda like the TV series 24, which devoted an entire season to justifying torture in the name of an imminent threat: a nuclear missile en route to a major city.”).

<sup>316</sup> Horton, *supra* note 90.

<sup>317</sup> James Poniewozik, *The Evolution of TV’s Tough Guy*, *TIME*, Jan. 22, 2007, at 68, also available at <http://www.time.com/time/magazine/article/0,9171,1576853,00.html>.

<sup>318</sup> *24: Day 5: 1:00 p.m. - 2:00 p.m.* (FOX television broadcast Feb. 6, 2006); see also Troy Patterson, *Senator, We’re Ready for Your Cameo*, *SLATE*, Feb. 7, 2006, <http://www.slate.com/id/2135664/> (last visited Mar. 13, 2009).

<sup>319</sup> Paul Farhi, *Calling On Hollywood’s Terrorism ‘Experts’*, *WASH. POST*, June 24, 2006, at C01.

course of his remarks, Chertoff praised Jack Bauer, and even likened certain aspects of the situation faced by the fictional CTU to that faced by the people working under him at the Department of Homeland Security.<sup>320</sup>

¶95 Further blurring the boundary between entertainment and reality has been the invocation of 24 and its hero in the course of debates about interrogation tactics and national security policy. This is both an indictment on the level of the debate, and an indicator of the show's penetration into the popular consciousness. For example, conservative pundit Laura Ingraham referred to the show's popularity as being the closest approximation to a national referendum on the permissibility of using torture and coercion when interrogating high-value al Qaeda detainees.<sup>321</sup> Similarly, during a debate between Republican presidential candidates in 2007, several presidential hopefuls tried to out-tough one another on the issue of torture and interrogation, which was raised—predictably—in the context of a ticking bomb scenario.<sup>322</sup> This itself was indicative of the new normality where there was perceived electoral traction in appearing more willing than one's opponents to use the harshest interrogation techniques on a terrorist suspect. Later in the debate, Congressman Tom Tancredo, when asked how far he would be willing to go in order to deal with a hypothetical terrorist attack, quipped, "I'm looking for Jack Bauer at that time, let me tell you."<sup>323</sup> The allusion to 24's hero not only established Tancredo's pop culture bona fides, but also succinctly expressed his willingness to let counter-terrorist agencies do whatever was necessary.<sup>324</sup>

¶96 A Canadian judge, during a panel discussion about torture at a legal conference in Canada, invoked Jack Bauer in the same manner, but as a negative example. The judge remarked, "Thankfully, security agencies in all our countries do not subscribe to the mantra 'What would Jack Bauer do?'"<sup>325</sup> This caused Supreme Court Justice Antonin Scalia to launch into an impassioned defense of Jack Bauer. Referring to season 2 of 24, when Bauer's tough interrogation tactics save Los Angeles from nuclear incineration, Justice Scalia argued that counterterrorism agents, both real and fictional, needed maximum latitude to thwart terrorist attacks.<sup>326</sup> Subsequently, Justice Scalia invoked the same scenario when discussing the issue of torture in an interview with the BBC.<sup>327</sup>

<sup>320</sup> *Id.*

<sup>321</sup> See Scott Stoneman, *Pedagogy in a Time of Terror: Henry Giroux's Beyond the Spectacle of Terrorism*, 29 REV. OF EDUC., PEDAGOGY & CULTURAL STUD. 111, 125 (2007); see also CROFT, *supra* note 313, at 250-51.

<sup>322</sup> See *Republican Presidential Debate in South Carolina*, N.Y. TIMES, May 15, 2007, transcript available at <http://www.nytimes.com/2007/05/15/us/politics/16repubs-text.html?pagewanted=all>; see also Rosa Brooks, *Torture: The New Abortion*, L.A. TIMES, Nov. 8, 2007, available at <http://www.latimes.com/news/print/edition/asection/la-oe-brooks8nov08,1,6469024,print.column>.

<sup>323</sup> *Republican Presidential Debate in South Carolina*, *supra* note 322; see also Holly Bailey, *Take That!*, NEWSWEEK, May 16, 2007, available at <http://www.newsweek.com/id/34684>.

<sup>324</sup> Cf. Eric Greene, *Jack Bauer Syndrome*, in JACK BAUER FOR PRESIDENT 171, 177-78 (Richard Minter ed., 2008) ("'Jack Bauer' has emerged in our War on Terrorism culture as a mythic hero whom Tom Tancredo knew would be readily understood as shorthand for the proposition that that in the War on Terrorism the acceptable means are any means necessary.").

<sup>325</sup> Colin Freeze, *What Would Jack Bauer Do?*, GLOBE & MAIL, June 16, 2007, at A9, available at <http://www.theglobeandmail.com/servlet/story/LAC.20070616.BAUER16/TPStory/TPNational/Television/>; see also Audrey Macklin, *From Cooperation, to Complicity, to Compensation: The War on Terror, Extraordinary Rendition, and the Cost of Torture*, 10 EUR. J. OF MIGRATION & LAW 11, 11-12 (2008).

<sup>326</sup> Freeze, *supra* note 325.

<sup>327</sup> *US Judge Steps in to Torture Row*, B.B.C. NEWS, Feb. 12, 2008, <http://news.bbc.co.uk/2/hi/americas/7239748.stm> (last visited Mar. 13, 2009).

¶97 The Intelligence Science Board’s December 2006 report that addressed the issue of torture and interrogation,<sup>328</sup> entitled “Educing Information,” was a further exception to the valorizing of 24. Referencing the main plotlines of seasons 2 and 3, the Board emphasized the unreality of the show’s portrayal of interrogation:

Prime-time television increasingly offers up plot lines involving the incineration of metropolitan Los Angeles by an atomic weapon or its depopulation by an aerosol nerve toxin. The characters do not have the time to reflect upon, much less to utilize, what real professionals know to be the “science and art” of “educing information.” They want results. Now. The public thinks the same way. They want, and rightly expect, precisely the kind of “protection” that only a skilled intelligence professional can provide. Unfortunately, they have no idea how such a person is supposed to act “in real life.”<sup>329</sup>

That a Supreme Court justice and a report sponsored by government agencies<sup>330</sup> should reference a television show in discussing the issue of torture and interrogation is extraordinary enough, but 24 has had an even more striking effect: the show appears to have directly influenced the behavior of actual soldiers and interrogators. In November 2006, Brigadier General Patrick Finnegan, the dean of West Point, met with some of the writers and producers of the show, and expressed concern that the show’s message about the efficacy and morality of torture was affecting the training of American soldiers.<sup>331</sup> Finnegan observed that he found it increasingly difficult to convince cadets that the United States should continue to take the moral high ground, even in the absence of reciprocity. He suggested that misconceptions about torture popularized by 24 were partly responsible for this.<sup>332</sup> Gary Solis, a retired Marine and Judge Advocate who also taught at West Point, noted the same phenomenon with his students. When discussing the legality and morality of torture, he found that some cadets had adopted Jack Bauer’s ethos of being willing to do whatever was necessary to save American lives. Solis had to remind them that the show was fictional, and was an inappropriate model for their conduct.<sup>333</sup>

¶98 24’s co-creator and executive producer, Joel Surnow, who was notably absent from the meeting with Finnegan, blithely disclaimed any such consequences caused by his show: “Young interrogators don’t need our show. What the human mind can imagine is so much greater than what we show on TV. No one needs us to tell them what to do. It’s not like somebody goes, ‘Oh, look what they’re doing, I’ll do that.’ Is it?”<sup>334</sup> But this

<sup>328</sup> The Intelligence Science Board is a body that advises the intelligence community on scientific and technical issues related to intelligence. See MAYER, *supra* note 59, at 330-31.

<sup>329</sup> Intelligence Science Board, *Educing Information: Interrogation: Science and Art*, ix (Dec. 2006), available at <http://www.dia.mil/college/3866.pdf>.

<sup>330</sup> Josh White, *Intelligence Research Is Lacking, Report Says*, WASH. POST, Jan. 16, 2007, at A15.

<sup>331</sup> Mayer, *supra* note 87.

<sup>332</sup> *Id.*

<sup>333</sup> *Id.* The human rights organization, Human Rights First, has even established the Primetime Torture Project, which aims to “limit the negative impact television has on the way U.S. troops operate.” See Human Rights First’s Primetime Torture Project, [http://www.humanrightsfirst.org/us\\_law/etn/primetime/project.asp](http://www.humanrightsfirst.org/us_law/etn/primetime/project.asp) (last visited Mar. 13, 2009).

<sup>334</sup> Mayer, *supra* note 87.

appears to be precisely what General Finnegan was complaining of. Moreover, this appears to be precisely what occurred at Guantánamo Bay. During meetings held in late 2002 to discuss new techniques for interrogating Guantánamo detainees, the participants drew on various sources of inspiration, including personal experiences, and military SERE training.<sup>335</sup> According to Diane Beaver, the author of the Beaver memo,<sup>336</sup> 24 was also a fount of ideas:

The first year of Fox TV's dramatic series 24 came to a conclusion in spring 2002, and the second year of the series began that fall. An inescapable message of the program is that torture works. "We saw it on cable," Beaver recalled. "People had already seen the first series. It was hugely popular." Jack Bauer had many friends at Guantánamo, Beaver added. "He gave people lots of ideas."<sup>337</sup>

### B. *Battlestar Galactica: Transcending the Science Fiction Genre*

¶99 The re-imagined *Battlestar Galactica*, unlike its camp 1970s iteration, has received critical acclaim.<sup>338</sup> Much of this is due to its combination of quality acting, writing and production values. Additionally, the show deals with issues that resonate in a post-9/11 world in a sophisticated manner. In addition to the episodes concerning torture, the show has, for example, considered the tension between civilian and military authority, and the limits of military necessity. Season 3, as discussed above, considered the morality of suicide bombing in the context of resistance to alien/foreign occupation.<sup>339</sup>

¶100 The fact that *Battlestar Galactica* has a political edge that underlies the space combat and the story of human survival has resulted in a kind of mainstreaming, as indicated by a migration "from the fan boards to political blogs."<sup>340</sup> Thus, *Battlestar Galactica* is now being discussed not simply as a work of science fiction, but as a show that has contemporary resonance, and which raises real serious political, moral, and legal issues.<sup>341</sup> In particular, the show appears to have a certain following amongst legal academics. *Concurring Opinions*, a well-known legal blog, featured an interview with co-creators Ron Moore and David Eick about various legal and moral issues raised by the show.<sup>342</sup> Other legal academics have discussed single episodes of *Battlestar Galactica* that

<sup>335</sup> SERE stands for Survival, Evasion, Resistance and Escape.

<sup>336</sup> See *supra* text accompanying note 192.

<sup>337</sup> Philippe Sands, *The Green Light*, VANITY FAIR, May 2008, available at <http://www.vanityfair.com/politics/features/2008/05/guantanamo200805>.

<sup>338</sup> See, e.g., James Poniewozik, *Best of 2005: Television*, TIME, Dec. 16, 2005, available at <http://www.time.com/time/arts/article/0,8599,1141640,00.html>.

<sup>339</sup> See *supra* text accompanying notes 247-249.

<sup>340</sup> John Hodgman, *Ron Moore's Deep Space Journey*, N.Y. TIMES, July 17, 2005, § 6 (Magazine) 32, 37.

<sup>341</sup> Joanna Weiss, *Moral Dilemmas Pulled into 'Battlestar' Galaxy*, BOSTON GLOBE, Oct. 5, 2006, at E7, available at [http://www.boston.com/ae/tv/articles/2006/10/05/moral\\_dilemmas\\_pulled\\_into\\_battlestar\\_galaxy/](http://www.boston.com/ae/tv/articles/2006/10/05/moral_dilemmas_pulled_into_battlestar_galaxy/) ("But the secret to 'Battlestar,' as one of my colleagues keeps saying, is not to think of it as science fiction. This is a show about religion, politics, parent-child relationships, and the moral dilemmas of insurgency. Consider it a workplace drama where the business is armed resistance."). See also Glater, *supra* note 235; Miller, *supra* note 242; Miller, *supra* note 249; Heffernan, *supra* note 249; Edwards, *supra* note 243; Ackerman, *supra* note 247; Reed, *supra* note 247.

<sup>342</sup> Daniel J. Solove, *Battlestar Galactica Interview*, CONCURRING OPINIONS, Feb. 21, 2008, [http://www.concurringopinions.com/archives/2008/02/battlestar\\_gala.html](http://www.concurringopinions.com/archives/2008/02/battlestar_gala.html) (last visited Mar. 13, 2009); see

raise legal issues such as the permissibility of genocide<sup>343</sup> and the use of military commissions.<sup>344</sup>

## V. CONCLUSION

¶101 This article has discussed two contrasting narratives about torture. The first is centered on the ticking bomb scenario and treats torture and coercion as a necessary tool for saving lives. The ticking bomb's logic has been expounded by various legal academics since September 11, and was also evident in various Bush administration documents and statements asserting the legality of torture and coercion. The second narrative contests the usefulness of the ticking bomb scenario. Other academic commentators have pointed out the numerous assumptions underlying the hypothetical that are unlikely to be met in practice, as well as the broader costs of employing torture and coercion. Certain government actors, notably the FBI and senior military lawyers, opposed the use of torture and coercion for similar reasons.

¶102 These two conflicting accounts of torture have been reproduced in popular culture as well. The ticking bomb scenario is at the heart of Fox's 24, and it justifies Jack Bauer's frequent use of torture. After all, the clock is ticking, catastrophe will ensue without heroic intervention, and torture works. Sci-Fi's *Battlestar Galactica* by contrast, presents a more skeptical view: torture and coercion spreads and corrupts, and above all, does not reliably produce results.

¶103 Despite Jack Bauer's fictional nature, he has been invoked in real-world discussions about interrogation and national security issues surprisingly often. This is problematic because, as argued above, 24's portrayal of torture and interrogation is unrealistic in many significant respects. Somewhat ironically, it is *Battlestar Galactica*, a science fiction show set in outer space, which depicts torture and coercion in a way that is more consistent with humanity's historical experience. The era of the Bush administration has of course passed, and President Obama has repudiated some of the most notorious excesses of his predecessor's counterterrorism policies.<sup>345</sup> But should the issue of interrogational torture and coercion arise again, particularly if the United States should suffer a further terrorist attack in the future, rather than just asking what Jack Bauer would do, perhaps we might also find wisdom in the words of the equally fictional Commander William Adama: "It is not enough to survive; one has to be worthy of surviving."<sup>346</sup>

---

also Tranter, *supra* note 233; Tung Yin, *Is "Battlestar Galactica" Must-See National Security TV?*, THE YIN BLOG, Oct. 13, 2006, [http://yin.typepad.com/the\\_yin\\_blog/2006/10/is\\_battlestar\\_g.html#more](http://yin.typepad.com/the_yin_blog/2006/10/is_battlestar_g.html#more) (last visited Mar. 13, 2009).

<sup>343</sup> Kevin Jon Heller, *Genocide and Battlestar Galactica*, OPINIO JURIS, Nov. 15 2006, <http://opiniojuris.org/2006/11/15/genocide-and-battlestar-galactica/> (last visited Mar. 13, 2009) (discussing *Battlestar Galactica: A Measure of Salvation* (Sci Fi Channel/NBC Universal broadcast Nov. 10, 2006)).

<sup>344</sup> Chris Borgen, *Military Commissions Declared Illegal . . . on Battlestar Galactica*, OPINIO JURIS, Oct. 30, 2006, <http://opiniojuris.org/2006/10/30/military-commissions-declared-illegal...on-battlestar-galactica/> (last visited Mar. 13, 2009) (discussing *Battlestar Galactica: Collaborators* (Sci Fi Channel/NBC Universal broadcast Oct. 27, 2006)).

<sup>345</sup> See *supra* text accompanying notes 1-2.

<sup>346</sup> *Battlestar Galactica: Resurrection Ship Part II*, *supra* note 298. For a similar real-world sentiment, see Charles Fried, *History's Verdict*, N.Y. TIMES, Jan. 11, 2009, at WK11 ("Some argue that torture is justified if our survival is threatened, but even apart from the elasticity of this justification, it is flawed because it depends on an equivocation. Our physical survival is not what is of overriding moral importance . . . but