TORTURE, POWER, AND LAW

This volume brings together the most important writing on torture and the "war on terrorism" by one of the leading US voices in the torture debate. Philosopher and legal ethicist David Luban reflects on this contentious topic in a powerful sequence of essays including two new and previously unpublished pieces. He analyzes the trade-offs between security and human rights, as well as the connection between torture, humiliation, and human dignity; the fallacy of using ticking-bomb scenarios in debates about torture; and the ethics of government lawyers. The book develops an illuminating and novel conception of torture as the use of pain and suffering to communicate absolute dominance over the victim. Factually stimulating and legally informed, this volume provides the clearest analysis to date of the torture debate. It brings the story up to date by discussing the Obama administration's failure to hold torturers accountable.

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For Daniel and Rachel, who came of age in a confusing world
without becoming confused

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PREFACE

The chapters in this volume represent my major writing over the twelve years since September 11, 2001 on topics surrounding the "war on terrorism," particularly the torture debate. The earliest appeared in summer 2002, barely nine months after 9/11; the latest are Chapter 5 and the final chapter, which I wrote for this volume. The book focuses on three themes: the alleged "trade-off" between national security and human rights, the torture debate itself, and the ways law was manipulated to legitimize torture and ensure there would be no accountability for it.

Obviously, the three topics are tightly connected. If rights must give way to security in times of emergency, those may include the right against torture, at least in "ticking-bomb" cases. Because torture is illegal, leaders who want to torture terrorism suspects for information must manipulate the law. And if the emergency persists for years, guaranteeing the absolute prohibition on torture as a fundamental human right may be a luxury societies think they cannot afford.

The book offers an extended critique of this reasoning. Its first two chapters examine whether the fight against terrorism really does require the sacrifice of major rights, and warn that such sacrifices are likely to become dangerously normalized. Chapter 2 emphasizes that talk of "trade-offs" and "sacrifices" of rights for security is a grotesque euphemism if all we really mean is that we will cheerfully sacrifice other people's rights for our own security. It also argues that the separation of powers and civilian control of the military require a stringently limited commander-in-chief power, just the opposite of the nearly unbounded presidential power to override the law claimed by the George W. Bush administration.

Succeeding chapters criticize the ubiquitous use of imaginary "ticking-bomb" scenarios as justification for torture. The argument is both philosophical and political. I criticize the philosophical strategy of testing moral principles by posing improbable extreme cases, and I argue that ticking-bomb arguments deflect public reflection from actual practices of torture to a make-believe world. In this connection, Chapter 4 examines the handful of supposedly genuine ticking-bomb cases often cited to prove that torture saves lives, and demonstrates that they show nothing of the sort. On the philosophical side,

Chapter 4 raises two objections to investigating morality through extreme cases. First, the cases are often so cartoonish that they transform moral reflection into puzzle-solving of brainteasers; second, the procedure wrongly assumes that moral rationality is equipped to deliver principled verdicts on all possible sets of facts. In my view, moral theories codify rules of thumb useful in many cases but not all possible cases, and there is no reason to suppose that either deductions from general theories or analogical thinking from easy cases to hard ones will reliably deliver rational answers.

The book next turns from the critique of ticking-bomb arguments to investigate more deeply the evils of torture. The newly written Chapter 5 develops a conception of torture as the use of pain and suffering to communicate the torturer's absolute dominance over the victim's absolute helplessness. This is one of the book's central ideas. It adds to the legal definition of torture as the intentional infliction of severe pain or suffering an additional insight into the practice of torture: that the pain and suffering are not simply neurological experiences of a certain intensity – they are *contentful* experiences, and their content is that the absolutely helpless victim is under the total domination of a cruel and merciless master. Analyzing and unpacking this "communicative" conception of torture allows us to see more precisely why torture belongs on the short list of archetypal evils that should properly be regarded as unthinkable. The analysis shows how tightly connected torture is with other forms of humiliating and degrading treatment. Torture is totalitarianism in miniature. To treat torture as merely one option among many for combating terrorism, to be used whenever the benefits outweigh the costs, is to devalue core liberal values of dignity, equal human worth, and antisubordination into matters of mere convenience. To open the question of torture is therefore to call all those commitments into question as well. Instead, I argue that torture belongs in the same moral category as slavery, military massacres, and the subordination of women. Like torture, the latter are all practices taken for granted through most of human history. All are now forbidden (even though they have by no means disappeared from practice). And they are not merely forbidden – they are forbidden in the strong sense that to put back on the table the question of whether their utility might sometimes justify them is itself morally odious. The communicative conception of torture explains why torture belongs in the same category, which for short I call the category of the unthinkable. I do not propose the communicative conception as a substitute for the broader legal definition. To serve its practical ends, the legal definition must remain broad. Rather, the communicative conception aims to provide a deeper understanding of torture, as a step in a moral argument for including torture in the category of the unthinkable.

The next two chapters analyze humiliation and mental torture as fundamental affronts to human dignity. Chapter 6 explores the resources that religious traditions can offer to the defense of human rights, taking as its

example the treatment of human dignity in Jewish law. Chapter 7 examines mental torture, and demonstrates how US legislators, determined to shield law-enforcement personnel from potential accusations of torture, wrote convoluted and incoherent law that makes mental torture nearly impossible to prosecute.

The following chapters describe how government lawyers abused the law to get around essential prohibitions on torture, and explore the ethical obligations of professionals in government service. A concluding chapter brings the story up to date (to mid 2013), and analyzes the morality of the Obama administration's decision to "look forward, not back" by not seeking accountability for the US government's descent into torture.

Before 9/11, I never imagined that I would devote ten years to something called the "torture debate." I never imagined there would *be* a torture debate. Debating torture was not how I would have chosen to spend my time. But somehow I did find myself immersed in the debate, not only as a scholar but also as an occasional journalist, radio commentator, Congressional witness, and blogger, as well as a frequent speaker both in and out of the academy.

I felt impelled to speak out on these issues whenever I could. Several of the chapters of this book originated as speeches, and preserve some of the less formal style of writing intended to be spoken. One chapter includes as an appendix my testimony to the US Senate Judiciary Committee on the role of lawyers in legitimizing torture. Whenever I spoke, I tried to supply the background necessary to make my arguments self-contained. As a result, some of these chapters repeat bits of information that also appear in others. Because one aim of this book is to make this writing conveniently available in one place, I have left most of the chapters in their original form, despite minor overlaps; only Chapter 6 has been rewritten to eliminate redundancies, and I have also made stylistic revisions to Chapter 9.[1] Despite the overlaps, each chapter contains distinct and unique material that does not appear in the others. The arguments are cumulative, and my hope is that the questions each chapter leaves in readers' minds will be answered by others.

Some chapters develop and expand on brief ideas from an earlier chapter. For example, Chapter 4 revisits, expands, and provides a philosophical basis for the critique of ticking-bomb arguments in Chapter 3. The newly written Chapter 5 provides an analysis of torture and its evils that I was only groping towards in Chapters 4 and 6.

[1] In two other chapters originally published in law reviews, I have removed some footnotes and consolidated others (and, even so, the chapters remain heavily footnoted). The conventions of law review citation require a footnote every time a document is mentioned, and a source citation to support every factual assertion, including minor or uncontroversial assertions. There are reasons for this convention, but it multiplies footnotes that readers of this book would likely find more distracting than helpful.

The issue that most preoccupied me is the conduct of the "torture lawyers" – the US government lawyers whose legal opinions opened the door to torture. The issue lies directly at the intersection of my work on the "war on terrorism" and my career-long interest in the professional ethics of lawyers. The torture lawyers' role first came into the open in 2004, soon after the revelations about Abu Ghraib, the US military prison in Baghdad, and it prompted my best-known paper on torture, "Liberalism, Torture, and the Ticking Bomb" (Chapter 3). But the full extent of the torture lawyers' activities did not come out until April 2009, when the Obama administration released hitherto secret torture memos, and again in February 2010, when the administration released documents from an internal investigation by the Office of Professional Responsibility (OPR), the Justice Department's internal ethics watchdog.

That investigation lasted for nearly six years. I was stunned to discover from one of these released documents that the OPR had been influenced by my writings. A letter from US Attorney General Michael Mukasey to the head of the OPR complains that "as confirmed in our meeting, the Draft Report draws substantially from Professor Luban's work." Mr. Mukasey continues:

> We are not personally familiar with all of Professor Luban's work, and have nothing bad to say about him, but commentators, like witnesses, typically have certain seeming biases that are conveyed so as to inform a reader or jury or decision-maker. Thus, for example, it would appear at least worth mentioning that, while Professor Luban seems to be a very thoughtful and prolific scholar, he is a trained philosopher, not an attorney; and he has not practiced law. He also appears to be a longtime—to be sure, thoughtful and sincere, but longtime—critic of the Bush Administration and of the War on Terror in general. These facts about Professor Luban do not make him wrong necessarily, of course.[2]

It seems to me that Mr. Mukasey's warning about commentators' biases is exactly right. One of my hopes is that reading these chapters together will reveal a coherent line of argument, and demonstrate that my conclusions are based on reasons and not biases. Of course, that is something readers will judge for themselves.

All the chapters were responses to unfolding events, written in something close to real time, and fuelled by a sense of urgency. From the beginning, the whole story of the war on terrorism and the torture program was blanketed in secrecy. Two weeks after 9/11, US Secretary of Defense Donald Rumsfeld gave journalists fair warning to expect government reticence and disinformation:

[2] Letter from Michael B. Mukasey, Attorney General, and Mark Filip, Deputy Attorney General, to H. Marshall Jarrett, Counsel, Office of Professional Responsibility, Jan. 19, 2009 (www2.nationalreview.com/dest/2010/02/20/description011909.mukaseyfilipletter-toopr.pdf). In fact, I never had any contact with the OPR, and had no advance notice that its report drew on the arguments I had been urging in print since 2005.

"Of course, this conjures up Winston Churchill's famous phrase when he said, '[S]ometimes the truth is so precious it must be accompanied by a bodyguard of lies.'"[3]

Secrecy meant that information trickled out, and these essays necessarily relied on incomplete or superseded information. To adapt another Rumsfeld aphorism, you write with the information you have, not the information you might want to have.[4] For example, Chapter 1 reports that Sweden had rendered a Muslim cleric to Egypt, where he was tortured. Years later it came out that actually it was the CIA that carried out the rendition. Chapter 8 describes the CIA's interrogation techniques based on a 2005 news report that listed six of them; when the torture memos were finally released, there turned out to be thirteen. There are other such examples in this book. In addition, the book discusses legal decisions that were sometimes overtaken by higher court decisions or new legislation.

To several chapters I have therefore added prefaces to frame the issues and bring the story up to date. The prefaces (all written in 2013) add significant new material. Writing them, I found that to a dismaying extent the worries I voiced a decade ago remain just as worrisome now.

By now, there is a large library of books and articles on the topics of this book, especially the torture issue. Many of them are very good. For the sake of readability, I have chosen not to add discussions of this literature to the prefaces, or to address disagreements between other authors and my own viewpoint. These omissions should not be taken to indicate disregard for the work of others, but only a desire to keep the prefaces brief and focused.

A note on terminology

Chapters in this book will discuss interrogation practices of a kind sometimes described as "torture lite," sometimes as "bloodless torture," and sometimes – in the official terminology of the US government – as "enhanced interrogation techniques." These include subjecting people to extremes of hot or cold, prolonged isolation, sleep deprivation, humiliations, threats, stress positions, slaps, bombardment with loud music, and nonlethal water suffocation.

Several of the chapters analyze official opinions by US government lawyers declaring that these techniques, singly or in combination, do not cross the legal line into torture. I criticize those opinions and reject their conclusions. For reasons that the book sets out at length, I maintain that US interrogators did,

[3] Defense Department Briefing, Sept. 25, 2001. According to some sources, Churchill's quotation is, "In time of war, when truth is so precious, it must be attended by a sturdy bodyguard of lies."

[4] "As you know, you go to war with the army you have, not the army you might want or wish to have at a later time." Wolf Blitzer Reports staff, *CNN*, "Troops Put Rumsfeld in the Hot Seat," Dec. 8, 2004 (http://edition.cnn.com/2004/US/12/08/rumsfeld.kuwait/index.html).

in fact, torture detainees. Recently, a comprehensive report by the bipartisan Constitution Project Task Force on Detainee Treatment reached the same conclusion, after a two-year-long investigation. They report that torture "occurred in many instances and across a wide range of theaters," not only in the three cases in which the US government admittedly waterboarded prisoners.[5] Significantly, President Barack Obama has publicly described the interrogation program as torture.

Journalists who write about these issues face a dilemma: to use the T-word or not? To call these practices "torture" amounts to rejecting the Bush administration's position that they are not torture. But to withhold the word "torture," or to adopt the euphemism of "enhanced interrogation," acquiesces in the Bush administration's legal arguments, and rejects the views of those of us who believe the practices *are* torture and that it is important to call a spade a spade.[6] Either choice begs the question. "Harsh tactics" works a bit better, but it still begs the question of whether the tactics are harsh enough to be torture – in which case, why settle for "harsh tactics"? After a few years of bumbling around the issue, US newspapers hit on a clumsy but suitably noncommittal formula: "techniques that some critics describe as torture."

As a scholar, I dislike begging questions, and begging one of a book's central questions through conclusory word choices seems downright sinful. That might recommend a similarly noncommittal strategy. But the journalists' formula, used throughout this book, would be a mortal sin against English prose. It would also put the author in the bizarre position of writing badly in order to sound noncommittal about his own conclusions.[7]

[5] The Constitution Project, Report of the Constitution Project's Task Force on Detainee Treatment 3 (2013) (http://detaineetaskforce.org/read/).

[6] "Enhanced techniques," by the way, literally translates a euphemism coined by the Gestapo in 1937 for similar interrogation methods. Andrew Sullivan, "Verschärfte Vernehmung," The Daily Dish (*The Atlantic*), May 29, 2007 (www.theatlantic.com/daily-dish/archive/2007/05/-versch-auml-rfte-vernehmung/228158/). Sullivan reproduces the Gestapo's order.

[7] The Constitution Project Task Force noted that it faced the same problem. They write:

> The question as to whether U.S. forces and agents engaged in torture has been complicated by the existence of two vocal camps in the public debate. This has been particularly vexing for traditional journalists accustomed to recording the arguments of both sides in a dispute without declaring one right and the other wrong. The public may simply perceive that there is no right side, as there are two equally fervent views held views [*sic*] on a subject, with substantially credentialed people on both sides. . .
>
> But this Task Force is not bound by this convention.
>
> The members, coming from a wide political spectrum, believe that arguments that the nation did not engage in torture and that much of what occurred should be defined as something less than torture are not credible.

Report of the Task Force on Detainee Treatment, at pp. 3–4.

For these reasons, I will usually forge ahead with the T-word and its cognates: *torture*, *torturer*, *torture memos*, *torture program*, *torture lawyers* (who wrote the torture memos), *torture doctors* (who assisted at torture sessions), and so on. Given that all terminologies beg the question, I might as well beg it in the direction my arguments support, not the direction they criticize. But readers must understand that when I say "torture" I am saying something that will seem like a tendentious and infuriating provocation to those who reject the label. Provocation is not my reason for using the language.

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A great many people have read and commented on these chapters in draft; many of them are acknowledged below. And more commentators than I can possibly remember, in audiences from San Marcos, Texas, to Saskatoon, from Ankara to Australia, from Amnesty International events to the US Military Academy, have influenced their final form. I owe thanks to all of them.

My Georgetown colleagues have been indispensable. I would like to single out Marty Lederman, with whom I have spent long hours discussing the issues in this book. On top of his breadth of knowledge and astounding skill as a lawyer and analyst, Lederman has a special knack of clarifying other people's thinking and making their work better. His detailed comments on several of these chapters saved me from mistakes and changed my thinking, sometimes dramatically; his help was indispensable on Chapters 4, 7, 8, and 10, even though he strongly disagrees with me on some issues. I am also deeply grateful to Julie O'Sullivan for years of illuminating discussions on the topics of the book, as well as her constant moral support and friendship. Discussions with David Cole, Laura Donohue, John Mikhail, Mike Seidman, and Carlos Vázquez have been extremely helpful. Robin West has been a friend as well as an inspiration for twenty-five years. And the encouragement of Naomi Mezey and Nina Pillard has been especially gratifying. Georgetown's research librarians provided indispensable help.

Henry Shue's influence on these pages will be clear. It is most obvious in Chapter 7, which we wrote together, and Chapter 5 (written originally for a *Festschrift* for Henry), which uses two of his important papers as my point of departure. I read drafts of his foundational work on human rights even before he and Peter Brown hired me at the University of Maryland's Center for Philosophy and Public Policy in 1979, and his ideas about basic rights have shaped my thinking ever since, in great and small ways.

My greatest debt is a collective one. Early in 2005, Lederman and Kim Lane Scheppele began the *Law of Torture* listserv, a forum for lawyers, activists, scholars, psychologists, journalists, military officers, and former interrogators to exchange information, documents, news, and analyses. List members often argue sharply with each other, but the arguments are conducted in a splendidly collegial spirit. Eight years after the forum began, I find three thousand

of its sometimes lengthy e-mail exchanges in my archive; and I archived only a fraction of what I read. Most of what I know came originally from the forum, and much of what I think was tested there. I have never met many of my most constant correspondents, but very little of this book could exist without them.

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A version of Chapter 9 was originally published in

Kieran Tranter *et al.*, Eds., *Reaffirming Legal Ethics: Taking Stock and New Ideas* (Routledge, 2010), pp. 56–72. Reprinted with permission of the publisher.

Chapters 5 and 10 are published here for the first time, as are the prefaces to all chapters that have them.