

## THE PROHIBITION OF TORTURE IN EXCEPTIONAL CIRCUMSTANCES

Can torture be justified in exceptional circumstances? In this timely work, Michelle Farrell asks how and why this question has become such a central debate. She argues that the ticking bomb scenario is a fiction that blinds us to the reality of torture, and investigates what it is that this scenario fails to represent. Farrell aims to reframe how we think about torture, and critically reflects on the historical and contemporary approaches to its use in exceptional situations. She demonstrates how torture, from its use in Algeria to the 'War on Terror', has been misrepresented, and appraises the legalist, extra-legalist and absolutist assessments of exception to the torture prohibition. Employing Giorgio Agamben's theory of the state of exception as a foil, Farrell deconstructs these approaches and goes on to propose her own theory of exceptional torture.

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CAMBRIDGE  
UNIVERSITY PRESS

Cambridge University Press & Assessment  
 978-1-107-03079-4 — The Prohibition of Torture in Exceptional Circumstances  
 Michelle Farrell  
 Frontmatter  
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CAMBRIDGE  
UNIVERSITY PRESS

Shaftesbury Road, Cambridge CB2 8EA, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India

103 Penang Road, #05–06/07, Visioncrest Commercial, Singapore 238467

Cambridge University Press is part of Cambridge University Press & Assessment,  
 a department of the University of Cambridge.

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 education, learning and research at the highest international levels of excellence.

[www.cambridge.org](http://www.cambridge.org)

Information on this title: [www.cambridge.org/9781107030794](http://www.cambridge.org/9781107030794)

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First published 2013

*A catalogue record for this publication is available from the British Library*

*Library of Congress Cataloging-in-Publication data*

Farrell, Michelle, 1981–

The prohibition of torture in exceptional circumstances / Michelle Farrell.  
 pages cm

Based on the author's thesis (doctoral) – National University of Ireland  
 Galway, 2011, under title: On torture.

Includes bibliographical references and index.

ISBN 978-1-107-03079-4 (hardback)

1. Torture (International law) I. Title.

KZ7170.F37 2013

341.6'5–dc23 2013008188

ISBN 978-1-107-03079-4 Hardback

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*In Memory of Nan*

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FOREWORD  
LOUIS E. WOLCHER

Within the circle of academic discourse about human rights, the customary way of thinking about torture in the post September 11 world has for a long time been obsessed with – one might even say has fetishised – the so-called ‘ticking time bomb scenario’ (TTBS). After paying lip service to the nearly universal modern chorus of moral and legal condemnation of the use of torture by the state as a general matter, mainstream academics in thrall to the TTBS have tended to focus their formidable intellectual energy on what they believe to be the one case where the argument for torture is strongest. As the TTBS is usually imagined, a terrorist bomb or other mechanism of mass destruction is set to go off in the near future, thereby precipitating hundreds (or thousands or millions) of casualties amongst the civilian population. The authorities believe they know that a particular person in their custody knows where the engine of destruction is located and/or how to disable it, but he or she will not disclose this information in response to ‘normal’ investigative techniques. Thus constructed in the form of an abstract thought experiment, the TTBS poses the question whether it is moral, or legal, or both, for agents of the state to subject such a person to various forms of torture (including what the Bush administration euphemistically called ‘enhanced interrogation techniques’ such as waterboarding) in order to obtain putatively life-saving information that the suspect refuses to reveal under the influence of less drastic measures.

The TTBS seems to pose the sort of ‘either/or’, ‘yes or no’ question – ‘Is torture justified in this scenario or not?’ – that Jacques Derrida called ‘violent, polemical and inquisitorial ... We may fear that it contains some instrument of torture – that is, a manner of interrogation that is not the most just.’<sup>1</sup> In other words, it takes the paradoxical form of something

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<sup>1</sup> Jacques Derrida (tr. Mary Quaintance), ‘Force of Law: The “Mystical Foundation of Authority”’, (1990) 11 *Cardozo Law Review* 919, 923.

akin to an academic torture device on the very subject of torture's legitimacy. Fortunately, every now and then a book comes along that does not arrogantly presume to instruct the reader what to think about a conventionally defined problem such as the TTBS. Instead, such a book attempts to uncover the problematic nature of convention itself – that is, of *what* we choose to think about and *how* we choose to think about it. The present volume is such a book. Its author's insights into the violence that is concealed and enabled by excessive use of the TTBS in academic and political discourse is a refreshing reminder that it is possible to think critically (and compassionately) about the theory and practice of human rights without immediately taking sides on a pressing 'problem' whose very taken-for-granted *frame of reference* is what actually poses the greatest problem.

Dr Farrell identifies three types of conventional positions or opinions that together characterise the logical space marked out for us in advance by the way the TTBS is usually constructed. They are: (1) the *absolute torture prohibition*, which, in line with international law, resolutely refuses to sanction torture in this or any other circumstance; (2) the *qualified torture prohibition*, which seeks to formalise a narrow legal exception to the general rule against torture through procedural devices such as 'torture warrants'; and (3) the *pragmatic absolute torture prohibition*, which officially denounces all torture as illegal but still manages to give a wink of approval at the extra-legal use of torture by agents of the state in certain extraordinary circumstances.

What unites all three of these approaches, Farrell maintains, is what might be called their pernicious moral and political *performativity*. Not only do they fail theoretically to resolve or even address the use of torture in exceptional situations, but more importantly they constitute speech acts whose intellectual cacophony drowns out the screams of those on whom torture is, as Farrell puts it, 'actually practiced in the liberal democratic state'. In other words, the book shows that the TTBS is a beguiling fiction that renders the realities of everyday state practices amounting to torture morally and legally invisible. Appropriating some powerful theoretical tools from the philosopher Giorgio Agamben,<sup>2</sup> the book's principal insight is that the discourse of the TTBS transforms the figure of the alleged terrorist-who-knows-about-the-ticking-time-bomb into a 'bare life' that is utterly excluded from the legal sphere by means of a Schmittian

<sup>2</sup> See Giorgio Agamben (tr. Daniel Heller-Roazen), *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press, 1995).



state of exception.<sup>3</sup> This implies, in turn, that in so-called ‘normal’ situations outside the context of the TTBS everyone has human rights that the state protects and no one is being tortured. One of the book’s most powerful contributions to the theory of human rights is to demonstrate the fundamental falsity of this implication by shining a bright light on the ubiquity of torture as it is actually practised by liberal and constitutional states.

In the end, this remarkable book gives proof of a simple but fundamental truth: that taking a moral and political stand against real instances of torture is not the same as simply being for a principle that forbids torture or against a principle that allows it. In essence, thinkers such as Farrell criticise conventional approaches to law and morality by criticising the universal extension of the stringent logic of consistency to the real conduct of men and women. Such logic does not allow us the space to notice that, in the words of Theodor Adorno, ‘perennial suffering has as much right to expression as a tortured man has to scream’.<sup>4</sup> To paraphrase Adorno, lines such as ‘No man should be tortured; there should be no concentration camps’ are undoubtedly true as an impulse, as a reaction to news that torture is going on somewhere. But at the same time ‘[t]hey must not be rationalized; as an abstract principle they would fall promptly into the bad infinities of derivation and validity.’<sup>5</sup>

The present book does human rights scholars and practitioners the inestimable favour of showing that the widespread academic and political obsession with developing a rationalised abstract formula for dealing with the scenario of the ticking time bomb threatens to lead us into a sort of bad infinity where we keep on overlooking instances of actual torture in order to take notice of the sort of ‘torture’ that only occurs inside works of fiction. The book thus belongs alongside other important theoretical contributions on the relationship between law and violence, including especially Walter Benjamin’s ‘Critique of Violence’,<sup>6</sup> which Farrell herself discusses in Chapter 3.

In one way or another, these contributions to critical thought can trace their lineage back to the very first text in the Western canon that dares to comment on the intimate relationship between law and violence. I am

<sup>3</sup> See Carl Schmitt (tr. George Schwab), *Political Theology: Four Chapters on the Concept of Sovereignty* (Cambridge, MA: MIT Press, 1985).

<sup>4</sup> Theodor Adorno (tr. E. B. Ashton), *Negative Dialectics* (London: Routledge, 1973), p. 362.

<sup>5</sup> *Ibid.* p. 285.

<sup>6</sup> See Walter Benjamin, ‘Critique of Violence’, in *Reflections: Essays, Aphorisms, Autobiographical Writings*, tr. Edmund Jephcott (New York: Schocken Books, 1978), p. 277.

referring of course to the Greek poet Pindar's famous fragment 169, the first four lines of which can be rendered in English as follows:

*Nomos* [signifying both law *and* custom] is lord of everything,  
Of mortals and immortals king.  
High violence it justifies,  
With hand uplifted plundering.<sup>7</sup>

Readers would do well to approach the present volume with an attitude, like Pindar's, that remains simultaneously critical *and* compassionate. I believe the book will amply reward those who are able to remain open to the essential task of subjecting customary ways of thinking and being to the kind of relentless ethical scrutiny that Dr Farrell brings to them here.

<sup>7</sup> Pindar (tr. C. M. Bowra), 'The Power of Custom', in T. F. Higham and C. M. Bowra (eds.), *The Oxford Book of Greek Verse in Translation* (Oxford: Clarendon Press, 1938), p. 330.

## ACKNOWLEDGEMENTS

When I picked up J. M. Coetzee's *Waiting for the Barbarians* for some light reading during the writing stage of my Ph.D. thesis, I had no idea how deeply it would influence my understanding of torture and of human rights more generally. I also did not realise that the Magistrate's struggle would become central to my own conclusions. *Waiting for the Barbarians* ends on a beautifully ambiguous note. Reflecting on a year of turmoil in the history of Empire, the Magistrate thinks to himself: 'There has been something staring me in the face, and still I do not see it.'<sup>8</sup> His inability to see, capture and conclude on the unfolding history and meaning of Empire, as well as his complicity to Empire, resonates with me as I try to see and make sense of what stares at me. In this unending effort, I have been guided and inspired by a number of individuals.

Above all, I would like to thank my Ph.D. supervisor, Dr Kathleen Cavanaugh, for her years of enthusiasm, expertise and provocation, her seemingly endless patience but mainly for trusting that I would eventually see something. I would also like to particularly thank my external examiner, Professor Louis Wolcher, who, through his scholarship and comments, has opened my eyes to new ways of seeing. Professor William A. Schabas has been an inspiration to me (not to mention infectious in his enthusiasm) since I first undertook my LLM at the Irish Centre for Human Rights. Finally, I would like also to give special thanks to Professor Edward Peters. My copy of his seminal text *Torture* is well thumbed for a good reason. Moreover, Professor Peters has kindly engaged with me on matters of substance and provided me with important comments, particularly as I moved this work from Ph.D. to book.

I would like to give special thanks to the team at Cambridge University Press for their hard work, guidance and patience with me in finalising this manuscript.

<sup>8</sup> J. M. Coetzee, *Waiting for the Barbarians* (London: Vintage Books, 2004), p. 170.

I spent a number of years at the Irish Centre for Human Rights as an LLM and Ph.D. student, as a postdoctoral research fellow and as a contract lecturer. Those years were foundational in so many ways for my academic career but, more importantly, they have set me up with friends for life. During my time there, I was lucky to meet, to learn from and to receive advice from a number of former and current staff. I would like, therefore, to thank Ray Murphy, Vinodh Jaichand, Shane Darcy, Joshua Castellino, Elvira Dominguez Redondo, Peter Fitzmaurice, Noam Lubell, Nadia Bernaz and Annysa Bellal. I have benefited from discussions with, and the friendship of, many 'Centre' folk including Andrea Breslin, Anthony Cullen, Josh Curtis, Aoife Daly, Fidelma Donlon, Annabel Egan, Roja Fazaeli, Niamh Hayes, Edel Hughes, Michael Kearney, Yvonne McDermott, Nicholas McGeehan, Eadaoin O'Brien, Joseph Powderly and John Reynolds.

A number of people have read and commented on drafts of this work. I would particularly like to thank Niamh Hayes, Andrea Breslin and John Reynolds for great comments and proofreads, always at the right time. I would also like to thank Fiona de Londras for her wonderfully critical reading of the introduction, not to mention her encouragement along the way. All errors are, of course, my own.

I would like to thank the National University of Ireland, Galway for initially providing me with a doctoral fellowship and for later providing me with a Write-Up Bursary. I would also like to thank the National University of Ireland for the award in 2010 of NUI E. J. Phelan Postgraduate Fellow in International Law. With this Fellowship I was in a position to devote my time to updating the Ph.D. for publication. I undertook the Fellowship at the Irish Centre for Human Rights and benefited so much from the experience of being a member of staff there.

Finally and notably, I would like generally to thank my family – immediate and extended – and my close friends. My parents, Brigid and Michael, are amazing people. They have never doubted my chosen career path, difficult and unrewarding as it may have looked to them at times. They are also endlessly selfless. To them and my brother Neil I must also give special thanks for remaining patient with me during the write-up period. I must thank my brother Stuart for being such a reliable source of cheer. Clare and Enagh, I must thank for the moral support; it's good to know you two are always there.

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