

## TWO NARRATIVES OF TORTURE

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### Introduction

In the period since the terrorist attacks of September 11, 2001, the notion that “9/11 changed everything” seems to have attained the status of conventional wisdom.<sup>1</sup> History is divided into the time before and after 9/11. In this new reality, basic commitments to certain values, even those long enshrined in the form of various legal rights, are called into question. In the face of an apparently novel societal threat, adherence to these values is seen as being characteristic of a naïve pre-9/11 mindset. Nothing illustrates this new normality more clearly than the use of torture and coercion in interrogation. What was previously unthinkable is no longer so. Indeed, according to some, the use of torture and coercion may now not only be necessary, it may be a moral duty.<sup>2</sup>

A key tool in the normalization of interrogational torture and coercion has been the ticking bomb scenario. No longer is it simply a philosophy professor’s heuristic for challenging deontological theories; legal academics have invoked it to undermine the status of the absolute legal prohibition on torture. Beyond the ivory tower, versions of the ticking bomb scenario can be found in official government documents and statements that assert the legality of torture and various coercive interrogation techniques. The ticking bomb scenario is also replicated in the media and popular culture, the most notable example being Fox’s high-rating television show, *24*. Together, these various elements, all reiterating the logic of the ticking bomb scenario, constitute the first narrative or account of torture.

However, this narrative is contested by a second account of torture that challenges the logic of the ticking bomb scenario. In the academic arena, various commentators have highlighted the assumptions underlying the scenario that render it a suspect guide to policy. Certain government actors, most notably the Federal Bureau of Investigation (FBI) and military lawyers, have consistently rejected the logic of the ticking bomb scenario, and opposed the use of torture and coercion in interrogation. This second point of view also has a popular culture representative in the form of Sci-Fi Channel’s *Battlestar Galactica*. Thus the same battles that have been fought over the treatment of detainees in the “war on terror” in the legal and political arenas by real world actors since 9/11 are also being fought at a discursive level in popular culture.

The article begins in Part I by laying out the law in relation to torture. The law in this area is clear: torture and various other forms of mistreatment are illegal. However, soon after 9/11, there were calls to loosen the reins and allow counterterrorist agencies more

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<sup>1</sup> Press Release, Office of the Vice President, Remarks by the Vice President, Dec. 23, 2003, *available at* <http://www.whitehouse.gov/news/releases/2003/12/20031223-1.html> (“In a sense, 9/11 changed everything for us.”); Press Release, Office of the Press Sec’y, President Bush and Prime Minister Allawi Press Conference, Sept. 23, 2004, *available at*

<http://www.whitehouse.gov/news/releases/2004/09/20040923-8.html> (“See, 9/11 changed everything.”); *see also* Daniel Henninger, *Wonder Land: 20th Century Rules Will Not Win A 21st Century War*, WALL STREET JOURNAL, Apr. 7, 2006, A12.

<sup>2</sup> *See infra* text accompanying notes 42-54.

flexibility. Part II discusses how advocates of torture and coercive interrogation have employed the ticking bomb scenario to justify their position, and how neatly these arguments fit with the ethos of *24*'s torturing hero, Jack Bauer. Part III considers the counterarguments raised by opponents of torture and coercive interrogation, and how the key points of this alternative narrative of torture are picked up in *Battlestar Galactica*. If the previous two parts consider how art has imitated life, Part IV deals with how life has imitated art. Both *24* and *Battlestar Galactica* are reflections of post-9/11 American society. At the same time, both shows have the potential to shape and influence the debate about torture in the United States. *24*, in particular, being representative of the dominant or hegemonic narrative of torture, has already done this in several different ways.

### Part I: the new normal

The prohibition on torture features prominently in international law. It is widely accepted as a peremptory norm of international law (*ius cogens*).<sup>3</sup> The right to be free from torture can also be found in numerous human rights treaties. The International Covenant on Civil and Political Rights, for example, states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>4</sup> The Covenant permits derogation from certain rights during exceptional situations of emergency, but the right to be free from torture is not one of these rights.<sup>5</sup> The Convention against Torture (CAT) further clarifies this point in unequivocal terms: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”<sup>6</sup> The CAT, in addition to prohibiting torture,<sup>7</sup> also obliges states to take measures to prevent acts, which, although falling short of the threshold of torture, nevertheless amount to “cruel, inhuman or degrading treatment or punishment”.<sup>8</sup>

International humanitarian law protects against torture and coercion as well. The prohibition on torture can be found as far back as the Lieber Code of 1863.<sup>9</sup> It also finds expression in the more recent Geneva Conventions. For example, article 17 of the Third Geneva Convention states, “No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatsoever.”<sup>10</sup> It further states that prisoners of war who refuse to answer questions

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<sup>3</sup> See *A v. Secretary of State for the Home Department* (No. 2) [2005] UKHL 71, paras. 33-34.

<sup>4</sup> International Covenant on Civil and Political Rights, art. 7, December 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR], available at [http://www.unhcr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhcr.ch/html/menu3/b/a_ccpr.htm).

<sup>5</sup> *Id.* at art. 4.

<sup>6</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT].

<sup>7</sup> CAT defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.” *Id.* at art. 1.

<sup>8</sup> *Id.* at art. 16.

<sup>9</sup> See Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 (Apr. 24, 1863), art. 16.

<sup>10</sup> Geneva Convention Relative to the Treatment of Prisoners of War, art. 17, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GCIII].

“may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.”<sup>11</sup> Article 31 of the Fourth Geneva Convention provides that “[n]o physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.”<sup>12</sup> Both the Third and Fourth Geneva Conventions explicitly state that torture is a grave breach of the Conventions.<sup>13</sup> Additionally, common article 3 of the Geneva Conventions, which appears in all four Conventions, protects against “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture.”<sup>14</sup> Finally, Article 75 of Additional Protocol I to the Geneva Conventions, which applies as a backstop to detainees who are not entitled to more favourable treatment under the Conventions or the Protocol, prohibits “torture of all kinds, whether physical or mental.”<sup>15</sup>

In terms of domestic law, the prohibition on the infliction of torture has long been considered a touchstone of the common law.<sup>16</sup> Torture is plainly prohibited under American law as well. The general criminal law would apply to acts amounting to torture committed inside the United States.<sup>17</sup> Additionally, the Torture Statute, enacted by Congress in order to implement obligations under CAT, criminalizes acts of torture committed outside the United States.<sup>18</sup> Moreover, prior to changes wrought by the

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<sup>11</sup> *Id.*

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

<sup>13</sup> *See Id.* at art. 147; GCIII, *supra* note 10, at art. 130.

<sup>14</sup> GCIII, *supra* note 10, at art. 3. Although applicable on its terms to “armed conflict not of an international character”, common article 3 also states the minimum protection applicable to international armed conflicts as a matter of customary international law. *See* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. REP. 4, 103-05, paras. 218-20 (June 27); *see also* George H. Aldrich, *The Laws of War on Land*, 94 AM. J. INT’L L. 42, 60 (2000); Adam Roberts, *The Laws of War in the War on Terror*, in 32 ISR. Y.B. ON HUM. RTS 193, 230 (Yoram Dinstein & Fania Domb eds. 2002).

<sup>15</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 75, June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391. Although the United States has not ratified the two Additional Protocols of 1977, article 75 of Additional Protocol I is applicable as the United States accepts that it is declaratory of customary international law. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2797 (2006); William H. Taft IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT’L L. 319, 322 (2003).

<sup>16</sup> *See* A v. Secretary of State for the Home Department (No. 2) [2005] UKHL 71, para. 11 (“[F]rom its earliest days the common law of England set its face firmly against the use of torture.”)

<sup>17</sup> Michael Garcia, U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques, CRS REP. FOR CONGRESS, at CRS-8 (Jan. 25, 2008), *available at* <http://www.fas.org/sgp/crs/intel/RL32438.pdf>.

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

§ 2340. Definitions

As used in this chapter--

- (1) “torture” means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
- (2) “severe mental pain or suffering” means the prolonged mental harm caused by or resulting from—
  - (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
  - (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
  - (C) the threat of imminent death; or
  - (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality; and
- (3) “United States” means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.

Military Commissions Act of 2006,<sup>19</sup> the War Crimes Act of 1996 made it a serious criminal offense for anyone, whether inside or outside the United States, to commit either grave breaches of the Geneva Conventions or breaches of common article 3.<sup>20</sup>

This impressive edifice of legal prohibitions would come under pressure soon after the September 11 attacks. Torture, long banished from the realm of the permissible, would once again be on the discussion table as an instrument of state. Shortly after 9/11, Vice President Dick Cheney spoke ominously of “hav[ing] to work . . . sort of the dark side”.<sup>21</sup> He also observed that it was “vital for us to use any means at our disposal, basically, to achieve our objective.”<sup>22</sup>

Those closer to the counterterrorism coalface seemed to take the tough talk from above to heart. As one anonymous official involved in the capture and transfer of terrorist detainees stated, “If you don’t violate someone’s human rights some of the time, you probably aren’t doing your job”.<sup>23</sup> The same official also opined that the CIA had for too long promoted a “view of zero tolerance” on torture.<sup>24</sup> Cofer Black, Director of the CIA’s Counterterrorist Center from 1999 until 2002, summed up this brave new world of interrogation in his Congressional testimony: “All I want to say is that there was ‘before 9/11’ and ‘after 9/11’. After 9/11 the gloves came off.”<sup>25</sup>

The end result is that, in 2008, torture and coercion have — to some degree — become acceptable, or at least tolerable. John Parry suggests that despite the elite opposition to the excesses of American counterterrorism policy, particularly in relation to the (mis)treatment of detainees, “the public as a whole is far less aggrieved.”<sup>26</sup> David Luban concurs: the American public, he observes, has become “decidedly tolerant of torture,

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§ 2340A. Torture

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

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

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

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

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

<sup>19</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 2601-02 (codified at 10 U.S.C. §948a).

<sup>20</sup> 18 U.S.C. §2441 (2000). The Military Commissions Act narrowed the War Crimes Act’s coverage from breaches of common article 3 to specified “grave” breaches of common article 3. See James G. Stewart, *The Military Commissions Act’s Inconsistency with the Geneva Conventions: An Overview*, 5 J. INT’L CRIM. JUST. 26, 33 (2005).

<sup>21</sup> “The Vice President appears on Meet the Press with Tim Russert”, Sept. 16, 2001, available at <http://www.whitehouse.gov/vicepresident/news-speeches/speeches/vp20010916.html>.

<sup>22</sup> *Id.*

<sup>23</sup> Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, A01.

<sup>24</sup> *Id.*

<sup>25</sup> Mark Bowden, *The Dark Art of Interrogation*, THE ATLANTIC MONTHLY, Oct. 2003, 56.

<sup>26</sup> John T. Parry, *Just for Fun: Understanding Torture and Understanding Abu Ghraib*, 1 J. NAT’L SEC. L. & POL’Y 253, 282 (2005).

provided that the subjects are described as terrorists.”<sup>27</sup> He notes the lack of public outrage upon the disclosure of the CIA’s torturing of high-value al Qaeda detainees, and the disinterest of the American media in the torture of al Qaeda leader Khalid Sheikh Mohammed and the disappearing of his two sons.<sup>28</sup> To this might now be added the similarly apathetic public response to official admissions in 2008 that the United States had subjected three high-value detainees to a form of torture known as waterboarding.<sup>29</sup>

## Part II. Art imitates life: ticking bombs and 24

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

The ticking bomb scenario is, as Luban observes, “a remarkably effective propaganda device... it is simple, easy to grasp, emotionally powerful, and — above all — it seems to have only one right answer, the pro-torture answer.”<sup>30</sup> In addition to its one-sidedness, the ticking bomb scenario is pervasive in discussions about torture and coercion.<sup>31</sup> Seemingly all debates over this issue invoke the ticking bomb scenario:

It is a remarkable fact that everyone argues the pros and cons of torture through the ticking time bomb. Senator Schumer and Professor Dershowitz, the Israeli Supreme Court, indeed every journalist devoting a think-piece to the unpleasant question of torture, begins with the ticking time bomb and ends there as well.<sup>32</sup>

The ticking bomb scenario’s ubiquity extends to academic discussions about torture, as well as official government documents and statements about the interrogation of terrorist suspects. It is also the *leitmotif* of Fox’s counterterrorism drama, *24*. Together, these various sources constitute a consistent narrative about torture centered on the ticking bomb: the bottom line is that torture is an effective and sometimes necessary tool for extracting crucial, lifesaving information.

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<sup>27</sup> David Luban, *Unthinking the Ticking Bomb* (manuscript at 2-3) (Georgetown Public Law Research Paper No. 1154202) available at <http://ssrn.com/abstract=1154202>; see also Will Lester, *Most Say Torture OK in Rare Cases*, WASH. POST, Dec. 6, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/06/AR2005120600110.html> (noting that 61 percent of Americans surveyed agreed that torture was justified at least on rare occasions. By comparison, almost 90 percent of respondents in South Korea and about half of respondents in France and Britain agreed).

<sup>28</sup> Luban, *supra* note 27, at 3.

<sup>29</sup> Richard Esposito & Jason Ryan, *CIA Chief: We Waterboarded*, ABC NEWS, Feb. 5, 2008, available at <http://abcnews.go.com/print?id=4244423>; *Poll results: Waterboarding is torture*, CNN.COM, Nov. 6, 2007, available at <http://www.cnn.com/2007/POLITICS/11/06/waterboard.poll/index.html> (noting that 69 percent of respondents agreed that waterboarding was a form of torture, and that 40 percent of respondents agreed that the U.S. government should be allowed to use waterboarding for interrogation). See generally Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 COLUM. J. TRANSNAT’L L. 468 (2007).

<sup>30</sup> Luban, *supra* note 27, at 4.

<sup>31</sup> *Id.*

<sup>32</sup> David Luban, *Liberalism, Torture, and the Ticking Bomb*, in *THE TORTURE DEBATE IN AMERICA* 35, 44 (Karen J. Greenberg ed., 2006).

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

There is little debate that torture is an evil; the debate rages over whether, in spite of this, torture may under certain circumstances be a necessary or lesser evil.<sup>33</sup> Invariably, the device used to dislodge all but a hardy few deontologists from the absolutist no-torture-ever position is the ticking bomb scenario. There is nothing new about this scenario. Jeremy Bentham constructed a version of it in the early nineteenth century.<sup>34</sup> Michael Walzer discussed it in 1973.<sup>35</sup> It also appeared in several law review articles written before the September 11 attacks.<sup>36</sup>

Shortly after 9/11, journalists began posing the ticking bomb scenario in discussions about whether torture should now be permissible.<sup>37</sup> The academic debate followed suit. Faced with the scenario, only a few academic commentators would uphold the prohibition on torture absolutely and under all circumstances.<sup>38</sup> The rest fall into the category of those who believe that torture may be justified in certain exceptional circumstances. However, there are differing views on precisely what this entails for the interrogator in the ticking bomb scenario and for the absolute legal prohibition on torture. Some would maintain the absolute legal prohibition on torture for pragmatic reasons, and find some ex post means of dealing with the interrogator who finds him or herself in the ticking bomb situation.<sup>39</sup> Parry, for example, argues that an interrogator who had truly resorted to torture as a last resort to save lives would have access to the criminal law defense of necessity.<sup>40</sup> Oren Gross, the foremost exponent of this view, advocates official disobedience and, where appropriate, ex post ratification. Thus, an

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<sup>33</sup> For a useful description of the debate, see Sherry F. Colb, *Why is Torture 'Different' and How 'Different' is it?* (manuscript at 7-14) (Columbia Public Law Research Paper No. 08-171) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1099061](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1099061).

<sup>34</sup> See W. L. Twining & P. E. Twining, *Bentham on Torture*, 24 N. IR. L. Q. 305, 347 (1973).

<sup>35</sup> Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 PHIL. & PUB. AFFAIRS 160, 167 (1973).

<sup>36</sup> See e.g., Sanford H. Kadish, *Torture, The State and the Individual*, 23 ISR. L. REV. 345, 345 (1989); Michael S. Moore, *Torture and the Balance of Evils*, 23 ISR. L. REV. 280, 333-34 (1989); Winfried Brugger, *May Government Ever Use Torture? Two Responses From German Law*, 48 AM. J. COMP. L. 661, 677 (2000). See also Gunter Frankenberg, *Torture and Taboo: An Essay Comparing Paradigms of Organized Cruelty*, 56 AM. J. COMP. L. 403, 404-5 (2008) (noting various discussions of torture in German legal literature before September 11, 2001).

<sup>37</sup> Vicki Haddock, *The Unspeakable*, S.F. CHRONICLE, Nov. 18, 2001, D1 (“The strongest argument for rougher interrogations of those now custody [sic] is that getting them to talk, by whatever means, might foil future attacks — possibly even a cataclysmic assault with a biochemical weapon or radioactive ‘dirty bomb’ that could kill tens of thousands of Americans.”); Jonathan Alter, *Time to Think About Torture*, NEWSWEEK, Nov. 5, 2001, available at <http://www.newsweek.com/id/76304> (“Israeli law leaves a little room for ‘moderate physical pressure’ in what are called ‘ticking time bomb’ cases, where extracting information is essential to saving hundreds of lives.”).

<sup>38</sup> Henry Shue, *Torture in Dreamland: Disposing of the Ticking Bomb*, 37 CASE W. RES. J. INT’L L. 231, 238-39 (2006) (“So I now take the most moderate position on torture, the position nearest to the middle of the road, feasible in the real world: never again. Never, ever, exactly as international law indisputably requires. If the perfect time for torture comes, and we are not prepared to prevent a terroristic catastrophe, we will at least know that we have not sold our souls and we have not brutalized the civilization. These are catastrophes we actually can avoid.”); Jeremy Waldron, *Torture and Positive Law: Jurisprudence and the White House*, 105 COLUM. L. REV. 1681, 1714-15 (2005) (“Might we be willing to allow the authorization of torture at least in a ‘ticking bomb’ case ... ? For what it is worth, my own answer to this question is a simple ‘No.’ I draw the line at torture.”). See also Ariel Dorfman, *The Tyranny of Terror: Is Torture Inevitable in Our Century and Beyond?*, in TORTURE: A COLLECTION 3 (Sanford Levinson ed., 2004).

<sup>39</sup> See John T. Parry, *Escalation and Necessity: Defining Torture at Home and Abroad*, in TORTURE: A COLLECTION 145 (Sanford Levinson ed., 2004); Oren Gross, *The Prohibition on Torture and the Limits of the Law*, in TORTURE: A COLLECTION 229 (Sanford Levinson ed., 2004); Kadish, *supra* note 36.

<sup>40</sup> Parry, *supra* note 39, at 158.

interrogator who tortured would violate the law, but it would then be up to society to decide how to respond to this illegal action. The interrogator could be subject to sanction if society regarded his or her action as unjustifiable or inexcusable. Conversely, societal ratification might occur by utilizing measures such as prosecutorial discretion, jury nullification, or executive clemency.<sup>41</sup>

Others, seeking to de-moralize the issue of torture, are less attached to the absolute legal prohibition on torture, and advocate a more transparent ex ante approach in order to accommodate a ticking bomb situation. The most notable proponent of the use of torture since September 11, Alan Dershowitz, falls into this category.<sup>42</sup> Dershowitz's argument is that since torture sometimes works, the use of torture in interrogation is a moral dilemma that must be faced.<sup>43</sup> Dershowitz accepts that, in the case of a ticking bomb, torture is justified on utilitarian grounds: "it is surely better to inflict nonlethal pain on one guilty terrorist than to permit a large number of victims to die."<sup>44</sup> His suggested methods for inflicting pain are a sterilized needle under the fingernails, or a dental drill into an unanaesthetized tooth.<sup>45</sup>

Dershowitz further suggests that the infliction of pain should be regulated by a system of judicial warrants in order to minimize the instances of torture. Under this system, an executive official would present evidence to a judge that a suspect had information needed to thwart an impending terrorist attack. Assuming that the judge granted the warrant, the suspect would then be granted immunity and told that he was compelled to testify. If the suspect refused, he would then be threatened with torture, and if necessary, subjected to non-lethal torture, as authorized by the warrant.<sup>46</sup> Torture, according to Dershowitz, is inevitably going to occur in a ticking bomb situation; the only question is whether it is going to be done openly, or secretly and illegally.<sup>47</sup> Dershowitz's position is that his system of judicial torture warrants will enhance the transparency and accountability of torture, and therefore limit its occurrence to truly exceptional cases.<sup>48</sup>

Mirko Bagaric and Julie Clarke go further than Dershowitz, who is opposed to torture as a general moral matter.<sup>49</sup> They argue that "torture is indeed morally defensible, not just

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<sup>41</sup> Gross, *supra* note 39, at 240-41.

<sup>42</sup> ALAN DERSHOWITZ, WHY TERRORISM WORKS (2002). Dershowitz also sets out his position on torture in various newspaper columns. See Alan M. Dershowitz, *Is There a Torturous Road to Justice?*, L.A. TIMES, Nov. 8, 2001, available at <http://ontology.buffalo.edu/smith//courses01/rtrw/Dershowitz.htm> ("[t]orture in general certainly shocks the conscience of most civilized nations. But what if it were limited to the rare 'ticking bomb' case--the situation in which a captured terrorist who knows of an imminent large-scale threat refuses to disclose it? Would torturing one guilty terrorist to prevent the deaths of a thousand innocent civilians shock the conscience of all decent people?"); Alan M. Dershowitz, *Want to torture? Get a warrant*, S.F. CHRONICLE, Jan. 22, 2002, A19 ("The Israeli Supreme Court left open the possibility, however, that in an actual 'ticking bomb' case — a situation in which a terrorist refused to divulge information necessary to defuse a bomb that was about to kill hundreds of innocent civilians — an agent who employed physical pressure could defend himself against criminal charges by invoking 'the law of necessity.' No such case has arisen since this court decision, despite numerous instances of terrorism in that troubled part of the world. Nor has there ever been a ticking bomb case in this country. But inevitably one will arise, and we should be prepared to confront it. It is important that a decision be made in advance of an actual ticking bomb case about how we should deal with this inevitable situation.").

<sup>43</sup> DERSHOWITZ, *supra* note 42, at 137.

<sup>44</sup> *Id.* at 144.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 158-59.

<sup>47</sup> *Id.* at 151.

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

<sup>49</sup> Alan Dershowitz, *Tortured Reasoning*, in *TORTURE: A COLLECTION* 257, 266 (Sanford Levinson ed., 2004).

pragmatically desirable.”<sup>50</sup> In their view, torture is morally justifiable on utilitarian grounds, namely “when more grave harm can be avoided by using torture as an interrogation device.”<sup>51</sup> They then proceed to set up their version of the ticking bomb scenario.<sup>52</sup> Bagaric and Clarke conclude that the absolute prohibition against torture is untenable, and that a legal framework that sanctions the use of torture in certain exceptional circumstances should be devised.<sup>53</sup>

Eric Posner and Adrian Vermeule also argue for the legalization and regulation of what they term “coercive interrogation”, a label that encompasses torture as well as cruel, inhuman and degrading treatment.<sup>54</sup> In their view, there is nothing exceptional about coercive interrogation, meaning that it should be dealt with like any other coercive state practice. Consequently, they recommend subjecting coercive interrogation to ex ante legal regulation, which would include Dershowitz-style warrants.<sup>55</sup> In the course of their argument, they also invoke the ticking bomb scenario to overcome the position of the absolute deontologist.<sup>56</sup>

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

Although it no doubt remains a college and law school professor’s staple, the ticking bomb scenario is no longer solely the preserve of academics. Versions of it have become a part of the official discourse on torture. The ticking bomb scenario can be found in various memoranda concerning the treatment of detainees, as well as in official statements made by various members of the Bush administration on the same issue.

An early memorandum, attributed to then-Attorney General Alberto Gonzales but reportedly the work of longtime Cheney ally, David Addington,<sup>57</sup> set the tone for the administration’s treatment of detainees in the “war on terror”. It asserted that the Geneva Conventions did not apply to either the conflict with al Qaeda or the Taliban, a

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<sup>50</sup> Mirko Bagaric & Julie Clarke, *Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable* 39 U.S.F. L. REV. 581, 582-83 (2005). A similarly enthusiastic view is put forward by columnist Charles Krauthammer, who sets up the ticking bomb scenario where the choice is to torture or have one million people die: “Not only is it permissible to hang this miscreant by his thumbs. It is a moral duty.” See Charles Krauthammer, *The Truth about Torture*, THE WEEKLY STANDARD, Dec. 5, 2005, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/006/400rhqav.asp>.

<sup>51</sup> Bagaric & Clarke, *supra* note 50, at 583.

<sup>52</sup> *Id.* (“Consider the following example: A terrorist network has activated a large bomb on one of hundreds of commercial planes carrying over three hundred passengers that is flying somewhere in the world at any point in time. The bomb is set to explode in thirty minutes. The leader of the terrorist organization announces this intent via a statement on the Internet. He states that the bomb was planted by one of his colleagues at one of the major airports in the world in the past few hours. No details are provided regarding the location of the plane where the bomb is located. Unbeknown to him, he was under police surveillance and is immediately apprehended by police. The terrorist leader refuses to answer any questions of the police, declaring that the passengers must die and will do so shortly.”).

<sup>53</sup> *Id.* at 616.

<sup>54</sup> ERIC POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE* 184 (2007).

<sup>55</sup> *Id.* at 185.

<sup>56</sup> *Id.* at 186 (“One might hold that coercive interrogation is absolutely impermissible, as a violation of rights rooted in human dignity or autonomy. This position is held by a very few moral philosophers. Here, the ticking-bomb hypotheticals are important: while it is possible to argue that such cases are so rare that they should be ignored by a rule-consequentialist calculus ex ante, an argument we consider below, it is fanatical to argue on deontological grounds that rights against coercive interrogation should not be overridden to prevent serious harms to others.”).

<sup>57</sup> JANE MAYER, *THE DARK SIDE* 124 (2008).



view that President Bush subsequently would largely endorse.<sup>58</sup> Elements of the ticking bomb scenario are immediately apparent:

As you have said, the war against terrorism is a new kind of war... The nature of the new war places a high premium on other factors, such as the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities against American civilians... In my judgment, this new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions.<sup>59</sup>

The ticking bomb scenario is also evident in the most infamous of the Bush administration's "torture memos",<sup>60</sup> the Bybee memorandum.<sup>61</sup> This memorandum was written because of the concerns of the Central Intelligence Agency (CIA) about the legality its interrogators' actions. Soon after 9/11, the CIA had been given a broad mandate to track down, detain and kill certain terrorists.<sup>62</sup> Thus began the High-Value Detainee (HVD) program.<sup>63</sup> The CIA subsequently interrogated a number of high-level al Qaeda operatives using various coercive interrogation techniques. CIA officials disagreed about the propriety of such techniques: some thought more latitude was appropriate, while others were concerned about potential legal exposure.<sup>64</sup> The CIA consequently sought clarification from the Department of Justice. This led to internal discussions amongst high-level decision-makers, and eventually the creation of the notorious Bybee memorandum of August 2002,<sup>65</sup> now widely acknowledged to be the work of John Yoo.<sup>66</sup> This memorandum tendentiously interpreted its way around the prohibition on torture in the Torture Statute by various means.<sup>67</sup> In the course of a discussion about the potential availability of the criminal law defense of necessity to an interrogator, the ticking bomb scenario appears:

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

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<sup>58</sup> George W. Bush, Memorandum for the Vice President, the Secretary of State, the Secretary of Defense, et al., Re: Humane Treatment of al Qaeda and Taliban Detainees (7 Feb. 2002), available at <http://www1.umn.edu/humanrts/OathBetrayed/Bush-2-7-02.pdf> (stating that GCIII did not apply to the conflict with al Qaeda and that, although GCIII did apply to the conflict with the Taliban, the Taliban detainees did not satisfy the requirements for prisoner of war status).

<sup>59</sup> Memorandum from Alberto R. Gonzales, Att'y Gen., on Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban, to the President (Jan. 25, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf>.

<sup>60</sup> *A Guide to the Memos on Torture*, N.Y. TIMES, available at <http://www.nytimes.com/ref/international/24MEMO-GUIDE.html>.

<sup>61</sup> Memorandum from Jay Bybee to Alberto R. Gonzales, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), 41, available at <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/doj/bybee80102mem.pdf>

<sup>62</sup> Jane Mayer, *The Black Sites*, THE NEW YORKER, Aug. 13, 2007, available at [http://www.newyorker.com/reporting/2007/08/13/070813fa\\_fact\\_mayer](http://www.newyorker.com/reporting/2007/08/13/070813fa_fact_mayer).

<sup>63</sup> Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report, AS/Jur (2007) 36, June 7, 2007, paras. 51-71, available at [http://www.bernan.com/images/PDF/EMarty\\_20070608\\_NoEmbargo.pdf](http://www.bernan.com/images/PDF/EMarty_20070608_NoEmbargo.pdf).

<sup>64</sup> ALFRED W. MCCOY, A QUESTION OF TORTURE 120-21 (2006).

<sup>65</sup> *Id.* at 121.

<sup>66</sup> JACK GOLDSMITH, THE TERROR PRESIDENCY 142 (2007).

<sup>67</sup> 18 U.S.C. §§ 2340-2340A (2000).

take hundreds or thousands of lives.<sup>68</sup>

Meanwhile, at Guantánamo Bay, military commanders were under pressure to obtain more intelligence from their captives. This eventually resulted in a push to loosen the restrictions on the use of coercive interrogation techniques.<sup>69</sup> The military leadership at Guantánamo sought and obtained high-level authorization: in December 2002, Defense Secretary Rumsfeld authorized the use of certain additional interrogation techniques such as forced standing.<sup>70</sup> This and other coercive techniques were used on Mohamed al-Qahtani, one of several alleged 20th September 11 hijackers.<sup>71</sup> However, in January 2003, Secretary Rumsfeld rescinded his earlier authorization, and convened a special Defense Department Working Group to consider the issue of interrogation. The final Working Group memorandum authorized the use of most of the same techniques that had earlier been authorized by Secretary Rumsfeld.<sup>72</sup> These included techniques euphemistically described as “environmental manipulation” and “reversing sleep cycles from night to day” and “isolation”.<sup>73</sup> The ticking bomb scenario appears once again in relation to the necessity defense:

According to public and governmental reports, al Qaeda has other sleeper cells within the United States that may be planning similar attacks [to 9/11]. Indeed, al Qaeda’s plans apparently include efforts to develop and deploy chemical, biological, and nuclear weapons of mass destruction. Under these circumstances, a detainee may possess information that could enable the United States to prevent attacks that potentially could equal or surpass the September 11 attacks in their magnitude. Clearly, any harm that might occur during an interrogation would pale to insignificance compared to the harm avoided by preventing such an attack, which could take hundreds or thousands of lives.<sup>74</sup>

In September 2006, just prior to the fifth anniversary of the 9/11 attacks, President Bush requested that Congress enact legislation to authorize military commissions to try terrorists.<sup>75</sup> In the course of this speech, President Bush revealed that a small number of terrorist suspects had been detained and interrogated outside the United States by the CIA.<sup>76</sup> This was the first official acknowledgement of the CIA’s HVD program and its associated “black sites”, interrogation facilities located at various places around the

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<sup>68</sup> Memorandum from Jay Bybee to Alberto R. Gonzales, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A, *supra* note 61, at 40-41.

<sup>69</sup> See *infra* text accompanying notes 186-190.

<sup>70</sup> MCCOY, *supra* note 64, at 127.

<sup>71</sup> Adam Zagorin & Michael Duffy, *Inside the Interrogation of Detainee 063*, TIME MAGAZINE, June 12, 2005, available at <http://www.time.com/time/magazine/printout/0,8816,1071284,00.html>.

<sup>72</sup> MCCOY, *supra* note 64, at 128-29.

<sup>73</sup> *Id.* at 129.

<sup>74</sup> Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations, (Apr. 4, 2003), 26, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.04.pdf>; see also Memorandum from John Yoo to William J. Haynes, Military Interrogation of Alien Unlawful Combatants Held Outside the United States (March 14, 2003), 62, available at <http://www.fas.org/irp/agency/doj/olc-interrogation.pdf> (“So, if officials had credible threat information that a U.S. city was to be the target of a large-scale terrorist attack a month from now and the detainee was in a position to have information that could lead to the thwarting of that attack, physical contact such as shoving or slapping the detainee clearly would not be disproportionate to the threat posed. In such an instance, those conducting the interrogations would have acted in good faith rather than maliciously and sadistically for the very purpose of causing harm.”).

<sup>75</sup> Congress would eventually accede to this request. See Military Commissions Act of 2006, *supra* note 19.

<sup>76</sup> Press Release, Office of the Press Sec’y, President Discusses Creation of Military Commissions to Try Suspected Terrorists, Sept. 6, 2006, available at <http://www.whitehouse.gov/news/releases/2006/09/print/20060906-3.html>.

world.<sup>77</sup> President Bush also defended the CIA's use of "an alternative set of procedures"<sup>78</sup> for interrogating the high-value al Qaeda detainees in the familiar terms of the ticking bomb scenario. He emphasized the success of these alternative procedures in broad terms, but adhered to the position that the United States did not engage in torture: these alternative procedures, while tough, were "safe, and lawful, and necessary."<sup>79</sup> The CIA's special program was necessary because these detainees were "dangerous men with unparalleled knowledge about terrorist networks and their plans for new attacks."<sup>80</sup> Accordingly, it was imperative that CIA agents have the operational flexibility to unlock these men's secrets: "The security of our nation and the lives of our citizens depend on our ability to learn what these terrorists know."<sup>81</sup> Even though there were no longer any detainees in the HVD program, President Bush reserved the right to start it up again if the need arose:

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

Similarly, in 2008, when CIA director Michael Hayden admitted before the Senate Select Committee on Intelligence that three high-value terrorist detainees had been subjected to waterboarding,<sup>82</sup> he justified the use of this technique by alluding to the ticking bomb scenario. In his view, waterboarding could be justifiably employed if "an unlawful combatant is possessing information that would help us prevent catastrophic loss of life of Americans or their allies."<sup>83</sup>

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<sup>77</sup> The story was originally broken in 2005. See Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, A01. For an account of life at a black site, see Mark Benjamin, *Inside the CIA's notorious "black sites"*, SALON.COM, Dec. 15, 2007, available at <http://www.salon.com/news/feature/2007/12/14/bashmilah/>.

<sup>78</sup> The euphemism "alternative set of procedures", like its post-9/11 variants "torture lite", "moderate physical pressure", "enhanced interrogation" and "highly coercive interrogation" are reminiscent of earlier euphemisms for torture, such as the Nazis' "sharpened interrogation", and the "pushed interrogation" of the French in Algeria. See DARIUS REJALI, *TORTURE AND DEMOCRACY* 358 (2007).

<sup>79</sup> Press Release, Office of the Press Sec'y, *supra* note 76. Given what is known about the interrogation practices of the CIA's HVD program, these assertions of legality strain credulity. See JAMES RISEN, *STATE OF WAR* 31-32 (2006) (describing various interrogation techniques such as confinement in confined boxes, sleep deprivation, sensory deprivation, stress positions and water-boarding, and noting that CIA officials familiar with the interrogations of high-value al Qaeda detainees have "no doubts in their minds that the CIA is torturing its prisoners."). See also Mayer, *supra* note 62 (describing the use of similar techniques, and quoting an expert as saying that the CIA's interrogation program is "one of the most sophisticated, refined programs of torture ever"); MAYER, *supra* note 57, at 272-78 (discussing the interrogation techniques used on Khalid Sheik Mohammed).

<sup>80</sup> Press Release, Office of the Press Sec'y, *supra* note 76.

<sup>81</sup> *Id.*

<sup>82</sup> This was the first such public admission by a high-ranking intelligence official. See Richard Esposito & Jason Ryan, *CIA Chief: We Waterboarded*, ABC NEWS, Feb. 5, 2008, available at <http://abcnews.go.com/print?id=4244423>.

<sup>83</sup> Terry Freiden, *CIA director: Waterboarding necessary, but potentially illegal*, CNN.COM, Feb. 7, 2008, available at <http://www.cnn.com/2008/POLITICS/02/07/mukasey.waterboarding/index.html>. See also Charlie Savage, *Bush could bypass new torture ban*, BOSTON GLOBE, Jan. 4, 2006, available at [http://www.boston.com/news/nation/articles/2006/01/04/bush\\_could\\_bypass\\_new\\_torture\\_ban/](http://www.boston.com/news/nation/articles/2006/01/04/bush_could_bypass_new_torture_ban/) (discussing a senior administration official's comments that President Bush intended to reserve the right to violate the prohibition on cruel, inhuman or degrading treatment contained in the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005), in exceptional situations such as a ticking bomb scenario).

In sum, the logic and rhetoric of the ticking bomb scenario features strongly in these statements from various governmental actors; those being interrogated are dangerous men with information about grave threats to national security. In order to save lives, that information needs to be extracted by any means necessary.

### C. *The ticking bombs of “24”*

Perhaps the most recognizable standard-bearer for the view that life-saving torture is justified is fictional. Jack Bauer, the hero of Fox’s highly successful drama *24*,<sup>84</sup> personifies the idea that the ends justify the means, and that effective counterterrorism requires the freedom to do whatever it takes to ensure national security, including torture where necessary. Each season of *24* tracks a single twenty-four hour day with Jack Bauer and his fellow agents at the fictional Counterterrorist Unit (CTU), who must protect the nation from various terrorist threats. The urgency and tension of the show is emphasized by its distinctive narrative device of a real-time digital clock that counts down each hour at the beginning and end of each episode and after each commercial break.<sup>85</sup> Inevitably, in the course of a season of *24*, Bauer forcibly interrogates various people connected to the terrorist plot for critical information. Almost invariably, these people divulge that information, allowing Bauer to eventually foil the terrorists’ nefarious plans.

Popular depictions of the ticking bomb scenario are not new. For example, Darius Rejali notes that such stories have been told in many television programs, and novels such as Jean Lartéguy’s *Les Centurions*, which includes a scene where a French soldier, fighting against Algerian terrorists, tortures a dentist and forces him to reveal the location of 15 bombs that he has set to explode the next morning.<sup>86</sup> Likewise, Clint Eastwood’s *Dirty Harry*, the maverick cop with little patience for bureaucratic niceties, was not afraid to torture when circumstances required it. In the eponymous 1971 film, Eastwood’s character faces a situation similar to the ticking bomb scenario: he tortures Scorpio, a serial killer, in order to discover the location of a kidnapped child before she dies. He succeeds in extracting the information, but the girl is already dead. To rub salt in the wound, Scorpio is released because of the unlawful nature of *Dirty Harry*’s tactics.<sup>87</sup>

Given the news and discussion about torture after September 11, there was an air of inevitability about torture becoming a dramatic device — a form of entertainment.<sup>88</sup> But *24*, which first aired in November 2001, around the time that Alan Dershowitz began speaking of ticking bombs and torture warrants,<sup>89</sup> takes the depiction of torture to a new

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<sup>84</sup> Alessandra Stanley, *Bombers Strike, and America Is in Turmoil. It’s Just Another Day for Jack Bauer*, N.Y. TIMES, January 12, 2007, available at <http://www.nytimes.com/2007/01/12/arts/television/12twen.html> (noting that the steady increase in the show’s ratings since 2001).

<sup>85</sup> See Jane Mayer, *Whatever it takes*, THE NEW YORKER, Feb. 19, 2007, available at [http://www.newyorker.com/reporting/2007/02/19/070219fa\\_fact\\_mayer](http://www.newyorker.com/reporting/2007/02/19/070219fa_fact_mayer).

<sup>86</sup> REJALI, *supra* note 78, at 545-47.

<sup>87</sup> DIRTY HARRY (Warner Bros. Studios 1971). See also Uwe Steinhoff, *Torture — The Case for Dirty Harry and against Alan Dershowitz*, 23 JOURNAL OF APPLIED PHILOSOPHY 337 (2006). This particular scenario has an eerie similarity to the real life case involving Frankfurt Police Vice-President Wolfgang Daschner. See Florian Jessberger, *Bad Torture — Good Torture?*, 3 J. INT’L CRIM. JUST. 1059 (2005).

<sup>88</sup> See Scott Horton, *How Hollywood Learned to Stop Worrying and Love the (Ticking) Bomb*, HARPERS MAGAZINE, March 1, 2008, available at <http://harpers.org/archive/2008/03/hbc-90002531> (“The entertainment industry latches on to the events of the day and tries to take a ride from them. That is the simple nature of things.”).

<sup>89</sup> See Alan M. Dershowitz, *Is There a Torturous Road to Justice?*, L.A. TIMES, Nov. 8, 2001, available at [http://ontology.buffalo.edu/smith//courses01/rrtv/Dershojack\\_bauerwitz.htm](http://ontology.buffalo.edu/smith//courses01/rrtv/Dershojack_bauerwitz.htm); see also PHILIPPE SANDS, TORTURE TEAM 64 (2008).

level. Graphic scenes of interrogational torture are a common occurrence, and have become a hallmark of the show.<sup>90</sup> If anything, instances of torture have become more frequent and graphic during the show's run.<sup>91</sup> Of course Jack Bauer (and sometimes his CTU colleagues) torture in order to uncover critical information that will forestall disaster and save lives, as per the logic of the ticking bomb scenario, which the show embraces wholeheartedly. Indeed, the show might aptly be described as a series of ticking bomb situations contained within a season long ticking bomb scenario. The key characteristics of *24*'s depiction of torture are discussed below.<sup>92</sup>

### 1. Torture is always a response to an urgent threat.

Jack Bauer tortures only when he is forced to by the exigency of the situation. Unlike some of the evil forces on the show (terrorists, the Chinese government), who torture sadistically or gratuitously, Bauer only engages in torture for the purposes of eliciting life-saving information.<sup>93</sup> For example, in season 2, Bauer interrogates Syed Ali, the terrorist leader involved in an attempt to detonate a nuclear bomb in Los Angeles. Ali refuses to give up any information. Bauer has Ali's son executed while Ali watches over a video-link, and threatens to execute the other. Ali finally relents and reveals the location of the bomb and key details of the plot. It is revealed later in the episode that in fact Bauer only staged the executions over the video-link.<sup>94</sup>

In season 4, Sarah Gavin, a CTU employee, is framed by a mole in the agency, leading CTU to believe that she knows the location of a device that will halt the impending meltdown of several nuclear reactors. Erin O'Driscoll, the head of CTU demands that Gavin reveal the location of the device, emphasizing that "thousands of people's lives are at stake".<sup>95</sup> Gavin does not answer — she genuinely does not know. She is repeatedly shocked with a taser, and injected with a pain-inducing drug.<sup>96</sup> O'Driscoll, supervising the application of these techniques, expresses some doubt over Gavin's guilt, but allows her to be tortured anyway.

In the same season, Bauer suspects that his love interest's ex-husband, Paul Raines, is connected to the same terrorist plot to cause multiple nuclear reactors to melt down because he owns a building used to plan an earlier terrorist attack that day. Bauer subjects Raines to improvisational electroshock torture with a live electrical wire pulled out of a hotel lamp. Bauer justifies his torture of Raines by emphasizing how he does not have

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<sup>90</sup> Horton, *supra* note 88 (noting 67 torture scenes in *24*'s first five seasons); see also Matt Feeney, *Torture Chamber*, SLATE.COM, Jan. 6, 2004, available at <http://www.slate.com/id/2093269/>.

<sup>91</sup> See Adam Green, *Normalizing Torture on '24'*, N.Y. TIMES, May 22, 2005, available at <http://www.nytimes.com/2005/05/22/arts/television/22gree.html>; see also Christopher J. Patrick & Deborah L. Patrick, *The Third Degree*, in JACK BAUER FOR PRESIDENT 87, 98-99 (Richard Minter ed., 2008) (noting further scenes of graphic torture in season 6, including Bauer asphyxiating his brother with a plastic bag, and severing one of the fingers of another victim with a cigar clipper).

<sup>92</sup> See generally Tung Yin, *Jack Bauer Syndrome: Hollywood's Depiction of National Security Law*, 17 S. CAL. INTERDIS. L.J. 279 (2008) (considering *24*'s depiction of torture and Arab villains).

<sup>93</sup> Sam Kamin, *How the War on Terror May Affect Domestic Interrogations: The 24 Effect*, 10 CHAP. L. REV. 693, 708 (2007); James R. Silkenat & Peter M. Norman, *Jack Bauer and the Rule of Law: The Case of Extraordinary Rendition*, 30 FORDHAM INT'L L.J. 535, 546 (2007) ("In the show, there are only hours or even minutes left to find the one crucial piece of intelligence. In reality, detainees are often tortured for months, without reference to any specific terrorist plot.").

<sup>94</sup> *24: Day 2: 7:00 pm - 8:00 pm* (FOX television broadcast Feb. 11, 2003).

<sup>95</sup> *24: Day 4: 2:00 pm - 3:00 pm* (FOX television broadcast Feb. 7, 2005).

<sup>96</sup> *Id.*

time to obtain the information any other way, and that he has to find out what Raines, at this stage an uncooperative suspect, knows about the terrorist plot.<sup>97</sup>

## 2. Torture rapidly generates important intelligence information

In the world of 24, torture swiftly yields critical intelligence.<sup>98</sup> In almost all cases, it goes without saying that Bauer or his colleagues have before them a factually guilty terrorist, or at least someone complicit in the terrorist plot.<sup>99</sup> Moreover, as Sam Kamin notes, “The imposition of torture on a suspect invariably and almost instantaneously forces the suspect to speak and to speak truthfully about what she knows.”<sup>100</sup> While the effectiveness of torture as an empirical matter is a highly contested issue,<sup>101</sup> one would never comprehend this from watching 24, where torture reveals critical information at a breakneck pace almost without fail. For example, Paul Raines is initially defiant, and has nothing to say in the face of Bauer’s questions. However, after being electrocuted several times, he is quickly persuaded to check through the business records on his laptop more closely. As Bauer ominously dangles the live wires near his cheek, Raines finds an important link to terrorist mastermind Habib Marwan.<sup>102</sup>

In season 4, Bauer also tortures Joe Prado, another man with connections Marwan. Prado’s interrogation is delayed after Marwan notifies the human rights organization, Amnesty Global, that CTU is planning to torture an innocent man.<sup>103</sup> Curtis Manning, the CTU agent supervising the interrogation, declares that he is willing to go as far as he needs to in order to break Prado and get him to reveal what he knows about Marwan’s plans. His efforts are thwarted by David Weiss, an attorney from Amnesty Global, who shows up at CTU — protective court order in hand — and halts the interrogation just as Prado is about to be injected with some type of drug.<sup>104</sup> Weiss holds firm in the face of appeals from various members of CTU, who argue that many lives depend on finding out what Prado knows. The President, meanwhile, is unwilling to authorize Prado’s torture without consulting the Justice Department. Knowing that time is running out, Bauer resigns from CTU and Prado is released. As Prado is about to leave the CTU carpark, Bauer re-emerges, tases the US Marshall responsible for protecting Prado, and tortures Prado as a private citizen. Prado initially feigns ignorance, but with a knife at his throat and his fingers freshly broken, he reveals the location of Marwan.<sup>105</sup>

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<sup>97</sup> 24: Day 4: 5:00 pm - 6:00 pm (FOX television broadcast Feb. 28, 2005).

<sup>98</sup> Silkenat & Norman, *supra* note 93, at 547. This is denied, however, by at least one of the show’s writers. See James Surowiecki, *The Worst Day Ever*, SLATE.COM, Jan. 17, 2006, available at <http://www.slate.com/id/2134395/fr/rss/>.

<sup>99</sup> Sarah Gavin’s torture in season 4 is a notable exception. However, as Tung Yin observes, Bauer himself is never wrong. See Yin, *supra* note 92, at 284-85.

<sup>100</sup> Kamin, *supra* note 93, at 706-07; see also Yin, *supra* note 92, at 285.

<sup>101</sup> See *infra* text accompanying notes 133-159.

<sup>102</sup> 24: Day 4: 5:00 pm - 6:00 pm, *supra* note 97.

<sup>103</sup> As Adam Green observes, the message in this episode is clearly that “those seeking to protect suspects’ rights risk abetting terrorist activities, to catastrophic ends.” See Green, *supra* note 91. A similar sentiment was expressed by real-life Deputy Assistant Secretary of Defense for Detainee Affairs, Charles Stimson. In a radio interview, Stimson identified several law firms acting for terrorist detainees and suggested that those firms’ corporate clients should make the firms “choose between lucrative retainers and representing terrorists.” See Neil Lewis, *Official Attacks Top Law Firms Over Detainees*, N.Y. TIMES, January 13, 2007, available at <http://www.nytimes.com/2007/01/13/washington/13gitmo.html>.

<sup>104</sup> 24: Day 4: 12:00 am - 1:00 am (FOX television broadcast April 18, 2005).

<sup>105</sup> *Id.*

In season 2, National Security Advisor Roger Stanton is revealed to be a traitor, and is interrogated about the location of a nuclear device that is to be detonated in Los Angeles. A Secret Service agent puts his feet in a bucket of water and electrocutes him with a defibrillator.<sup>106</sup> In the next episode, Stanton's interrogation continues as the President watches on; "Everyone breaks eventually," he observes.<sup>107</sup> Stanton manages to hold out for longer than most of *24*'s villains, but eventually discloses information in the following episode.<sup>108</sup> Indeed, seemingly the only exception to the rule that everyone breaks eventually is Jack Bauer himself. As he is returned by the Chinese government after a long period of detention and torture in season 6, a Chinese official remarks, with apparent grudging admiration, that Bauer never broke his silence.<sup>109</sup>

For Joel Surnow, the co-creator and executive producer of *24*, torture is more than a just a dramatic device; he clearly believes in the efficacy of torture as an article of faith.<sup>110</sup> By contrast, Douglas Johnson, the Executive Director of the Center for the Victims of Torture, testified to the Senate Committee on the Judiciary that torture does not swiftly elicit information. It is a time-consuming process, and the information elicited is often unreliable.<sup>111</sup> Thus, the instant efficacy of torture as depicted on *24*, where "Jack Bauer seems successfully to torture someone to extract crucial national security information from one commercial break to the next" bears minimal relation to the reality of torture.<sup>112</sup>

### 3. There are few adverse consequences for the torture victim

Victims of torture in *24* often recover quickly and experience no long-term adverse effects. They may even cooperate and work with the person or agency that has just finished torturing them. Their experience of torture can, it seems, be quickly put in the past.<sup>113</sup> For example, Paul Raines, just hours after being tortured by Bauer, assists his former torturer by using his computer database expertise to recover files from terrorist Habib Marwan's computer at the defense contractor where Marawan was employed.<sup>114</sup> Later Raines helps Bauer fight off a team of mercenaries. He even takes a bullet for Bauer (which eventually kills him).<sup>115</sup> Similarly, Sarah Gavin willingly goes back to work for CTU after a brief period of recovery in the infirmary. Soon after returning to her workstation, she even has the presence of mind to request that O'Driscoll have her arrest

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<sup>106</sup> *24: Day 2: 6:00 pm - 7:00 pm* (FOX television broadcast Feb. 4, 2003).

<sup>107</sup> *24: Day 2: 7:00 pm - 8:00 pm* (FOX television broadcast Feb. 11, 2003).

<sup>108</sup> *24: Day 2: 8:00 pm - 9:00 pm* (FOX television broadcast Feb. 18, 2003).

<sup>109</sup> *24: Day 6: 6:00 am - 7:00 am* (FOX television broadcast Jan. 14, 2007).

<sup>110</sup> See Mayer, *supra* note 85 (quoting Surnow as saying, "We've had all of these torture experts come by recently, and they say, 'You don't realize how many people are affected by this. Be careful.' They say torture doesn't work. But I don't believe that."). John Yoo, author of many of the Bush administration's memoranda concerning the war on terrorism, has a similar view about the use of torture and coercion. See MAYER, *supra* note 57, at 134 (quoting Yoo as saying, "It works — we know it does. The CIA says it does and the Vice President says it does.").

<sup>111</sup> Testimony of Douglas A. Johnson, Testimony of Douglas A. Johnson, Executive Director, The Center for Victims of Torture: Hearing on the Nominations of the Honorable Alberto R. Gonzales to be Attorney General of the United States Before the Senate Comm. on the Judiciary, 109th Cong. 154–56 (2005), available at [http://judiciary.senate.gov/testimony.cfm?id=1345&wit\\_id=3939](http://judiciary.senate.gov/testimony.cfm?id=1345&wit_id=3939) ("Although eventually everyone will confess to something, it takes a lot of time."). See also *infra* text accompanying notes 133-159.

<sup>112</sup> Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 IND. L.J. 1145, 1164 (2005).

<sup>113</sup> Silkenat & Norman, *supra* note 93, at 549.

<sup>114</sup> *24: Day 4: 6:00 pm - 7:00 pm* (FOX television broadcast March 7, 2005).

<sup>115</sup> *24: Day 4: 7:00 pm - 8:00 pm* (FOX television broadcast March 14, 2005); *24: Day 4: 2:00 am - 3:00 am* (FOX television broadcast May 2, 2005).

expunged from her record and give her a pay raise as compensation for being wrongfully tortured.<sup>116</sup>

As Claudia Card observes, “The FOX network television serial drama ‘24,’ . . . does real torture victims a disservice by sanitizing torture and presenting victims as bouncing back from it the next day, as though it were no worse than a painful tooth extraction.”<sup>117</sup> Such swift and miraculous recoveries from torture, of course, are not reflective of the experience of actual torture victims, who may — in addition to any ongoing physical effects — experience serious psychological and emotional problems such as memory loss, depression, and posttraumatic stress disorder.<sup>118</sup>

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

*24* epitomizes the dominant ticking bomb-centered narrative about torture.<sup>119</sup> The clock is counting down and time is running out; with its omniscient view, the audience knows the person about to be tortured has some vital clue, and that absent heroic intervention, nuclear incineration (or some equivalent horror) awaits.<sup>120</sup> The only hope of discovering the critical clue necessary to thwart the terrorist attack is someone like Jack Bauer, who is willing to do whatever it takes, including torture.

Season 4’s torture of Joe Prado, offers perhaps the paradigmatic depiction of torture in *24*.<sup>121</sup> The audience knows that Prado is involved with the terrorist Marwan, but CTU is unable to uncover this information because Weiss, the Amnesty Global lawyer, intervenes to protect Prado’s legal rights. The audience also knows that Amnesty Global was tipped off by Marwan himself, making both Weiss and Amnesty Global unwitting agents of “lawfare”.<sup>122</sup> An over-cautious President is unwilling to act without bureaucratic cover. But in spite of all these obstacles, Bauer once again saves the day with torture.<sup>123</sup>

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<sup>116</sup> *24: Day 4: 4:00 pm - 5:00 pm* (FOX television broadcast Feb. 21, 2005).

<sup>117</sup> Claudia Card, *Ticking Bombs and Interrogations*, (2008) 2 CRIM. L. & PHIL. 1, 9.

<sup>118</sup> See Testimony of Douglas A. Johnson, *supra* note 111 (detailing the serious longer-term effects on victims of torture). See also JOHN CONROY, UNSPEAKABLE ACTS, ORDINARY PEOPLE 169-183 (2000).

<sup>119</sup> The fictional nature of the ticking bomb scenario is acknowledged by one of the show’s co-creators, Bob Cochran. See Clive Thompson, *Cruel Intentions*, NEW YORK MAGAZINE, Jan. 31, 2005, available at <http://nymag.com/nymetro/arts/tv/10966/>.

<sup>120</sup> See See Yin, *supra* note 92, at 285.

<sup>121</sup> Cf. Brett Chandler Patterson, “I Despise You for Making Me Do This”, in JACK BAUER FOR PRESIDENT 29, 37-38 (Richard Minter ed., 2008).

<sup>122</sup> “Lawfare” denotes the use of legal processes as a means of achieving a military advantage. See David Luban, *Lawfare and Legal Ethics in Guantánamo*, 60 STAN. L. REV. (forthcoming) (manuscript at 48), available at SSRN: <http://ssrn.com/abstract=1092451>. See also National Defense Strategy of the United States of America, 5 (March 2005), available at [http://www.globalsecurity.org/military/library/policy/dod/nds-usa\\_mar2005.htm](http://www.globalsecurity.org/military/library/policy/dod/nds-usa_mar2005.htm) (“Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism.”).

<sup>123</sup> In the upcoming season of *24*, Bauer apparently faces a tough reception before a Senate hearing. One meddlesome Senator asks him whether he tortured a certain terrorist. Bauer simply answers that the terrorist concerned targeted a bus full of civilians, that he simply did what was necessary to stop the terrorist, and that he has no regrets. Eventually, this fictional Senate committee sees the light and recognizes the merits of Bauer’s actions, including his heroic use of torture. See Horton, *supra* note 88.



The show's unapologetic message is that torture works, that torture is necessary,<sup>124</sup> and that rather being a tool of dictators and tyrants, torture is an act of rebellious heroism.<sup>125</sup> Those who would stop Jack Bauer from doing his job effectively — smug liberals, spineless politicians, and dangerously naïve human rights groups — are to be viewed with contempt. What the real Jack Bauers of the world need is the unfettered discretion to do whatever is necessary to protect national security.<sup>126</sup>

### Part III. Art imitates life: skepticism about torture and *Battlestar Galactica*

Not everyone agrees with the muscular approach of Jack Bauer. A second and alternative account of torture exists; this account questions the validity of the first account's centerpiece, the ticking bomb scenario. Academic proponents of this view emphasize the assumptions and unreality of the ticking bomb scenario. Certain government actors, most notably the FBI and military lawyers, have opposed the use of torture or coercion on the basis of its inefficacy and long-run costs. And at the level of popular culture, Sci-Fi's *Battlestar Galactica* portrays the use of torture and coercion ambiguously, and, as will be argued below, skeptically. In this show, the use of torture and coercion spreads and corrupts; it often does not work. *Battlestar Galactica's* account of torture thus forms an interesting counterpoint to the ticking bombs and moral certainty of *24*.

#### A. Academic counterarguments to the ticking bomb scenario

Although Dershowitz's torture warrant proposal has attracted the most attention, he is by no means the only — nor indeed the most enthusiastic — advocate of the use of torture and coercion in interrogation. His torture warrant proposal may be faulted on the basis that it will not achieve his professed goal of minimizing torture.<sup>127</sup> But a more fundamental critique can be made of Dershowitz's position, and by extension others who rely on the ticking bomb scenario to undermine the absolute prohibition on torture. Like the economist trapped on the desert island with a can of food who, according to the well-worn joke, simply assumes a can-opener, the ticking bomb scenario assumes away all the difficulties and untidiness of reality.

As Luban has thoroughly demonstrated, the ticking bomb scenario depends on a series of assumptions,<sup>128</sup> of which four are particularly important. The scenario assumes: first, that the interrogator knows that disaster is imminent unless he or she acts; second, that the interrogator has the terrorist who has the requisite knowledge; third, that torturing the terrorist (and nothing else) will reveal the critical information; and fourth, that we are

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<sup>124</sup> See Alessandra Stanley, *Bombers Strike, and America Is in Turmoil. It's Just Another Day for Jack Bauer*, N.Y. TIMES, Jan. 12, 2007, available at <http://www.nytimes.com/2007/01/12/arts/television/12twen.html>.

<sup>125</sup> See Teresa Wiltz, *Torture's Tortured Cultural Roots*, WASH. POST, May 3, 2005, C01 (observing the shift towards torture by heroes rather than just villains). Notably, Alan Dershowitz's torture warrant proposal does not appear to have been taken up in *24*. See Alan M. Dershowitz, *24 and the Use of Torture to Obtain Preventive Intelligence*, in JACK BAUER FOR PRESIDENT 103,105 (Richard Minter ed., 2008).

<sup>126</sup> See Horton, *supra* note 88; Stanley, *supra* note 124. In many ways, this is simply an extension of the idea of an individual hero (typically a police officer) having to battle criminals as well as "the system". This is a staple of fictional accounts of policing. See generally RAY SURETTE MEDIA, CRIME, AND CRIMINAL JUSTICE (3rd ed, 2007).

<sup>127</sup> DERSHOWITZ, *supra* note 42, at 158-59.

<sup>128</sup> Luban, *supra* note 27, at 7-8.

dealing with a one-off situation. The chance that all of those assumptions would be satisfied in any given case is, in Luban's words, "vanishingly unlikely."<sup>129</sup>

### 1. Disaster is imminent

The ticking bomb scenario conveniently stipulates that authorities know that a bomb is ticking somewhere; typically, the interrogator knows that terrorists have planted a bomb in a major city that will detonate with catastrophic consequences in several hours. But reality rarely, if ever, presents such black and white situations. As Kim Lane Scheppele discusses, even if one accepts that the United States is indeed engaged in a "war on terrorism", and that it is faced with a generalized and pervasive terrorist threat of some severity, the decision of whether to torture or not will in all likelihood have to be made under a much more uncertain set of circumstances.<sup>130</sup>

### 2. The captive is the terrorist bomber

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

### 3. Torture works

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

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<sup>129</sup> *Id* at 7. See also Luban, *supra* note 32, at 45.

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

<sup>131</sup> Shue, *supra* note 38, at 233.

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

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

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

<sup>135</sup> DERSHOWITZ, *supra* note 42, at 137.

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

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

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

Bagaric and Clarke make a similarly sweeping claim about the effectiveness of torture on the basis of limited evidence. They put forward one example before concluding that torture “is an excellent means of gathering information”.<sup>143</sup> Their example concerns the actions of Frankfurt Police Vice-President Wolfgang Daschner, who ordered the infliction of pain upon a captured child kidnapper. On Daschner’s instructions, a police officer told the kidnapper that police would inflict pain on him that “he would never forget” unless he revealed the location of the kidnapped child.<sup>144</sup> After hearing this threat, the kidnapper revealed the location of the child, who tragically was already dead.<sup>145</sup> This episode certainly appears to be an instance where threatened torture was able to elicit the truth. Even so, one example is a thin reed on which to base such an extravagant conclusion. Indeed, in a subsequent article, Bagaric and Clarke state rather more circumspectly that torture is sometimes effective, and cite some further examples, including Posner and Vermeule’s evidence from Israel, and the case of Murad.<sup>146</sup>

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

<sup>138</sup> REJALI, *supra* note 78, at 507. See also MCCOY, *supra* note 64 at 111-12.

<sup>139</sup> REJALI, *supra* note 78, at 507. However, Dershowitz continues to rely on this example in more recent writing. See Dershowitz, *supra* note 125.

<sup>140</sup> POSNER & VERMEULE, *supra* note 54, at 196.

<sup>141</sup> *Id.* Rejali casts doubt on these claims. See REJALI, *supra* note 78, at 517 (noting instances of Israeli interrogators going home in the evenings and weekends in cases of supposed ticking bombs).

<sup>142</sup> *Id.* at 195. Additionally, it is hard to know what to make of Posner and Vermeule’s arguments about coercive interrogation in light of their claims of non-expertise in national security matters and their professed agnosticism about national security policy. See Thomas P. Crocker, *Torture, with Apologies*, 86 TEX. L. REV. 569, 610-11 (2008) (book review); Alice Ristophe, *Professors Strangelove*, 11 GREEN BAG 2D 243, 254 (2008) (book review).

<sup>143</sup> Bagaric & Clarke, *supra* note 50, at 588-89.

<sup>144</sup> See Jessberger, *supra* note 87, at 1061-62.

<sup>145</sup> *Id.*

<sup>146</sup> Mirko Bagaric & Julie Clarke, *Tortured Responses (A Reply to our Critics): Physically Persuading Suspects is Morally Preferable to Allowing the Innocent to be Murdered*, 40 U.S.F. L. REV. 703, 716-718 (2006). A number of the other examples cited by Bagaric and Clarke are also problematic. They cite as an example how authorities in the Philippines broke open the 1993 World Trade Center bombings “when they threatened to torture a suspect”. *Id.* at 718. The source they rely on, however, states: “Philippine police reportedly helped crack the 1993 World Trade Center bombings (plus a plot to crash 11 U.S. airliners and kill the pope) by convincing a suspect that they were about to turn him over to the Israelis.” See Alter, *supra* note 37. Thus, the example turns out to be the Murad case again, and is subject to the same criticisms.

President Bush's 2006 speech that acknowledged the CIA's HVD program asserted several further examples as evidence of the success of the CIA's "alternative set of procedures" for interrogating high-value al Qaeda detainees.<sup>147</sup> At least some of these examples do not stand up to scrutiny. The President emphasized the interrogation of al Qaeda member Abu Zubaydah as being significant in the apprehension of two al Qaeda leaders. Bush claimed that Zubaydah had revealed that "mukhtar" was the nickname of 9/11 mastermind Khalid Sheikh Mohammed, and that this was an important piece of information in the pursuit of Mohammed.<sup>148</sup> However, according to the 9/11 Commission Report, this fact was known since August 2001.<sup>149</sup> Additionally, some of the information was obtained from him without coercion.<sup>150</sup> The ultimately redundant information about Khalid Sheikh Mohammed's nickname, for example, was revealed to an FBI agent who questioned Abu Zubaydah in hospital without the use of coercion.<sup>151</sup> A careful parsing of President Bush's speech confirms that Abu Zubaydah revealed this information before coercion was used.

President Bush also claimed that Abu Zubaydah, upon being subjected to the CIA's "alternative set of procedures", identified another al Qaeda leader, Ramzi bin al Shibh.<sup>152</sup> This claim is also dubious, as al Shibh's involvement in al Qaeda and role in the 9/11 attacks were already a matter of public knowledge.<sup>153</sup> Both Ramzi bin al Shibh and Khalid Sheikh Mohammed were ultimately apprehended through information obtained from tip offs. The critical information in the apprehension of the former came from the Emir of Qatar; the information leading to the capture of the latter came from an anonymous informant who collected a \$25 million reward.<sup>154</sup>

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Dershowitz makes the same error. *See* Dershowitz, *supra* note 42, at 248 n.11. Additionally, Bagaric and Clarke cite a possibly self-serving French General's account of his use of torture during the Battle of Algiers. Rejali provides a more skeptical view about whether the Battle of Algiers demonstrates the effectiveness of torture. He convincingly argues that public cooperation and informants, rather than torture, provided the French with accurate information. *See* REJALI, *supra* note 78, at 480-92.

<sup>147</sup> President Discusses Creation of Military Commissions to Try Suspected Terrorists, *supra* note 76.

<sup>148</sup> *Id.*

<sup>149</sup> NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 277 (2004).

<sup>150</sup> Dan Egeen & Walter Pincus, *FBI, CIA Debate Significance of Terror Suspect*, WASH. POST, Dec. 18, 2007, A01 ("There is little dispute, according to officials from both agencies, that Abu Zubaida provided some valuable intelligence before CIA interrogators began to rough him up, including information that helped identify Khalid Sheikh Mohammed"); *see also* RON SUSKIND, THE ONE PERCENT DOCTRINE 116-17 (2006) (discussing how a CIA interrogator convinced Abu Zubaydah that it was his religious obligation to cooperate).

<sup>151</sup> Office of the Inspector General, A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantánamo Bay, Afghanistan, and Iraq (May 2008), 68, *available at* <http://www.usdoj.gov/oig/special/s0805/final.pdf>. The reference to the person identified as travelling to attack America by Abu Zubaydah is, according to Jane Mayer, regarded as referring to Jose Padilla. However, Abu Zubaydah again revealed this information without the use of coercion. *See* MAYER, *supra* note 57, at 176.

<sup>152</sup> Press Release, Office of the Press Sec'y, *supra* note 76.

<sup>153</sup> FREDERICK A. O. SCHWARZ JR. & AZIZ Z. HUQ, UNCHECKED AND UNBALANCED 89 (2007) ("there are more than twenty references to al Shibh's involvement in al Qaeda in the *Washington Post* alone that predate Zubaydah's capture") (emphasis in original); *see also* Mark Mazzetti, *Questions Raised About Bush's Primary Claims in Defense of Secret Detention System*, N.Y. TIMES, Sept. 8, 2006, A24 ("American officials had identified Mr. bin al-Shibh's role in the [9/11] attacks months before Mr. Zubaydah's capture.").

<sup>154</sup> Ron Suskind, *The Unofficial Story of the al-Qaeda 14*, TIME MAGAZINE, Sept. 10, 2006, *available at* <http://www.time.com/time/magazine/article/0,9171,1533436,00.html>.

Advocates of the use of torture and coercion in interrogation also tend to ignore evidence of the contrary, namely that there are clear instances of torture or coercion producing unreliable evidence as well. For example, Shafiq Rasul, Ruhul Ahmed and Asif Iqbal, known as the “Tipton Three”, were accused of having links to al Qaeda on the basis of being apparently captured on a videotape of a meeting in Afghanistan between September 11 hijacker, Mohamed Atta, and Osama bin Laden.<sup>155</sup> After a long period of multiple interrogations that included the application of various coercive techniques, Rasul confessed to being in the video,<sup>156</sup> as did Ahmed and Iqbal.<sup>157</sup> The falsity of their confessions was later confirmed by British intelligence, which demonstrated conclusively that all three had been in England at the time the video was made, as Rasul had long claimed.<sup>158</sup>

What can be concluded from these examples and counter-examples? It is hard to sustain the claim that torture or coercive interrogation techniques never work; but it does not follow that such techniques can be characterized as effective in eliciting truth either. All that can be said is that the effectiveness of these techniques is, at best, equivocal.<sup>159</sup> This complex reality, however, is largely assumed out of the way by the ticking bomb scenario.

#### 4. One off situation

Finally, the ticking bomb scenario assumes a single decision to torture in a one-off situation of dire emergency.<sup>160</sup> But the focus of the hypothetical on the moral quandary faced by one interrogator again obscures reality: the decision to torture is not a one-off decision made by a single person. Rather, as Scheppele emphasizes, the decision to employ torture involves a bureaucracy, such as the military or an intelligence agency, applying guidelines:

The real-world question that arises is not whether you or I would torture the Manhattan nuclear terrorist personally, but instead whether we can design rules for agents in complex organizations . . . that would in fact limit torture to situations like this hypothetical, where we might agree as a political community that torture would be warranted. The decision to torture is wrongly presented in the hypothetical as a personal moral choice, when the actual decision would in fact be a political judgment about standard operating procedures for a bureaucracy.<sup>161</sup>

By making the decision to torture a personal moral choice of a lone interrogator in a single exceptional situation, rather than a decision situated within a bureaucracy, we need not concern ourselves with such matters as the long run impact of torture on

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<sup>155</sup> David Rose, *Revealed: the full story of the Guantanamo Britons*, THE OBSERVER, March 14, 2004, available at <http://www.guardian.co.uk/uk/2004/mar/14/terrorism.guantanamo>. The fate of Ibn al-Sheikh al-Libi is another notable example. See *infra* text accompanying notes 177-179.

<sup>156</sup> See JOSEPH MARGULIES, GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER 40-43 (2006) (outlining how Rasul was short-shackled, subjected to deafening music, and kept in prolonged isolation).

<sup>157</sup> Rose, *supra* note 155.

<sup>158</sup> MARGULIES, *supra* note 156, at 42. False confessions in the “war on terror” are not isolated incidents. See *infra* text accompanying notes 177-179 (outlining the false information extracted from Ibn al-Sheikh al-Libi concerning links between Iraq and al Qaeda). See also Brian J. Foley, *Guantanamo and Beyond Dangers of Rigging the Rules*, 97 J. CRIM. L. & CRIMINOLOGY 1009, 1046-48 (2007).

<sup>159</sup> See generally REJALI, *supra* note 78, at 446-518.

<sup>160</sup> Luban, *supra* note 32, at 47.

<sup>161</sup> Scheppele, *supra* note 130, at 305.

international legitimacy,<sup>162</sup> or on the possible treatment of one's own troops captured in future conflicts.<sup>163</sup> Nor need we worry about the possibility of the spread of the practice of torture, which is precisely what has occurred since 9/11. The use of torture and other coercive interrogation techniques began with the CIA's interrogation of high-value al Qaeda detainees who were thought to have critical information about further attacks on the United States.<sup>164</sup> Soon, however, in response to demands for more intelligence, some of the same techniques came to be employed more widely, first against detainees in Guantánamo, and later in Iraq, a traditional theater of war.<sup>165</sup> As Jeremy Waldron observes, "The torture at Abu Ghraib had nothing to do with 'ticking bomb' terrorism. It was intended to 'soften up' detainees so that U.S. military intelligence could get information from them about likely attacks by Iraqi insurgents against American occupiers."<sup>166</sup> It is unsurprising that the use of torture post-9/11 has spread. Indeed, this pattern is consistent with the history of attempts to regulate torture.<sup>167</sup>

## 5. Summary

The ticking bomb scenario has, as Luban puts it, "displaced genuine issues in the public forum and substituted a fictitious example stacked in favor of torture-permissiveness."<sup>168</sup> This fictitious example is a clever thought experiment that has a tenuous connection to reality. The fact that one might be willing to countenance torture in a hypothetical extreme situation in order to avert catastrophe provides little guidance as to whether torture should be adopted as part of counterterrorism policy.<sup>169</sup> This is because, as detailed above, the scenario's pristine and ideal assumptions and conditions are unlikely ever to be met. Even the CIA's interrogation of high-value Al Qaeda detainees falls outside the ticking bomb scenario's boundaries. These detainees have been held, interrogated, and tortured over a long period of time.<sup>170</sup> As such, any imminent terrorist plots that they might have been privy to would presumably have come to fruition. Of course, such detainees might have valuable information about al Qaeda's operations in

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<sup>162</sup> See DAVID COLE & JULES LOBEL, LESS SAFE, LESS FREE 140 (2007); Marci Strauss, *The Lessons of Abu Ghraib*, 66 OHIO ST. L.J. 1269, 1303-04 (2005).

<sup>163</sup> See Strauss, *supra* note 162, at 1305.

<sup>164</sup> See MCCOY, *supra* note 64, at 120-21.

<sup>165</sup> *Id.* at 123-43 & 195 ("Orders from President Bush and Secretary Rumsfeld for the CIA to torture just a few 'high value' Al Qaeda targets quickly proliferated into the abuse of dozens at Bagram, hundreds at Guantánamo, and thousands at Abu Ghraib and other Iraqi prisons.").

<sup>166</sup> Waldron, *supra* note 38, at 1717.

<sup>167</sup> REJALI, *supra* note 78, at 526 (noting that as a historical matter, "populations liable to be tortured, however narrowly defined at first, grow over time."); Johnson, *supra* note 118 (testifying that "Torture has never been confined to narrow conditions. Torture has often been justified by reference to a small number of people who know about the 'ticking time bomb,' but in practice, it has always been extended to a much wider population."); EDWARD PETERS, TORTURE 61 (1996) (noting a gradual wearing away of limits as to who could and could not be tortured under Roman-Canonical procedure); *but cf.* POSNER & VERMEULE, *supra* note 54, at 201.

<sup>168</sup> Luban, *supra* note 27, at 24.

<sup>169</sup> Scheppele, *supra* note 130, at 306-7.

<sup>170</sup> See REJALI, *supra* note 78, at 526 (noting that the CIA subjected Abu Zubaydah to various forms of torture and coercion, but that he only spoke after two months). See also SUSKIND, *supra* note 150, at 228 (discussing the treatment of Ramzi bin al-Shibh: "In the six months since his capture, he'd received death threats, water-boarding, hot and cold treatments, sleeplessness, noise and more death threats. Nothing worked."). *But see* Scott Shane, *Inside a 9/11 Mastermind's Interrogation*, N.Y. TIMES, June 22, 2008, A1 ("Mr. bin al-Shibh quickly cooperated").

general, or about other long-range plans.<sup>171</sup> But the use of torture and coercion to elicit this information, however useful, cannot be justified by the ticking bomb scenario if one takes its parameters seriously.

### *B. Dissenting voices in government*

Despite the pro-torture and coercion stance at the highest levels of the Bush Administration, there has not been a complete consensus on either the legality or wisdom of employing aggressive interrogation techniques. Certain individuals and institutions, including notably the FBI and many military lawyers, have opposed the use of torture and coercion, and in the course of doing so, have reiterated many of the academic arguments discussed in the previous section.

The FBI has proven skeptical of the utility of torture and coercive interrogation techniques. This is a reflection of its traditional law enforcement role, which emphasizes the importance of obtaining statements that are admissible in court.<sup>172</sup> The FBI also had experience in dealing with al Qaeda in the 1990s, including the investigation that led to the prosecutions for the first bombing of the World Trade Center. In contrast to the CIA's more aggressive attitude, the FBI advocated a patient rapport-building approach to interrogation that did not involve torture.<sup>173</sup> The FBI's approach is exemplified by Dan Coleman, a retired FBI agent who investigated the embassy bombings in Tanzania and Kenya prior to 9/11. Coleman and others succeeded in eliciting confessions from al Qaeda operatives, who later pleaded guilty to various terrorism charges.<sup>174</sup> Coleman continues to adhere to his rapport-based view of interrogation. Jane Mayer quotes Coleman as saying, "Brutalization doesn't work. We know that. Besides, you lose your soul."<sup>175</sup>

The fate of one of the first high-ranking al Qaeda operatives captured by the United States, Ibn al-Sheikh al-Libi, is a microcosm of the disagreement between the FBI and CIA over interrogating detainees. Coleman's colleague, Jack Cloonan, urged FBI agents in Afghanistan to question al-Libi according to the usual protocols. The agents reportedly began developing a rapport with him — al-Libi even told his interrogators about a plot to attack the United States embassy in Aden, which was subsequently averted.<sup>176</sup> The CIA, however, believing that al-Libi was not being entirely forthcoming, had him rendered to Egypt.<sup>177</sup> Having been subjected to various forms of torture and coercion, he claimed that Iraq had trained Qaeda members in the use of chemical and biological weapons.<sup>178</sup> He subsequently recanted in 2004, but not before his claim of a

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<sup>171</sup> Khalid Sheik Mohammed, for example, provided intelligence about al Qaeda that was later incorporated into the report of the 9/11 Commission. See Shane, *supra* note 170 ("Mr. Mohammed provided more and more detail on Al Qaeda's structure, its past plots and its aspirations.").

<sup>172</sup> Office of the Inspector General, *supra* note 151, at 47. The great majority of FBI agents continued to adhere to this position and did not participate in coercive interrogations. See *Id.* at 361, 369.

<sup>173</sup> Suskind, *supra* note 154. It should be noted though that certain veterans of the CIA have been critical of the administration's approach. See Jason Vest, *CIA Veterans Condemn Torture*, NATIONAL JOURNAL, Nov. 19, 2005, available at <http://nationaljournal.com/about/njweekly/stories/2005/1119nj1.htm>.

<sup>174</sup> Jane Mayer, *Outsourcing Torture*, THE NEW YORKER, Feb. 14, 2005, available at [http://www.newyorker.com/archive/2005/02/14/050214fa\\_fact6](http://www.newyorker.com/archive/2005/02/14/050214fa_fact6).

<sup>175</sup> *Id.*

<sup>176</sup> MAYER, *supra* note 57, at 105.

<sup>177</sup> *Id.* at 106. See also SUSKIND, *supra* note 150, at 75-76.

<sup>178</sup> MAYER, *supra* note 57, at 135 (describing al-Libi's claims that he was beaten and locked in a small cage for over eighty hours); Brian Ross & Richard Esposito, *CIA's Harsh Interrogation Techniques Described*, ABC

collaborative relationship between al Qaeda and Saddam Hussein had been used by the Bush administration as one of the justifications for the Iraq war.<sup>179</sup>

The two agencies had a similar clash over the interrogation of Abu Zubaydah, who was captured in March 2002, and initially jointly questioned by the FBI and CIA.<sup>180</sup> The FBI was satisfied with the headway they were making with non-coercive questioning. The CIA once again felt that Abu Zubaydah was not being forthright with them, and subjected him to coercive techniques such as forced nudity, cold and loud music.<sup>181</sup> One FBI agent described the CIA's techniques as amounting to "borderline torture".<sup>182</sup> The FBI's Counterterrorism Assistant Director, Pasquale D'Amuro ordered his agents to come home, and not participate in any aggressive CIA interrogations.<sup>183</sup> D'Amuro's decision was later affirmed by FBI Director Robert Mueller.<sup>184</sup>

FBI agents based at Guantánamo faced similar issues.<sup>185</sup> In 2002, multiple governmental agencies, including the CIA and FBI, were present at Guantánamo. The military leadership at Guantánamo was also coming under increasing pressure from Washington to deliver actionable intelligence.<sup>186</sup> The debate focused on the interrogation of Mohammed al-Qahtani,<sup>187</sup> whose case proved to be the catalyst for the loosening of the military's rules on interrogation. In September, a series of meetings took place to discuss new interrogation techniques.<sup>188</sup> The result was a memorandum written by Lieutenant Colonel Jerald Phifer that outlined eighteen interrogation techniques.<sup>189</sup> This memorandum was backed by a further memorandum written by Lieutenant Colonel Diane Beaver, which concluded that all the techniques were legal.<sup>190</sup> The request for approval of these techniques was sent to the Pentagon. William Haynes, General Counsel for the Department of Defense, recommended the approval of fifteen of the eighteen techniques.<sup>191</sup> Of the harshest "Category III" techniques, Haynes recommended only the blanket approval of "mild, non-injurious physical contact," although he noted that "all

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NEWS, Nov. 18, 2005, available at <http://abcnews.go.com/WNT/Investigation/story?id=1322866> (describing CIA sources as saying al-Libi made the relevant statements after being waterboarded and being made to stand in a cold cell while being regularly doused with cold water).

<sup>179</sup> REJALI, *supra* note 78, at 504-05. See also MAYER, *supra* note 57, at 136-37 (noting that al-Libi's claim of a collaborative relationship between al Qaeda and Saddam Hussein was important in persuading Secretary of State Powell to make his February 2003 speech before the United Nations Security Council).

<sup>180</sup> Office of the Inspector General, *supra* note 151, at 67.

<sup>181</sup> Eggen & Pincus, *supra* note 150.

<sup>182</sup> Office of the Inspector General, *supra* note 151, at 68. Abu Zubaydah was also subjected to other coercive techniques, including sleep deprivation and waterboarding. Under duress, he revealed all kinds of information about various terrorist plots and targets, although their reliability is uncertain. See REJALI, *supra* note 78 at 505-06; SUSKIND, *supra* note 150, at 115-16.

<sup>183</sup> Office of the Inspector General, *supra* note 151, at 69.

<sup>184</sup> *Id.* at 71.

<sup>185</sup> Between January 2002 and December 2004, more than four hundred FBI agents were deployed to Guantánamo. See *id.* at 32.

<sup>186</sup> SANDS, *supra* note 89, at 53.

<sup>187</sup> Office of the Inspector General, *supra* note 151, at 77-82.

<sup>188</sup> SANDS, *supra* note 89, at 72-73.

<sup>189</sup> Jerald Phifer, Memorandum for Commander, Joint Task Force 170, Request for Approval of Counter-Resistance Strategies (Oct. 11, 2002), available at <http://www.globalsecurity.org/security/library/policy/dod/d20040622doc3.pdf>.

<sup>190</sup> Diane E. Beaver, Memorandum for Commander, Joint Task Force 170, Legal Review of Aggressive Interrogation Techniques (Oct. 11, 2002), available at <http://www.globalsecurity.org/security/library/policy/dod/d20040622doc3.pdf>.

<sup>191</sup> William J. Haynes II, Action Memo, Counter-Resistance Techniques (Nov. 27, 2002), available at <http://www.globalsecurity.org/security/library/policy/dod/d20040622doc5.pdf>.



Category III techniques may be legally available.”<sup>192</sup> Secretary of Defense Rumsfeld gave his approval on December 2, 2002.<sup>193</sup>

As the military sought to push the interrogation envelope at Guantánamo, the FBI agents who were present objected, as evidenced by various documents subsequently released to the public. For example, an email from a FBI counterterrorism official to General Donald Ryder of the Army’s Criminal Investigation Command detailed instances of “highly aggressive interrogation techniques,” including apparent physical torture, which were observed by FBI agents at Guantánamo in late 2002.<sup>194</sup> Similarly, an unnamed FBI agent based in Guantánamo sent a memorandum by facsimile on November 27, 2002 to Marion Bowman, legal counsel at the FBI.<sup>195</sup> This memorandum offered a legal analysis of various interrogation techniques that closely matched the list of techniques proposed by Phifer.<sup>196</sup> It concluded that many of the techniques were illegal, and any information obtained through the use of such methods would be inadmissible in a criminal trial. It also concluded that some of the more aggressive Category II and III methods might violate the federal Torture Statute.<sup>197</sup> Interestingly, the anonymous author also discussed the Category IV technique of extraordinary rendition — the practice of transferring detainees to third countries for harsh interrogations — and concluded that “[t]his technique [could] not be utilized without violating U.S. Federal law.”<sup>198</sup>

In 2003 and 2004, other unnamed FBI agents would document their observations of the military’s interrogations.<sup>199</sup> In one particular email, dated December 5, 2003, an FBI agent referred to the military’s practices as “torture techniques”.<sup>200</sup> The agent also noted that these tactics had produced no useful intelligence, and had made criminal prosecution of the tortured detainee impossible.<sup>201</sup> All in all, two hundred FBI agents deployed at Guantánamo reported that they heard about or observed the use of coercive techniques

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<sup>192</sup> *Id.*

<sup>193</sup> *Id.* FBI agents had already noted the use of aggressive interrogation techniques on al-Qahtani by early October 2002, including “sleep deprivation, loud music, bright lights and body placement discomfort.” See Office of the Inspector General, *supra* note 151, at 84. The use of these techniques may have begun even earlier. See MAYER, *supra* note 57, at 192 (“By late summer, both the FBI agents visiting Guantánamo and the investigators working on the CITF began to hear bizarre and disturbing accounts of late-night interrogations using pounding music, bright strobe lights, extremely painful temperatures, dogs, and other oddities.”).

<sup>194</sup> T. J. Harrington, Re. Suspected Mistreatment of Detainees (July 14, 2004), available at [http://www.aclu.org/torturefoia/released/FBI\\_4622\\_4624.pdf](http://www.aclu.org/torturefoia/released/FBI_4622_4624.pdf).

<sup>195</sup> See SANDS, *supra* note 89, at 145-146. See also Office of the Inspector General, *supra* note 151, at 80-129.

<sup>196</sup> Legal Analysis of Interrogation Techniques (Nov. 27, 2002), available at [http://www.humanrightsfirst.org/us\\_law/etn/pdf/fbi-brief-inter-analysis-112702.pdf](http://www.humanrightsfirst.org/us_law/etn/pdf/fbi-brief-inter-analysis-112702.pdf). The author was later revealed to be an FBI agent referred to by the pseudonym of “Agent Brett”. See Office of the Inspector General, *supra* note 151, at 106. Mayer identifies the agent as Jim Clemente of the FBI’s Behavioural Analysis Unit. See MAYER, *supra* note 57, at 204.

<sup>197</sup> Legal Analysis of Interrogation Techniques, *supra* note 196.

<sup>198</sup> *Id.* The Inspector General’s report discusses a November 2002 interrogation plan for al-Qahtani that involved four phases. Phase IV was rendition to a third country such as Jordan or Egypt. See Office of the Inspector General, *supra* note 151, at 88-89. Margulies notes that Category IV was ultimately not included in the Phifer memorandum of October 11, 2002. See MARGULIES, *supra* note 156, at 98-99. Mayer states that the disappearance of Category IV was due to FBI resistance. See MAYER, *supra* note 57, at 220.

<sup>199</sup> Michael Isikoff & Mark Hosenball, *Terror Watch: Has the Government Come Clean?*, NEWSWEEK, Jan. 5, 2005, available at <http://www.newsweek.com/id/48419>.

<sup>200</sup> Dan Eggen & R. Jeffrey Smith, *FBI Agents Allege Abuse of Detainees at Guantanamo Bay*, WASH. POST, Dec. 21, 2004, A01.

<sup>201</sup> *Id.*

such as sleep deprivation, stress positions, shackling, isolation, bright lights and loud music.<sup>202</sup>

Like the FBI, Alberto Mora, at the time the general counsel of the United States Navy, opposed the torture and mistreatment of detainees. Mora's resistance centered on his attempt to stop the recommendations of the Defense Department Working Group from becoming military policy.<sup>203</sup> As far as Mora was concerned, the issue was not just about protecting national security, but also protecting the nation's values.<sup>204</sup> Mora learnt of events at Guantánamo in December 2002 from David Brant of the Naval Criminal Investigative Service, who supervised a team of agents working in conjunction with the FBI.<sup>205</sup> Brant passed along his agents' reports of the military's interrogation practices at Guantánamo. Mora later saw Secretary Rumsfeld's approval of the various coercive interrogation techniques, as well as the underlying legal analysis of the Beaver memorandum, which Mora considered flawed. Mora met with Haynes to express his concerns.<sup>206</sup> In January 2003, Brant informed Mora that nothing had changed, which led to Mora meeting Haynes again.<sup>207</sup> In their meeting, Haynes stated that American officials believed that the interrogation techniques were needed in order to extract from the Guantánamo detainees critical information about further attacks.<sup>208</sup> Mora's response relegated Haynes' invocation of the ticking bomb scenario to the realm of the hypothetical:

I acknowledged the ethical issues were difficult. I was not sure what my position would be in the classic "ticking bomb" scenario where the terrorist being interrogated had knowledge of, say, an imminent nuclear weapon attack against a U.S. city. If I were the interrogator involved, I would probably apply the torture myself, although I would do so with full knowledge of potentially severe personal consequences. *But I did not feel this was the factual situation we faced in Guantánamo*, and even if I were willing to do this as an individual and assume the personal consequences, by the same token I did not consider it appropriate for us to advocate for or cause the laws and values of our nation to be changed to render the activity lawful.<sup>209</sup>

On January 15, Haynes called Mora to tell him that Secretary Rumsfeld was suspending his earlier authorization of December 2, 2002, and that Rumsfeld was convening a

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<sup>202</sup> Office of the Inspector General, *supra* note 151, at 171. See also John Barry, Michael Hirsh and Michael Isikoff, *The Roots Of Torture*, NEWSWEEK, May 24, 2004, available at <http://www.newsweek.com/id/105387/output/print> ("Under the leadership of an aggressive, self-assured major general named Geoffrey Miller, a new set of interrogation rules became doctrine. Ultimately what was developed at Gitmo was a "72-point matrix for stress and duress," which laid out types of coercion and the escalating levels at which they could be applied. These included the use of harsh heat or cold; withholding food; hooding for days at a time; naked isolation in cold, dark cells for more than 30 days, and threatening (but not biting) by dogs. It also permitted limited use of 'stress positions' designed to subject detainees to rising levels of pain.").

<sup>203</sup> See *supra* text accompanying notes 70-73.

<sup>204</sup> Jane Mayer, *The Memo*, THE NEW YORKER, Feb. 27, 2006, available at [http://www.newyorker.com/archive/2006/02/27/060227fa\\_fact](http://www.newyorker.com/archive/2006/02/27/060227fa_fact) (quoting Mora as stating "The debate here isn't only how to protect the country. It's how to protect our values.").

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

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

<sup>208</sup> Alberto J. Mora, Memorandum for Inspector General, Department of the Navy, Statement for the Record: Office of General Counsel Involvement in Interrogation Issues (July 7, 2004), 11, available at [http://www.aclu.org/pdfs/safefree/mora\\_memo\\_july\\_2004.pdf](http://www.aclu.org/pdfs/safefree/mora_memo_july_2004.pdf) (emphasis added).

<sup>209</sup> *Id.*

special Defense Department Working Group to consider interrogation guidelines.<sup>210</sup> However, Haynes bureaucratically outmaneuvered Mora. Despite Mora recommending to Haynes that Rumsfeld not approve the Working Group's draft report, which was based on another memorandum written by John Yoo,<sup>211</sup> Rumsfeld — without Mora's knowledge — did just that.<sup>212</sup> The final Working Group memorandum included a list of thirty-five interrogation techniques.<sup>213</sup> On April 16, 2003, the Pentagon approved twenty-four of those techniques for use at Guantánamo.<sup>214</sup>

Another locus of resistance to the Bush administration's policies has been the American military's own lawyers, which is in keeping with the military's traditional policy of humane treatment of detainees and compliance with the law of armed conflict.<sup>215</sup> In debates over the treatment of detainees in the "war on terror", senior military lawyers have consistently opposed the use of torture and coercion. For example, in November 2002, military lawyers were already expressing reservations about the proposed interrogation techniques that were later authorized by Secretary Rumsfeld in December 2002.<sup>216</sup> Most notably, the leadership of the Judge Advocate General's Corps, like Alberto Mora, disagreed with the approach taken by the Defense Department Working Group. Rear Admiral Michael Lohr, Judge Advocate General for the United States Navy, while not contesting the questionable legal conclusions about the legality of the interrogation techniques, urged caution on policy grounds:

[W]hile we may have found a unique situation in Guantánamo where the protections of the Geneva Conventions, U.S. statutes, and even the Constitution do not apply, will the American people find we have missed the forest for the trees by condoning practices that, while technically legal, are inconsistent with our most fundamental values? How would such perceptions affect our ability to prosecute the Global War on Terrorism?<sup>217</sup>

Major General Jack Rives, the Deputy Judge Advocate General of the United States Air Force, was more pointed in his analysis, and observed that several of the exceptional interrogation techniques "on their face, amount[ed] to violations of domestic criminal law and the UCMJ [Uniform Code of Military Justice]".<sup>218</sup> General Rives also urged that consideration "be given to the possible adverse effects on U.S. Armed Forces culture and self-image".<sup>219</sup> He noted that American armed forces had been "consistently trained to take the legal and moral 'high-road' in the conduct of our military operations regardless of how others may operate."<sup>220</sup>

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<sup>210</sup> Mayer, *supra* note 204.

<sup>211</sup> Memorandum from John Yoo to William J. Haynes, Military Interrogation of Alien Unlawful Combatants Held Outside the United States, *supra* note 74.

<sup>212</sup> Mayer, *supra* note 204.

<sup>213</sup> Working Group Report on Detainee Interrogations in the Global War on Terrorism, *supra* note 74, at 62-65.

<sup>214</sup> Donald Rumsfeld, Memorandum for the Commander, US Southern Command, Counter-Resistance Techniques in the War on Terrorism (April 16, 2003), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.16.pdf>.

<sup>215</sup> David A. Wallace, *Torture v. the Basic Principles of the US Military*, 6 J. INT'L. CRIM. JUST. 309, 310 (2008).

<sup>216</sup> Joby Warrick, *Report Questions Pentagon Accounts*, WASH. POST, June 17, 2008, A1.

<sup>217</sup> Rear Admiral Michael F. Lohr, Working Group Recommendations Relating to Interrogation of Detainees (Feb. 6, 2003), para. 3, available at <http://balkin.blogspot.com/jag.memos.pdf>.

<sup>218</sup> Major General Jack L. Rives, Memorandum for SAF/GC (Feb. 5, 2003), para. 2, available at <http://balkin.blogspot.com/jag.memos.pdf>.

<sup>219</sup> Major General Jack L. Rives, Memorandum for SAF/GC (Feb. 6, 2003), para. 1b, available at <http://balkin.blogspot.com/jag.memos.pdf>.

<sup>220</sup> Rives, *supra* note 218, at para. 5.

Brigadier General Kevin Sandkuhler, Staff Judge Advocate of the United States Marine Corps, expressed a similar view, suggesting that the authorization of “aggressive counter-resistance techniques” by the military would negatively impact the “Pride, Discipline, and Self-Respect [sic] within the U.S. Armed Forces”.<sup>221</sup> General Sandkuhler and the other Judge Advocates General also emphasized the position of captured American service members, a matter that they did not think had been adequately considered.<sup>222</sup>

The advice of these military lawyers was ignored. In May 2003, after the Working Group’s report had taken effect,<sup>223</sup> several unnamed senior members of the Judge Advocate General’s Corps visited Scott Horton, at the time the head of the Human Rights Committee of the New York City Bar Association.<sup>224</sup> They discussed with him the decisions that, in their view, would lead to detainee abuse and possible violations of the Geneva Conventions. They urged him to challenge the administration’s policies.<sup>225</sup>

The public opposition amongst senior military lawyers towards the administration’s policies did not cease.<sup>226</sup> In 2006, the Senate Judiciary Committee held hearings on the legal authority to prosecute terrorists. In relation to those hearings, the Judge Advocates General of the military services were asked to submit written responses to questions regarding the use of various coercive interrogation techniques, including waterboarding.<sup>227</sup> General Rives, General Sandkuhler, Rear Major General Scott Black of the U.S. Army, and Admiral Bruce MacDonald of the U.S. Navy all concluded that waterboarding was illegal and violated common article 3 of the Geneva Conventions.<sup>228</sup> Generals Rives and Sandkuhler further stated that waterboarding would constitute torture under the Torture Statute.<sup>229</sup> Their forthright answers provide a pointed contrast to the equivocations of Attorney General Michael Mukasey on the same issue.<sup>230</sup>

### C. Torture and *Battlestar Galactica*

Sci-Fi Channel’s remake of the 1970s television show *Battlestar Galactica* is not where one would expect to find a critical examination of the use of torture and coercion in

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<sup>221</sup> Brigadier General Kevin M. Sandkuhler, Working Group Recommendations Relating to Interrogation of Detainees (Feb. 27, 2003), para. 3, available at <http://balkin.blogspot.com/jag.memos.pdf>.

<sup>222</sup> *Id.* See also Lohr, *supra* note 217, at para. 4; Rives, *supra* note 219, at para. 1b; Major General Thomas J. Romig, Draft Report and Recommendations of the Working Group to Access the Legal, Policy and Operational Issues Related to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism (March 3, 2003), para. 4, available at <http://balkin.blogspot.com/jag.memos.pdf>.

<sup>223</sup> Vivia Chen, *Interrogation Memo Puts Air Force Counsel in Hot Seat*, THE AMERICAN LAWYER, Aug. 6, 2004, available at <http://www.law.com/jsp/article.jsp?id=1090180294718>.

<sup>224</sup> MCCOY, *supra* note 64, at 129. See also Barry, Hirsh and Isikoff, *supra* note 202.

<sup>225</sup> MCCOY, *supra* note 64, at 130-131.

<sup>226</sup> Nor was this opposition limited solely to the issue of torture. For example, top military lawyers also opposed aspects of the Bush administration’s proposals relating to the use of classified evidence in what would later form part of the Military Commissions Act 2006. See R. Jeffrey Smith, *Top Military Lawyers Oppose Plan for Special Courts*, WASH. POST, Aug. 3, 2006, A11; Kate Zernike, *Lawyers and G.O.P. Chiefs Resist Proposal on Tribunal*, N.Y. TIMES, Sept. 8, 2006, A1. This opposition should be seen in the context of a larger struggle by the Bush administration to exert control over the JAG corps. See CHARLIE SAVAGE, TAKEOVER 279-88 (2007).

<sup>227</sup> See Letter from Retired Generals to Senator Patrick J. Leahy, Nov. 2, 2007 available at <http://leahy.senate.gov/press/200711/110207RetGeneralsOnMukasey.pdf>.

<sup>228</sup> See Question for the Record, Senate Committee on the Judiciary, Hearing on the Authority to Prosecute Terrorists under the War Crimes Provisions of Title 18, Aug. 2, 2006, available at [http://gulcfac.typepad.com/georgetown\\_university\\_law/files/JAGS.CommonArticle3.answers.pdf](http://gulcfac.typepad.com/georgetown_university_law/files/JAGS.CommonArticle3.answers.pdf).

<sup>229</sup> *Id.*

<sup>230</sup> See Philip Shenon, *So Is Waterboarding Torture? Mukasey May Never Say*, N.Y. TIMES, Jan. 26, 2008, A11.

interrogation. The re-imagined show follows the basic contours of the original. Most of human society, which inhabited twelve planets known as the twelve colonies, is wiped out in a surprise attack by the Cylons, metallic robots with the iconic oscillating red-eye. Protected by a single warship, the *Battlestar Galactica*, a fleet of the human survivors sets out in search of a mythical thirteenth colony, known as Earth.<sup>231</sup> The small band of human survivors is outgunned, on the run, and under near-constant threat of oblivion — a milieu that naturally lends itself to posing questions about how far a society should be willing to go in order to ensure its survival.

The re-imagined *Battlestar Galactica* eschews the modern and clean aesthetics characteristic of many science fiction shows in favor of a vintage, naturalistic look.<sup>232</sup> This visual presentation matches the darker tone of the re-imagined series, which lacks the escapist jauntiness of its 1970s predecessor.<sup>233</sup> The virtual annihilation of all but a handful of humanity looms large. Crisis is never far away, nor the memories of the fallen — a point brought home most clearly by commemorative passageway in the *Galactica*, which is adorned with photographs and mementos of those lost, a scene poignantly reminiscent of post-9/11 America.<sup>234</sup> In a nod to the science-fiction classic *Bladerunner*,<sup>235</sup> not only are the Cylons originally human creations, but they now also have several models that appear completely human. These new Cylon models, which the humans refer to as “skin jobs”, have the capability to act as spies, sleeper agents, and suicide bombers. The ability of these humanoid Cylons to effortlessly infiltrate society preys on a classic human anxiety, amplified after 9/11, of enemies lurking in our midst.<sup>236</sup> Of course the idea of a fifth column, or enemies within, has echoes in American history — the Palmer raids, the Japanese internment and the red scare being notable examples.<sup>237</sup>

During the three complete seasons of *Battlestar Galactica* that have aired to date, there have been several notable depictions of aggressive interrogations. The Cylons, naturally, engage in torture. They show little compunction in using torture during their occupation of New Caprica, a planet the humans have settled on at the end of season 2. Saul Tigh, a leader of the human resistance, for example, has his eye ripped out.<sup>238</sup> Later, the Cylons torture Gaius Baltar, the wonderfully narcissistic and self-serving human genius, for information about a virus that has infected them.<sup>239</sup> However, the focus of this article is on instances when humans, with whom the audience for the most part identifies, employ torture and coercion.<sup>240</sup>

*Battlestar Galactica*'s depiction of torture by humans is ambiguous, at least on the surface. According to the show's creators, this was a deliberate choice, the idea being to

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<sup>231</sup> See Kieran Tranter, “Frakking Toasters” and *Jurisprudence of Technology*, 19 LAW & LIT. 45, 47-48 (2007); see also John Hodgman, Ron Moore's Deep Space Journey, N.Y. TIMES MAGAZINE, July 17, 2005, 32.

<sup>232</sup> Tranter, *supra* note 231, at 48.

<sup>233</sup> Jonathan Glater, *Retooling a 70's Sci-Fi Relic for the Age of Terror*, N.Y. TIMES, January 13, 2005, E7.

<sup>234</sup> See, e.g., *Battlestar Galactica*, 33 (Sci Fi Channel/NBC Universal broadcast, Jan. 14, 2005).

<sup>235</sup> BLADERUNNER (Warner Bros. Pictures 1982).

<sup>236</sup> Christian W. Erickson, *Counter-Terror Culture: Ambiguity, Subversion, or Legitimization?*, 38 SECURITY DIALOGUE 197, 206 (2007) (“It is evident that this series is evocative of a *zeitgeist* in which potential enemies, such as spectral Al-Qaeda sleeper cells, can attack without warning and shatter normalcy.”).

<sup>237</sup> See generally DAVID COLE, ENEMY ALIENS (2003).

<sup>238</sup> *Battlestar Galactica, Occupation* (Sci Fi Channel/NBC Universal broadcast, Oct. 6, 2006).

<sup>239</sup> *Battlestar Galactica, A measure of salvation* (Sci Fi Channel/NBC Universal broadcast, Nov. 10, 2006).

<sup>240</sup> In addition to the episodes discussed below, a number of other episodes contain scenes involving the interrogation of Cylons or suspected Cylons. See, e.g., *Battlestar Galactica, Scattered* (Sci Fi Channel/NBC Universal broadcast, July 15, 2005); *Battlestar Galactica, Resistance* (Sci Fi Channel/NBC Universal broadcast, Aug. 5, 2005); *Battlestar Galactica, Home, Part I* (Sci Fi Channel/NBC Universal broadcast, Aug. 19, 2005).

undermine the settled expectations of the audience and force them to confront difficult issues.<sup>241</sup> This moral ambiguity is a hallmark of the show.<sup>242</sup> However, as Christian Erickson has argued, a morally ambiguous depiction already contains an element of subversion;<sup>243</sup> ambiguity is subversive because it undermines the certainty of the discourse of counter-terrorism.<sup>244</sup> Erickson is referring primarily to the actions of the humans at the beginning of season 3, when most of the human race remains trapped on Cylon-occupied New Caprica.<sup>245</sup> Harking back to the situation in Vichy France, and alluding more controversially to the Iraqi insurgency,<sup>246</sup> some of the humans form an underground resistance to oppose the Cylons and their puppet human government. The resistance, whose cause the audience identifies with, employs tactics that include suicide bombing. The humans themselves do not agree on the morality of their actions: while resistance leader Saul Tigh sees suicide bombing as a necessary means to an end, Laura Roslin (the human President for most of the show) ultimately cannot countenance such action.<sup>247</sup> The correct course is left unclear.<sup>248</sup> The same point can be made about *Battlestar Galactica's* portrayal of torture and coercion. The audience is forced to question whether torturing the captive is the correct course of action, with the result that it is often unclear whether one should empathize with the torturer or the tortured.<sup>249</sup> This contrasts with the moral certainty characteristic both of *24*,<sup>250</sup> and some real-world advocates of torture.<sup>251</sup>

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<sup>241</sup> Daniel Solove, *Battlestar Galactica Interview Transcript (Part I)*, CONCURRING OPINIONS, March 02, 2008, available at [http://www.concurringopinions.com/archives/2008/03/battlestar\\_gala\\_4.html](http://www.concurringopinions.com/archives/2008/03/battlestar_gala_4.html); see also Laura Miller, *The Man behind "Battlestar Galactica"*, SALON.COM, March 24, 2007, available at <http://www.salon.com/ent/feature/2007/03/24/battlestar/>.

<sup>242</sup> Gavin Edwards, *Intergalactic Terror*, ROLLING STONE, Jan. 27, 2006, available at [http://www.rollingstone.com/news/story/9183391/intergalactic\\_terror](http://www.rollingstone.com/news/story/9183391/intergalactic_terror); Rudy Hartmann, *Battlestar Galactica: TV's Best Drama Just Happens To Be Set In Space*, TUFTS OBSERVER, Feb. 10, 2006, available at [http://www.tuftsobserver.org/arts/20060210/battlestar\\_galactica\\_tvs\\_.html](http://www.tuftsobserver.org/arts/20060210/battlestar_galactica_tvs_.html); Rudy Hartmann, *Space Out on... Battlestar Galactica*, TUFTS OBSERVER, Oct. 20, 2006, available at [http://www.tuftsobserver.org/arts/20061020/space\\_out\\_on\\_battlestar\\_g.html](http://www.tuftsobserver.org/arts/20061020/space_out_on_battlestar_g.html).

<sup>243</sup> Erickson, *supra* note 236, at 207.

<sup>244</sup> *Id.* at 198.

<sup>245</sup> *Battlestar Galactica, Occupation*, *supra* note 238.

<sup>246</sup> See Spencer Ackerman, *Battlestar: Iraqtica*, SLATE.COM, Oct. 13, 2006, available at <http://www.slate.com/id/2151425/>; Brad Reed, *Battlestar Galactica*, THE AMERICAN PROSPECT, Oct. 27, 2006, available at <http://www.prospect.org/cs/articles?articleId=12172>.

<sup>247</sup> See *Battlestar Galactica, Occupation*, *supra* note 238; *Battlestar Galactica, Preiçe* (Sci Fi Channel/NBC Universal broadcast, Oct. 6, 2006).

<sup>248</sup> Virginia Heffernan, *In Galactica, It's Politics as Usual. Or is it?*, N.Y. TIMES, October 26, 2006, E7; see also Laura Miller, *Space Balls*, SALON.COM, Nov. 10, 2006, available at <http://www.salon.com/ent/tv/review/2006/11/10/battlestar/print.html>.

<sup>249</sup> Solove, *supra* note 241 (quoting the show's co-creator, Ron Moore as saying "We really wanted them [the audience] to struggle (we like to do this a lot in the show) — we wanted them to struggle with [the questions]: 'Who am I supposed to be rooting for in this circumstance? Whose side am I on? I thought I was on her [Kara's] side because [Leoben has] said he's got a nuke somewhere in the Fleet, and that's a pretty scary thing, and Kara, you better do what you've got to do to get the information out of him. . . . Okay, now I'm sitting here, and now I have to watch him be smacked around, blood flowing from his mouth, and watch him be, in essence, water boarded. And I'm starting to really feel uncomfortable with that. And I'm starting to feel like she's going too far and . . . wait a minute . . . whose side am I on?").

<sup>250</sup> See Wiltz, *supra* note 125 ("If you're addicted to Fox's '24,' you probably cheered on Jack Bauer when, in a recent episode, he snapped the fingers of a suspect who was, shall we say, reluctant to talk. Maybe you hated yourself a little bit for it, but you watched, and you got it: Yessssss!!!! Torture's a no-brainer here. Jack's got to save us all from imminent thermonuclear annihilation. Never mind the Geneva Convention, bring on the electroshock machine!").

<sup>251</sup> See, e.g., Krauthammer, *supra* note 50 ("Question: If you have the slightest belief that hanging this man by his thumbs will get you the information to save a million people, are you permitted to do it? Now, on most issues regarding torture, I confess tentativeness and uncertainty. But on this issue, there can be no uncertainty: Not only is it permissible to hang this miscreant by his thumbs. It is a moral duty.").

In addition to this subversive ambiguity, the relevant episodes of *Battlestar Galactica* are, on closer inspection, critical of the use of torture and coercion. Significantly, the use of torture and coercion is portrayed as being an ineffective tool of interrogation, particularly relative to non-coercive alternatives. Second, the use of torture and coercion also spreads; it is first inflicted upon those considered inhuman, but the boundary proves unstable. Both of these points reiterate arguments discussed in the previous sections. Thus, *Battlestar Galactica* forms part of an alternative and skeptical account of torture. These points are discussed further below.

### 1. Skepticism about the efficacy of torture

The episode of the first season that deals with torture was prompted by the events at Abu Ghraib prison in Iraq.<sup>252</sup> In this episode, one of the human-like Cylons, known as Leoben Conroy, is captured aboard a civilian ship in the fleet. President Laura Roslin orders his interrogation, despite the desire of Commander William Adama, who commands the *Galactica*, to destroy Leoben immediately. Lieutenant Kara Thrace (usually referred to by her call-sign “Starbuck”) begins to interrogate Leoben, who claims to have planted somewhere in the fleet a nuclear warhead that is timed to detonate in under nine hours.<sup>253</sup> And so *Battlestar Galactica* sets up a classic ticking bomb scenario.

Starbuck informs Adama and Roslin about the bomb. Adama orders radiological searches throughout the fleet while Starbuck returns to interrogate Leoben further about the location of the bomb. Starbuck surmises that because Leoben is programmed to act like a human, he will respond to stimuli, such as pain.<sup>254</sup> The interrogation quickly turns violent as Starbuck has a marine beat Leoben. Although he is bloodied, Leoben reveals nothing. In the face of Leoben’s intransigence, Starbuck decides to up the torture ante: “Now the gloves come off,” she tells Leoben,<sup>255</sup> echoing the real-life words of former counterterrorism official Cofer Black.<sup>256</sup> Starbuck then subjects Leoben to a form of water torture by having marines force him underwater for increasing periods of time.<sup>257</sup> Leoben talks, but not about the location of the bomb. Near the conclusion of the episode, President Roslin arrives to put an end to Starbuck’s torture of Leoben, which has not revealed any useful information. She admonishes Starbuck: “You spent the last eight hours torturing this man, this machine, whatever it is. And you don’t have a single piece of information to show for it.”<sup>258</sup> After Leoben has been dried off, Roslin apologizes to him about his treatment, and attempts to reason with him instead. Leoben reveals that in fact there is no nuclear warhead. He also insinuates that Adama is a Cylon. Roslin has him ejected into space.<sup>259</sup>

The point to emphasize is that torture in this ticking bomb scenario does not work: Leoben never reveals any useful information under torture. Only after the torture has

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<sup>252</sup> See Tama Lever, “Humanity’s Children”: *Constructing and Confronting the Cylons*, in *CYLONS IN AMERICA* 131, 134 (Tiffany Potter & C.W. Marshall eds., 2008).

<sup>253</sup> *Battlestar Galactica*, *Flesh and Bone* (Sci Fi Channel/NBC Universal broadcast Feb. 25, 2005).

<sup>254</sup> *Id.*

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

<sup>256</sup> See *supra* text accompanying note 25.

<sup>257</sup> *Battlestar Galactica*, *Flesh and Bone*, *supra* note 253. For a description of different forms of water torture, see REJALI, *supra* note 78, at 279-86.

<sup>258</sup> *Battlestar Galactica*, *Flesh and Bone*, *supra* note 253.

<sup>259</sup> *Id.*

stopped does he reveal to Roslin that there is no ticking bomb. This skeptical view about the efficacy of torture continues in later seasons. In season 2, with the arrival of Admiral Helena Cain's Battlestar Pegasus, the audience learns that the Galactica was not the only warship to survive the initial Cylon attack on the twelve colonies.<sup>260</sup> It turns out that the Galactica and the Pegasus are each holding captive one human-like Cylon. Both Cylon captives are valuable because they have general knowledge about the nature and tactics of the enemy, although not necessarily information about the Cylon's imminent plans; there are no ticking bombs to be heard. Indeed, this is more closely analogous to the actual situation faced by the United States in relation to its most valuable terrorist detainees.<sup>261</sup>

The paths taken to unlock the secrets from the two Cylon captives differ. The different treatment of the two Cylons can be interpreted as an allegorical critique of the Bush Administration's treatment of terrorist detainees.<sup>262</sup> Adama treats his Cylon captive humanely, whereas Cain is willing to use torture and coercion. Their contrasting methods reflect the divergence of approach in real-life counterterrorism, highlighted, for example, by the disagreement between the FBI and CIA over the interrogation of terrorist suspects.<sup>263</sup>

The crew of the Pegasus is holding a Cylon known as Gina. Gina posed as a civilian network administrator supervising a retrofit of the Pegasus prior to the Cylon attack. Later, she helped "upgrade" the Pegasus' computer systems, and found an inviting Cylon target to attack.<sup>264</sup> This was in fact a trap, and the Pegasus' weapons systems failed at the crucial moment, presumably having been sabotaged by Gina. The Cylons boarded the Pegasus, presumably aided again by Gina. During the ensuing battle inside the ship, Gina was revealed to be a Cylon after one of the Pegasus' officers killed a duplicate copy of her. She was captured after a brief struggle.<sup>265</sup>

Stunned by Gina's betrayal, Cain subsequently orders Lieutenant Thorne to interrogate her. Cain guesses that Gina, being a Cylon who can mimic human behaviour, has human frailties as well. She authorizes the use of "pain . . . degradation, fear, shame."<sup>266</sup> To drive home the point, Cain gives Thorne carte blanche: "I want you to really test its limits. Be as creative as you feel you need to be."<sup>267</sup> Subsequently, Cain looks impassively upon an obviously beaten and bleeding Gina. Later, it is revealed that Thorne and other members of the Pegasus' crew sexually brutalized her as well.<sup>268</sup>

By contrast, the Galactica's Cylon prisoner, Sharon, is treated humanely. Commander Adama informs Admiral Cain that Sharon has been cooperative, and has proven to be a valuable source of intelligence.<sup>269</sup> In fact, in the previous episode, Sharon saved the Galactica after a Cylon virus had infected the ship's computer systems.<sup>270</sup> Gaius Baltar

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<sup>260</sup> *Battlestar Galactica, Pegasus* (Sci Fi Channel/NBC Universal broadcast Sept. 23, 2005).

<sup>261</sup> See generally Luban, *supra* note 32, at 46.

<sup>262</sup> Cf. Rikk Mulligan, *The Cain Mutiny: Reflecting the Faces of Military Leadership in a Time of Fear*, in *CYLONS IN AMERICA* 52, 59-60 (Tiffany Potter & C.W. Marshall eds., 2008).

<sup>263</sup> See *supra* text accompanying notes 177-184.

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

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

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

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

<sup>268</sup> *Battlestar Galactica, Pegasus*, *supra* note 260.

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

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



confirms with Cain that Sharon has provided useful intelligence about Cylon systems, tactics, and strategy.<sup>271</sup> Cain is surprised that Baltar has been able to obtain this intelligence without coercion. Baltar replies that he finds “the application of coercive techniques to be counterproductive,” and that he gets greater cooperation by treating Sharon “as if it’s the human being it pretends to be.”<sup>272</sup> Although she appears to express some disdain for this apparent coddling of the enemy, Cain admits that the torture of Gina carried out by Thorne and others has proven fruitless. She requests that Baltar examine Gina.<sup>273</sup>

When Baltar first sees Gina, she is manacled and chained to the floor by the neck and feet; she appears badly beaten, and lies motionless. Baltar demands that she be given food, clothing, and be allowed to bathe.<sup>274</sup> Cain is not interested, and points out that Gina is responsible for the deaths of several hundred of her crew, suggesting that Gina’s torture may be as much about cathartic revenge as obtaining information. Baltar replies that the Cylon psyche can be manipulated like that of humans, and that it is time to try a different approach: “Simply put, Admiral, you have already used the stick. It’s time to use a carrot.”<sup>275</sup> Subsequently, Baltar brings Gina some food, has the guards remove her restraints, and begins talking to her. At this point, she finally shows signs of life.<sup>276</sup>

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

Once again, it is striking that the use of torture and coercion provides no useful intelligence. By contrast, it is Baltar who is successful in getting cooperation from Gina, which in turn leads to the identification of the resurrection ship. Similarly, Sharon’s humane treatment has already been shown to have had very tangible benefits for the Galactica.

Finally, in the third season, Baltar, who collaborated with the Cylons as the head of the puppet government during their occupation of New Caprica, has been held by the Cylons for a considerable amount of time. The human leadership wishes to extract any

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<sup>271</sup> *Battlestar Galactica, Pegasus*, extended DVD edition (Universal Studios 2006).

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

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

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

<sup>275</sup> *Battlestar Galactica, Pegasus*, *supra* note 260.

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

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

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

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

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

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

useful information that he might have about the Cylons. Baltar has been deprived of sleep, and in response has gone on hunger strike. He unsuccessfully attempts suicide at the beginning of the episode.<sup>282</sup> President Roslin suggests an alternative interrogation plan. She questions him about his involvement with the Cylons, which he denies. Roslin appears to lose her cool, and threatens him with execution. She yells for the marines to have Baltar taken to the airlock; Baltar demands a fair trial. This mock execution gambit proves unsuccessful.<sup>283</sup> Next, Adama suggests trying an experimental hallucinogenic drug on Baltar, which Roslin authorizes. While Baltar is under the influence of this drug, Adama and Roslin attempt to extract information about the Cylons and his involvement with them. But Baltar reveals nothing. Doctor Cottle eventually calls off the interrogation once Baltar's vital signs begin to drop precipitously.<sup>284</sup> One final attempt to elicit information from Baltar is made. Lieutenant Gaeta, who previously served as Baltar's aide on New Caprica, is sent to lure Baltar into a false sense of comfort, in the hope that he will let some relevant information slip. But on this occasion, the non-coercive approach proves unsuccessful as well. After discussing the failure of these various attempts to interrogate Baltar with Adama, Roslin decides to give Baltar a trial.<sup>285</sup>

Adama's use of the hallucinogenic drug recalls the CIA's search for a reliable truth serum. Beginning in the 1940s, the CIA tested over one hundred and fifty substances to determine whether they might be effective for use in interrogation.<sup>286</sup> These included substances such as coffee, alcohol, morphine, atrophine, heroin, LSD, cocaine, marijuana, peyote, and so-called "truth serums" such as sodium amytal and sodium pentothal.<sup>287</sup> Ultimately, the CIA concluded that there was no magic bullet: no substance could consistently cause people to reveal the truth.<sup>288</sup> The idea that such a substance exists, however, has persisted.<sup>289</sup> Adama's fictional interrogation drug proves to be no exception. Thus, as with the other episodes discussed above, the various coercive techniques in this episode — sleep deprivation, mock execution, and the use of an interrogation drug — end up delivering nothing of substance.

## 2. The problem of torture's spread

Initially, torture is something that demarcates the boundary between human and Cylon. Humans do not torture humans; but Cylons — the mysterious, technologically superior, and apparently single-minded enemy — can be tortured, for the very reason that they are not rights-bearing humans: they are machines. As Ron Moore, one of the co-creators of *Battlestar Galactica* put it, "Is there anything morally wrong about beating a machine? And torturing machines?"<sup>290</sup>

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<sup>282</sup> *Battlestar Galactica*, *Taking a break from all your worries* (Sci Fi Channel/NBC Universal broadcast Jan 28, 2007).

<sup>283</sup> *Id.*

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

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

<sup>286</sup> REJALI, *supra* note 78, at 388-89.

<sup>287</sup> *Id.*

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

<sup>289</sup> See, e.g., Eric Schmitt, *There Are Ways To Make Them Talk*, N.Y. TIMES, June 16, 2002, 4.1 ("William H. Webster, a former director of central intelligence and the Federal Bureau of Investigation, has urged the Pentagon to inject truth serum into defiant Qaeda and Taliban prisoners.")

<sup>290</sup> Solove, *supra* note 241.

The very language the humans use to describe the Cylons emphasizes their non-human otherness. The standard dehumanizing term used to describe a Cylon is a “toaster”, a reference to the metallic appearance of earlier Cylon robotic models.<sup>291</sup> This point comes through even stronger in the episodes involving the use of torture and coercion on Cylons. When he hears of Leoben Conroy’s discovery, Adama stresses Conroy’s mechanistic otherness: “First of all, it’s not a him, it’s an it.”<sup>292</sup> This kind of labeling persists throughout the episode. As Starbuck observes Leoben prior to interrogating him, she refers to Leoben as one of the “things”, and remarks, “It’s sweating.”<sup>293</sup> As she tortures Leoben, Starbuck continues to emphasize his non-human status. When President Roslin puts a stop to Leoben’s torture, Starbuck states the moral calculus at work: “It’s a machine Sir. There’s no limit to the tactics I can use.”<sup>294</sup>

Likewise, Cain and crew of the Pegasus consider Cylons, represented by Gina, to be subhuman. Once Gina’s betrayal comes to light, a shocked Cain stammers, “Get that thing off my bridge.”<sup>295</sup> From that point onward, Gina is strictly an “it” or a “thing”,<sup>296</sup> and can therefore be treated as such by Cylon interrogator Lieutenant Thorne and others. Thorne’s subsequent interrogation of Sharon follows the same logic. Employing his usual methods, Thorne chokes and beats Sharon. Then, with the assistance of his two guards, Thorne stretches Sharon over her bed and attempts to rape her, but is stopped by Helo and Chief Tyrol, two members of the Galactica’s crew.<sup>297</sup> Colonel Fisk, the second in command of the Pegasus, later justifies Thorne’s actions and dismisses Helo’s concerns in the same way that Starbuck justified her treatment of Leoben: “You can’t rape a machine, Lieutenant.”<sup>298</sup>

The dichotomy in treatment between human and Cylon has historical parallels. In ancient Greece and Rome, torture was reserved for non-citizen outsiders, namely those who were “slaves, barbarians and foreigners.”<sup>299</sup> Torture was therefore a mechanism that divided the citizens from everyone else. In more modern times, public attention and scrutiny still seems to be more forthcoming when it is people like us who are being subjected to torture. Thus, accounts of the torture of the Mau Mau in Kenya met with indifference in Britain and internationally.<sup>300</sup> Reports of French torture of Algerians met with similar apathy; it was only when French police and military began to torture Europeans that there was an international outcry and the beginnings of an anti-torture movement.<sup>301</sup> Since 9/11, torture and its close cousins have also largely been reserved for those who are perceived as being the other. It is permissible to treat them this way

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<sup>291</sup> See Tranter, *supra* note 231, at 47.

<sup>292</sup> *Battlestar Galactica, Flesh and Bone*, *supra* note 253.

<sup>293</sup> *Id.*

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

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

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

<sup>297</sup> *Battlestar Galactica, Pegasus*, *supra* note 260.

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

<sup>299</sup> REJALI, *supra* note 78 at 56.

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

<sup>301</sup> REJALI, *supra* note 78 at 195.

because they are not like us.<sup>302</sup> The Bush administration's description of its terrorist detainees has been carefully chosen to accentuate this. Detainees are referred to as "aliens", "deadly enemies" and "faceless terrorists".<sup>303</sup> This dehumanizing rhetoric relegates them to the ranks of the subhuman, increasing the distance between them, the captive terrorist suspects, and us.<sup>304</sup> Thus, they need not be afforded the rights that we have.<sup>305</sup> Indeed, like the (literally) inhuman Cylons of *Battlestar Galactica*, they need not even be the subjects of our moral concern.<sup>306</sup>

However, as noted earlier, one of the difficulties with torture is its tendency to spread in spite of attempts to confine it.<sup>307</sup> This dynamic is illustrated in *Battlestar Galactica* as torture and other coercive techniques come to be applied to humans as well. Gaius Baltar, for example, is subjected to various forms of psychological torture and coercion in season 3.<sup>308</sup> But the starkest example arises out of the death of the Pegasus' Cylon interrogator, Lieutenant Thorne in season 2. Thorne, acting on Cain's instructions, interrogates Sharon aboard the Galactica about the function of the mysterious Cylon ship, which Gina later reveals to be the resurrection ship.<sup>309</sup> Sharon claims ignorance, leading Thorne to resort to physical torture. Thorne is about to sexually assault her, when Helo and Chief Tyrol, who have found out over bootlegged drinks with members of the Pegasus' crew that rape is part of Thorne's interrogational modus operandi, burst into the room, temporarily subdue the marines, and stop him. In the ensuing struggle, Tyrol accidentally kills Thorne.<sup>310</sup> The marines arrest both Helo and Thorne, and they are taken back to the Pegasus, where Admiral Cain's swiftly convened court-martial sentences both to death.<sup>311</sup>

While they await their fate inside the Pegasus' brig, Helo and Chief Tyrol are confronted by several crewmembers of the Pegasus, who are angry about Thorne's death.<sup>312</sup> Helo and Tyrol are overcome and restrained. They are then beaten in the stomach with a bar of soap wrapped in a towel, which is, as one of the Pegasus' crewmembers explains, very painful but leaves no marks.<sup>313</sup> Colonel Fisk interrupts the torture session soon after it

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

<sup>303</sup> Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report, AS/Jur (2007) 36 (June 7, 2007), para. 233, available at [http://www.bernan.com/images/PDF/EMarty\\_20070608\\_NoEmbargo.pdf](http://www.bernan.com/images/PDF/EMarty_20070608_NoEmbargo.pdf).

<sup>304</sup> Gershon Shafir, *Torturing Democracies: The Curious Debate over the "Israeli Model"* in NATIONAL INSECURITY AND HUMAN RIGHTS 92, 98 (Alison Brysk & Gershon Shafir eds., 2007) ("torture is a process of dehumanization and, consequently, is most easily applied to those already dehumanized through social exclusion and racism. . . . In general, the depiction of the enemy as illegitimate, or as one not following the rules, plays a crucial role in justifying torture").

<sup>305</sup> See Parliamentary Assembly of the Council of Europe, *supra* note 303, at para. 234.

<sup>306</sup> Richard Jackson, *Language, policy and the construction of a torture culture in the war on terrorism*, 33 REVIEW OF INTERNATIONAL STUDIES 353, 363 (2007) (noting that the dehumanization of the terrorist other contributes to the "suspension of individual empathy and social inhibitions against wanton cruelty").

<sup>307</sup> See *supra* text accompanying notes 164-167.

<sup>308</sup> See *supra* text accompanying note 282-285.

<sup>309</sup> *Battlestar Galactica*, *Pegasus*, *supra* note 260.

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

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

<sup>313</sup> On the use of "clean" beatings as torture, see REJALI, *supra* note 78, at 335-37.

begins. Despite his loyalty to Thorne, he reprimands the two torturers for assaulting two colonial officers, and for “treating those men like they were Cylons”.<sup>314</sup> The subtext of Fisk’s statement is simply that there are certain things that can be done to Cylons — beatings, whipping, sexual degradation — that cannot be done to humans. But in the eyes of the Pegasus’ torturers, this dividing line is not so clear. Once one has begun torturing Cylons without compunction, the next logical step is to do the same to those who sympathize with them.

### 3. Summary

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

## IV. Life imitates Art

The previous two parts of this article have considered how the television shows *24* and *Battlestar Galactica* portray the use of torture and coercion in interrogation. Each represents, and is part of, a different narrative or account of torture. Both are a reflection of post-9/11 society, where the use of torture and coercion is a genuine topic of debate. At the same time, as part of popular culture, these shows do not simply reflect different sides of the torture debate; they may influence and shape the debate as well.

Stuart Croft ascribes considerable significance to popular culture in this regard. Because of its accessibility and pervasiveness, popular culture is important for reinforcing the discourse of the “war on terror” throughout society.<sup>315</sup> *24*, has played this role in relation to the use of torture and coercion; it has achieved such a level of cultural penetration that it is a quickly recognizable shorthand for the pro-torture, torture-as-common-sense narrative. It is frequently referenced in public discourse in this way. Most disturbingly, it has reportedly been the source of inspiration for actual interrogation techniques. *Battlestar Galactica*, representing a rival narrative about torture, has not so far achieved the same level of influence as *24*. However, *Battlestar Galactica* has achieved a degree of recognition as a television show that deals with issues that face societies in times of crisis, including torture, and it has managed to transcend the usual boundaries of the science fiction genre.

### A. The *24* effect

The constant repetition of scenes of torture and other coercive techniques in *24* contributes to the audience becoming desensitized to the intentional and graphic infliction of pain upon a captive victim. Torture and near-torture becomes increasingly normalized.<sup>316</sup> Further, it reinforces the view that torture and coercion is a necessary and

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<sup>314</sup> *Battlestar Galactica*, *Resurrection Ship Part II*, *supra* note 298.

<sup>315</sup> STUART CROFT, *CULTURE, CRISIS AND AMERICA’S WAR ON TERROR* 204 (2006).

<sup>316</sup> DAVID L. ALTHEIDE, *TERRORISM AND THE POLITICS OF FEAR* 70 (2006) (“The reality of torture is muted by popular-culture depictions that are important for familiarizing and desensitizing audiences to

justifiable tool in the grim struggle against terrorism. This likely solidifies public apathy and indifference to the use of torture and coercion in counter-terrorism.<sup>317</sup> Indeed, Scott Horton goes so far as to suggest that *24* has been created for that very purpose, “namely, to create a more receptive public audience for the Bush Administration’s torture policies”.<sup>318</sup>

*24* has been aptly described as the nearest thing to “the Official Cultural Product of the War on Terrorism”.<sup>319</sup> Senator John McCain, now the presumptive Republican presidential nominee, made a brief cameo in season 5 as an unnamed member of CTU, despite his public stance against torture.<sup>320</sup> In 2006, the Heritage Foundation held a forum entitled “*24* and America’s Image in Fighting Terrorism: Fact, Fiction or Does it Matter?” Several cast members, producers, Supreme Court Justice Clarence Thomas, and Michael Chertoff, the Secretary of the Department of Homeland Security, attended the forum, which was chaired by conservative radio personality Rush Limbaugh.<sup>321</sup> In the course of his remarks, Chertoff praised Jack Bauer, and even likened certain aspects of the situation faced by the fictional CTU to that faced by the people working under him at the Department of Homeland Security.<sup>322</sup>

But the impact of *24* involves more than merely instances of crossover between entertainment and reality; invoking *24* and its hero in the course of debates about interrogation tactics and national security policy has become *de rigueur*. This is both an indictment on the level of the debate, and an indicator of the show’s penetration into the popular consciousness. For example, conservative pundit Laura Ingraham referred to the show’s popularity as being the closest approximation to a national referendum on the permissibility of using torture and coercion when interrogating high-value al Qaeda detainees.<sup>323</sup> Similarly, during a debate between Republican presidential candidates in 2007, several presidential hopefuls tried to out-tough one another on the issue of torture and interrogation, which was raised — predictably — in the context of a version of the ticking bomb scenario.<sup>324</sup> This itself is indicative of the new normality: there is perceived electoral traction in appearing more willing than one’s opponents to use the toughest interrogation techniques on a terrorist suspect. Later in the debate, Congressman Tom

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grotesque cruelty.”); see also Neil McMaster, *Torture — Algiers to Abu Ghraib*, (2004) 46 RACE & CLASS 1, 4 (singling out *24* for normalizing the idea of torture in the general public); Andrew Sullivan, *Torture Nation*, Feb. 13, 2007, available at

[http://andrewsullivan.theatlantic.com/the\\_daily\\_dish/2007/02/torture\\_nation.html](http://andrewsullivan.theatlantic.com/the_daily_dish/2007/02/torture_nation.html) (arguing that the effect of *24* has been to normalize torture).

<sup>317</sup> Parry, *supra* note 26 at 283-84; see also David Edelstein, *Now Playing at Your Local Multiple: Torture Porn*, N.Y. MAGAZINE, Feb. 6, 2006, available at <http://nymag.com/movies/features/15622/> (“Our righteousness is buoyed by propaganda like the TV series *24*, which devoted an entire season to justifying torture in the name of an imminent threat: a nuclear missile en route to a major city.”).

<sup>318</sup> Horton, *supra* note 88.

<sup>319</sup> James Poniewozik, *The Evolution of Jack Bauer*, TIME MAGAZINE, Jan. 14, 2007, available at <http://www.time.com/time/magazine/article/0,9171,1576853,00.html>.

<sup>320</sup> *24: Day 5: 1:00 pm - 2:00 pm* (FOX television broadcast Feb. 6, 2006); see also Troy Patterson, *Senator, We're Ready for Your Cameo*, SLATE.COM, Feb. 7, 2006, available at <http://www.slate.com/id/2135664/>.

<sup>321</sup> Paul Farhi, *Calling On Hollywood's Terrorism 'Experts'*, WASH. POST, June 24, 2006, C01.

<sup>322</sup> *Id.*

<sup>323</sup> See Scott Stoneman, *Pedagogy in a Time of Terror: Henry Giroux's Beyond the Spectacle of Terrorism*, 29 REVIEW OF EDUCATION, PEDAGOGY AND CULTURAL STUDIES 111, 125 (2007); see also CROFT, *supra* note 315, at 250-51.

<sup>324</sup> See *Republican Presidential Debate in South Carolina*, N.Y. TIMES, May 15, 2007, available at <http://www.nytimes.com/2007/05/15/us/politics/16repubs-text.html?pagewanted=all>; see also Rosa Brooks, *Torture: the new abortion*, L.A. TIMES, Nov. 8, 2007, available at <http://www.latimes.com/news/printedition/asection/la-oe-brooks8nov08,1,6469024,print.column>.

Tancredo, when asked how far he would be willing to go in order to deal with a hypothetical terrorist attack, quipped, “I’m looking for Jack Bauer at that time, let me tell you.”<sup>325</sup> The allusion to *24*’s hero not only established Tancredo’s pop culture bona fides, but also provided a simple shorthand for his willingness to let counter-terrorist agencies do whatever is necessary.<sup>326</sup>

A Canadian judge, during a panel discussion about torture at a legal conference in Canada, invoked Jack Bauer in the same manner, but as a negative example. The judge remarked, “Thankfully, security agencies in all our countries do not subscribe to the mantra ‘What would Jack Bauer do?’”<sup>327</sup> This caused Supreme Court Justice Antonin Scalia to launch into an impassioned defense of Jack Bauer. Referring to the second season of *24*, when Bauer’s tough interrogation tactics save Los Angeles from nuclear incineration, Justice Scalia argued that counterterrorism agents, both real and fictional, should have maximum latitude to thwart terrorist attacks.<sup>328</sup> Subsequently, Justice Scalia invoked the same scenario when discussing the issue of torture in an interview with the BBC.<sup>329</sup>

The Intelligence Science Board’s December 2006 report that addressed the issue of torture and interrogation,<sup>330</sup> entitled “Educing Information”, provides a further exception to the valorizing of *24*. Referencing the main plotlines of seasons 2 and 3, the Board emphasized the unreality of the show’s portrayal of interrogation:

Prime-time television increasingly offers up plot lines involving the incineration of metropolitan Los Angeles by an atomic weapon or its depopulation by an aerosol nerve toxin. The characters do not have the time to reflect upon, much less to utilize, what real professionals know to be the “science and art” of “educing information.” They want results. Now. The public thinks the same way. They want, and rightly expect, precisely the kind of “protection” that only a skilled intelligence professional can provide. Unfortunately, they have no idea how such a person is supposed to act “in real life.”<sup>331</sup>

That a Supreme Court justice and a report sponsored by government agencies<sup>332</sup> should reference a television show in discussing the issue of torture and interrogation is extraordinary enough, but *24* has had an even more striking effect: the show appears to have directly influenced the behavior of actual soldiers and interrogators. In November

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<sup>325</sup> *Republican Presidential Debate in South Carolina*, *supra* note 324; see also Holly Bailey, *Take That!*, NEWSWEEK, Aug. 21, 2007, available at <http://www.newsweek.com/id/34684>.

<sup>326</sup> Cf. Eric Greene, *Jack Bauer Syndrome*, in JACK BAUER FOR PRESIDENT 171, 177-78 (Richard Minter ed., 2008) (“Jack Bauer’ has emerged in our War on Terrorism culture as a mythic hero whom Tom Tancredo knew would be readily understood as shorthand for the proposition that that in the War on Terrorism the acceptable means are any means necessary.”).

<sup>327</sup> Colin Freeze, *What would Jack Bauer do?*, GLOBE AND MAIL, June 16, 2007, available at <http://www.theglobeandmail.com/servlet/story/LAC.20070616.BAUER16/TPStory/TPNational/Television/>; see also Audrey Macklin, *From Cooperation, to Complicity, to Compensation: The War on Terror, Extraordinary Rendition, and the Cost of Torture*, 10 EUROPEAN JOURNAL OF MIGRATION AND LAW 11, 11-12 (2008); Alan Berlow, *Who would Antonin Scalia torture?*, SALON.COM, Jan. 2, 2008, available at [http://www.salon.com/opinion/feature/2008/01/02/lethal\\_injection/](http://www.salon.com/opinion/feature/2008/01/02/lethal_injection/).

<sup>328</sup> Freeze, *supra* note 327.

<sup>329</sup> *US judge steps in to torture row*, B.B.C. NEWS, Feb. 12, 2008, available at <http://news.bbc.co.uk/2/hi/americas/7239748.stm>.

<sup>330</sup> The Intelligence Science Board is a body that advises the intelligence community on scientific and technical issues related to intelligence. See MAYER, *supra* note 57, at 330-31.

<sup>331</sup> Intelligence Science Board, *Educing Information: Interrogation: Science and Art*, ix (Dec. 2006), available at <http://www.dia.mil/college/3866.pdf>.

<sup>332</sup> Josh White, *Intelligence Research Is Lacking, Report Says*, WASH. POST, Jan. 16, 2007, A15.

2006, Brigadier General Patrick Finnegan, the dean of West Point, met with some of the writers and producers of the show, and expressed concern that the show's message about the efficacy and morality of torture was affecting the training of American soldiers.<sup>333</sup> Finnegan observed that he found it increasingly difficult to convince cadets that the United States should continue to take the moral high ground, even in the absence of reciprocity. He suggested that misconceptions about torture popularized by *24* were partly responsible for this.<sup>334</sup> Gary Solis, a retired Marine and Judge Advocate who also taught at West Point, noted the same phenomenon with his students. When discussing the legality and morality of torture, he found that some cadets had adopted Jack Bauer's ethos of being willing to do whatever was necessary to save American lives. Solis had to remind them that the show was fictional, and should not serve as a model for their conduct.<sup>335</sup>

*24* co-creator and executive producer, Joel Surnow, who was notably absent from the meeting with Finnegan, blithely disclaimed any such consequences caused by his show: "Young interrogators don't need our show. What the human mind can imagine is so much greater than what we show on TV. No one needs us to tell them what to do. It's not like somebody goes, 'Oh, look what they're doing, I'll do that.' Is it?"<sup>336</sup> But this appears to be precisely what General Finnegan was complaining of. Moreover, this appears to be precisely what occurred at Guantánamo Bay. During meetings held in late 2002 to discuss new techniques for interrogating Guantánamo detainees, the participants drew on various sources of inspiration, including personal experiences, and military SERE training.<sup>337</sup> According to Diane Beaver, the author of the Beaver memo,<sup>338</sup> *24* was also a fount of ideas:

The first year of Fox TV's dramatic series *24* came to a conclusion in spring 2002, and the second year of the series began that fall. An inescapable message of the program is that torture works. "We saw it on cable," Beaver recalled. "People had already seen the first series. It was hugely popular." Jack Bauer had many friends at Guantánamo, Beaver added. "He gave people lots of ideas."<sup>339</sup>

#### *B. Battlestar Galactica: transcending the science fiction genre*

The re-imagined *Battlestar Galactica*, unlike its camp 1970s iteration, has received critical acclaim.<sup>340</sup> Much of this is due to its combination of good acting, writing and production values. Additionally, the show deals with issues that resonate in a post-9/11 world in an intelligent and sophisticated manner. In addition to the episodes concerning torture, the show has, for example, considered the tension between civilian and military authority,

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<sup>333</sup> Mayer, *supra* note 85.

<sup>334</sup> *Id.*

<sup>335</sup> *Id.* The human rights organization, Human Rights First, has even established the Primetime Torture Project, which aims to "limit the negative impact television has on the way U.S. troops operate". See Human Rights First's Primetime Torture Project, available at [http://www.humanrightsfirst.org/us\\_law/etn/primetime/project.asp](http://www.humanrightsfirst.org/us_law/etn/primetime/project.asp)

<sup>336</sup> Mayer, *supra* note 85.

<sup>337</sup> SERE stands for Survival, Evasion, Resistance and Escape.

<sup>338</sup> See *supra* text accompanying note 190.

<sup>339</sup> Philippe Sands, *The Green Light*, VANITY FAIR, May 2008, available at <http://www.vanityfair.com/politics/features/2008/05/guantanamo200805>.

<sup>340</sup> See, e.g., James Poniewozik, *Best of 2005: Television*, TIME MAGAZINE, Dec. 16, 2005, available at <http://www.time.com/time/arts/article/0,8599,1141640,00.html>.



and the limits of military necessity. Season 3, as discussed above, considered the morality of suicide bombing in the context of resistance to alien/foreign occupation.<sup>341</sup>

The fact that *Battlestar Galactica* has a political edge that underlies the space combat and the story of human survival has resulted in a kind of mainstreaming, as indicated by a migration “from the fan boards to political blogs”.<sup>342</sup> Thus, *Battlestar Galactica* is now being discussed not simply as a work of science fiction, but as a show that has contemporary resonance, and which raises real serious political, moral, and legal issues.<sup>343</sup> In particular, the show appears to have a certain following amongst legal academics. *Concurring Opinions*, a well-known legal blog, featured an interview with co-creators Ron Moore and David Eick about various legal and moral issues raised by the show.<sup>344</sup> Other legal academics have considered single episodes of *Battlestar Galactica* that raise legal issues such as the permissibility of genocide<sup>345</sup> and the use of military commissions.<sup>346</sup>

## Conclusion

This article has discussed two contrasting narratives about torture. The first is centered on the ticking bomb scenario and treats torture and coercion as a necessary tool for saving lives. This view has been espoused by various legal academics since September 11, 2001. The ticking bomb’s logic is also evident in various official U.S. government statements asserting the legality of torture and coercion. The second narrative contests the usefulness of the ticking bomb scenario. Other academics have pointed out the numerous assumptions underlying the hypothetical that are unlikely to be met in practice, as well as the broader costs of employing torture and coercion. Certain government actors, notably the FBI and senior military lawyers, have opposed the use of torture and coercion for similar reasons.

These two conflicting accounts of torture are found in popular culture as well. The ticking bomb scenario is at the heart of Fox’s *24*, and it justifies Jack Bauer’s frequent use of torture. After all, the clock is ticking, catastrophe will ensue without heroic intervention, and torture works. Sci-Fi’s *Battlestar Galactica* by contrast, presents a more

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<sup>341</sup> See *supra* text accompanying notes 246-248.

<sup>342</sup> John Hodgman, *Ron Moore’s Deep Space Journey*, N.Y. TIMES MAGAZINE, July 17, 2005, 32, 37.

<sup>343</sup> Joanna Weiss, *Moral dilemmas pulled into ‘Battlestar’ galaxy*, BOSTON GLOBE, October 5, 2006, available at [http://www.boston.com/ae/tv/articles/2006/10/05/moral\\_dilemmas\\_pulled\\_into\\_battlestar\\_galaxy/](http://www.boston.com/ae/tv/articles/2006/10/05/moral_dilemmas_pulled_into_battlestar_galaxy/) (“But the secret to ‘Battlestar,’ as one of my colleagues keeps saying, is not to think of it as science fiction. This is a show about religion, politics, parent-child relationships, and the moral dilemmas of insurgency. Consider it a workplace drama where the business is armed resistance.”). See also Glater, *supra* note 233; Miller, *supra* note 241; Miller, *supra* note 248; Heffernan, *supra* note 248; Edwards, *supra* note 242; Ackerman, *supra* note 246; Reed, *supra* note 246.

<sup>344</sup> Daniel J. Solove, *Battlestar Galactica Interview*, CONCURRING OPINIONS, Feb. 21, 2008, available at [http://www.concurringopinions.com/archives/2008/02/battlestar\\_gala.html](http://www.concurringopinions.com/archives/2008/02/battlestar_gala.html); see also Tung Yin, *Is ‘Battlestar Galactica’ must-see national security TV?*, THE YIN BLOG, Oct. 13, 2006, available at [http://yin.typepad.com/the\\_yin\\_blog/2006/10/is\\_battlestar\\_g.html#more](http://yin.typepad.com/the_yin_blog/2006/10/is_battlestar_g.html#more).

<sup>345</sup> Kevin Jon Heller, *Genocide and Battlestar Galactica*, OPINIO JURIS, Nov. 15 2006, available at <http://opiniojuris.org/2006/11/15/genocide-and-battlestar-galactica/> (discussing *Battlestar Galactica: A Measure of Salvation* (Sci Fi Channel/NBC Universal broadcast Nov. 10, 2006)).

<sup>346</sup> Chris Borgen, *Military Commissions Declared Illegal...on Battlestar Galactica*, OPINIO JURIS, Oct. 30, 2006, available at <http://opiniojuris.org/2006/10/30/military-commissions-declared-illegal...on-battlestar-galactica/> (discussing *Battlestar Galactica: Collaborators* (Sci Fi Channel/NBC Universal broadcast Oct. 27, 2006)).

skeptical view. Torture and coercion is not limited to the ticking bomb scenario; torture and coercion spreads and corrupts, and above all, does not reliably produce results.

Despite the fact that Jack Bauer is a fictional character, he is invoked in real-world discussions about interrogation and national security issues surprisingly often. But as argued above, *24*'s portrayal of interrogation is unrealistic in many significant respects. Somewhat ironically, it is *Battlestar Galactica*, a science fiction show set in outer space, which depicts torture and coercion in a way that is more consistent with humanity's historical experience. So rather than just asking ourselves what Jack Bauer would do, perhaps we might also find wisdom in the words of the equally fictional Commander William Adama: "It is not enough to survive; one has to be worthy of surviving."<sup>347</sup>

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<sup>347</sup> *Battlestar Galactica, Resurrection Ship Part II, supra* note 298.