

Torture, Truth Serum, and Ticking Bombs:
*Toward a Pragmatic Perspective on Coercive
Interrogation*

By Kenneth Lasson*

I don't wanna bypass the Constitution,
but these are extraordinary circumstances.
—Jack Bauer¹

INTRODUCTION

The “War on Terror” has prompted a great deal of discussion about the use of torture as a means of extracting information from those suspected of having perpetrated past acts of violence or planning future ones. Despite the years that have passed since the attacks of September 11, 2001, for both citizens and government officials there is still a strong tension between the competing emotions of anger, revenge, and desperation; it seems increasingly difficult to adhere to international norms governing a nation’s moral and legal obligations to protect its citizens from grave danger while continuing to support individual freedoms.

Among the more difficult questions to emerge from those that were far-fetched (if not unthinkable) just a few decades ago is how to handle the so-called “ticking-bomb” scenario.² As terror organizations grow in

* Professor of Law, University of Baltimore. Many thanks to my student research assistant on this project, Francesca Gibbs, as well as to Duane Demers, Amy Beth Costanza, and Rebecca Phillips, who worked on earlier drafts of the manuscript, and to Barbara Jones for her invaluable word-processing assistance.

1. Jane Mayer, *Whatever It Takes*, NEW YORKER MAG., Feb. 19, 2007, at 68 (quoting Jack Bauer, the lead character in the fictional United States Counter-Terrorism Unit television program 24). In one episode, when a libertarian lawyer makes a principled argument to a presidential aide against unwarranted detentions—“You continue to arrest innocent people, you’re giving the terrorists exactly what they want!”—the aide sarcastically responds, “Well! You’ve got the makings of a splendid law review article here.” *Id.*

2. The ticking-bomb image first appeared in Jean Lartéguy’s 1960 novel *Les Centurions*. Mayer, *supra* note 1, at 68. Its use as a justification for torture has been debated in a wide variety of post-9/11 scholarly literature. See, e.g., Alex J. Bellamy, *No Pain, No Gain? Torture and Ethics in the War on Terror*, INT’L AFFAIRS 82 at 121–48 (2006) (discussing how the ticking-

size and complexity, uncovering terrorist plans by interrogating a group member has become critical, and the need to gather intelligence in order to save lives increasingly urgent.

In this context, the lines between truth and fiction have become exceedingly, if not frighteningly, blurred for the common citizen. One may compare the use of coercive interrogation techniques in the television program *24* with those that are likely being employed to prevent terror attacks in, for example, Iraq and Israel. For all its fictional liberties, *24* depicts the fight against Islamist extremism much as it has been defined by the Bush Administration: a perilous and all-consuming struggle for America's survival that demands the toughest tactics.³

The perception that physical coercion in interrogations produces unreliable information, although widespread among military intelligence officers and FBI agents, has been firmly rejected by the Bush Administration.⁴ However, the use and reliability of means short

bomb case has been used as a justification for torture); Rosa Brooks, *Ticking Bombs and Catastrophes*, 8 GREEN BAG 2d 311, 317 (Spring 2005) (arguing that it is too difficult to determine what could potentially be a catastrophe, and torture should not be used when dealing with such a subjective standard); Jason R. Odeshoo, *Truth or Dare?: Terrorism and "Truth Serum" in the Post-9/11 World*, 57 STAN. L. REV. 209, 212–13 (2004) (arguing that the use of "truth serum" may be constitutional and comport with international law in certain situations); Jessica Wolfendale, *Training Torturers: A Critique of the "Ticking Bomb" Argument*, 32 SOC. THEORY & PRAC. 269, 270 (2006) (arguing that training torturers is not justified, given the small chance that a ticking-bomb case will ever present itself).

3. Homeland Security Secretary Michael Chertoff praised *24*'s depiction of the war on terrorism as "trying to make the best choice with a series of bad options. . . . Frankly, it reflects real life." Mayer, *supra* note 1, at 82. "Most terrorism experts will tell you that the 'ticking time bomb' situation never occurs in real life, or very rarely. But on our show it happens every week." *Id.* at 68 (quoting Bob Cochran, co-creator of *24*). The program has a weekly audience of fifteen million viewers. *Id.* at 77; see also John Doyle, *24 Becomes Touchstone of War on Terror*, THE GLOBE AND MAIL (Toronto), Feb. 19, 2007, at R3 (discussing how *24* is being "taken seriously outside the entertainment pages of newspapers and magazines," referring to the attention the military and Human Rights First have given the show); *Dispatcher of Suicide Bomber Killed*, JERUSALEM POST, Feb. 21, 2007, available at <http://www.jpost.com/servlet/Satellite?pagename=JPost/JParticle/ShowFull&cid=1171894482209>; *Egypt: Palestinian Nabbed, Planning Suicide Attack on Israelis*, HAARETZ.COM, Feb. 21, 2007, available at <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=828772&contrassID=1&subContrassID=1>; Jill Savitt, *Torture on TV Imitated in the Field*, HUMAN RIGHTS FIRST, Feb. 15, 2007, available at http://www.voxpublica.org/archives/cat_do.html (discussing the negative impacts of portraying torture on television).

4. In September 2006, President Bush defended the CIA's use of "an alternative set of procedures." Mayer, *supra* note 1, at 77. In order to "save innocent lives," he said, the agency needed to be able to use "enhanced" measures to extract "vital information" from "dangerous" detainees who were aware of "terrorist plans we could not get anywhere else." *Id.* But see Mark Bowden, *The Dark Art of Interrogation*, ATLANTIC MONTHLY, Oct. 2003, at 51, 56 (examining the potential use of torture by the United States).

of physical coercion remains highly debatable.⁵

The thrust of this article is that the use of a drug popularly known as “truth serum” on terror suspects should not be considered torture. To the contrary, it should be considered an entirely lawful interrogation tool—particularly in ticking-bomb scenarios.⁶ Further, and perhaps more fundamentally, this article argues that there is a moral *obligation* in such situations to use truth serum in order to prevent future harm to large groups of people.

Part I offers an overview of the laws against torture, discusses issues concerning the existence and effectiveness of “truth serum,” describes the prototypical “ticking-bomb” scenario, and analyzes the legal framework involved.⁷ Part II addresses the moral considerations surrounding coercive interrogation in various emergent circumstances.⁸ Part III distinguishes the use of truth serum from torture, and supports the proposition that there is a moral imperative to apply the former in ticking-bomb situations.⁹

I. TORTURE, TRUTH SERUM, AND TICKING BOMBS: DEFINITIONS AND SCENARIOS

Pain forces the innocent to lie.

—Publius Syrus¹⁰

In analyzing the legal framework surrounding the use of truth serum to facilitate the gathering of information that could save lives, it is necessary to examine the history of torture and the evolution of law against torture and to describe precisely the circumstances involved.

5. According to one veteran interrogator, torture involving sensory-deprivation methods is likely to “produce false information, rather than actionable intelligence,” driving people to lie for the sake of ending the harsh treatment. Mark Benjamin, *The CIA’s Favorite Form of Torture*, SALON.COM, June 7, 2007, http://www.salon.com/news/feature/2007/06/07/sensory_deprivation (quoting Peter Bauer, a former senior interrogation resistance trainer for NATO who was a leading Army interrogator during Operation Desert Storm); see also Klein, *infra* note 38 and accompanying text (stating that when an individual is drugged, he or she may discuss anything “from the whimsical to the serious”).

6. The author is fully cognizant of the arguments that no reliable truth serum exists, and that true ticking-bomb cases have rarely been reported. But there is good reason to believe that forensic science continues to seek such a serum, and that ticking-bomb situations do occur and may be proliferating. See *infra* notes 25–32 and 33–52 and accompanying text (discussing the history of truth serums and the broader context of ticking-bomb scenarios).

7. See *infra* Part I (providing an overview of legislation concerning torture, the concept of truth serum, and ticking-bomb scenarios).

8. See *infra* Part II (examining moral concerns regarding coercive interrogation).

9. See *infra* Part III (explaining the differences between truth serum and torture and the necessity of using truth serum under certain circumstances).

10. First-Century B.C. Roman writer of mimes, *Sententiae*, No. 171 [CDQ 914].

A. Historical Overview

The analysis of whether the administration of truth serum as part of a coercive interrogation should be permitted in ticking-bomb cases should begin with an overview of the use of torture through the ages.

Although torture is now abhorred and prohibited in most modern societies, its use for the purpose of obtaining criminal confessions was once a mainstay in virtually all legal systems and persists in many. In Europe, the law of torture evolved in conjunction with the law relating to the production of evidentiary proof. Since courts themselves often dictated the specifics of how it was utilized, the practice became known as “judicial torture.”¹¹ In order to meet the standard of proof necessary for a conviction, either the testimony of two eyewitnesses to a crime or a voluntary confession of an accused was required.¹² Torture became an acceptable method to obtain such a confession.¹³ The evidence gathered under the coercion of torture was used to corroborate confessions, rather than the confession being used to corroborate the evidence.¹⁴

Although the practice of judicial torture was finally abolished in the mid- to late 1700s, a host of “modern” justifications for coercive interrogations has emerged.¹⁵ For example, “[i]n Uzbekistan and Egypt, torture is used to eradicate political dissent and to meet perceived security threats.”¹⁶ The same is true in China and Turkey.¹⁷ In Brazil, criminal suspects are routinely tortured to extract confessions for common crimes.¹⁸ State actors have often used torture to satisfy base purposes, such as the persecution of political or ethnic groups. Torture is still employed ostensibly for the purpose of obtaining information or eliciting a confession in the People’s Republic of China.¹⁹

Even in the United States, torture and related forms of coercive

11. John H. Langbein, *The Legal History of Torture*, in TORTURE 93, 94 (Sanford Levinson ed., 2004).

12. *Id.*

13. *Id.* at 96.

14. *Id.* at 95–96.

15. *Id.* at 97.

16. Kenneth Roth, *Introduction* to TORTURE, at xi, xiii (New Press 2005).

17. *Id.*

18. The Latin American countries of Guatemala, El Salvador, and Honduras have engaged in some of the worst official human rights violations in recent history. JENNIFER K. HARBURY, TRUTH, TORTURE AND THE AMERICAN WAY: THE HISTORY AND CONSEQUENCES OF U.S. INVOLVEMENT IN TORTURE 29 (2005).

19. See JUNG CHANG, WILD SWANS: THREE DAUGHTERS OF CHINA 347–48 (1991) (discussing methods used in imprisonment and their effects).

interrogation have become tools for addressing the threat of terrorism.²⁰ Such practices might not sit well with American policy-makers or interrogators.²¹ In November 2006, for example, the dean of the United States Military Academy at West Point and three veteran federal law enforcement officials flew to Southern California to meet with the creators of the television program *24* and express their concern that the show's central premise—that the letter of American law must be sacrificed for the sake of national security in certain situations—was promoting unethical and illegal behavior among active American military personnel.²²

The distinction between which acts constitute torture and which do not has given rise to much debate. Similarly controversial was whether the acts employed by U.S. Special Forces against detainees in Afghanistan and Iraq, when considered individually, amounted to torture under international law or were examples of inhuman and degrading treatment. In addition to beatings, the documented methodologies used by American military personnel included keeping detainees standing or kneeling for hours in black hoods or spray-painted goggles while in awkward, painful positions, depriving them of sleep by exposing them to light for twenty-four hours, and selectively giving pain-killing drugs to a suspect with gunshot wounds.²³

Other techniques carried out by U.S. armed forces against “enemy

20. Roth, *supra* note 16, at xiii; see also Laura Parker, *Terror Suspect's Claim: Too Traumatized for Trial*, USA TODAY, Feb. 14, 2007, at 1A (discussing Jose Padilla's attempt to be declared unfit for trial); Peter Whoriskey, *Judge Orders Padilla Jail Personnel to Testify*, WASH. POST, Feb. 17, 2007, at A17 (discussing a judge's order forcing the officials responsible for jail conditions where Jose Padilla was being held to testify at a hearing to determine whether he was mentally fit for trial).

21. See, e.g., *Do We Use Torture?*, L.A. TIMES, June 18, 2007, at A16 (arguing that torture is always wrong, and that Congress should withhold funding for operations utilizing torture); Editorial, *Torture Isn't Necessary for Security*, CHI. SUN-TIMES, June 3, 2007, at B6 (“It's not about the terrorists,” Senator John McCain has said, in opposition to the use of torture in interrogations, “it's about us. It's about what kind of country we are. The more physical pain you inflict on someone, the more they're going to tell you what they think you want to know. We have procedures for interrogation, adequate in 999,999 [out of a million] cases, and if we agree to torture people, we will do ourselves great harm in the world.”); Editorial, *Wrong and Ineffective*, COURIER-J. (Louisville), June 2, 2007, at 10A (arguing that the interrogation methods used by the United States are ineffective and unreliable).

22. “The disturbing thing,” Brigadier General Patrick Finnegan, West Point dean, said ‘is that although torture may cause Jack Bauer some angst, it is always the patriotic thing to do.’” Mayer, *supra* note 1, at 72; see also *Soldiers Have Imitated What They See on TV*, HUMAN RIGHTS FIRST, http://www.humanrightsfirst.org/us_law/etn/primetime/interrogators.asp (reporting that “soldiers currently in the field have imitated the interrogation techniques they have seen on television”).

23. *Id.* at 154.

combatants” have included prolonged stress positions, isolation, sensory deprivation, exposure to heat and cold, removal of clothing and religious items, forced grooming, exploitation of individual phobias, and “waterboarding”.²⁴

Interrogational torture is commonly employed against suspected terrorists or other criminals in ticking-bomb situations—that is, when it is believed that the only way to prevent imminent death or danger is to coerce a suspect to reveal the plan.²⁵ The efficacy and probative value of traditional coercive methods (other than the administration of truth serum) has been broadly debated.²⁶

Today, the most widely-accepted functional definition of torture can be found in Article 1 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter “the C.A.T.”).

The C.A.T. defines torture as:

[A]ny 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.²⁷

Article 2 appears unequivocal in its prohibition: “No exceptional circumstances whatsoever, whether a state of war or a threat of war,

24. U.N. Human Rights Comm., *International Covenant on Civil and Political Rights: Consideration of Reports Submitted By States Parties Under Article 40 of the Covenant*, ¶ 13, U.N. Doc. CCPR/C/USA/CO/3 (Sept. 15, 2006), available at <http://www.unhcr.ch/tbs/doc.nsf> (follow “CCPR Human Rights Committee,” then follow “Concluding Observations/Comments,” then follow “United States of America.”); see also Paul Kramer, *The Water Cure*, NEW YORKER, Feb. 25, 2008, at 38; Greg Miller, *CIA Chief Confirms Use of Waterboarding*, L.A. TIMES, Feb. 6, 2008, at A1; *infra* note 57.

25. See Henry Shue, *Torture*, in TORTURE 47, 53 (Sanford Levinson ed., 2004) (defining “interrogational torture”).

26. See *supra* note 2 and accompanying text (examining the debate surrounding the ticking-bomb situation justifying torture).

27. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Article 1, ¶ 1, U.N. Doc. A/RES/39/46 (June 26, 1987), available at <http://www2.ohchr.org/english/law/cat.htm> [hereinafter G.A. Res. 39/46]. The C.A.T. has been ratified by over 140 countries to date. See *United Nations Convention Against Torture*, <http://www.ohchr.org/english/bodies/ratification/9.htm> (listing the countries which have signed the C.A.T.).

internal political instability or any other public emergency, may be invoked as a justification of torture.”²⁸

This definition of torture is far from unambiguous. Many nations, in the course of establishing their own internal legislation to prevent torture as required by Article 2 of the Convention, have developed broader or narrower interpretations of the words “any act.”²⁹ The use of torture as an interrogational option is no longer taboo in popular discourse.³⁰ The questions nowadays revert to whether torture works—always, never, or sometimes.³¹

B. “Truth Serum”

The term “truth serum” is used throughout this article to describe a variety of mind-altering substances, specifically barbiturates such as sodium amytal scopolamine and sodium pentothal, with properties that are believed capable of eliciting the truth from people to whom they are administered.

The history of such drugs can be traced from their origin as pain blockers during childbirth, through their use by police departments in the 1920s and ‘30s, to the CIA’s infamous MK-ULTRA experiments with LSD. Such physiological agents had the patina of modern science but could be understood by the average citizen. This contributed to a public understanding of memory, and helped lay the groundwork for claims about scientific recall techniques later in the twentieth century.

Although pundits in publications as varied as the *Atlantic Monthly*,

28. G.A. Res. 39/46, *supra* note 27, at Article 2, ¶ 2. Torture is often viewed as a “crime against humanity.” Bellamy, *supra* note 2, at 126. The International Covenant on Civil and Political Rights permits “no derogation from the prohibition on torture . . . even in times of public emergency which threatens the life of the nation.” *Id.*

29. GAIL H. MILLER, *DEFINING TORTURE* 7 (2005). Miller points out that while Article 1 requires an “act,” the United Kingdom holds that “‘it is immaterial whether the pain or suffering . . . is caused by an act or an omission.’” *Id.* In contrast, “Greece uses the term ‘infliction’ instead of ‘act’ and requires that it be ‘systematic.’” *Id.* In addition, the status of a terrorist under international law has not been established. A terrorist may be defined as someone seeking to achieve a political goal by use of violent means. Under the Geneva Conventions, however, a terrorist is neither an “enemy combatant” nor a “civilian”—and thus is not entitled to the protections afforded either. Captured terrorists, therefore, need not be treated as prisoners of war, and terrorist acts can (and often must) be met with responses that are not always governed by established international protocols.

30. See Eyal Press, *In Torture We Trust?*, *THE NATION*, Mar. 31, 2003, at 11 (stating that “the taboo on torture has been broken”).

31. The claim by proponents of torture that “it always works,” is no more valid than the claim by opponents that “it never works.” *E.g.*, Bowden, *supra* note 4, at 56 (discussing President Bush’s reaffirmation of the United States’s stance against torture). “The tragic reality,” notes Professor Dershowitz, “is that torture sometimes works, much though many people wish it did not.” ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS* 137 (2002). See also Bellamy, *supra* note 2, at 135–36.

Newsweek, and the *Wall Street Journal* have called for the development and use of truth serum in the interrogation of suspected terrorists,³² there is little data in medical and scientific literature about contemporary truth-seeking drugs or techniques.³³ It is likely they are still being researched.³⁴ On the other hand, while a few anecdotal cases have been reported,³⁵ it is quite unlikely that the discovery of any effective truth serum would be publicly disclosed.³⁶

Theoretically, truth serum works by limiting the suspect's ability to suppress the impulse to tell the truth. It does not magically produce the truth, but has a similar effect to alcohol (which has been used by the Russians to gain information). Since such a drug acts to suppress a suppressor, its effectiveness is problematic in at least two ways. First, the assertion that truth serum would induce a person to tell the truth assumes that there is an innate impulse to tell the truth when asked. This may not be the case for a suicide terrorist or an extremist who has been trained to withhold information. Its degree of effectiveness may thus be greater on "ordinary" criminals, or perhaps a higher dose would need to be administered to those who are not.³⁷ Second, one's impulses under the influence of truth serum, as with alcohol, are not always

32. *False Hopes*, *ECONOMIST*, Jan. 11, 2003, at 20.

33. See *50 and 100 Years Ago*, *SCI. AM.*, June 1953, at 48 (reporting on instances of "neurotic" subjects confessing to crimes they did not commit after being given truth serum); David Dressler, *The Drug That Makes Criminals Talk*, *SATURDAY EVENING POST*, Dec. 27, 1947, at 16, 43-44 (describing how in one model the consent of the accused is needed before administering the drug, which is said to immobilize "the will and inhibitions, leaving the individual powerless to resist talking truthfully . . . [A subject] [u]nder their influence . . . begins to examine himself and his experiences in a more detached manner"); Kaja Perina, *Truth Serum: Brain Scans May Be Foolproof Lie Detectors*, *PSYCHOL. TODAY*, Jan./Feb. 2002, at 15 (exploring the potential use of brain scans for determining if an individual is telling the truth).

34. David Brown, *Some Believe 'Truth Serums' Will Come Back*, *WASH. POST*, Nov. 20, 2006, at A08.

35. In 2006, for example, after terrorist bomb blasts went off in Mumbai, India, the police commissioner said that his investigation "relied heavily on scientific procedures like narcoanalysis tests." Arvinder Kaur, *The Truth Drug*, *PRESS TR. OF INDIA*, Jan. 13, 2007.

36. When a West Point delegation visited the producers of *24*, the show's lead writer excitedly asked "if they knew of any effective truth serums." Mayer, *supra* note 1, at 72. On the program, a member of the Counter-Terrorism Unit carries a "briefcase filled with elephantine hypodermic needles." *Id.* at 70. "In recent years . . . 'we've resorted a lot to a pharmacological sort of thing . . . [the briefcase-carrier will] inject chemicals that cause horrible pain that can knock down your defenses—a sort of sodium pentothal plus." *Id.* (quoting Howard Gordon, the show's lead writer).

37. In the early 1950s, two lawyers and two psychiatrists on the Yale University faculty cited clinical evidence to show that "normal" subjects under the influence of sodium amytal readily conceal what they wish to conceal, and that "'neurotic' subjects frequently confess to deeds of which they are innocent." *50 and 100*, *supra* note 33, at 48 ("The statements elicited by drugs, they said, are more apt to be symbolically significant than objectively true.").

predictable. Consequently, the more one's inhibitions are lowered, the greater the tendency might be to reveal anything and everything, not just information that is responsive to an interrogator's question. Lying may not be the only impulse that is suppressed; one could begin discussing a wide array of topics from the whimsical to the serious.³⁸ Presumably, these impulses would be fairly easy to discern.

Notwithstanding such potential problems, the use of truth serum to obtain valuable information would be a relatively painless, less intrusive method of obtaining potentially life-saving information from suspects in custody.

C. *The Ticking-Bomb Scenario*

There are few peaceful alternatives to pursue when dealing with terrorists. Under international law, if there is a high degree of certainty that an attack is imminent and that the identity of the potential attackers is known, pre-emptive actions—even crossing borders to carry them out—are warranted.³⁹ In every instance, the attack should be proportionate to the circumstances justifying it, and peaceful alternatives should be explored first.⁴⁰

The use of torture in ticking-bomb situations was addressed long before the attacks against the United States on September 11, 2001 so harshly demonstrated that terrorism had become a global struggle between democracy and its enemies.⁴¹ The ticking-bomb situation presupposes that a suspect has been apprehended who is strongly suspected of having knowledge of an imminent terrorist attack.

Some commentators suggest that a true ticking-bomb case is so rare as to be implausible,⁴² but, just as the issues that it raises have become increasingly complicated, so have they become less far-fetched. Whether real or hypothetical, the typical ticking-bomb scenario occurs when law enforcement personnel apprehend a terrorist suspect who is

38. Letter from Colin Klein, Ph.D., Professor of Philosophy, Univ. of Ill. at Chicago, to author (May 9, 2007); see also Benjamin, *supra* note 5 and accompanying text (discussing the possible production of false information while using sensory deprivation methods of interrogation).

39. Emanuel Gross, *Thwarting Terrorist Acts by Attacking the Perpetrators or Their Commanders as an Act of Self-Defense: Human Rights Versus the State's Duty to Protect Its Citizens*, 15 TEMP. INT'L & COMP. L.J. 195, 211 (2001).

40. *Id.* at 208–12.

41. See *supra* notes 2–3 and accompanying text (explaining the parameters and development of the ticking-bomb situation).

42. See, e.g., Bellamy, *supra* note 2, at 125 (arguing that the ticking-bomb hypothetical is “based on a series of unlikely assumptions designed to prejudge the moral outcome”); Wolfendale, *supra* note 2, at 270 (arguing that the chances of a ticking-bomb situation ever presenting itself is so rare that the training of torturers is not justified).

believed to have knowledge of an imminent and very deadly attack. Much of the literature addressing the question poses a situation in which there is reason to believe that, for example, a nuclear weapon is hidden somewhere in New York City, but the suspect is unwilling to reveal its location.⁴³ Law enforcement and government officials must determine how to obtain the information from the suspect. While some would condone the use of a torture warrant to attempt to gather information, others oppose any form of torture for any reason.⁴⁴

How serious must be the threat be, how imminent, or how many lives must be at stake, for a situation to be considered a ticking-bomb scenario? Is the possibility or likelihood of injury to ten people enough to take interrogation to the next step? One hundred people? One thousand people? Should the method employed be used for ten minutes, an hour, two days? Will judicial approval be required to decide the answers to these questions, or can someone in law enforcement make that determination? Are coercive methods of interrogation permissible for municipal police departments, or only for counter-terrorism units like the FBI or CIA? Should the standards be different when damage to large cities is possible?

For the purposes of this article, it is assumed that “imminent” refers to a threat about to occur within a relatively short time (for example, forty-eight hours) from the time a suspect is apprehended, and that the threat poses a likelihood of substantial damage to lives and property. Before alternative methods of interrogation are used, there should also be a degree of certainty that the information the suspect could provide through coercive means would rise to the threshold of probable cause.

It may be useful to compare the current approach of the United States in its fight against terror with Israel’s approach. As a state, Israel has struggled to strike the correct balance between the preservation of human rights and the need for national security. That balance is based on reasonableness, whereby Israeli courts usually defer to the judgment of military commanders. The criteria for the latter’s strategic and

43. Brooks, *supra* note 2, at 317 (presenting a situation where an individual has a chance to save a thousand lives by torturing one suspect).

44. See M. Cherif Bassiouni, *The Institutionalization of Torture Under the Bush Administration*, 37 CASE W. RES. J. INT’L L. 389, 390–91 (2006) (arguing that the United States may be deliberately misleading the United Nations with respect to the use of torture); Christopher Kutz, *Torture, Necessity and Existential Politics*, 95 CAL. L. REV. 235, 242–44 (2007) (discussing the concept of necessity in relation to torture, from an ethical perspective); Mary Ellen O’Connell, *Affirming the Ban on Harsh Interrogation*, 66 OHIO ST. L.J. 1231, 1233–34 (2005) (discussing the United States’s obligation to abide by broad restrictions on inhuman treatment, under all circumstances).

tactical decisions are (a) the gravity of the circumstances presented by terrorists; (b) legislative restrictions on and latitude given to commanders in exercising their judgment; and (c) the impropriety of judicial intervention.⁴⁵

Throughout its brief history, Israel has confronted the challenge of foiling terrorist attacks before they occur. In 1987, the Israeli government commissioned a study of how terrorists were interrogated in prison. The Landau Commission recognized that Israel faced a continuing threat of terrorism, and concluded that acquiring information was vital to the defense of the state. It also accepted the security forces' claim that aggressive interrogation techniques were warranted. Further, it suggested that torture may be used against a terrorist in a "ticking-bomb" situation. The Commission stated:

The deciding factor is not the element of time, but the comparison between the gravity of . . . two evils. . . . To put it bluntly, the alternative is: are we to accept the offense of assault entailed in slapping a suspect's face, or threatening him, in order to induce him to talk and reveal a cache of explosive materials meant for use in carrying out an act of mass terror against a civilian population, and thereby prevent the greater evil which is about to occur? The answer is self-evident.⁴⁶

Prior to 1999, common interrogation methods in Israel included forcing the suspect to stand or sit for prolonged periods in uncomfortable positions, "tight hand or ankle cuffing, loud noise, sleep deprivation, hooding, cold rooms, and violent shaking."⁴⁷ But in 1999

45. See Emanuel Gross, *Democracy in the War Against Terrorism—The Israeli Experience*, 35 LOY. L.A. L. REV. 1161, 1164–65 (2002) (defining terrorism as "the use of violence for political ends [that] includes any use of violence for the purpose of putting the public or any section of the public in fear"). Also, "[t]he Court has instructed the military commander to conform the exercise of his power to the severity of the case and the gravity of the circumstances." *Id.* at 1206.

46. See Landau Commission, *Commission of Inquiry Into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity*, 23 ISR. L. REV. 146, 174 (1989) (translating and reprinting excerpts from the Landau Commission Report); see also Emanuel Gross, *Legal Aspects of Tackling Terrorism: The Balance Between the Right of a Democracy to Defend Itself and the Protection of Human Rights*, 6 UCLA J. INT'L L. & FOREIGN AFF. 89, 102–04 (2001) (acknowledging that the ticking-bomb situation is rare, but that it may be an instance where torture is justified); Daniel Statman, *The Absoluteness of the Prohibition Against Torture*, 4 MISHPAT UMIMSHAL 161, 163 (1997). *But see* Bellamy, *supra* note 2, at 135 (noting a problem of distinguishing between when the extraction of information from a suspect is necessary versus expedient).

47. John T. Parry, *Escalation and Necessity: Defining Torture at Home and Abroad*, in TORTURE 145, 148 (Sanford Levinson ed., Oxford University Press 2004). As might be expected, such tactics have met with differing reactions: the U.N. Committee Against Torture and its Special Rapporteur, for example, determined that these methods amounted to torture, but an Israeli investigatory commission concluded they were legally authorized by the necessity defense.

the Supreme Court of Israel prohibited such forms of torture, holding that they would be justified only where it is certain that the suspect holds information that can enable the state to thwart an attack and prevent loss of life. If it is uncertain exactly what information the suspect holds, or it is known that the suspect possesses little helpful information, torture is not permitted.⁴⁸

With torture being viewed as a last resort, the various other methods tried by Israel to thwart terrorism have met with varying success. The alternatives to coercive interrogations tried by Israel include the demolition of terrorists' houses; the imposition of curfews; the utilization of blockades, encirclements, and checkpoints; declaration of specified territories as closed military areas; and administrative detentions. Israel's use of each of these measures has been criticized by various international states and media, with the United States the most notable exception. Nevertheless, Israel's actions have withstood challenges that they have violated international law.⁴⁹

In 2001, the Israeli Supreme Court found that certain methods of interrogating terrorists, even though they entail only moderate physical force or non-violent psychological pressure, infringe on human dignity and violate international law.⁵⁰ Significantly, however, the Court suggested that a justification defense could be acceptable in certain situations.⁵¹

Id. at 148–49.

48. See HCJ 5100/94 Pub. Comm. Against Torture in *Isr. v. Isr.* [1999] IsrSC 53(4) 817, as reprinted in *Supreme Court of Israel: Judgment Concerning the Legality of the General Security Service's Interrogation Methods*, Sept. 6, 1999, 38 I.L.M. 1471, 1478, 1480–85 (stating that in limited circumstances, torture may be justified even against innocent people, such as against a member of the suspect's family if he is about to die or can withstand the torture). *But see Israel Supreme Court Bans Interrogation Abuse of Palestinians*, CNN.COM, Sept. 6, 1999, <http://www.cnn.com/WORLD/meast/9909/06/israel.torture/> (discussing Israel's Supreme Court decision banning the use of torture in interrogations); Steve Weizman, *Israel Uses Torture in Defiance of Court Ban, Report Says*, INDEPENDENT, Nov. 12, 2001, http://news.independent.co.uk/world/middle_east/article143641.ece (examining Israel's return to systematic torture after the Israeli Supreme Court ban).

49. HCJ 5100/94 Pub. Comm. Against Torture in *Isr. v. Isr.* [1999] IsrSC 53(4) 817, as reprinted in *Supreme Court of Israel: Judgment Concerning the Legality of the General Security Service's Interrogation Methods*, Sept. 6, 1999, 38 I.L.M. 1471, 1478, 1480–85; see also Jonathan Grebinar, *Responding to Terrorism: How Must a Democracy Do It? A Comparison of Israeli and American Law*, 31 FORDHAM URB. L.J. 261, 263–69, 273–76, 280–83 (2003) (discussing the criticisms of American and Israeli tactics when dealing with terrorism).

50. HCJ 5100/94 Pub. Comm. Against Torture in *Isr. v. Isr.* [1999] IsrSC 53(4) 817, as reprinted in *Supreme Court of Israel: Judgment Concerning the Legality of the General Security Service's Interrogation Methods*, Sept. 6, 1999, 38 I.L.M. 1471, 1481–82.

51. *Id.* at 1487. Necessity is a justification that can be raised only by an accused torturer at trial, and cannot be invoked as a source of administrative power to infringe upon human rights

In the United States, the Comprehensive Terrorism Prevention Act establishes guidelines for interrogation and recognizes that suspects are entitled to specific basic human rights and constitutional protections.⁵² In the past few years, however, there has been considerable debate over the application of these standards, and evidence has surfaced that the government circumvents these standards in its war against terror.⁵³ In July 2007, President Bush issued an Executive Order authorizing the CIA interrogation program. The Order fails to explicitly rule out interrogation techniques that were previously authorized for use in the CIA program, such as waterboarding, stress positions, hypothermia, sensory deprivation, sleep deprivation, and isolation.⁵⁴ Some commentators argue in favor of requiring torture warrants, to be issued by courts of law, as a means both to limit the practice and to make it part of the public record.⁵⁵

Few Americans ever envisioned a 9/11 before 2001. Now, however, almost all realize that such a terrorist act could happen again, perhaps on a much more destructive scale. Not long after 9/11, government officials began discussing how to handle a potential ticking-bomb situation, in which a terrorist plan has been put into action or an actual device deployed and the police have in custody a suspect who may have the information necessary to prevent or minimize large-scale death and

during interrogations. Johan D. van der Vyver, *Torture as a Crime Under International Law*, 67 ALB. L. REV. 427, 461 (2003).

52. IV. Investigative Techniques:

A. When conducting investigations under these guidelines the FBI may use any lawful investigative technique. Before employing a technique, the FBI should consider whether the information could be obtained in a timely and effective way by less intrusive means. Some of the factors to be considered in judging intrusiveness are adverse consequences to an individual's privacy interests and avoidable damage to his reputation. Whether a highly intrusive technique should be used depends on the seriousness of the crime and the strength of the information indicating the existence of the crime. It is recognized that choice of technique is a matter of judgment.

B. All requirements for use of a technique set by statute, Department regulations and policies, and Attorney General Guidelines must be complied with.

The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations § 4 (1989), available at <http://www.fas.org/irp/agency/doj/fbi/generalcrimea.htm#general>.

53. See Jane Mayer, *The Black Sites*, NEW YORKER, Aug. 13, 2007, at 46, 50–51 (discussing President Bush's secret authorization for the CIA to "create paramilitary teams to hunt, capture, detain, or kill designated terrorists almost anywhere in the world").

54. Maureen Byrnes, *From the Executive Director*, HUMAN RIGHTS FIRST RIGHTS WIRE, July/Aug. 2007, http://www.humanrightsfirst.org/rights_wire/RightsWire_56.htm.

55. Professor Dershowitz is the leading advocate of this procedure. See DERSHOWITZ, *supra* note 31 and accompanying text (arguing that torture sometimes works in certain circumstances); see also Barry Gewen, *Thinking the Unthinkable*, N.Y. TIMES, Sept. 15, 2002, § 7, at 12 (reviewing Dershowitz's book *Why Terrorism Works*).

violence.⁵⁶ The attacks on the World Trade Center in New York and the Pentagon in Washington, D.C. were certainly planned long in advance and with the aid of many co-conspirators. If similar actions were planned again, and the government held a suspect with possible knowledge of its taking place, could he or she be subjected to physical coercion in order to obtain relevant information?

Even in the face of international agreements reflecting a general disapproval of coercive interrogations, torture may be appropriate in a ticking-bomb scenario. Many commentators suggest that rough interrogation techniques rarely work, producing little more than false confessions.⁵⁷ However, there is some data to support the proposition that the use of torture can yield valuable information.⁵⁸ In 1995, for example, the Philippine government tortured a suspect who eventually disclosed truthful information about schemes that included killing the pope, flying an explosives-laden plane into CIA headquarters, and destroying up to eleven commercial airplanes over the Pacific Ocean.⁵⁹

56. See DERSHOWITZ, *supra* note 31, at 137 (positing that torture does work in certain instances); see also Andrew A. Moher, *The Lesser of Two Evils? An Argument for Judicially Sanctioned Torture in a Post-9/11 World*, 26 T. JEFFERSON L. REV. 469, 470 (2004) (arguing that “judicially sanctioned torture is appropriate, but only under certain, well-defined circumstances”); Walter Pincus, *Silence of 4 Terror Probe Suspects Poses Dilemma for FBI*, WASH. POST, Oct. 21, 2001, at A06 (“FBI and Justice Department investigators are increasingly frustrated by the silence of jailed suspected associates of Osama bin Laden’s al Qaeda network, and some are beginning to . . . say that traditional civil liberties may have to be cast aside if they are to extract information about the Sept. 11 attacks and terrorist plans.”).

57. One former interrogator said, “I never saw pain produce intelligence. . . . I worked with someone who used water-boarding”—an interrogation method involving the repeated near-drowning of a suspect. ‘I used severe hypothermia, dogs, and sleep deprivation. I saw suspects after soldiers had gone into their homes and broken their bones, or made them sit on a Humvee’s hot exhaust pipes until they got third-degree burns. Nothing happened.’ Some people, he said, ‘gave confessions. But they just told us what we already knew. It never opened up a stream of new information.’ If anything, he said, ‘physical pain can strengthen the resolve to clam up.’” Mayer, *supra* note 1, at 77. A top FBI questioning techniques expert, estimating “that he has conducted some twelve thousand interrogations,” says that torture is not an effective technique: “‘These are very determined people, and they won’t turn just because you pull a fingernail out.’” *Id.* at 72 (quoting Joe Navarro). West Point’s dean says that would-be martyrs would almost welcome torture, and that a ticking time bomb . . . would make a suspect only more unwilling to talk.” *Id.* at 77. “‘They know if they can simply hold out several hours, all the more glory—the ticking-bomb will go off!’” *Id.* (quoting Finnegan); see also Mischa Gaus, *Interrogations Behind Barbed Wire: Who’s to Blame for America’s New Torture Techniques?*, IN THESE TIMES, Feb. 2007, at 26 (reporting on detainees claiming they were drugged involuntarily); Editorial, *Is Torture Ever Justified?*, ECONOMIST, Jan. 11, 2003, at 9 (arguing that torture can be beneficial in certain circumstances).

58. See Kaur, *supra* note 35 (discussing the success of narcoanalysis tests in interrogation sessions).

59. Matthew Brzezinski, *Bust and Boom: Six Years Before the September 11 Attacks, Philippine Police Took Down an al Qaeda Cell That Had Been Plotting, Among Other Things, to Fly Explosives-Laden Planes into the Pentagon*, WASH. POST, Dec. 30, 2001, at W09.

For over two months, Philippine agents physically coerced the prisoner, beating him “with a chair and a long piece of wood, forced water into his mouth, and crushed lighted cigarettes into his private parts”—and were able to extract information that prevented the realization of massive terrorist attacks.⁶⁰

In a related way, inflicting mental pain on people in order to obtain information from them is not a new technique in other countries. Jordan threatened terrorist Abu Nidal’s family in order to get him to talk; in similar fashion, the Philippines convinced a terrorist suspect that they were going to turn him in to the Israeli authorities and as a result, they helped solve the case of the 1993 World Trade Center bombings and a plot to kill the pope. And Israel, until 1999, used violent shaking as a means of extracting information from suspects in custody.

In early 2007, Israel reported that it had thwarted a major suicide bombing attack at the central bus station in Tel Aviv by capturing the perpetrator before any damage was done. It is highly unlikely that the valuable information provided by the suspect, which included the location of the un-detonated bomb and the name of the attacker’s sponsor, was forthcoming without the use of coercive interrogation.⁶¹

Some commentators suggest that, even in the ticking-bomb situation, the scope and kind of training necessary to enable an efficient and effective state actor to torture a suspect raises serious questions about such coercive interrogation. For example, one scholar argues:

The ticking-bomb scenario requires a torturer desensitized to the infliction and endurance of suffering, trained to dehumanize victims of torture, and who will obey orders without question . . . deliberately

60. DERSHOWITZ, *supra* note 31, at 137. Dershowitz cites a recent case in Germany in which the eleven-year-old son of a prominent banker was kidnapped. Interview by Bob Abernethy with Alan Dershowitz, Professor, Harvard Law School (Feb. 20, 2004), *available at* <http://www.pbs.org/wnet/religionandethics/week725/cover.html> [hereinafter Dershowitz Interview]. The boy had been missing for three days. The police apprehended a man they were convinced had been a participant in the abduction because he had been taken into custody after having been seen collecting a ransom that was paid by the boy’s family. After seven hours spent exhausting all lawful means of interrogation, the deputy police commissioner instructed his officers, in writing, that they could try to extract information “by means of the infliction of pain, under medical supervision and subject to prior warning.” Ten minutes after the warning was given the suspect told the police where the boy could be located. Tragically, he was already dead, having been killed shortly after the kidnapping. Compare Bellamy, *supra* note 2, at 141 (describing a much earlier case, in 1957, where the chief of police in Algiers sought official authorization to torture “a communist insurgent caught in act of planting a bomb at a gasworks,” and the police believed he had planted a second bomb, which if exploded could kill thousands; the authorization to torture was denied, and ultimately the second bomb was not detonated).

61. See Abraham Rabinovich, *Suicide Bomber Thwarted*, AUSTRALIAN, Feb. 22, 2007, at 8 (describing the police’s capturing of the would-be suicide bomber).

inducing dispositions . . . very likely to lead to crimes of obedience We cannot assume (and we have every reason to doubt) that torturers will only be given legitimate orders and will disobey illegal and immoral orders. We have every reason to doubt that military and political authorities will use torture only in cases that meet the ticking bomb criteria In this world torture causes far more suffering than it has ever prevented. The mere possibility of a ticking bomb scenario arising is not sufficient to justify such massive suffering.⁶²

However, the state actor in this model presupposes an unrealistic prototype. However rare a true ticking-bomb situation may be, when one occurs the interrogator/torturer would not likely be someone thoroughly desensitized, blindly trained to follow orders, and totally incognizant of their illegality. As one commentator notes, “[i]n genuinely ‘urgent’ situations, the interrogator will not have time to make such calculations.”⁶³

In any event, all of these analyses only contemplate the application of traditional physical torture to obtain information, not the use of truth serum.

II. THE MORAL CONSIDERATIONS

To force a person to talk through the application of drugs
is as much a denial of human dignity as to coerce talk through
the use of physical force.
—Human Rights Watch⁶⁴

Suicide terrorists do not belong to our moral community,
and the human and moral rights enjoyed by members of our
community do not belong to them—and thus place no constraints on
our treatment of them.
—Jonathan Schonsheck⁶⁵

The basis for international agreements banning torture is that, like

62. Wolfendale, *supra* note 2, at 287.

63. Bellamy, *supra* note 2, at 146.

64. *The Legal Prohibition Against Torture*, HUMAN RIGHTS WATCH, <http://www.hrw.org/press/2001/11/TortureQandA.htm>. For arguments in favor of using truth serum in ticking-bomb situations, see 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, 611 (2005) (arguing that torture is justifiable when it is being used to gather information necessary to avoid a grave risk); DERSHOWITZ, *supra* note 31, at 137 (arguing that torture does work in certain circumstances).

65. Jonathan Schonsheck, *Thwarting Suicide Terrorists: The Locus of Moral Constraints and the (Ir)Relevance of “Human Rights,”* at 210–22, in STEVEN T. LEE, ED., *INTERVENTION, TERRORISM, AND TORTURE: CONTEMPORARY CHALLENGES TO JUST WAR THEORY* (2007).

rape or genocide, such behavior offends modern notions of morality.⁶⁶ As one scholar points out, the use of torture degrades the moral high ground that Western culture has sought for over a century:

Experience has shown that if torture, which has been deemed illegitimate by the civilized world for more than a century, were now to be legitimated—even for limited use in one extraordinary type of situation—such legitimation would constitute an important symbolic setback in the worldwide campaign against human rights abuses. Inevitably, the legitimation of torture by the world’s leading democracy would provide a welcome justification for its more widespread use in other parts of the world.⁶⁷

This rationale supported the passage of the C.A.T. (ratified by the U.S. Senate in 1984), which specifies that “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.”⁶⁸

Others see the use of torture, even in the ticking-bomb scenario, as a capitulation to the terrorist’s evil standard. They argue that “[r]esort to torture could conceivably stave off catastrophe. But at what price to our self-respect? . . . We are in a war of the decent against the indecent. We dare not cross the line that separates the two.”⁶⁹

Even those who favor the prohibition on torture recognize the exceptional circumstances where desperate necessity may dictate, though not excuse, its use.⁷⁰ However, they argue that the ticking-bomb hypothetical is designed to prejudge a moral outcome because it relies on four unlikely conditions—that interrogators are sure (1) they are holding the right person; (2) the person has information they need to avert an imminent threat and save lives; (3) the use of torture will help secure the necessary information; and (4) the information elicited is reliable. As one scholar argues:

I can see no way to deny the permissibility of torture in a case just like this. . . . But there is a saying in jurisprudence that hard cases make bad law, and there might well be one in philosophy that artificial cases make bad ethics. If the example is made sufficiently extraordinary,

66. See GEERT-JAN G.J. KNOOPS, DEFENSES IN CONTEMPORARY INTERNATIONAL CRIMINAL LAW 29 (2001) (discussing how excuses can be given for these types of wrongs, but they cannot be justified).

67. DERSHOWITZ, *supra* note 31, at 145.

68. G.A. Res. 39/46, *supra* note 27, at Article 2, ¶ 2.

69. Jeff Jacoby, *How Not to Win the War*, BOSTON GLOBE, Jan. 26, 2003, at H11.

70. Bellamy, *supra* note 2, at 124. “[W]e should avoid the temptation to permit the torture of the ticking bomb terrorist just as much as we should avoid the temptation to rule it out in all cases.” *Id.* at 147.

the conclusion that the torture is permissible is secure. But one cannot easily draw conclusions for ordinary cases from extraordinary ones, and as the situation described become more likely, the conclusion that the torture is permissible becomes more debatable.⁷¹

These arguments, of course, present a dilemma to Western democracies, whose adherence to such values would shackle them in extraordinary circumstances—ultimately, as some say, consigning them to the dustbin of history.

In theory, it is easy to disavow all torture. Human-rights organizations can advocate policy without ever having to assume responsibility in determining the fate of others. Amnesty International can be praised for taking the high road, because it need not make hard judgments about the choices between two evils. In practice, however, governments must act in the interest of the people and take whatever actions are necessary to prevent widespread harm. Just as we entrust the government to use legitimate force during wartime, so we look to the government to act in a ticking-bomb scenario. Responsibility for its resolution falls upon a nation's leadership.⁷²

Under a hypothetical "dirty hands" theory, a leader may be faced with determining whether to authorize the torture of a captured terrorist who does or may know the location of a number of bombs hidden in an apartment building and set to go off within twenty-four hours.⁷³ Even though the leader believes that "torture is wrong, indeed abominable, not just sometimes, but always," the leader orders the man tortured, convinced that he must do so for the sake of those who might otherwise die in the explosions.⁷⁴ The leader's action might be justified on the grounds that American citizens expect their armed forces—under the control of the executive branch—to fight for their interests. "People sleep peaceably in their beds at night only because rough men stand ready to do violence on their behalf."⁷⁵ It is this role-specific ethical

71. Shue, *supra* note 25 at 57.

72. In many episodes of 24, heroic American officials act as the tormentors of suspects thought to have knowledge of ticking bombs. "Isn't it obvious that if there was a nuke in New York City that was about to blow—or any other city in this country—that, even if you were going to go to jail, it would be the right thing to do?" Mayer, *supra* note 1, at 68 (quoting Joel Sarnow, creator/producer of 24); see also Max Weber, *Politik als Beruf*, Speech at Munich University (1918), in *THE VOCATION LECTURES: "SCIENCE AS A VOCATION" "POLITICS AS A VOCATION"* 32–33 (2004) (noting that a state is a human community that successfully claims the monopoly of the legitimate use of physical force within a given territory).

73. Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 *PHIL. & PUB. AFF.* 160, 167 (1973).

74. *Id.*

75. Roger Cohen, *An Obsession the World Doesn't Share: Many Countries See the War on*

standard that distinguishes an average person's proper behavior from that of those who govern.⁷⁶

Utilitarianism, which posits that the results of an action should contribute to the overall good, is often invoked to rebut arguments that torture is an unpredictable and dangerous abrogation of the principles of humanity.⁷⁷ Most basically, the "dirty hands" theory is a utilitarian cost-benefit calculation. Such an analysis was set out by both Jeremy Bentham and John Stuart Mill, who are credited with the libertarian underpinnings of American political philosophy. Bentham states:

For the purpose of rescuing from torture [a] hundred innocents, should any scruple be made of applying equal or superior torture, to extract the requisite information from the mouth of one criminal, who having it in his power to make known the place where at this time the enormity was practicing or about to be practiced, should refuse to do so? To say nothing of wisdom, could any pretence be made so much as to the praise of blind and vulgar humanity, by the man who to save one criminal, should determine to abandon [] 100 innocent persons to the same fate?⁷⁸

Utilitarian arguments apply where the rights of terrorists and innocents compete. The origin of the argument lies in the pursuit of happiness ideal. Over a century ago, proclaiming the right of free speech, Mill contended that truth is important to the attainment of general happiness. In the event of a clash, the right that will generate the most happiness emerges victorious.⁷⁹

Under this rationale, torture of the ticking-bomb suspect would be justified to prevent the deaths of many innocent civilians.⁸⁰ However, one scholar points out in a thoughtful analysis of the ticking-bomb situation:

The various claims that torture might be justified to prevent catastrophes all assume that we will know a catastrophe when we see one. But as the comparison of death rates from various wars suggests,

Terror as a U.S.-Imposed Distraction from Critical Issues Such as Poverty, Crime and AIDS, N.Y. TIMES UPFRONT, Mar. 28, 2005, at 10–13.

76. Adam Raviv, *Torture and Justification: Defending the Indefensible*, 13 GEO. MASON L. REV. 135, 142 (2004).

77. See generally Bagaric & Clarke, *supra* note 64, at 606–11 (discussing utilitarian arguments and their counterarguments).

78. W.L. & P.E. Twining, *Bentham on Torture*, 24 N. IR. LEGAL Q. 305, 347 n.99 (1973) (quoting Bentham). Under this rationale, torture of the ticking-bomb suspect would be justified to prevent the deaths of many innocent civilians. DERSHOWITZ, *supra* note 31, at 143.

79. Bagaric & Clarke, *supra* note 64, at 611.

80. See DERSHOWITZ, *supra* note 31, at 143 (describing a ticking-bomb scenario and maintaining that it would be justified to torture the suspect to gather the information necessary to save many innocent lives).

catastrophe is relative. A threat to one of my children would be catastrophe enough for me, but presumably not to others. How bad would a catastrophe have to be to justify torture from some “objective” standpoint? How many deaths would constitute a catastrophe? If torture was not officially deemed necessary by the U.S. military in any prior war, why on earth would torture be necessary to prevent another 9/11?⁸¹

Yet if we limit the use of torture strictly to exceptional circumstances, we could still maintain its taboo status. Treating torture as a crime does not require all torturers to be convicted and punished. Some terrible choices give rise to criminal defenses such as duress and necessity, and sentences that can reflect mitigation and clemency. Some of these doctrines might be appropriately invoked should true “ticking-bomb” situations ever occur.⁸²

Nevertheless, even professed utilitarians, recognizing that this view places governments on a very slippery slope—that is, that no one can be trusted to use such power wisely in practice—might support an absolute prohibition against institutionalized torture. Examples abound throughout history: without restraint, what is to prevent a once-fair-minded regime from evolving into one like those of Hitler, Stalin, or Pol Pot, which epitomize an ends-justifies-the-means view of government that leads to the murders of millions?⁸³

III. TRUTH SERUM AS A LAWFUL AND MORAL MEANS OF INTERROGATION

If King John had had to contend with suicide bombers,
he might never have signed [the Magna Carta].⁸⁴

Veritas vos liberabit.

(The truth will set you free.)

The administration of truth serum to a suspect in custody, for purposes of eliciting information about the possibility of imminent harm, should not be considered torture under either the U.S. Constitution or international law. Moreover, there may be a moral imperative to employ such a tactic in certain circumstances.

A. *Distinguishing Torture from Truth Serum*

Several commentators have asserted that the administration of truth

81. Brooks, *supra* note 2, at 317.

82. *Id.* at 315–16.

83. See DERSHOWITZ, *supra* note 31, at 145.

84. JOHN MORTIMER, RUMPOLE AND THE REIGN OF TERROR 96 (2006).

serum would violate international law and conventions prohibiting torture, but few clearly conclude that its use in ticking-bomb interrogations is thus forbidden.⁸⁵

As noted earlier, the widely-accepted definition of torture in Article 1 of the C.A.T. is ambiguous, and Article 2 appears to unequivocally prohibit torture.⁸⁶ However, there is no uniform understanding among signatories about what acts or omissions constitute egregious types of cruel, inhuman, or degrading treatment but still fall short of torture, nor is there consistency in the prohibition of both mental and physical suffering.⁸⁷ Notably, neither Article refers specifically to “truth serum.”

It is not clear whether mental suffering includes prolonged effects such as flashbacks or post-traumatic stress, or whether it is limited only to what occurs as a direct result of an act at the time it is being committed. Attempting to provide clarification, the United States submitted the following as part of its formal reservations, as well as a condition for American ratification of the C.A.T.:

(1) (a) . . . in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) 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; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death,

85. The most thorough analysis of the issue is by Jason Odesloo, but his conclusions strike this writer as overly circumspect. *See generally* Odesloo, *supra* note 2 (discussing the possibility that while “the use of truth serum does not rise to the level of torture, it violates the [U.N. Convention Against Torture] ban on cruel, inhuman, and degrading treatment. . . .”). For arguments against using truth serum in ticking-bomb situations, see Matthew Hannah, *Torture and the Ticking Bomb: the War on Terrorism as a Geographical Imagination of Power/Knowledge*, 96 ANNALS OF THE ASS’N OF AM. GEOGRAPHERS 622, 622 (2006) (“If there is an exercise of power that represents the antithesis of freedom and democracy, it is torture.”); Linda M. Keller, *Is Truth Serum Torture*, 20 AM. U. INT’L L. REV. 521, 536 n.72 (2005), Human Rights Watch, *The Legal Prohibition Against Torture*, <http://www.hrw.org/press/2001/11/TortureQandA.htm> (last visited Sept. 21, 2007); and Marcy Strauss, *Torture* 48 N.Y.L. SCH. L. REV. 201 (2003/2004). For arguments in favor of using truth serum in ticking-bomb situations, see Bagaric & Clarke, *supra* note 64, at 611 (stating that torture may be allowable where the suspect will likely provide the information necessary to save lives), and DERSHOWITZ, *supra* note 31, at 143 (stating occasions where torture is effective).

86. *See supra* note 29 and accompanying text (discussing interpretations of the definition of torture).

87. *See* MILLER, *supra* note 29, at 11–12 (noting the different definitions of torture used by various nations); Mary Ellen O’Connell, *Affirming the Ban on Harsh Interrogation*, 66 OHIO ST. L. J. 1231 (2005) (listing various definitions and example of torture according to governing bodies throughout the world).

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.⁸⁸

While this definition provides more specific guidance as to what constitutes mental suffering, it does not specifically refer to “truth serum.” Though some assert that the above reservation implicitly refers to truth serum as torture, since it includes “the administration or application, or threatened administration or application, of mind altering substances,” that description is prefaced by the requirement that mental pain and suffering, in order to constitute torture, must cause “prolonged mental harm.”

Besides the fact that the administration of truth serum would arguably be more effective than traditional methods of torture, its use would not likely leave severe lasting effects.⁸⁹ If the definition were construed so broadly, much of what society considers annoying or harassing would suddenly become torture. Logically, there must be limits on what it means to “disrupt profoundly the senses or the personality.” Thus, because there would likely be little, if any, pain or long-term negative effects associated with the administration of truth serum, it cannot be considered tantamount to torture.

Privacy issues are also implicated under the International Covenant on Civil and Political Rights (“ICCPR”). Article 17 of that document provides: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”⁹⁰ While the use of truth serum might appear to contravene this prohibition, the right to privacy is not absolute. Although a number of the Article’s drafters suggested a more precise accounting of the kinds of circumstances that might justify infringement of the right, no such language was ever added. Nor has the United Nations’ Human Rights Committee further defined the privacy right. Ultimately, “Article 17 places only two limitations on

88. Office of the United Nations High Commissioner for Human Rights, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, U.S. Reservations, Understandings and Declarations, ¶ II, available at <http://www.unhcr.ch/tbs/doc.nsf>; cf. Office of International Law, Inter-American Convention to Prevent and Punish Torture, Article 2, <http://www.oas.org/juridico/English/Treaties/a-51.html> (last visited Sept. 21, 2007).

89. See *False Hopes*, *ECONOMIST*, Jan. 11, 2003, at 20. Dr. Cottrell, president of the American Society of Anesthesiologists, “does not believe that thiopental has any long-term adverse affects.” *Id.* Others, however, caution that such drugs can be addictive. *Id.*

90. International Covenant on Civil and Political Rights, G.A. Res. 2200, (XXI) Article 17, ¶ 1 U.N. Doc (Dec. 16, 1966), <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/005/03/IMG/NR000503.pdf?OpenElement>.

infringements of privacy: interference with privacy is prohibited where it is either unlawful or arbitrary.”⁹¹ The administration of truth serum in a ticking-bomb case need not be considered either unlawful or arbitrary. Put plainly, protecting the integrity or health of an individual’s personality should not be deemed more important than saving the lives of others.

B. Constitutional Considerations

In the United States, it is debatable whether there are any constitutional obstacles to torturing a suspect who has been taken into custody and is suspected of possessing valuable information about an impending terrorist attack. The Fifth, Eighth, and Fourteenth Amendments to the Constitution have each been suggested as possible sources of a constitutional obstacle to the use of torture in a ticking-bomb situation.

The Fifth Amendment prohibits coerced self-incrimination, to the extent that compelled statements are generally excluded from use in prosecution. However, what if statements obtained by means of torture are not used to prosecute the suspect, but solely to obtain information about a pending attack? The Due Process clauses of the Fifth and Fourteenth Amendments control this question only to a limited extent. It is clear that if a suspect’s due process rights are violated, through the use of torture, a confession obtained by such a violation could not be used in prosecuting the individual.⁹² However, due process does not exist in a vacuum, and requires consideration of any compelling government interest as well as any alternative means to secure those interests.⁹³ The same police behavior that might be condemned as indecent and abhorrent in ordinary law enforcement could be embraced as a necessary evil in a ticking-bomb scenario, where countervailing governmental interests outweigh the need for strict adherence to procedural due process rights of individuals.

The Eighth Amendment, which prohibits “cruel and unusual punishment,” has been construed to apply only to post-conviction

91. Odeshoo, *supra* note 2, at 224.

92. *See, e.g.*, *Brown v. Mississippi*, 297 U.S. 278, 287 (1936) (holding that savage beatings of the suspects violated the Due Process Clause of the Fourteenth Amendment and therefore any confession obtained by such a violation was precluded from use in prosecution); *Leyra v. Denno*, 347 U.S. 556, 558 (1954) (“[U]se in a state criminal trial of a defendant’s confession obtained by coercion—whether physical or mental—is forbidden by the Fourteenth Amendment”); *Martinez v. City of Oxnard*, 337 F.3d 1091, 1091-92 (9th Cir. 2003) (finding that brutal interrogation violates Fourteenth Amendment due process rights).

93. Strauss, *supra* note 85, at 38.

punishment.⁹⁴ Specifically, the Supreme Court has upheld the forcible administration of psychotropic medication to mentally ill prisoners.⁹⁵ The United States equates “cruel, inhuman or degrading punishment” in Article 16 of the C.A.T. with the Constitution’s ban on “cruel and inhuman punishment” in the Eighth Amendment.⁹⁶ If the government contemplated a prohibition on the administration of truth serum on the grounds that it constitutes cruel and unusual punishment, it could have so stated in its Reservations, Understandings, or Declarations to the C.A.T.

The types of conduct found by the courts to violate the Eighth Amendment, generally involving infliction of pain and suffering, provide no clear indication as to how the administration of truth serum—which causes little physical pain beyond that of a pinprick—would be regarded. In this regard, it is noteworthy that the Supreme Court upheld the forcible administration of psychotropic medication to mentally ill prisoners.⁹⁷ On the other hand, the Court has also held that beating a prisoner could be considered cruel and unusual punishment even if it causes little more than bruising.⁹⁸ In addition, relying on *Wilkerson v. Utah*, which found that punishment by torture in all cases amounted to unnecessary cruelty forbidden by the Eighth Amendment, the Court suggested that cruel and unusual punishment occurs in situations other than interrogation.⁹⁹

While the Supreme Court has yet to weigh the government’s interest against the procedural guarantees of an interrogated suspect, at least one state court has considered whether the use of extreme force is

94. See, e.g., *Ingraham v. Wright*, 430 U.S. 651, 664 (1977) (holding that the Eighth Amendment protects those convicted of crimes). In *Ingraham*, the Court held that the proscription was designed to protect those convicted of crimes, and does not apply to the paddling of children as a means of maintaining discipline in public schools. *Id.*

95. *Washington v. Harper*, 494 U.S. 210, 227 (1990). But see Jami Floyd, *The Administration of Psychotropic Drugs to Prisoners: State of the Law and Beyond*, 78 CALIF. L. REV. 1243, 1273–74 (1990) (arguing that the Eighth Amendment should provide a minimum safeguard against forced medication where a patient is competent and poses no emergency threat to herself or to others).

96. O’Connell, *supra* note 87, at 1250–51; see also *supra* note 22 and accompanying text.

97. *Harper*, 494 U.S. at 227. See also Gary Fields, *On Death Row, Fate of Mentally Ill Is Thorny Problem: Can States Execute Inmates Made Sane Only by Drugs? Medical, Legal Quandary*, WALL ST. J., Dec. 14, 2006, at A1 (stating that states can choose to medicate defendants to reach a point where they are sane enough to be executed). But see Floyd, *supra* note 95, at 1273–74 (arguing that the Eighth Amendment should provide a minimum safeguard against forced medication where a patient is competent and poses no emergency threat to herself or to others).

98. See *Hudson v. McMillan*, 503 U.S. 1, 9 (1992) (finding that the Eighth Amendment can be violated “whether or not significant injury is evident”).

99. *Id.* at 9.

acceptable when a suspect has information vital to saving someone's life. In *Leon v. State*, the court held that violence inflicted by the police in order to obtain evidence was not inflicted to obtain a confession or provide other evidence to establish guilt, but rather because of "the immediate necessity to find the victim and save his life."¹⁰⁰

Some scholars have nevertheless advocated various procedures by which the government could constitutionally handle such situations. Professor Dershowitz suggests judicial supervision of interrogations through the use of a "torture warrant," whereby judicial approval for the use of torture must be sought and obtained before coercive interrogation takes place.¹⁰¹ The purpose of requiring judicial intervention would be to ensure both accountability and judicial neutrality, asking an independent third party to confront the choice of evils.¹⁰² A torture warrant would also provide transparency, obviating the current post-9/11 practice under which torture happens, perhaps more often than not, with few restraints under the radar of a hear-no-evil, see-no-evil society.¹⁰³

However, torture warrants are problematic because they legitimize a practice many want to see minimized or ended completely.¹⁰⁴ In addition, while the judiciary is supposed to be non-political, many pragmatic judges would find it difficult to overcome the social pressure to sign a torture warrant. How could a politically-correct standard be articulated?

This solution presents other significant questions as well. Can a judge with an application for a torture warrant before him trust all the information supplied?¹⁰⁵ How long would the government have to wait

100. *Leon v. State*, 410 So. 2d 201, 203 (Fla. Dist. Ct. App. 1982), *aff'd sub nom Leon v. Wainwright*, 734 F.2d 770 (11th Cir. 1984). This was a kidnapping case, in which police officers physically abused petitioner until he revealed where the victim was being held. A confession obtained as a result of police violence was not admitted into evidence, but a later one was. *Id.* See also Strauss, *supra* note 85, at 39.

101. DERSHOWITZ, *supra* note 31, at 158–59.

102. See *id.* at 160 (questioning whether "there is likely to be more torture or less if the decision is left entirely to field officers, or if a judicial officer has to approve a request for a torture warrant").

103. See Raviv, *supra* note 76, at 153–54 ("The way we can distinguish ourselves from the brutal methods of totalitarian regimes is by being absolutely forthright when we find it necessary to torture a suspect. The regimes in Tehran, Damascus, and Pyongyang can never be honest about the torture they commit because the reasons for the torture are so utterly unjustified.")

104. *Id.*; see also Elizabeth Silker, *Terrorists, Interrogation, and Torture: Where Do We Draw the Line?*, 31 J. LEGIS. 191, 206 (2004) (discussing the consequences of publicly endorsing torture).

105. See, e.g., Christopher Slobogin, *Testifying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1048–49 (1996) (maintaining that police perjury is common and

for such a torture warrant? Perhaps the best way to legally justify the use of torture in a ticking-bomb case is the “necessity defense”—which essentially countenances an unavoidable choice between two evils.¹⁰⁶ The necessity defense properly places the acts of the torturer within the purview of the jury. Such a defense in a ticking-bomb case properly considers actions of officials after the act—torture—rather than before, which is what a torture warrant contemplates.¹⁰⁷ If prosecutors are informed that torture took place, and they deem the case worthy of prosecution, a trial will take place to determine whether or not the actor who tortured the suspect was justified in doing so.¹⁰⁸ Generally, in order to succeed with a necessity defense, the torturer must show that (1) he acted to prevent a “significant and immediate” harm; (2) there was “no reasonable or adequate legal alternative;” and (3) the injury caused was not “disproportionate to the harm avoided.”¹⁰⁹

The Supreme Court has yet to clearly state whether the use of torture is unconstitutional, not to mention whether statements obtained from torture can violate a suspect’s due process rights absent a criminal prosecution, particularly in a ticking-bomb scenario.¹¹⁰

Some commentators argue that the use of truth serum offends due process rights guaranteed by the Fifth and Fourteenth Amendments. Information obtained from an interrogated individual violates the Fifth Amendment if: (1) it was compelled; (2) it was testimonial in nature; and (3) it was incriminating.¹¹¹ While the use of truth serum might meet the first two standards, it would not satisfy the third, because the information gained would not be used in a prosecution. On this point,

suggesting methods to reduce occurrences).

106. The necessity defense has also become a part of the truth/fiction world in *24*. One of the co-creators of the show, a lawyer, believes the use of torture in certain circumstances can be justified under the Constitution. “The Doctrine of Necessity says you can occasionally break the law to prevent greater harm. I think that could supersede the Convention Against Torture.” Mayer, *supra* note 1, at 72 (quoting Bob Cochran).

107. Raviv, *supra* note 76, at 162.

108. *Id.* at 180.

109. LAURA DIETZ ET AL., 21 AM. JUR. 2D *Criminal Law* § 158 (2007) (citations omitted). One might question whether this standard would encourage the torturer to inflict more pain in order to gain something “valuable” enough, even if the information gained turns out not to be true. At what point does it become clear that the suspect isn’t giving up anything?

110. *See, e.g.,* Chavez v. Martinez, 538 U.S. 760, 773–74 (2003) (where the Supreme Court remanded a case for the trial court to determine whether brutality therein rose to a level where it “shocks the conscience,” thereby implicating the due process rights of the individual even without a prosecution). Whether there should be a different standard applied to the “enemy combatants” is beyond the scope of this article.

111. *See* Schmerber v. California, 384 U.S. 757, 759–70 (1966) (discussing rights of an accused).

“the Court has been very clear: in order to be incriminating, a statement must be used against the accused at trial.”¹¹² This position is supported by the White House’s Office of Legal Counsel, which has said that the self-incrimination provision of the Fifth Amendment would not classify “unwarned custodial interrogation as a constitutional violation in itself.”¹¹³

The Court has addressed the Due Process challenge presented by the Fourteenth Amendment in cases where the defendant is administered drugs involuntarily in order to render him competent to stand trial, holding that the government is permitted to undertake such action if the treatment is medically appropriate.¹¹⁴ It would follow that an unwilling terror suspect could be injected with truth serum in order to reveal life-saving information, if such a course of action is absolutely necessary in the face of imminent potential harm.

Indeed, the only case in which the Supreme Court confronted the legality of truth serum involved a Due Process issue. In *Townsend v. Sain*, the Court found that the use of truth serum constitutes a due process violation when the statements obtained were admitted as evidence at trial.¹¹⁵ That rationale is applicable to the ticking-bomb scenario, where those administering truth serum are attempting to prevent imminent potential harm, not to accumulate evidence for trial.¹¹⁶

In *Schmerber v. California*, the Supreme Court upheld the constitutionality of a warrantless and non-consensual blood test for alcohol, saying that such a test did not violate the individual’s Fourth Amendment privacy rights.¹¹⁷ Although the Court later held that prisoners have a reasonable expectation that the privacy of their bodies and their minds will not be physically invaded by the state,¹¹⁸ it was not

112. Odeshoo, *supra* note 2, at 226.

113. Memorandum from Asst. U.S. Attorney General Jay Bybee, to U.S. Department of Defense General Counsel William Haynes 3 (Feb. 26, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/022602bybee.pdf>.

114. *Sell v. United States*, 539 U.S. 166, 181 (2003); see also Odeshoo, *supra* note 2, at 226 n.106.

115. *Townsend v. Sain*, 372 U.S. 293, 307–09 (1963), overruled on other grounds by *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992).

116. See Odeshoo, *supra* note 2, at 231 (noting that it is not “clear that the use of truth serum is illegal or unconstitutional under either the Fifth or Fourteenth Amendments. At best . . . [it] might be inadmissible . . . as evidence at trial”).

117. *Schmerber v. California*, 384 U.S. 757, 759–70 (1966).

118. *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 634 (1989) (reversing a judgment that the Federal Railroad Administration violated the Fourth Amendment by subjecting an employee to alcohol and drug tests without a warrant, finding a strong governmental interest in

contemplating a ticking-bomb interrogation.

The Supreme Court has also assessed whether various physical invasions “shock the conscience” as interrogation techniques. In *Breithaupt v. Abram*, the Court held that drawing blood from a suspected, and unconscious, drunk driver did not shock the conscience, and was not deemed cruel or offensive if done in a hospital.¹¹⁹ If such an intrusion does not shock the conscience, neither would the imposition of a needle prick, especially in circumstances where a terrorist act might be imminent.

One can readily draw the conclusion that on a purely physical level, administering truth serum does not so shock the conscience that it would be unconstitutional under the Fifth and Fourteenth Amendments. Among the few commentators who have considered the question to date, there is disagreement as to whether the administration of truth serum constitutes a violation of an individual’s right to privacy, personal dignity, and bodily integrity. Some say categorically that it does;¹²⁰ others are more circumspect.¹²¹

Though the physical pain of an injection may be minimal, critics who argue that truth serum should never be used suggest that it causes severe mental distress. According to one professor:

The core of a person—her own mind, her beliefs, thoughts, judgments—is negated when under the influence of an effective truth serum. The significance of this loss results in significant mental pain or suffering. Truth serum invades the mind in a profoundly disturbing way, and its absolute control over the mind and personality during the session might be compared to a physical invasion: truth serum as the equivalent to mental rape, leading to prolonged mental harm.¹²²

Thus, even the threat of truth serum could cause severe mental harm because of “fear of the unknown.”¹²³

This line of reasoning, besides being highly speculative, ignores the suspect’s ostensible and overriding goal of causing widespread harm and mayhem. Even if truth serum were in fact to “fundamentally alter the subject’s personality,” which may be “virtually wiped out during the session, and significantly affected afterward,” its use can be justified as

regulating railroad employees’ conduct to ensure public safety).

119. *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957).

120. *See, e.g., Keller, supra* note 85, at 584–88 (equating the use of truth serum to mental suffering).

121. *See, e.g., Odeshoo, supra* note 2, at 214 (contending that the use of truth serum may be appropriate under some circumstances).

122. *Keller, supra* note 85, at 584.

123. *Id.*

necessary to prevent greater suffering.¹²⁴ Law-enforcement officers regularly use stun guns to prevent violence to others. Here, the government's urgent interest in life-saving information should allow intrusions into individual liberties and due process rights.

In short, the use of truth serum could fairly be characterized as a very low-risk medical procedure, closer to an acceptable blood-extraction than an unconstitutional stomach-pumping.¹²⁵ The courts have recognized that in certain circumstances it may be permissible to use interrogational tools involving physical contact with a suspect in custody. It is unlikely a court would find that the pin-prick involved in the administration of truth serum would violate standards of decency where the information acquired could be potentially life-saving.

C. Using Truth Serum as a Moral Imperative

Under utilitarian doctrine, subjecting suspected terrorists to injections of truth serum is a reasonable means of obtaining information to protect a greater number of people. Citizens expect military forces to fight on their behalf, even in losing battles where lives are at stake, if, in the end, society as a whole will benefit.¹²⁶ So it is with the use of truth serum—when it is the best option in order to save the most lives.

Thus William Webster, former director of the CIA and FBI, said that “truth drugs” should be used “for the protection of the country,” and should be administered to uncooperative al-Qaeda and Taliban captives held at Guantanamo Bay, Cuba and elsewhere in order to obtain details about terrorist operations.¹²⁷ It is “a less intrusive means of learning something that you badly need to know.”¹²⁸

In ticking-bomb cases, where there is not enough time to investigate every lead, quick and decisive action must be taken if any useful information is to be obtained. One might legitimately wonder how many lives could have been saved on the morning of September 11, 2001 if suspected terrorists had been caught beforehand and

124. *Id.* at 592.

125. *Id.* at 566.

126. Bagaric & Clarke, *supra* note 64, at 607.

127. Kevin Johnson & Richard Willing, *Ex-CIA Chief Revitalizes 'Truth Serum' Debate*, USA TODAY, Apr. 26, 2002, at A12 (quoting William Webster); Ann Tyson, *U.S. Task: Get Inside Head of Captured bin Laden Aide*, CHRISTIAN SCI. MONITOR, Apr. 4, 2002, at 1 (quoting William Webster); see also Viki Mabrey, Correspondent, CBS News, *Truth Serum: A Possible Weapon*, Apr. 23, 2003, <http://www.cbsnews.com/stories/2003/04/07/60II/main548221.shtml> (last visited Sept. 22, 2007).

128. Stewart M. Powell, *Truth Serum Urged for Detainees*, MILWAUKEE J. SENTINEL, April 28, 2002, at 16A.

administered truth serum.

There is a valid argument that terrorists are *sui generis* because they do not fit neatly into either an “enemy combatant” or “ordinary criminal” definition, especially in view of the fact that the legal community cannot agree on a definition of terrorism. One may be reasonably certain, however, that suicide terrorists are unlikely to be dissuaded by threats—no pain we could plausibly threaten to inflict upon them could be worse than what they intend to do to themselves, in the process inflicting great evil on us.¹²⁹

Nor can the suicide terrorist lay claim to human rights. Membership in a moral community requires conscious fulfillment of one’s own moral obligations, which in turn means respecting the moral rights of other members. The moral community does not automatically include the entirety of humanity.¹³⁰ Moreover, any pain inflicted on the tortured terrorist is far outweighed by the pain to innocents that is thereby avoided. As one commentator observes, “[I]f we are convinced that a world at which the planes and passengers are lost is morally inferior to the actual world, then there is torturing that has got to be done.”¹³¹

Those who claim that we are no better than the terrorists if we do not respect the human rights of terrorists are mistaken. We are morally superior to suicide terrorists because we respect the rights of others—provided that they respect our rights as well. Refusing to tolerate the murderously intolerant is in quite a different moral category than intolerance *per se*.¹³²

In fact, if a reasonably reliable truth serum were available, there may be a moral *obligation* to use it in ticking-bomb scenarios. Some maintain there is a “moral duty” to employ torture in order to gain information in ticking-bomb situations.¹³³ These discussions rightly combine moral and philosophical theories with the practical questions

129. See generally Schonscheck, *supra* note 65.

130. “Suicide terrorists do not belong to our moral community, and the human and moral rights enjoyed by members of our community do not belong to them—and thus place no constraints on our treatment of them.” *Id.* at 222. Schonscheck goes farther, rejecting the idea that suicide bombers are entitled to any rights whatsoever. *Id.* at 217 (“[T]he claim that suicide terrorists have human rights is nonsense upon stilts with vertigo.”).

131. *Id.* at 223.

132. *Id.* at 224.

133. Charles Krauthammer, *The Truth About Torture: It’s Time to be Honest About Doing Terrible Things*, 11 WEEKLY STANDARD 12 (2005). Others believe that having to resort to torture is a “sign of desperation, an admission that your side has no other resources left.” TOM HEAD, IS TORTURE EVER JUSTIFIED? (2005) (citation omitted).

of effectiveness and predictability.¹³⁴

In advocating for the use of torture in certain situations, some observers promote a “harm minimization rationale,” where the question of whether torture is “morally defensible” should depend upon the following factors: “(1) the number of lives at risk; (2) the immediacy of the harm; (3) the availability of other means to acquire the information; (4) the level of wrongdoing of the agent; and (5) the likelihood that the agent actually does possess the relevant information.”¹³⁵ Under this theory, all forms of physical coercion may be inflicted on the suspect: the primary consideration is the magnitude of the harm that the state wishes to prevent.¹³⁶

Regardless of one’s views about the legal and ethical propriety of using torture in ticking-bomb cases, the question becomes moot if one accepts the argument that the administration of truth serum is not torture.

V. CONCLUSION

It is clear that the post-9/11 world presents new and critical problems, such as whether we should torture a suspect in a ticking-bomb scenario. Though both sides of the legal and moral debate have merit, in such a situation the government must choose the lesser of two evils for the protection of the community it serves. While it must not engage in torture with impunity, neither can it afford to be summarily shackled by

134. See Philip N.S. Rumney, *The Torture Debate: Is Coercive Interrogation of Terrorist Suspects Effective? A Response to Bagaric and Clarke*, 40 U.S.F. L. REV. 479, 482 (2006) (“If coercion is unreliable, then it is unlikely that it will produce the timely and accurate information that is sought.”). Rumney argues that proponents of such measures rely on incomplete information and make illogical conclusions. Criticizing Alan Dershowitz’s assumption that torture exists for a rational reason—as a means of preventing terrorism—he points out that the fact that “coercive interrogation ‘sometimes’ works . . . can hardly be viewed as a solid basis for making resilient legal and public policy.” *Id.* at 513. Rumney also cites doubt regarding the “effectiveness of coercion within the Israeli context” as there has not been a “shred of evidence that physical force is the only or the most effective means to prevent attacks.” *Id.* at 489 (quoting B’TSELEM, LEGISLATION ALLOWING THE USE OF PHYSICAL FORCE AND MENTAL COERCION IN INTERROGATIONS BY THE GENERAL SECURITY SERVICE 52–53 (2000)). Rumney also contends that the information obtained through coercive interrogation may not always be valuable or reliable because “[t]he agony of torture create[s] an incentive to speak, but not necessarily to speak the truth.” *Id.* at 490 (internal quotation marks omitted). Additional problems with coercive interrogation, according to Rumney, include the problem of the slippery slope and the difficulty in correctly identifying terrorists or those who possess “required knowledge.” *Id.* at 500–01.

135. Bagaric & Clarke, *supra* note 64, at 611.

136. *Id.* at 605. The authors base their argument on the concept of “hedonistic act utilitarianism,” where torture is justified because “the harm caused to the agent will be offset by the increased happiness gained to other people.” *Id.*

moral concerns.

Whether or not a civilized society can or should allow torture is a matter that will continue to be debated for years to come. But given only the terrible choice of permitting the death of many people or torturing an individual or group of suspects who can possibly prevent those murders, the government must do what is necessary to save lives.

The choice is clearer—and not so terrible—when the same end can be accomplished with administration of a drug.