

**TERRORISM, TICKING TIME-BOMBS, AND TORTURE<sup>1</sup>**

REVIEWED BY FRED L. BORCH III\*

Does the end sometimes justify the means? May the United States torture a terrorist in order to save lives? May U.S. agents even torture an *innocent* man, woman or child to save other innocent lives? The answers to these questions—and more—are in this compelling book, which argues that it is morally permissible for a state to torture an individual in order to save innocent lives, albeit only in exceptional circumstances. Precisely because the intellectual arguments in *Terrorism, Ticking Time-Bombs, and Torture* are seductive, this also is a dangerous book, because it fails to provide real-world solutions to issues that arise from the use of torture. Additionally, it provides a philosophical basis for disregarding the basic moral norms that have made the United States “the greatest force for freedom and security that the world has ever known.”<sup>2</sup>

Judge advocates should read this book for both personal and professional reasons: for personal reasons because all American citizens should understand that a cogent, rational argument exists for using interrogational torture; for professional reasons because as long as the military is involved in counter-terrorism operations, Army lawyers will be asked about the legality of alternative interrogation techniques.

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\* Mr. Borch is the Regimental Historian and Archivist for the U.S. Army Judge Advocate General's Corps. He graduated from Davidson College (A.B., 1976), from the University of North Carolina (J.D., 1979), and from the University of Brussels, Belgium (LL.M., *magna cum laude*, International and Comparative Law, 1980). Mr. Borch also has advanced degrees in military law (LL.M., The Judge Advocate General's School, 1988), National Security Studies (M.A., *highest distinction*, Naval War College, 2001), and history (M.A., University of Virginia, 2007). From 2012 to 2013, Mr. Borch was a Fulbright Scholar in the Netherlands, where he was a Visiting Professor at the University of Leiden and a Visiting Researcher at the Netherlands Institute of Military History.

Fred Borch is the author of a number of books and articles on legal and non-legal topics, including *Judge Advocates in Combat: Army Lawyers in Military Operations from Vietnam to Haiti* (2001), and *Judge Advocates in Vietnam: Army Lawyers in Southeast Asia* (2004). His latest book, *Medals for Soldiers and Airmen: Awards and Decorations of the United States Army and Air Force* was published by McFarland Press in 2013.

<sup>1</sup> FRITZ ALLHOF, *TERRORISM, TICKING TIME-BOMBS, AND TORTURE* (2012).

<sup>2</sup> Presidential Statement on Sustaining U.S. Global Leadership: Perspectives for the 21st Century Defense, DEP'T OF DEF.GOV. (Jan. 3, 2012), [http://www.defense.gov/news/Defense\\_Strategic\\_Guidance.pdf](http://www.defense.gov/news/Defense_Strategic_Guidance.pdf) (last visited Aug. 21, 2013).

*Terrorism, Ticking Time-Bombs, and Torture* explores the question of whether it is ever “morally permissible to torture”<sup>3</sup> a terrorist in order to save innocent lives. For author Fritz Allhof, an Associate Professor of Philosophy at Western Michigan University, “torture” refers to “interrogational torture”<sup>4</sup> and it means the interrogational torture of terrorists. Consequently, Allhof’s book distinguishes between torture used to obtain actionable intelligence that will save lives, and other forms of torture, which Allhof identifies as “sadistic, confessional, punitive, and terroristic” in nature.<sup>5</sup>

*Terrorism, Ticking Time-Bombs and Torture* begins by defining terrorism, and then discusses the morality of using torture to counter terrorism. Allhof insists that, while torture is a moral wrong (because it causes pain and suffering), its use in an interrogation of a terrorist is morally permissible if it saves innocent lives, because such torture “aims at a positive moral good, namely, the disarming of some threat.”<sup>6</sup> In his view, those who object to the use of torture place too much emphasis on the rights of suspected terrorists, when it is the lives of innocents that should be the focus of any philosophical discussion on the use of torture. Interrogational torture may be a moral wrong, but it is permissible in exceptional cases because it represents the lesser of two evils.

While Allhof says “that virtually any plausible moral theory could defend the permissibility of torture in exceptional cases,”<sup>7</sup> the philosophical foundation of *Terrorism, Ticking Time-Bombs and Torture* relies chiefly on the 19th century English philosophy of “utilitarianism” developed by Jeremy Bentham and John Stuart Mill. At its core, utilitarianism is the idea that the “purpose of government and its system of law is to provide the citizenry with the greatest possible amount of happiness.”<sup>8</sup> It follows that if the purpose of the state is to maximize

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<sup>3</sup> ALLHOF, *supra* note 1, at 113.

<sup>4</sup> *Id.* at xi.

<sup>5</sup> *Id.* at 77. Allhof does not devote much space to defining these terms, but he gives some examples. While “sadistic” torture might be inflicted to give the torturer pleasure, torture inflicted as part of a “well-received public spectacle” also would qualify as “sadistic.” Torture inflicted on a criminal as punishment would be “punitive”; that same torture would also be “terroristic” if it scared other potential criminals from committing crimes. Torture used to obtain admissions used to convict an accused would be “confessional.” *Id.* at 66–67.

<sup>6</sup> *Id.* at 76.

<sup>7</sup> *Id.* at 195.

<sup>8</sup> GEORGE L. ABERNETHY & THOMAS A. LANGFORD, INTRODUCTION TO WESTERN PHILOSOPHY: PRE-SOCRATICS TO MILL 319 (1970). *See also* JOHN STUART MILL,

pleasure (and minimize pain), then the yardstick for measuring its success is whether the state has achieved the greatest good for the greatest number of people. Consequently, Allhof's central argument is that torture, even if a moral wrong, is morally permissible if the good accomplished by that torture is of sufficient value.

Perhaps the most interesting part of Allhof's book is his discussion of five "ticking time-bomb" scenarios. He has constructed these scenarios so each explores whether it is "morally permissible" to torture a terrorist based on the terrorist's guilt or innocence and the likelihood of obtaining intelligence from torture:<sup>9</sup>

Scenario No. 1: State law enforcement agents have apprehended a terrorist who has planted a bomb in a crowded city. An explosive ordnance demolition team has examined the bomb but is unable to diffuse it. Unless the terrorist provides the deactivation code, the bomb will explode and kill 100 innocent men, women, and children. If "moderate torture" is used on the terrorist, "he will surely provide the deactivation code" in time to disarm the device.

Scenario No. 2: Same as Scenario No. 1, except that, the bomb will kill 10,000 innocent people. If "moderate torture" is used on the terrorist, there is only a one percent chance that he will reveal the deactivation code; there is a 99 percent chance that the torture will fail and that the bomb will explode.

Scenario No. 3: Same as Scenario No. 1 (bomb will kill 100 people if not defused) except that torturing the terrorist will be ineffective, because he has been trained to resist torture. The terrorist's young and completely innocent daughter, however, is in custody. She knows nothing about her father's terrorist activities. A psychological profile of the terrorist shows that if "moderate torture" is applied to his innocent child (and

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"UTILITARIANISM," THE ENGLISH PHILOSOPHERS FROM BACON TO MILL 895, 900 (1939) ("actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness").

<sup>9</sup> ALLHOF, *supra* note 1, at 104.

he is aware of this torture), the terrorist “will surely provide the deactivation code” for the bomb.

Scenario No. 4. Same as Scenario No. 3, except that 10,000 innocent men, women and children will lose their lives if the bomb is not deactivated, and there is only a one percent chance that, if his innocent daughter is subjected to “moderate torture,” that the terrorist will provide the code to deactivate the bomb.

Scenario No. 5. Same as Scenario No. 1, except that government officials know only that the terrorist who planted the bomb was wearing a red sweatshirt. Law enforcement teams set up check-points and apprehend two men wearing red sweatshirts. Both deny that they are terrorists or that they know anything about the bomb, but one of the men is lying. May “moderate torture” be used on both men, one of whom is innocent, in order to obtain the code to deactivate the bomb?<sup>10</sup>

In Allhof’s discussion of the first four scenarios, he concludes that “it is morally permissible” to use “moderate torture” on the terrorist and his innocent daughter, even in those situations where the chance of obtaining the necessary information is only one percent. As for the fifth scenario involving men dressed in red sweatshirts, Allhof concedes that while it is wrong to torture an innocent person, “this torture could still be justified if there are enough people at risk.”<sup>11</sup> Stated differently, Allhof argues that while torture is “a moral wrong,” it is morally permissible to torture “in the pursuit of a greater moral good.”<sup>12</sup>

While there are no known real-world cases of ticking time-bombs,<sup>13</sup> Allhof argues, convincingly, that this does not make these five scenarios (or any similar scenarios) any less important to a discussion of the morality of using interrogational torture. There is, however, a major problem with Allhof’s reliance on utilitarianism: this philosophical

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<sup>10</sup> *Id.* at 141.

<sup>11</sup> *Id.* 104–05, 141.

<sup>12</sup> *Id.* at 202.

<sup>13</sup> *Frontline, The Torture Question* (PBS television broadcast Oct. 18, 2005) <http://www.pbs.org/wgbh/pages/frontline/torture/justify/> (last visited Aug. 21, 2013) (*Frontline* gathered a group of experts and scholars to debate whether a “ticking time-bomb” terrorist can be tortured.).

viewpoint either envisions or relies upon a common understanding of what is “good” for a society. Consequently, when “good” is perverted (e.g., in Germany under the Nazis from 1933 to 1945), the utilitarian viewpoint is similarly corrupted. Moreover, while *Terrorism, Ticking Time-Bombs and Torture* defines “good” in terms of saving innocent lives, could not “good” also be saving revered cultural property? Would it be morally permissible to inflict ‘moderate torture’ on a terrorist to prevent his bomb from destroying the Declaration of Independence, Lincoln Memorial, Washington Monument or the White House?

Assuming *arguendo* that Allhof’s philosophical rationale for permitting interrogational torture is sound, there are significant practical difficulties associated with using such torture. This is an important point, as constructing a clever philosophical argument justifying the use of torture is of little value if its application to the real world is problematic.

To his credit, Allhof recognizes that he must address the issues raised by the use of interrogational torture in the real world, and his book devotes more than sixty pages to these concerns.<sup>14</sup> Despite the book’s attempts to show how interrogational torture could work in practice, *Terrorism, Ticking Time-Bombs, and Torture* fails to satisfactorily overcome a number of critical issues. First, what types of torture may be used? Allhof acknowledges that U.S. law and the UN Convention Against Torture define torture in terms of “severe physical or mental pain or suffering”<sup>15</sup> and he identifies a variety of techniques that fall into the category of torture, including whipping, cuffing the ears, eyeball pressing, and simulated drowning. But what is the “moderate torture” that Allhof says would be used in his five scenarios? Does it include extinguishing a lighted cigarette on the face of the terrorist’s daughter? Using an electric cattle prod on her genitals? Perhaps more importantly, why should only “moderate torture” be used if inflicting a higher degree of pain and suffering will result in information that saves thousands and thousands of lives? Allhof does not endorse the use of “highly brutalized torture” and he suggests that a check on the use of such torture will be the philosophical premise that “we should torture no more than is necessary to elicit our goal” of obtaining actionable intelligence.<sup>16</sup> But

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<sup>14</sup> ALLHOF, *supra* note 1, at 139–204.

<sup>15</sup> *Id.* at 61; 18 U.S.C. § 2340 (2006) (Definitions). Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 1, para. 1, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987, in accordance with Article 27(1)), available at <http://www.hrweb.org/legal/cat.html> (last visited Aug. 21, 2013).

<sup>16</sup> ALLHOF, *supra* note 1, at 199.

this is not how the real world works and a torturer who sincerely believes that his subject will talk if just a little more pain is inflicted is likely to do just that. Additionally, if Allhof's point is that torture is morally permissible because it achieves a greater moral good, a logical extension of Allhof's argument is that an interrogation technique that often results in the death of the subject is permissible if there are sufficient lives at stake. Would saving a million innocent lives permit such torture?

Second, if the state may torture a terrorist, who will inflict the torture? Allhof rejects the idea that an "institutional apparatus" is needed for torture, although he concedes that an institution, if necessary, would simply be "a necessary cost."<sup>17</sup> He also is "skeptical as to how much training is actually required for torture."<sup>18</sup> As for who would inflict the torture, Allhof seems to believe that "torturers should . . . be drawn . . . from special forces like Delta Force, Green Berets or Navy SEALs." In his view, members of the special operations community will be the best torturers because they are trained in interrogation and interrogation resistance, including waterboarding.<sup>19</sup> But suggesting that members of this community are best able to inflict torture on terrorists shows that Allhof does not understand the purpose of special operations, much less the type of person who joins that unique community. Who will be the most "effective torturers" in the Green Beret community? Officers? Noncommissioned officers? Will torturers be volunteers? If so, will these men and women torture the terrorist's innocent young daughter, or the innocent man wearing the red sweatshirt?

Finally, and most alarming, is his discussion of who should decide when torture is permissible. *Terrorism, Ticking Time-Bombs and Torture* rejects the idea that lawyers should be involved in the process. He argues that Harvard law professor Alan Dershowitz's idea that "torture warrants" could be used to ensure that the use of torture was justified by the circumstances is wrongheaded.<sup>20</sup> Allhof reasons that intelligence officers contemplating torture will "have nothing to lose by applying for a [torture] warrant and, once such a warrant were issued, would have reasonably wide latitude in their application of torture."<sup>21</sup> He also insists

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<sup>17</sup> *Id.* at 150.

<sup>18</sup> *Id.* at 152.

<sup>19</sup> *Id.* at 151.

<sup>20</sup> See ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE (2002); Alan M. Dershowitz, *The Torture Warrant: A Response to Professor Strauss*, 48 N.Y. L. SCH. REV. Nos. 1 & 2, at 275-94 (2003/2004).

<sup>21</sup> ALLHOF, *supra* note 1, at 193.

that the judge issuing the torture warrant “is not trained to evaluate circumstances of life-threatening catastrophe”<sup>22</sup> like those discussed in the five scenarios. Instead, the judicial officials must rely almost exclusively on the information provided to him by the official desiring authority to torture. Although Allhof does not conclude that this means judicial oversight of the torture process will be a ‘rubber stamp,’ he does believe that torture warrants would not lower incidents of unjustified torture and that the warrants are “more trouble than they are worth.”<sup>23</sup>

Allhof’s solution for guarding against unjustified torture is to permit the person inflicting the torture to defend his actions using the “necessity defense” as defined in the *Model Penal Code*.<sup>24</sup> Consequently, a field officer who tortures will suffer no legal liability for his actions if he clearly establishes “that he chose the lesser of two evils.” If this “lesser evil argument cannot be clearly established, then the torturer is criminally liable.”<sup>25</sup>

But again, this is both naïve and impractical. In the real world, no Soldier, Sailor, Airman or Marine will rely on a *Model Penal Code* provision when deciding to inflict torture on a terrorist. Even if the torturer is convinced in his own thinking that the torture is morally permissible, that torturer will want authorization from his chain of command on the type of torture to be used, its duration, and whether his superiors agree that torture is justified to save innocent lives. Will that chain of command make those decisions without consulting with a judge advocate? Will that legal advisor opine that the necessity defense will be a complete bar to a prosecution for aggravated assault or the grievous bodily harm resulting from the torture? In the real world, agents of the government want to know that what they are asked to do as part of their official work is legal. Military personnel, who are wedded to the idea that they act under orders from their superiors, are no different. Witness the infamous August 2002 memorandum written by Jay S. Bybee, who now serves as a judge on a federal appellate court. Judge Bybee’s memo told Central Intelligence Agency (CIA) officers that any interrogation technique (including torture) was legal if it did not produce pain equal to that caused by “organ failure, impairment of bodily function, or even

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<sup>22</sup> *Id.* at 182.

<sup>23</sup> *Id.* at 185.

<sup>24</sup> *Id.* at 188.

<sup>25</sup> *Id.* at 194.

death.”<sup>26</sup> The purpose of Bybee’s memo was to give legal cover to CIA agents obtaining “time-sensitive, threat-related information where lives hang in the balance.”<sup>27</sup> An American Soldier torturing a terrorist’s innocent young daughter will want similar assurances from his superiors that what he is doing is both authorized and legal.

*Terrorism, Ticking Time-Bombs and Torture* is a dangerous book because it offers the reader an intellectually sophisticated and seductive argument that fails the real world test. But the book is doubly dangerous because, in claiming that torture can be morally permissible, the book asks Americans to jettison, temporarily at least, the basic and invariable moral norms that have made the United States the exceptional nation that it is today and must remain. The moral standard upon which the country was created was first expressed in 1776, when the Continental Congress decreed that “all men are created equal” and that they have certain unalienable rights, including “Life, Liberty and the Pursuit of Happiness.”<sup>28</sup> While the United States has failed in its history to always live up to this moral standard, the American people have held steadfast to this declaration as a guiding principle in the administration of justice, and it is what sets the nation apart from all others in the world. Torture is a violation of international law, and it is a violation of U.S. law. Since Americans believe in the Rule of Law, the idea that laws are the foundation of the United States, and not men or religious beliefs, using torture is unacceptable because it is unlawful. It also is immoral and, as such, is incompatible with American ideas about equality, fairness, justice, dignity and respect. During the Vietnam War, when U.S. military personnel were subjected to horrific torture at the hands of their North Vietnamese and Viet Cong captors, no responsible U.S. government official suggested that U.S. and South Vietnamese forces should reciprocate by intentionally inflicting pain and suffering on enemy prisoners of war. This is because, regardless of what North Vietnamese or Viet Cong officials did to American prisoners, the United States adhered to a higher standard of moral behavior. Opening the door to

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<sup>26</sup> Memorandum from Jay S. Bybee, Assistant Attorney Gen, for Alberto R. Gonzales Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. § 2340–2340A (Aug. 1, 2002). See also DAVID COLE, *TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE* (2009); JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* (2009).

<sup>27</sup> David Ignatius, *Interrogators Left Out in the Cold*, WASH. POST, Sept. 22, 2006, at A17.

<sup>28</sup> DECLARATION OF INDEPENDENCE (1775).



interrogational torture would mean that the ends do justify the means, and that committing a moral wrong can be morally right.

A final problem with Allhof's argument in favor of interrogational torture is his insistence that it is wrong to focus on the rights of a terrorist when the lives of innocents should be the paramount concern of the state. But this flies in the face of the Rule of Law and our system of jurisprudence. The English jurist William Blackstone wrote in *Commentaries on the Laws of England* "it is better that ten guilty persons escape than one innocent suffer"<sup>29</sup> and America's legal framework is built on this principle. Americans do not balance needs of society against the rights of the accused and, when Allhof claims that it is proper to inflict pain and suffering on one person for the benefit of others, he necessarily asks Americans to reject this fundamental moral norm. While ticking time-bomb scenarios are worthy of discussion, the arguments espoused in *Terrorism, Ticking Time-Bombs, and Torture* are not the answer.

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<sup>29</sup> 1 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND IN FOUR BOOKS (1753).