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Torture in the Living Room

M. Angela Buenaventura¹

INTRODUCTION

The prohibition against torture has become a *jus cogens* of international law.² In other words, the prohibition is considered binding on all states, even in times of emergency,³ and regardless of a state's signing of a convention or actually practicing in accordance with the norm.⁴ Domestically, the United States has signed treaties prohibiting torture and also has enacted federal statutes that prohibit torture. Despite these prohibitions, the "torture memos"⁵ and the leaked photos displaying the treatment of prisoners at Abu Ghraib prison have shown that the current administration is indeed responsible for acts of torture.

As images of cruel and degrading prisoner treatment—some of which rises to the level of torture—have emerged, and evidence of the current administration's acceptance of such interrogation techniques has made its way into the public arena, fictional portrayals of torture on television programs have become more prevalent. In this article, I will explore the effects that fictional portrayals of torture have on the torture debate in America. By focusing on the portrayal of torture and other coercive interrogation techniques on the television program *24*—a serial drama in which torture methods are tools of the trade for an agent with the fictional Counter Terrorist Unit of the Central Intelligence Agency (CIA)—I will argue that inaccurate fictional portrayals of torture on television mislead the American public as to the true nature of torture, thereby obscuring the public debate and diminishing the public pressure to hold those guilty of torture accountable.

I will begin in Part I by briefly addressing the current laws and treaties that proscribe the use of torture. Part II outlines the current public debate

on torture, while Part III considers how fictional portrayals of torture on television affect this national debate. Drawing on critiques of the “ticking time bomb” hypothetical by David Luban and Elaine Scarry, as well as Susan Sontag’s theories about how the public responds to images of war and atrocity, I will analyze the ways in which fictional portrayals of torture on shows like *24* shape the public debate on torture. Part IV will explore specifically how the television drama *24* fits into and influences that debate. Next, in Part V, I will discuss why having a substantive, realistic public debate on torture is so important. Finally, in Part VI, I will propose several means, including possible remedies and responses, to counteract the detrimental effect fictional portrayals of torture have on any productive torture debate.

I. LAW PROHIBITING TORTURE

As previously stated, the prohibition against torture has become a *jus cogens* of international law. Moreover, the United States has signed treaties that make torture illegal, and under Article VI of the U.S. Constitution, “all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.”⁶ First, the United States ratified the Third Geneva Convention, the Geneva Convention Relative to the Treatment of Prisoners of War,⁷ in July 1955.⁸ The Third Geneva Convention provides that prisoners of war “must at all times be humanely treated”⁹ and that “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 whatever.”¹⁰

The United States also ratified the Fourth Geneva Convention, the Geneva Convention Relative to the Protection of Civilians in Time of War, in July 1955.¹¹ Although this treaty has limited applicability because it only comes into force during times of war or occupation, it created a new category of international offenses, which it labeled *grave breaches*.¹² According to Article 147, grave breaches include:

willful killing, *torture or inhuman treatment*, including biological experiments, willfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.¹³

In 1994 the United States ratified the Convention Against Torture (CAT).¹⁴ The treaty came into force when the U.S. Congress passed implementing legislation in 1998.¹⁵ Article 2 of the CAT provides:

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political in stability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture.¹⁶

Thus, torture is prohibited by the CAT under all circumstances.

Furthermore, some scholars argue that the U.S. Constitution itself prohibits torture.¹⁷ For example, the Eighth Amendment prohibits cruel and unusual punishment,¹⁸ and the Fifth Amendment provides that life, liberty, and property shall not be taken without due process of law.¹⁹

Federal statutes and military codes also prohibit torture: 18 U.S.C. § 2340 imposes U.S. criminal liability on any individual who commits an act of torture anywhere in the world,²⁰ and 28 U.S.C. § 1350 establishes civil liability for acts of torture.²¹ Finally, the Uniform Code of Military Justice makes cruelty, oppression, or maltreatment of prisoners by U.S. forces a crime.²²

II. THE CURRENT DEBATE ON TORTURE

A. *The Ticking Time Bomb*

Although torture is unquestionably illegal, the debate persists on whether or not torture is justified under certain circumstances. The focal point of the debate about torture is the ticking time bomb hypothetical. Although the hypothetical may be worded slightly differently in different contexts, the general dilemma is as follows: A bomb threatens countless lives and a suspect refuses to disclose information that might prevent or reduce the potential damage from an explosion. Do you torture the suspect in order to obtain information that could save countless lives? David Luban has noted that the ticking time bomb hypothetical has become the “alpha and omega of our thinking about torture.”²³ Luban stated, “Everyone argues the pros and cons of torture through the ticking time bomb. Senator Schumer and Professor Dershowitz, the Israeli Supreme Court, and indeed every journalist devoting a think-piece to the unpleasant question of torture, begins with the ticking time bomb and ends there as well.”²⁴

B. *Dershowitz*

One of the most well-known analyses of the acceptability of torture, which focuses on the ticking time bomb scenario, is Alan Dershowitz’s book *Why Terrorism Works: Understanding the Threat, Responding to the Challenge*.²⁵ In his book, Dershowitz explores the possibility of striking a balance between national security and civil liberties through the use of *torture warrants*.²⁶ A torture warrant is judicial permission to utilize a non-lethal method of torture (such as “[inserting] a sterilized needle . . . under the fingernails [of a suspect] to produce unbearable pain without any threat to health or life”²⁷) to obtain information from the suspect.²⁸ Law enforcement officials would be able to obtain a judicial warrant from a court that would allow them to torture a suspected terrorist.²⁹

Dershowitz argues that torture warrants would minimize the use of torture against terrorist suspects for several reasons.³⁰ First, judges would only grant warrants when presented with compelling reasons, so the amount of physical violence against terrorist suspects would decrease.³¹ Dershowitz states:

[A]t the most obvious level, a double check is always more protective than a single check Requiring the decision [to torture a suspect] to be approved by a judicial officer will result in fewer instances of torture even if the judge rarely turns down a request.³²

Second, torture warrants would give suspects one more opportunity to testify before being subjected to torture.³³

Dershowitz further argues that torture warrants would bring the debate on torture out into the open.³⁴ He contends that integrating torture into the legal system through the use of judicial warrants is preferable to allowing torture to occur “ad hoc, off-the-books, and under-the-radar-screen.”³⁵ Torture warrants would make officials publicly accountable for their actions, and torture could be confronted in a candid way rather than ignoring the problem or pretending that only a few bad apples are responsible.³⁶ Dershowitz states that “in a democracy it is always preferable to decide controversial issues in advance, rather than in the heat of battle.”³⁷

Moreover, Dershowitz argues that torture warrants would better protect the rights of the suspect. He states that a suspect “would be granted immunity, told that he was now compelled to testify, threatened with imprisonment if he refused to do so, and given the option of providing the requested information.”³⁸ If the suspect refused to provide information, he would be threatened with torture. Thus, the suspect would be more willing to provide the information since the use of torture had been authorized by law.³⁹

C. Criticisms of the Ticking Time Bomb and Refutations of Dershowitz

Although the ticking time bomb and, by extension, Dershowitz's torture warrants have become the "alpha and omega" of the torture debate, several notable scholars—including David Luban, Elaine Scarry, and Richard Posner—have denied the practicality of focusing on the ticking time bomb hypothetical and have refuted Dershowitz's rationale for torture warrants.

1. Luban

David Luban argues that the ticking time bomb hypothetical has become the "alpha and omega of our thinking about torture," not because the scenario is likely to play out in real life, but in order to sway those who believe in an absolute prohibition on torture.⁴⁰ In other words, once this extreme and improbable hypothetical convinces a torture prohibitionist that her moral principles can be breached under certain circumstances and she can no longer claim moral high ground, all that is left is deciding which scenarios justify torture.⁴¹ In addition, the ticking time bomb serves a second rhetorical goal of painting the torturer in a different light—the torturer becomes a heroic public servant out to save lives rather than a cruel sadist.⁴² In this way, torture is divorced from cruelty and becomes more palatable.⁴³

Luban warns that in a world of imperfect information, the ticking time bomb "bewitches us" and distracts us from the real debate.⁴⁴ He notes, "The ticking-bomb scenario cheats its way around difficulties by stipulating that the bomb is there, ticking away, and that officials know it and know they have the man who planted it. Those conditions will seldom be met."⁴⁵ In reality, al Qaeda suspects will almost never be interrogated to find out where a bomb is hidden, but rather to add to a body of intelligence that might later "unwind" a terrorist organization.⁴⁶ Rather than evaluate the merits of torture through the black and white lens of the ticking time bomb scenario, Luban suggests we ask ourselves more complex and realistic questions. For example, how does the chance that a suspect has vital

information affect a decision to torture?⁴⁷ Does a suspect's refusal to talk after being tortured mean it is time to stop or time to ramp up the level of torture?⁴⁸ Finally, "must a citizen . . . unblinkingly think the unthinkable and accept that the morality of torture should be decided purely by totaling up costs and benefits[?]"⁴⁹ At a time when the United States is undertaking an endless war on terror and the administration would have us believe that a permanent emergency exists, it is dangerous to assume that torture can be neatly confined to exceptional ticking time bomb cases.⁵⁰

In addition to deconstructing the absurdity of a situation where a would-be torturer has perfect information and perfect certainty, Luban makes the salient point that any discussion of the ticking time bomb hypothetical focuses only on discrete instances of torture for emergency's sake, distracting from any discussion of the possibility that we are condoning organized torture and a culture of torture.⁵¹ He notes, "The real world is a world of policies, guidelines, and directives. It is a world of practices, not of ad hoc emergency measures."⁵² He further notes that one can reasonably infer that the administration's recent efforts to defend its actions demonstrate that a torture culture is firmly in place despite official condemnation of it.⁵³

Moreover, Luban finds fault in Dershowitz's assertion that warrants would make the torture of suspects less likely.⁵⁴ Noting that Jay S. Bybee—who, in August 2002, signed the U.S. Department of Justice (DOJ) memo interpreting U.S. laws so as to permit torture ("the Bybee memo")⁵⁵—is now a federal judge,⁵⁶ Luban asserts that because politicians pick judges, if politicians accept torture, then judges will similarly accept torture.⁵⁷ Thus, "once we create a torture culture, only the naïve would suppose that judges will provide a safeguard. Judges do not fight their culture—they reflect it."⁵⁸

2. Scarry

In her essay “Five Errors in the Reasoning of Alan Dershowitz,” Elaine Scarry outlines similar contentions with Dershowitz’s reasoning in particular and the ticking time bomb hypothetical in general. Like Luban, Scarry explains the improbability of having perfect information about a suspect’s guilt and a bomb’s reality.⁵⁹ She, too, argues that introducing a hypothetical occasion for torture that bears no resemblance to “the thousands of cases that actually occur” merely serves to “change torture into a sanctionable act.”⁶⁰

Scarry also echoes Luban’s doubt that torture warrants would decrease the incidence of torture,⁶¹ noting that the Foreign Intelligence Surveillance Act (FISA)⁶² has declined only one requested warrant in twenty-five years.⁶³ Moreover, she argues that there is no reason to believe that people who are willing to breach our current prohibition on torture would obey court orders if a torture warrant were denied.⁶⁴ Scarry additionally argues that, contrary to Dershowitz’s assertion, torture warrants would not make officials publicly accountable for their actions since obtaining a warrant would actually release a torturer from liability.⁶⁵ Finally, Scarry points out that warrants most likely would not allow us to review torturers’ actions, noting that our “[l]ong experience with search warrants suggests [that] . . . far from facilitating review, [they have] historically . . . tended to close the door on review.”⁶⁶

3. Posner

Although Judge Posner has expressed approval of Dershowitz’s reasoning that civil liberties may need to be curtailed in times of endangered public safety, he has expressed strong disapproval of Dershowitz’s torture warrant proposal.⁶⁷ First, Posner doubts that torture warrants would provide a check on executive discretion.⁶⁸ He notes that judicial officers authorized to issue warrants would be selected at least partially for their sensitivity to security concerns.⁶⁹ In addition, because

warrants are issued in ex parte proceedings, law enforcement officers can forum shop for judges or magistrates who are likely to approve the warrants.⁷⁰

Second, Posner refutes Dershowitz's claim that warrants would demystify torture practice and encourage public debate because warrants and the reasons for granting them would most likely be kept secret.⁷¹ Posner disagrees with Dershowitz's proposal that screening would make law enforcement officials seeking warrants more candid and would provide a significant check against government use of torture, arguing that "[t]he requirement of a warrant would no doubt make the [law enforcement] officers seeking them a little more careful, but perhaps not much more truthful or candid."⁷²

Moreover, Posner has expressed strong concerns about legitimizing the practice of torture through torture warrants.⁷³ Instead, Posner believes that interrogation techniques that may qualify as torture should remain illegal technically, but should be permitted in "extreme circumstances."⁷⁴ He argues that if courts declare that certain highly coercive interrogation techniques are acceptable in certain circumstances, officers will explore the outer bounds of the rule.⁷⁵ In addition, Posner argues that subjecting something immoral and customarily prohibited to the controls of the legal process will legitimize it.⁷⁶ Posner believes that it would be better "to leave in place the customary legal prohibitions, but with the understanding that of course they will not be enforced in extreme circumstances."⁷⁷ Furthermore, Posner notes that "requiring a warrant in cases of coercive interrogation would operate merely to whitewash questionable practices by persuading the naive that there was firm judicial control over such interrogations."⁷⁸

In summary, the current debate on torture can be characterized generally as follows: Those who believe torture should be allowed under certain circumstances tend to focus on a cost-benefit analysis and the ticking time bomb situation, reasoning that the cost of curtailing civil liberties in times of imminent danger is outweighed by the benefit of saving innocent

civilians through the use of torture. Those who would prohibit torture believe that the ticking time bomb hypothetical is an unrealistic and impractical method of assessing the issue, that the ticking time bomb hypothetical obscures real issues, and that torture warrants will not reduce the incidents of torture.

III. HOW FICTIONAL PORTRAYALS OF TORTURE CAN AFFECT THE NATIONAL DEBATE

In order to understand how fictional portrayals of torture can affect the public's understanding of the reality of torture, it is first necessary to examine how images of actual torture can influence citizen action. An analysis by cultural commentator Susan Sontag and the public reaction to the photographs of abuse at the Abu Ghraib detention center show that images play a substantial role in shaping public debate.

A. Sontag

In her book *Regarding the Pain of Others*, Susan Sontag explores how images of atrocity have the power to shape viewers' understanding of the atrocities in a way that can incite them to act.⁷⁹ She notes that the photographs of the suffering of Vietnamese villagers and American conscripts published by *Life* magazine starting in 1962 intensified protest against the American presence in Vietnam.⁸⁰ Sontag further notes that although “[i]t takes some very peculiar circumstances for the war to become genuinely unpopular. . . . When it does, the material gathered by photographers, which they may think of as unmasking the conflict, is of great use.”⁸¹

However, Sontag also acknowledges the limitations and dangers of communicating to the public through pictures.⁸² She stresses that pictures serve to mobilize people to act on their own preexisting beliefs rather than giving them pause to question them.⁸³ She notes that it is “the whims and

loyalties of the diverse communities” that determine the meaning of photographs, not the photographer’s intentions.”⁸⁴ Sontag writes:

Images of dead civilians and smashed houses may serve to quicken the hatred of the foe, as did the hourly re-runs by Al Jazeera, the Arab satellite television network based in Qatar . . . Incendiary as that footage was to the many who watch Al Jazeera throughout the world, it did not tell them anything about the Israeli army they were not already primed to believe. In contrast, images offering evidence that contradicts cherished pieties are invariably dismissed as having been staged for the camera.⁸⁵

Sontag also notes that pictures can be dangerous because they lead to oversimplified conceptions of reality. Although “[t]he understanding of war among people who have not experienced war is now chiefly a product of the impact of . . . images,”⁸⁶ this understanding is dangerous because photographs are easily recalled overgeneralizations, “like a quotation, or a maxim or proverb.”⁸⁷

Furthermore, Sontag points out that photographs of atrocities are unreliable because military authorities often censor war photography in order to maintain public support and morale.⁸⁸ She notes:

What the American military promoted during the Gulf War in 1991 were images of the techno war . . . that illustrated America’s absolute military superiority over its enemy. American television viewers weren’t allowed to see footage acquired by NBC . . . of what that superiority could wreak: the fate of thousands of Iraqi conscripts who . . . were carpet bombed with explosives, napalm, radioactive DU rounds, and cluster bombs . . .⁸⁹

Sontag is not alone in her fear that pictures are manipulated to advance an agenda. Citing the combination of accreditation and daily briefings in Vietnam, the selected press pools and video briefings in the Persian Gulf War of 1990–91, and the Pentagon’s strategy of embedding reporters and their camera crews with fighting units in the most recent war in Iraq, one commentator has noted that during the post–World War II period, neither

the U.S. nor the U.K. military has operated without detailed media management procedures designed to influence pictorial outcomes.⁹⁰ More recently, both the U.S. media and Al Jazeera have used images to manipulate public opinion about the war in Iraq.⁹¹ While Al Jazeera airs footage of “blown-out brains, the blood-splattered pavements, [and] screaming infants,”⁹² the U.S. media closes its eyes to civilian casualties and airs interviews of the families of American military serving in Iraq.⁹³

In summary, visual representations of torture can influence the national debate because they can incite political action (given the proper context), can become easily recalled overgeneralizations of a controversial situation, and can be manipulated by the government to create a desired perception of events.

B. Abu Ghraib Photos, 2004 and 2006

The public’s reaction to the Abu Ghraib photos also supports the notion that pictures can lead to political action. Although written accounts of prisoner mistreatment existed before these pictures became public,⁹⁴ there was no substantial public outcry until the pictures of American soldiers tormenting Iraqi prisoners in Abu Ghraib were published on April 28, 2004. After the pictures were leaked, the Bush administration and its lawyers worked to prevent the release of any more photographs or videotapes.⁹⁵ Thus, the outrage resulting from the pictures led to political action, albeit action to conceal mistreatment. As mentioned previously and discussed in detail in Part V below, the DOJ’s repudiation of its earlier analysis of the definition of torture and a legislative amendment prohibiting torture can be accredited to widespread public criticism after the Abu Ghraib scandal.⁹⁶

Indeed, in 2006, when Judge Alvin Hellerstein ordered the release of additional Abu Ghraib photographs after the American Civil Liberties Union (ACLU) filed a Freedom of Information Act (FOIA) lawsuit against the U.S. Department of Defense (DOD) in October 2003,⁹⁷ his opinion

reflected a strong belief in the power of pictures to inform the public and incite political action.

Publication of the photographs is central to the purposes of FOIA for two main reasons. First, it initiates debate about the improper and unlawful conduct of American soldiers—“rogue” soldiers, as they have been characterized. Second, it raises other important questions such as whether supervisory failures in the chain of command may make commanding officers culpable *in addition to* the soldiers who were already court-martialed for perpetrating the wrongs.⁹⁸

Although the government planned to appeal the decision, it abandoned the appeal and agreed to release the disputed pictures.⁹⁹ In a filing to the United States Court of Appeals for the Second Circuit, government lawyers cited *Salon.com*'s publication of an official army criminal archive that included many, if not all, of the disputed images as the reason for dropping their legal fight.¹⁰⁰ In *Salon.com*'s February 16, 2006, statement explaining why they released the photos, the editors echoed both Sontag's and Judge Hellerstein's belief in the power of pictures to inform the public and incite political action, stating: “The . . . reason for publishing these pictures is that the system itself broke down over Abu Ghraib. . . . After an initial flurry of outrage, the Republican-controlled Congress lost interest in investigating whether senior military officers—and even Pentagon officials—created a climate in which torture (yes, torture) flourished.”¹⁰¹

Government actions to control the messages sent to the public by pictures of conflicts, as well as the commentary provided by organizations such as the ACLU and *Salon.com* explaining their efforts to release pictures of torture and atrocity, corroborate Sontag's theory that pictures have the power to shape the public's perception and incite political action.

IV. 24: A CASE STUDY ON THE NATIONAL DEBATE AND FICTIONAL PORTRAYALS OF TORTURE

As detailed above, real-life images of torture have the power to shape national debate and political action. That power is not diminished when the images are fictional. In this section, I will explore how fictional portrayals of torture can shape the torture debate and incite political action by focusing on the popular television show *24*.

A. An Overview of 24

24, a U.S. television series broadcast by the Fox Broadcasting Company (Fox),¹⁰² premiered on November 6, 2001, and continues to be aired in forty-five countries worldwide.¹⁰³ The main character, Jack Bauer, is the head of an elite team of CIA agents known as the Counter Terrorist Unit (CTU).¹⁰⁴ The show also features Jack's colleagues at the CTU, an assortment of terrorists, and important political figures such as senators and the President.¹⁰⁵

In this concept drama, each season takes place within one twenty-four-hour period.¹⁰⁶ The sense of urgency created by this framework is emphasized by a ticking digital clock that appears on-screen throughout the show.¹⁰⁷ As one commentator has noted, the main characters of this program are not Jack Bauer and President David Palmer; they are the minute and the second: "Emblazoned on the screen at irregular intervals is a digital clock that marks off the passing seconds, and every time we see it, our anxiety ratchets up a notch."¹⁰⁸ Also adding to the sense of excitement and urgency are the rapid scene changes between different locations, which follow the parallel adventures of different characters tied together by the central plot.

The formula for each season remains, for the most part, static: there is a central threat to the United States that Jack Bauer and the CTU must stop before countless lives are lost. Throughout each episode, another dramatic layer is added to the show as Jack experiences a series of personal problems

that are integrated into the main plot. For example, in season one, the main plot involved Jack Bauer and other CTU agents attempting to stop a group of terrorists trying to kill presidential candidate David Palmer.¹⁰⁹ In a subplot, a mole inside the CTU is exposed.¹¹⁰ Tying the plot to Jack's personal life, the terrorists attempt to assassinate Palmer—with whom Jack is friends—and capture Jack's family.¹¹¹

One notable characteristic of the show is the frequent portrayal of torture, usually utilized to obtain information from a suspect. As one commentator notes: "On *24*, torture is less an unfortunate last resort than an epistemology. Whenever an urgent or sticky question of fact arises, someone—bad guy or good guy, terrorist or counterterror agent; it doesn't matter—automatically sparks up the electrodes or starts filling syringes with seizure juice."¹¹² Examples abound. In season one, when a suspected mole named Jamey Farrell will not talk, CTU agents bring her to their headquarters and threaten to harm her.¹¹³ In the same "day," Jack Bauer rams a kidnapping suspect in the chest with the back end of a knife. As the suspect begins to have a heart attack, Jack holds the suspect's heart pills in his hand, claiming he'll hand them over after he gets the information he wants.¹¹⁴

Later seasons continue the tradition of showing torture under similarly urgent circumstances. In season two, Jack Bauer shows a suspected terrorist a video monitor linked to a live satellite of the suspect's family in captivity.¹¹⁵ As he threatens to kill the suspect's family if the suspect does not talk, Jack fakes a shooting of the suspect's oldest son on the monitor, and the suspect gives Jack the desired information.¹¹⁶ In season three, Nina Myers, Jack Bauer's ex-girlfriend and former CTU agent-turned-mole, is interrogated by a CTU torture expert to extract information about a deadly biological weapon.¹¹⁷ When she refuses to talk, the interrogator sticks a needle into her carotid artery.¹¹⁸

In the first episode of season four, Jack Bauer breaks into an interrogation room, shoots a captured terrorist in the kneecap, and threatens to shoot him

again if he does not give up the information Jack needs.¹¹⁹ Later in season four, when CTU agents suspect that the secretary of defense's son knows something about his father's kidnapping, they subject him to sensory deprivation.¹²⁰ In the same season, a CTU analyst is suspected of being a mole and is immediately brought into the interrogation room for a taser session.¹²¹ Later in the season, after Jack Bauer and other CTU agents break into a hotel room to arrest a suspected terrorist's wife who has been shot, one of the agents grinds his thumb into the wife's gunshot wound and tells her that she must give up information about her husband if she wants the pain to stop.¹²² During the first episode of season five, Jack Bauer interrogates the critically wounded leader of a team of assassins, promising medical attention if he cooperates.¹²³ Later in season five, Audrey Raines, an inter-agency liaison for the DOD, is implicated in ongoing terrorist attacks.¹²⁴ She is soon cleared of wrongdoing, but not before being subjected to torture involving Sodium Pentothal.¹²⁵

24 has become a water cooler show. According to Nielsen ratings for the week of Tuesday, April 18, 2006, 12.5 million Americans watched *24*.¹²⁶ It also has received critical acclaim.¹²⁷ Kiefer Sutherland, who plays Jack Bauer and also executive produces the show, won a Golden Globe for his performance,¹²⁸ and the creators of the show, Joel Surnow and Robert Cochran, won an Emmy Award.¹²⁹ *24* also won the Golden Globe for Best Drama Series in 2004.¹³⁰

Although the show deals with timely issues such as terrorism and the use of torture, individuals involved in the making of *24* perceive the show purely as fictional rather than an attempt to portray real-life events or to argue for or against the use of torture in real life. In an interview with Charlie Rose, Kiefer Sutherland stated: "Do I personally believe that the police or any of these other legal agencies that are working for this government should be entitled to interrogate people and do the things that I do on the show? No, I do not."¹³¹ In addition, Bob Cochran, the co-creator of *24*, noted that even when government characters torture suspects, they do

so in theoretically ideal circumstances: “The terrorist really has the code, the bomb is really ticking.”¹³² He added that “[i]n real life, you don’t have that certainty.”¹³³

B. Is 24 Beneficial or Detrimental to the Debate on Torture?

Given the power of the visual image to shape public debate, it is worth examining whether the portrayals of torture on *24* accurately reflect the real-life context in which torture occurs. In this section, I will analyze both the positive and negative contributions *24* makes to the debate, concluding that the ticking time bomb scenario played out on television works to perpetuate the false debate that currently exists, which ultimately does a disservice to a substantive dialogue on torture.

1. Beneficial Effects of *24* on the Torture Debate

Because torture on *24* is depicted in a clear and disturbing manner, it could be seen as a tool for awakening public discourse. For this reason, Amnesty International has stated that the show is “educational.”¹³⁴ There may be something to this endorsement. After all, one of the ways the Bush administration has sought to evade laws prohibiting torture is through creative interpretation of the letter of the law.¹³⁵ In order to consider what should fall within the ambit of torture and should thus be prohibited, the public must first become familiar with terms such as “waterboarding” (simulated drowning) and Sodium Pentothal. Use of these methods to extract information from suspects on *24* may serve to inform the debate on whether this conduct constitutes torture.

For example, the current administration has attempted to narrow the definition of torture to exclude acts that should fall within the ambit of “torture.”¹³⁶ In the “torture memos,” which were meant to define torture in the context of interrogations conducted outside the United States against enemy combatants,¹³⁷ the administration attempted to narrow the definition of torture so drastically that acts such as waterboarding would not qualify as

torture.¹³⁸ As mentioned previously, in the August 2002 Bybee memo, the DOJ's Office of Legal Counsel (OLC) tried to restrict the definition of torture to those acts resulting in "serious physical injury, such as organ failure, impairment of bodily function, or even death."¹³⁹ Similarly, after CBS's *60 Minutes II* aired leaked photographs of prisoners in humiliating poses taken at Abu Ghraib,¹⁴⁰ Defense Secretary Donald Rumsfeld alleged that the pictures—which included scenes of U.S. military personnel forcing nude Iraqi prisoners to simulate sex acts, a man badly beaten, and a corpse¹⁴¹—portrayed abuse, not torture.¹⁴²

The current administration has also creatively interpreted international treaties to exclude certain persons from the protection of laws prohibiting torture.¹⁴³ The DOJ concluded in the torture memos that the CAT "may be unconstitutional if applied to interrogations" conducted by the United States in the course of the "war against al Qaeda and its allies," and that "necessity or self-defense may justify interrogation methods that might" violate the statute.¹⁴⁴ Furthermore, the Bush administration has sought to prevent the Third Geneva Convention Relative to the Treatment of Prisoners of War from being applied to individuals detained at Guantanamo by declining to designate them as prisoners of war.¹⁴⁵

Television programs such as *24*, which portray torture techniques in a graphic manner, may be useful in encouraging public discourse and meditation about the boundaries of torture. As Karen J. Greenberg, Executive Director of the Center on Law and Security, notes, "[O]nce we understand and define what legal coercive interrogation is, we can perhaps separate it from torture."¹⁴⁶ A similar sentiment regarding the importance of defining the boundaries of torture was evident during Alberto Gonzales's Senate Judiciary Committee confirmation hearing. During his hearing, Gonzales stated, "[T]he agencies wanted to be sure that they would not do anything that would violate our legal obligations. And so they did the right thing: they asked questions. *What is lawful conduct?* Because we don't want to do anything that violates the law."¹⁴⁷

When the American public sees what the administration would consider “coercive interrogation techniques” on *24*, they are encouraged to consider whether such physically and psychologically punishing techniques (which appear both on the show and in real life interrogations at Guantánamo and Abu Ghraib) qualify as torture. Public meditation on the boundaries of torture—as the public outcry after the release of the Abu Ghraib photos shows—is crucial in preventing the administration from narrowing the definition of torture. This type of meditation can be encouraged through fictional portrayals of torture on programs such as *24*.

2. Detrimental Effects of *24* on the Torture Debate

Despite the assertion that fictional portrayals of torture on *24* may educate the public as to what various torture techniques look like, such portrayals ultimately do more harm than good when it comes to informing the public and shaping the debate on torture. The depictions of torture on *24* are problematic because the images are grounded in the unrealistic ticking time bomb scenario. Without providing viewers with an accurate context, any information gained from viewing the fictional portrayal of torture is flawed and detrimental to the public debate.

First, as discussed above, Sontag notes that pictures serve to mobilize people to act on their preexisting tendencies and beliefs rather than to give them pause to question their beliefs.¹⁴⁸ When new Abu Ghraib photos were released worldwide in 2006, the vast difference between the response of Americans and the response abroad demonstrated that viewers’ community, loyalties, and perspectives shaped their reactions to pictures. These new Abu Ghraib photos, which included “those of a man whose throat had apparently been slit, a group of men being forced to masturbate in front of guards, photographs of bloodied Iraqis who had been shot, and prisoners with burns and weeping wounds,”¹⁴⁹ showed up on Australian television first,¹⁵⁰ then on networks across the Middle East,¹⁵¹ then in the U.S. on *Salon.com*.¹⁵² As one commentator noted, the photos “[did] not get much

attention in the United States, but [are] drawing expressions of disgust and outrage abroad,¹⁵³ where they have reawakened bitter memories of the Abu Ghraib scandal.¹⁵⁴

Therefore, even if people view photographs of an atrocity, they will not be mobilized against the atrocity unless preexisting tendencies and beliefs predispose them to protest the atrocity. Thus, viewing realistic portrayals of horrific torture techniques on shows such as *24* can do nothing on its own. Though a person might learn what waterboarding is, merely viewing a portrayal of somebody being subjected to this type of torture may not incite action.

Second, *24* poses the same dangers as the ticking time bomb hypothetical. Namely, both *24* and the ticking time bomb hypothetical work to transform the torturer into a heroic public servant and distract the public from the real issues. *24* thus works to perpetuate the artificial debate on torture that currently exists. In the ticking time bomb hypothetical, the torturer is not someone who enjoys inflicting pain, but rather is a person who must do something he despises in order to save millions of people. Similarly on *24*, the *hero* of the show, Jack Bauer, is the torturer. By focusing on Jack's personal life and integrating it into the show's main story lines, *24* humanizes the torturer. As one *24* fan at the *Washington Post* has noted, "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. . . . Torture's a no-brainer here. Jack's got to save us all from imminent thermonuclear annihilation."¹⁵⁵ Thus, like the omnipresent ticking time bomb scenario, *24* turns the torturer into a hero, divorcing torture from cruelty.

In reality, as Luban has noted, interrogators who are trained to torture become "inured to levels of violence and pain that would make ordinary people vomit at the sight."¹⁵⁶ Luban further notes that, historically, individuals trained to torture begin to run amok. He cites both a 1999 Israel Supreme Court decision concerning interrogators needlessly torturing two-

thirds of their Palestinian captives and the fact that during the Argentinian Dirty War, torturers were initially hesitant to inflict torture but by the end had become hardened young officers who placed bets on who could kidnap the prettiest girl to rape and torture.¹⁵⁷ Thus, the fictional image of torturer-as-hero is incompatible with the reality of those who commit torture.

In addition, *24* ignores the same issues that the current debate on torture neglects to incorporate. As mentioned previously, the ticking time bomb scenario distracts the public from debating the important questions such as whether the chance that a suspect has vital information affects the decision to torture, whether refusal to talk after torture means it is time to stop or time to ramp up the level of torture, and whether the morality of torture should be decided by totaling up costs and benefits.¹⁵⁸ On *24*, the majority of the instances of tortures are the result of Jack Bauer's need to extract information from a suspect as quickly as possible in order to save millions of lives:

For *24*'s producers, in their fourth season of constructing a save-the-world scenario that must be completed in one day, the use of torture is about 'real-time' drama, not politics. "It goes with the *24* conceit that we need information and don't have days to break this person. Sometimes we don't even have hours."¹⁵⁹

Thus, while scenarios are crafted to fit the format of a television program when problems must be solved in twenty-four hours, they greatly distort the context in which torture takes place. As one commentator has noted: "Real intelligence gathering is not a made-for-TV melodrama. It consists of acquiring countless bits of information and piecing together a mosaic. So the most urgent question has nothing to do with torture and ticking bombs."¹⁶⁰

24 also cheats its way around complex issues by concealing the consequences of torture. Although the torture techniques used and immediate pain caused by torture are realistically portrayed on *24*, the context in which torture is used and the long-term costs of torture are highly

unrealistic. For example, in one episode, after two CTU employees are shown being tortured because the rest of the CTU erroneously believes that they are moles, both subsequently return to work and lead normal lives.¹⁶¹

In reality, torture survivors suffer for the rest of their lives. As the Center for Victims of Torture notes, “Psychological symptoms of torture frequently include anxiety, depression, irritability, paranoia, guilt, suspiciousness, sexual dysfunction, loss of concentration, confusion, insomnia, nightmares, impaired memory, and memory loss.”¹⁶² For example, since Diana Ortiz, a Catholic missionary from a Kentucky convent who was working with the poor in Guatemala, was kidnapped in 1989 and tortured, her life has never been the same.¹⁶³ Although Ortiz was held for only twenty-four hours, she suffered a complete loss of memory of everything in her life prior to being tortured.¹⁶⁴ After her release, Ortiz no longer recognized her own parents.¹⁶⁵ Years later, Ortiz still has no memory of her childhood, her college years, or her pretorture friendships.¹⁶⁶ In short, in both the ticking time bomb hypothetical and *24*, the consequences of torture—the political ramifications of violations of norms governing everyday society and the shattering of every aspect of a victim’s well-being—are almost entirely ignored. Thus, fictional portrayals of torture on shows such as *24* are dangerous because viewers may assume that the context that gives rise to torture on *24* and the political and long-term ramifications are as realistic as the torture methods portrayed.

The fact that the consequences of torture are not revealed in fictional portrayals such as *24* is also dangerous because engaging in a calculation of consequences could greatly affect the public’s perception of the acceptability of torture in times of emergency; *24* distorts the debate in such a way that this calculation does not occur. A *Newsweek* poll on torture found that 58 percent of people would support torture to thwart a terrorist attack; however, when asked if they would still support the use of torture if such use made it more likely that enemies would torture Americans, 57 percent said no.¹⁶⁷

In summary, on *24*, torture is only carried out in emergency situations, it almost always extracts the desired information, torture victims recover seamlessly, and the torturer is a hero. This fictional portrayal of torture becomes the “maxim” that viewers will recall when confronted with the topic of torture. Like the ticking time bomb situation, which has “bewitched” us and pulled the torture debate off course, *24*’s format cheats its way around important and complex issues, reinforcing the ticking-time-bomb-centered public debate on torture, and causing its viewers to carry an unrealistic portrait of torture in their minds.

V. WHY IS THE PUBLIC DEBATE ON TORTURE IMPORTANT?

Now that I have generally outlined the current debate on torture, the question remains: Why is a public debate on torture important? As I noted in Part I, torture is unquestionably illegal. However, a gap remains between American torture laws and practices. Incontrovertible evidence demonstrates that U.S. forces have tortured prisoners at U.S. detention centers in Guantánamo Bay, Afghanistan, and Iraq.¹⁶⁸ The ACLU documented these incidents of torture in a report submitted to the United Nations Committee Against Torture.¹⁶⁹ In addition, in March 2006, Pentagon officials issued a new rule stating that evidence obtained through torture cannot be used by the special panels that review the cases of “enemy combatants” being held at Guantánamo.¹⁷⁰ The need for such a rule, despite numerous laws prohibiting torture, illustrates the current gap between the United States’ obligations not to torture and its actual policies and practices. Thus, the public debate on torture is important because the American public has the ability to pressure the government to close, or at least narrow, the gap between the acts of U.S. citizens and the laws prohibiting torture.

A. Effect Public Debate Can Have on the Interpretation of the Law Governing Torture

Although international treaties prohibiting torture are guided by larger political forces, the interpretation of these treaties is subject to public opinion. One illustrative example of the effect public outcry can have on the practical application of laws governing torture is the DOJ's repudiation of its earlier analysis of the definition of torture. As mentioned previously, in the August 2002 Bybee memo, the OLC informed the White House that the CAT only prohibits the most extreme interrogation techniques and that under the anti-torture statute,¹⁷¹ in order for an act to qualify as torture, pain endured as a result of the act "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."¹⁷² The memo also stated that the statute "may be unconstitutional if applied to interrogations" conducted by the United States in the course of the "war against al Qaeda and its allies," and that "necessity or self-defense may justify interrogation methods that might" violate the statute.¹⁷³ In addition, a March 6, 2003, draft report by Pentagon lawyers defined torture in the narrowest of terms: "[E]ven if the defendant [U.S. government agent] knows that severe pain will result from his actions, if causing the harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith."¹⁷⁴

As a result of widespread public outcry, the OLC issued a December 2004 memo repudiating its earlier analysis of the definition of torture and rejecting the absurdly high threshold for torture set forth in the Bybee memo.¹⁷⁵ As the *Washington Post* noted, "This second effort by the Bush administration to parse the legal meaning of the word 'torture' was provoked by the damaging political fallout from the disclosure this summer of the first memo, drafted in August 2002 and criticized by human rights lawyers and experts around the globe."¹⁷⁶

B. Effect Public Debate Can Have on Legislation to Prevent Torture

Public outcry can also lead to the enactment of legislation that proscribes torture. For example, in response to the public's reaction to the Abu Ghraib scandal, the Senate passed the McCain Amendment on October 5, 2005.¹⁷⁷

As the *Washington Post* noted:

When the abuses by U.S. servicemen and intelligence officers at Abu Ghraib surfaced last year, there was understandable outrage in this country and abroad. . . . In response, Sen. John McCain, himself a victim of brutal torture by the North Vietnamese, introduced an amendment to the 2006 Defense Appropriations Act that would, in essence, require all agencies of the U.S. government to comply with the Geneva Conventions and international law, which prohibit torture.¹⁷⁸

This amendment prohibits the “cruel, inhuman, or degrading treatment or punishment” of any “individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location,” and reiterates existing law, requiring that the DOD’s interrogations conform to the U.S. Field Army Manual on Intelligence Interrogation.¹⁷⁹ The McCain Amendment also requires that persons under U.S. control be accorded their Constitutional right to be free from “cruel, inhuman, or degrading treatment or punishment.”¹⁸⁰

Recognizing the power of public outcry, Amnesty International asks visitors to its interactive Web page “Ten Things You Can Do to Stop Torture and Indefinite Detention” to urge their representatives “to cosponsor and pass H.R. 952, the ‘Torture Outsourcing Prevention Act’” and to urge their senators “to cosponsor and pass S. 654, the ‘Convention Against Torture Implementation Act,’ which address the practice of ‘extraordinary renditions’ (the U.S. practice of sending individuals to countries with a record of torture, such as Jordan, Morocco, Syria, and Egypt, for interrogation).”¹⁸¹

C. Effect Public Debate Can Have on Confirmation Hearings

Confirmation hearings also allow the public to hold high-level officials accountable for their actions. As the U.S. District Court for the District of Columbia noted in *Washington Legal Foundation v. Department of Justice*, “[t]hrough the confirmation process, the public, individuals, and interested organizations alike have an opportunity to inform the decisionmaking process and scrutinize the President’s nominee.”¹⁸² Because confirmation hearings have become public spectacles, senators’ performance in these hearings are subject to popular review.¹⁸³ Thus, through senators, the public can voice its concern about nominees’ stances on torture.

Recently, high-level officials have indeed been questioned about their stance on torture at nomination hearings. Most notably, because his stance on torture was the subject of complaints by Democrats and human rights groups,¹⁸⁴ Attorney General nominee Alberto R. Gonzales was questioned heavily about torture policy during his 2004 Senate Judiciary Committee confirmation hearing.¹⁸⁵ For example, Senator Leahy read the definition of torture from the Bybee memo and then asked Gonzales if he agreed with that interpretation of torture back in August 2002.¹⁸⁶

In addition, during Secretary of State nominee Condoleezza Rice’s January 2005 Senate confirmation hearing, Democrats questioned Rice about whether she considered certain extreme interrogation tactics to be torture.¹⁸⁷ Supreme Court nominee Samuel Alito was also questioned about his stance on torture during his January 2006 confirmation hearing.¹⁸⁸ Senator Graham asked Alito, “Do you believe that any president, because we’re at war, could say, the statute on torture gets in the way of my ability to defend the United States; therefore I don’t have to comply with it?”¹⁸⁹ Thus, although high-level officials may not veer from prepared statements at public confirmation hearings, the public has some opportunity to hold them accountable for their stances on torture.

D. Effect Public Debate Can Have on the Prosecution of Torturers

Public outcry could also lead to the prosecution of torturers, although this route to preventing torture may be more difficult and indirect. There are three separate routes to prosecute a torturer: (1) federal criminal prosecution, (2) military prosecution, and (3) prosecution by the international community. Federal criminal prosecution of a torturer could be pursued under the War Crimes Act of 1996 (as amended in 1997),¹⁹⁰ which authorizes federal prosecution of any U.S. national or member of the U.S. armed forces who commits a war crime or of any third country national who commits a war crime against a U.S. national or service member.¹⁹¹ Federal criminal prosecution of officials could also be pursued under the anti-torture provisions of the implementing legislation for the CAT,¹⁹² which authorizes federal criminal prosecution of U.S. citizens who commit torture abroad and of any perpetrator, regardless of nationality, who is present in the United States.¹⁹³

Military prosecution could be pursued under the U.S. Uniform Code of Military Justice, which subjects any person found guilty of cruelty, maltreatment, or maiming to punishment “as a court-martial may direct.”¹⁹⁴

Finally, a torturer could be prosecuted by the international community. The CAT obligates the international community to investigate and prosecute cases of torture regardless of the victim’s nationality or where the abuse occurred.¹⁹⁵ Indeed, the international community has not only the right, but the duty, to prosecute individuals guilty of torture: if the U.S. fails to investigate and prosecute incidents of torture and other mistreatment, then other countries must do so under the CAT and under the Third Geneva Convention Relative to the Treatment of Prisoners of War (which includes an obligation to investigate and prosecute grave breaches).¹⁹⁶

Despite these laws requiring the prosecution of individuals who have committed torture, those responsible for torture—particularly high level officials—frequently escape prosecution.¹⁹⁷ A 2005 *New Yorker* article described how in 2003, an Abu Ghraib prisoner named Manadel al-Jamadi

died from asphyxiation during an interrogation.¹⁹⁸ During the interrogation, Manadel's head was covered with a plastic bag and he was shackled in a crucifixion-like pose that inhibited his ability to breathe.¹⁹⁹ In a subsequent internal investigation, U.S. government authorities classified Manadel's death as a "homicide."²⁰⁰ Tragically, Mark Swanner, the C.I.A. officer who conducted the interrogations, has not been charged with a crime and continues to work for the agency.²⁰¹ Moreover, the *Times* (London) noted that after the initial Abu Ghraib photos surfaced in 2004, only "[n]ine American soldiers—all low-ranking Reservists—[were] convicted in connection with the abuse"²⁰²

Public outcry could affect the likelihood of federal criminal prosecutions of torture; it has swayed prosecutorial decisions in the past. In 1991, after television viewers nationwide witnessed several white Los Angeles police officers brutally attack Rodney King, an African American man whom they had pulled over for speeding, public outcry across the country prompted the Federal Bureau of Investigation to launch a nationwide review of all police brutality complaints in the past six years.²⁰³ Similarly, in the 1990s, public opinion demanding increased environmental protection resulted in a prosecutorial climate so charged that, as commentators noted, prosecutors became highly incentivized to pursue environmental cases.²⁰⁴ Indeed, Alberto Gonzales's January 25, 2002, memo to the OLC expressed fear that future prosecutors and independent counsels would prosecute ex-Bush administration officials for violations of the War Crimes Act.²⁰⁵ He urged President Bush to exempt the treatment of Taliban and Al Qaeda fighters from the provisions of the Geneva Conventions,²⁰⁶ arguing that this exemption would "create a reasonable basis in law that [the War Crimes Act] does not apply, which would provide a solid defense to any future prosecution."²⁰⁷ Thus, public outcry against torture could lead to the election of a new president whose administration would prosecute ex-Bush officials.

Moreover, as Professor William Aceves stated:

It took over twenty years before the efforts to prosecute Augusto Pinochet were successful And, the impetus for prosecution did not come from Chile; it came from the international community. Similarly, establishing responsibility for the abuses perpetrated at Abu Ghraib and Guantanamo may not happen this year (or even this decade). And it may not happen in the United States. But if history serves as a guide, it will happen.²⁰⁸

Thus, as citizens of the international community, the U.S. public can bring about the prosecution of torturers by supporting international prosecution efforts.

VI. HOW CAN WE COUNTERACT THE TICKING TIME BOMB IN TELEVISIONLAND?

Shows like *24* that portray torture under fictional circumstances can perpetuate the already detrimental debate on torture by distorting the costs and benefits of torture and making torture appear heroic and necessary. In this section, I will briefly explore what organizations opposed to torture, such as Amnesty International, can do to counteract the negative effects of fictional portrayals of torture.

As Sontag notes, visual portrayals of atrocities become the overgeneralized “maxim” that is recalled in the viewer’s mind when the subject of torture arises.²⁰⁹ In order to counteract the maxim that *24* plants in the viewer’s mind, another, more truthful conceptualization of torture must take its place. *Salon.com* attempted to educate the American public about the well-documented abuses that remain unprosecuted by releasing a multitude of new photos of Abu Ghraib in 2006. These photographs failed to arouse public reaction for two possible reasons. First, the public had seen similar pictures in 2004, thus their capacity to respond to the images may have been dulled. In *Regarding the Pain of Others*, Sontag notes that the overabundance of images of atrocity has created a “culture of spectatorship.”²¹⁰ “For photographs to accuse, and possibly to alter conduct, they must shock”;²¹¹ however, “shock can become familiar. Shock

can wear off. . . . As one can become habituated to horror in real life, one can become habituated to the horror of certain images.”²¹² Thus, it is quite possible that the American public failed to respond to the new 2006 pictures because they were no longer shocked that such abuse occurred at Abu Ghraib. This lack of shock can potentially be attributed to the fact that similar pictures had previously been released, coupled with the numbing effect of watching countless instances of torture in TV dramas.²¹³

Second, as discussed previously, pictures alone cannot mobilize viewers. As Sontag noted, “[P]hotographs supply no evidence . . . for renouncing war The destructiveness of war . . . is not in itself an argument against waging war unless one thinks . . . that violence is always unjustifiable”²¹⁴ Pictures can fail to send a political message that challenges a viewer’s current beliefs if the viewer does not know the context. Therefore, the method of communication used to counteract the false and distorted depictions of torture on shows like *24* must be, to some extent, shocking and must communicate the appropriate context in which torture occurs. Thus, I propose four possible ways of conveying such a message: (1) televised disclaimers, (2) disclaimers on fan sites, (3) fictional or documentary films, and (4) testimony by survivors.

A. Televised Disclaimers

One method of counteracting the negative effects of fictional portrayals of torture on *24* would be to air a disclaimer after particularly torture-heavy episodes. Although the Second Circuit has stated, “We are doubtful that a few words could erase the indelible impression that is made by a television broadcast, . . .”²¹⁵ as one commentator noted, “All this [statement by the Second Circuit] means is that it depends on the effectiveness of the disclaimer; a large-text title card preceding the film would undoubtedly be more effective than a small-text disclaimer buried in the closing credit crawl.”²¹⁶

In the trademarks realm, courts and commentators have noted that disclaimers are an effective means of communicating with television and film viewers.²¹⁷ One U.S. district court has stated: “To the extent that the viewers of [the film] may have mistakenly believed that [plaintiff] was associated with [it], the disclaimer, if it had been appropriately placed with the credits, is an adequate means of alleviating the viewers’ confusion.”²¹⁸ In examining how a director of a film that was originally produced in black and white can “negat[e] the inference that the director of the original film is in any way connected with the colorized version,” one commentator noted that “[a]ny danger [of consumer confusion] confronting a colorizer could easily be averted by an effective disclaimer.”²¹⁹ Thus, a disclaimer to *24* could be an effective method of communicating the fictional nature of the program, provided that the placement and content of the disclaimer were carefully structured.

With respect to the placement of the disclaimer, in order to ensure that viewers of *24* watch the disclaimer, it should be aired between the end of the show and the trailer for the next episode. With respect to the content of the disclaimer, one experiment conducted by a law professor suggests that disclaimers displayed but not spoken have little effect in preventing consumers from drawing misleading impressions.²²⁰ Thus, a spoken disclaimer by Kiefer Sutherland, the executive producer and hero of *24*, or another actor familiar to the audience, would be the most effective means of conveying the disclaimer. This spoken disclaimer would highlight the differences between the portrayal of torture on television and torture in real life. The disclaimer could also state Sutherland’s personal opinion that torture by the government is unacceptable in real life.²²¹

The disclaimer should also be crafted in narrative format. As Sontag has stated, “a narrative seems more likely to be more effective than image.”²²² Rather than merely stating, “The consequences of torture are much more dire than this show would suggest,” Sutherland or another cast member could briefly recount the story of a torture victim, outlining where the

victim lived, how old the victim was, and what the victim's life was like once they escaped their captors.

Convincing Fox and the producers of *24* to include a disclaimer may be a difficult task given that Fox is part of conservative Rupert Murdoch's media empire. Disclaimers would also reduce profitable advertising time. However, as mentioned in Part V(A) *supra*, Kiefer Sutherland, the executive producer and star of *24*, does not personally believe in the use of torture by the government and has stated this opinion on national broadcasts.²²³ Thus, convincing *24*'s producers to air such a disclaimer may be possible.

B. Disclaimers on Fan Sites

Another method of communicating disclaimers, which would be cheaper than buying advertising time during *24* and easier than convincing the conservative Fox network to air an anti-torture message, would be to include anti-torture messages on *24* fan Web sites. *24* fan Web sites offer fan Weblogs, screen captures, image galleries, and episode transcripts for *24*. In addition, some fan Web sites host "viewing parties," which allow viewers to chat online while viewing the show.²²⁴ As Jeff Alexander, the creator of the fan Web site televisionwithoutpity.com notes, *24* is similar to *The X-Files* in that its conspiracy-driven plotlines lend themselves to "fevered speculation and discussion by fans."²²⁵ Alexander also notes that fan Web sites are popular because people like to try to poke holes in the plot.²²⁶

Fan Web sites receive tens and even hundreds of thousands of visitors. As of October 8, 2007, 24addict.com's site meter indicated that the site had a total of 280,083 visitors since its inception,²²⁷ and 24weblog.com's meter indicated that it had 1,001,751 visitors since its inception.²²⁸ Unofficial fan Web sites for *24* are even more popular than Fox's official *24* Web site.²²⁹ Thus, organizations that wish to convey messages about the realities of torture and its use by the current administration could either approach

already existing *24* fan Web sites about displaying disclaimers or create their own fan Web sites. These Web sites could be based on the traditional *24* fan site services, providing episode guides and chat forums in order to draw *24* fans. The disclaimers on these Web sites could include narratives written by victims of torture that detail their experiences with the torture methods depicted on episodes of *24* and the effects of such torture. Fans interested in poking holes in *24*'s plots and noting inconsistencies might be particularly interested in the vast differences between the post-torture lives of real-life victims of torture and the fictional torture victims on *24*. These fans might also be interested in victims' statements about the fact that torturers are likely to obtain false information from desperate captives.

C. Fictional or Documentary Films

Organizations that oppose torture could also create fictional or documentary films that portray torture in a realistic manner, highlighting important issues such as whether the chances that a suspect has vital information should affect a decision to torture. Sontag states that

[n]o photograph or portfolio of photographs can unfold, go further, and further still, as do *The Ascent* (1977), . . . the most affecting film about the sadness of war I know, and an astounding Japanese documentary, . . . *The Emperor's Naked Army Marches On* (1987), the portrait of a "deranged" veteran of the Pacific war, whose life's work is denouncing Japanese war crimes from a sound truck he drives through the streets of Tokyo²³⁰

In addition, the ability of well-crafted and provocative documentaries to, at the very least, draw an audience was demonstrated by the popularity of Michael Moore's *Fahrenheit 9/11*.²³¹ Thus, films could provide viewers with a much more detailed understanding of torture practice than pictures or disclaimers alone could, and moving to a new medium would capture viewers' attention. Through these documentaries, viewers would become aware of the brutal consequences of torture and the fact that the ticking time

bomb scenario bears little resemblance to real-world situations in which torture is used.

D. Testimony by Survivors

Finally, another way to counter the deceptive portrayal of torture on shows like *24* would be to encourage victims of torture to give public testimony at churches, college campuses, and on television and radio talk shows. Although at least 500,000 survivors of torture have taken refuge in the United States,²³² as the *Washington Post* has noted, “[f]ew Americans will ever meet a survivor of torture, and many may find it almost impossible to believe what they read about abuses committed by U.S. troops.”²³³ Through public appearances by survivors of torture, the American public, which has become numbed to photographs of Abu Ghraib, will witness torture in a distinctly different format. Rather than being blurry figures in a photograph, victims will become mothers, fathers, sons, and daughters in the eyes of the American public. Instead of conceptualizing torture as something that happens to villains with knowledge of a ticking time bomb’s whereabouts, the American public will learn that torture happens to individuals such as the shy Afghan taxi driver who was choked in a hood and forced to kiss his American captors’ boots, or the dignified police officer whose American captors photographed him naked and twisted his body like a pretzel.²³⁴

VII. CONCLUSION

Despite a multitude of laws prohibiting torture, documentary evidence proves that torture occurs at the hands of Americans. The Bush administration has failed to adhere to laws prohibiting torture and laws that require the prosecution of torturers. However, as the repudiation of the Bybee memo and the McCain Amendment demonstrate, the public has the power to force the administration to take actions to narrow the gap between torture law and practice.

Unfortunately, the current debate on torture has been bewitched by the unrealistic and impractical ticking time bomb hypothetical. Moreover, the inadequacies of the current debate are reflected in and reinforced by fictional portrayals of torture in shows like *24*. Both the ticking time bomb hypothetical and *24* pull the torture debate off course, cheat their way around important and complex issues, and cause viewers to carry an unrealistic portrait of torture in their minds. These negative effects are dire because public awareness and mobilization are crucial to political change.

In order to counteract the dire effects of fictionalized portrayals of torture on shows like *24*, organizations opposed to the use of torture can attempt to communicate a more realistic portrait of torture to the American public through televised disclaimers, disclaimers on fan sites, fictional or documentary films, and public testimony by survivors. Doing so hopefully will foster a more realistic and productive public debate about the consequences of torture and create an environment in which those guilty of torture are held accountable.

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² Kristen B. Rosati, *The United Nations Convention Against Torture: A Detailed Examination of the Convention as an Alternative for Asylum Seekers*, 3 BENDER'S IMMIGR. BULL. 185, 199 (1998).

³ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. d (1987); RESTATEMENT, *supra*, at § 702, reporter's note 11 ("It has been suggested that a human rights norm cannot be deemed *jus cogens* if it is subject to derogation in time of public emergency."); James S. Gifford, *Jus Cogens and Fourteenth Amendment Privileges or Immunities: A Framework of Substantive, Fundamental Human Rights in a Constitutional Safe-Harbor*, 16 ARIZ. J. INT'L & COMP. L. 481, 488 (1999) ("Consequently, the doctrine of *jus cogens* is widely, if not unanimously, recognized as allowing for no derogation, even during circumstances of emergency.").

⁴ See Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 418 (1989) ("Once an international norm becomes *jus cogens*, it is absolutely binding on all states, whether they have

persistently objected or not. The rule is very clear: when a norm acquires *jus cogens* status, it is binding even on persistent objector states.”)

⁵ In the aftermath of September 11, 2001, attorneys for the White House, the Justice Department, and the Defense Department drafted legal opinions concluding that the torture of terrorism suspects might be legally defensible and that traditional laws of war might not apply to interrogation of terrorism suspects. See Jesselyn Radack, *Tortured Legal Ethics: The Role of the Government Advisor in the War on Terrorism*, 77 U. COLO. L. REV. 1, 2 (2006); see, e.g., U.S. Dep’t of Justice Office of the Legal Counsel, Memorandum for Alberto R. Gonzales, Counsel to the President, on Standards of Conduct for Interrogation Under 18 U.S.C. § 2340–40A, at 1-2 (Aug. 1, 2002), available at <http://news.findlaw.com/wp/docs/doj/bybee80102mem.pdf> [hereinafter Bybee Memo].

⁶ U.S. CONST. art. VI.

⁷ Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 135 [hereinafter Treatment of Prisoners of War].

⁸ *Id.*

⁹ *Id.* at art. 13.

¹⁰ *Id.* at art. 17.

¹¹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

¹² *Id.* at art. 147.

¹³ *Id.* (emphasis added).

¹⁴ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, at 197, U.N. GAOR, Supp. No. 51, U.N. Doc. A/RES/39/708 (1984), reprinted in 23 I.L.M. 1027 (1984), modified in 24 I.L.M. 535 (1985) [hereinafter CAT].

¹⁵ The U.S. Senate attached an understanding that the treaty was not self-executing; thus, the treaty did not come into force until Congress passed implementing legislation in 1998. A discussion of the Senate understanding and whether the treaty was meant to be self-executing is provided by Rosati in *Detailed Examination*, *supra* note 2, at 190–91. Non-self-executing treaties require the implementation of “enacting legislation” by Congress.

¹⁶ CAT, *supra* note 14, art. 2.

¹⁷ Jamie Mayerfeld, *Playing by Our Own Rules: How U.S. Marginalization of International Human Rights Law Led to Torture*, 20 HARV. HUM. RTS. J. 89, 123 (2007); see also Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278, 324–25 (2003).

¹⁸ David R. Dow et al., *The Extraordinary Execution of Billy Vickers, the Banality of Death, and the Demise of Post-Conviction Review*, 13 WM. & MARY BILL RTS. J. 521, 531, 531 n.60 (“[T]he United States Constitution prohibits torture.” (citing the Eighth Amendment)).

¹⁹ See Mayerfeld, *supra* note 17, at 123 (“The Fifth and Eighth Amendments, read together, make torture impermissible.”). Congress recently declared that “the Constitution, laws, and treaties of the United States and the applicable guidance and regulations of the United States government prohibit the torture or cruel, inhuman, or degrading treatment of foreign prisoners held in custody of the United States,” here or

abroad. Sense of Congress and Policy Concerning Persons Detained by the United States, Pub. L. No. 108-375, 118 Stat. 1811, 1091 (a)(1)(6) (Oct. 28, 2004).

²⁰ 18 U.S.C. § 2340 (2000) (providing nearly identical definition for criminalization of torture committed outside the United States by U.S. nationals or persons later found in the United States).

²¹ See Torture Victim Protection Act, 28 U.S.C. § 1350 (2000) (“[D]istrict courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

²² The Uniform Code of Military Justice, 10 U.S.C. § 893, art. 93 (2007).

²³ David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1440–41 (2005).

²⁴ *Id.* at 1440.

²⁵ ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE (2002) [hereinafter DERSHOWITZ, TERRORISM WORKS].

²⁶ *Id.* at 151–58.

²⁷ *Id.* at 144.

²⁸ *Id.* at 151–58.

²⁹ *Id.* at 158.

³⁰ *Id.*

³¹ *Id.* at 158–59.

³² *Id.* at 158.

³³ *Id.* at 159.

³⁴ See Alan M. Dershowitz, *The Torture Warrant: A Response to Professor Strauss*, 48 N.Y.L. SCH. L. REV. 275, 278–79 (2004) [hereinafter Dershowitz, *Torture Warrant*].

³⁵ DERSHOWITZ, TERRORISM WORKS, *supra* note 25, at 158.

³⁶ See Dershowitz, *Torture Warrant*, *supra* note 34, at 278–79.

³⁷ DERSHOWITZ, TERRORISM WORKS, *supra* note 25, at 162.

³⁸ *Id.* at 159.

³⁹ *Id.*

⁴⁰ Luban, *supra* note 23.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 1442.

⁴⁵ *Id.*

⁴⁶ *Id.* at 1443.

⁴⁷ *Id.* at 1442–43.

⁴⁸ *Id.*

⁴⁹ *Id.* at 1444.

⁵⁰ *Id.* at 1461.

⁵¹ *Id.* at 1445.

⁵² *Id.*

⁵³ *Id.* at 1460–61.

⁵⁴ *Id.* at 1452.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Elaine Scarry, “Five Errors in the Reasoning of Alan Dershowitz,” in TORTURE: A COLLECTION 281, 283–84 (Sanford Levinson, ed., 2004).

⁶⁰ *Id.* at 282.

⁶¹ *Id.* at 286–87.

⁶² Foreign Intelligence Surveillance Act, 50 U.S.C. §§1801–11 (2006).

⁶³ Scarry, *supra* note 59, at 286.

⁶⁴ *Id.* at 287.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Richard A. Posner, *The Best Offense*, NEW REPUBLIC, Sept. 2, 2002, at 28 [hereinafter Posner, *Best Offense*] (“[T]he scope of our civil liberties is not graven in stone, but instead represents the point of balance between public safety and personal liberty The more endangered public safety is thought to be, the more the balance swings against civil liberties. That is how it is and that is how it should be.”).

⁶⁸ *Id.* at 30.

⁶⁹ Richard A. Posner, *Torture, Terrorism, and Interrogation*, in TORTURE: A COLLECTION 296 (Sanford Levinson ed., 2004) [hereinafter Posner, *Torture*].

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 296–97.

⁷⁴ *Id.* at 297–98.

⁷⁵ *Id.* at 296–97.

⁷⁶ *See id.*

⁷⁷ *Id.* at 296.

⁷⁸ *Id.*

⁷⁹ SUSAN SONTAG, REGARDING THE PAIN OF OTHERS (2003).

⁸⁰ *Id.* at 37.

⁸¹ *Id.* at 38.

⁸² *Id.* at 10, 21, 38–39.

⁸³ *Id.* at 10.

⁸⁴ *Id.* at 39.

⁸⁵ *Id.* at 10.

⁸⁶ *Id.* at 21.

⁸⁷ *Id.* at 22.

⁸⁸ *Id.* at 64–65.

⁸⁹ *Id.* at 66.

⁹⁰ David Campbell, *Representing Contemporary War: Regarding the Pain of Others*, 17 ETHICS & INT’L AFF., 99 (2003) (book review).

⁹¹ *See generally* DANNY SCHECHTER, EMBEDDED: WEAPONS OF MASS DECEPTION (2003).

- ⁹² PHILIP SEIB, *BEYOND THE FRONT LINES* 107 (2004).
- ⁹³ SCHECHTER, *supra* note 91, at 23.
- ⁹⁴ *See, e.g.*, Carol Rosenberg, *Soldiers Shielded in Prisoner-Abuse Case*, MIAMI HERALD, Mar. 22, 2004, at 16A; Thom Shanker, *6 G.I.'s in Iraq Are Charged with Abuse of Prisoners*, N.Y. TIMES, Mar. 21, 2004, at A14; *U.S. Military Charges 6 in Probe of Prisoner Abuses*, CHI. TRIB., Mar. 21, 2004, at C4.
- ⁹⁵ Anthony Lewis, *The Torture Administration*, THE NATION, Dec. 7, 2005, available at <http://www.thenation.com/doc/20051226/lewis>.
- ⁹⁶ *See generally* U.S. Dep't of Justice Office of the Legal Counsel, Memorandum for James B. Comey, Deputy Attorney General, Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340(A) (Dec. 30, 2004), available at http://www.humanrightsfirst.org/us_law/etn/pdf/levin-memo-123004.pdf (repudiating earlier analysis of the definition of torture) [hereinafter Repudiation Memo]; S. AMENDMENT 1977, 109th Cong. (Oct. 3, 2005), 109 CONG. REC. S 10908-09 (prohibiting torture) [hereinafter McCain Amendment].
- ⁹⁷ David de Sola, *U.S. Agrees to Issue Abu Ghraib Images*, CNN.COM, Mar. 29, 2006, <http://www.cnn.com/2006/US/03/28/abu.ghraib/index.html>. That lawsuit resulted in the release of over ninety thousand pages of government documents on issues of detainee treatment in Iraq, Guantánamo Bay, and Afghanistan. *Id.*
- ⁹⁸ *Id.*
- ⁹⁹ *Id.*
- ¹⁰⁰ *U.S. Agrees to Release Abu Ghraib Photos*, SALON.COM, Mar. 29, 2006, http://www.salon.com/news/feature/2006/03/29/aclu_abu_ghraib/index_np.html.
- ¹⁰¹ Walter Shapiro, *Why We're Publishing the New Abu Ghraib Photos*, SALON.COM, Feb. 16, 2006, http://www.salon.com/opinion/feature/2006/02/16/abu_ghraib_intro/index.html.
- ¹⁰² *TV Forum*, DAILY OKLAHOMAN, July 27, 2003, at 26.
- ¹⁰³ Etan Vlessing, *After Hours*, HOLLYWOOD REPORTER, Jan. 12, 2006, http://www.hollywoodreporter.com/thr/television/feature_display.jsp?vnu_content_id=1001842711.
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- ¹⁰⁵ *Id.*
- ¹⁰⁶ Jenni Parrish, *Litigating Time in America at the Turn of the Twentieth Century*, 36 AKRON L. REV. 1, 1–2 (2002).
- ¹⁰⁷ *Id.*
- ¹⁰⁸ *Id.*
- ¹⁰⁹ 24 *Episode Guide, Season 1*, FOX.COM, <http://www.fox.com/24/episodes/season1/> (last visited Oct. 28, 2006).
- ¹¹⁰ *Id.*
- ¹¹¹ *See id.*
- ¹¹² Matt Feeney, *Torture Chamber: Fox Terrifies Viewers into Believing Its Bizarre and Convoluted Plot Twists*, SLATE, Jan. 6, 2004, <http://www.slate.com/id/2093269/>.
- ¹¹³ 24 *Character Guide: Jamey Farrell*, FOX.COM, <http://www.fox.com/24/character/season1/jf.htm> (last visited May 8, 2006).

- ¹¹⁴ *24 Episode Guide: 10:00 A.M.-11:00 A.M.*, TV.COM, <http://www.tv.com/1000-a.m.-1100-a.m./episode/85406/recap.html> (last visited Oct. 28, 2006).
- ¹¹⁵ *24: Day 2: 07:00 p.m. - 08:00 p.m.* (Fox television broadcast Feb. 11, 2003).
- ¹¹⁶ *Id.*
- ¹¹⁷ *24: Day 3: 2:00 A.M. - 3:00 A.M.* (Fox television broadcast Feb. 17, 2004).
- ¹¹⁸ *24 Character Guide: Nina Myers*, FOX.COM, <http://www.fox.com/24/character/season3/nm.htm> (last visited May 8, 2006).
- ¹¹⁹ *24: Day 4: 07:00 A.M.- 08:00 A.M.* (Fox television broadcast Jan. 9, 2005).
- ¹²⁰ Spencer Ackerman, *How Real is 24?*, SALON.COM, May 16, 2005, <http://dir.salon.com/story/ent/feature/2005/05/16/24/index.html?pn=4>.
- ¹²¹ *Id.*
- ¹²² *24 Episode Guide, Season 4*, FOX.COM, <http://www.fox.com/24/episodes/season4/> (last visited Oct. 28, 2006).
- ¹²³ *24 Episode Guide, Season 5*, FOX.COM, <http://www.fox.com/24/episodes/season5/> (last visited Oct. 28, 2007).
- ¹²⁴ *See 24 Character Guide: Audrey Raines*, FOX.COM, <http://www.fox.com/24/character/ar.htm> (last visited May 8, 2006).
- ¹²⁵ *See id.*
- ¹²⁶ Nielsen Ratings for the week of Apr. 18, 2006.
- ¹²⁷ Jake DiGregorio, *All in a Day's Work: Jack Bauer Saves the World, One Day at a Time*, GW HATCHET, Feb. 23, 2006, available at <http://media.www.gwhatchet.com/media/storage/paper332/news/2006/02/23/Arts/All-In.A.Days.Work.Jack.Bauer.Saves.The.World.One.Day.At.A.Time-1625130.shtml>.
- ¹²⁸ Hollywood Foreign Press Association, <http://www.hfpa.org/browse/member/29457> (last visited Oct. 7, 2007).
- ¹²⁹ Press Release, Acad. of Television Arts & Sci., 58th Primetime Emmy Awards (Aug. 27, 2006), available at http://www.emmys.tv/media/releases/2006/rel_pte58_winners.pdf.
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- ¹³³ *Id.*
- ¹³⁴ Anne-Marie Cusac, *Watching Torture in Prime Time*, THE PROGRESSIVE, Aug. 2005, at 34, available at <http://www.progressive.org/node/2318/print>.
- ¹³⁵ *See, e.g.*, Memorandum for George W. Bush, President of the United States, from Alberto Gonzales on Decision Re: Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban, at 2 (Jan. 25, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf> [hereinafter Memorandum for George W. Bush].
- ¹³⁶ Bybee Memo, *supra* note 5, at 2–13.
- ¹³⁷ *See* Thomas Adcock, *NYU Law Center Publishes "Torture Memos,"* N.Y. L.J., Oct. 8, 2004, at 16.

¹³⁸ Editorial, *Impunity*, WASH. POST, Apr. 26, 2005, at A14 (stating that the Gonzales meeting approved simulated drowning).

¹³⁹ Bybee Memo, *supra* note 5, at 1–2.

¹⁴⁰ *Abuse of Iraqi POWs by GIs Probed*, CBSNEWS.COM, Apr. 28, 2004, <http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml> (summarizing 60 Minutes report on the alleged mistreatment).

¹⁴¹ Pictures available at <http://medialit.med.sc.edu/torturephotos.htm> (last visited Apr. 23, 2006).

¹⁴² Donald H. Rumsfeld, Secretary of Defense, Defense Department Operational Update Briefing (May 4, 2004), available at <http://www.defenselink.mil/transcripts/2004/tr20040504-secdef1423.html>.

¹⁴³ See Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel for the Dep't of Defense, on Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002), available at <http://www.washingtonpost.com/wp-srv/national/documents/012202bybee.pdf>.

¹⁴⁴ *Id.*

¹⁴⁵ See *The Alberto Gonzales Memo January 25, 2002*, available at http://lawofwar.org/Torture_Memos_analysis.htm (last visited Oct. 12, 2007) (arguing that the nature of the enemy justified the categorization of al Qaeda and Taliban prisoners as “unlawful combatants not eligible for protection” under the Geneva Conventions).

¹⁴⁶ Karen J. Greenberg, *The Torture Question*, BALTIMORE SUN, Feb. 20, 2005, at 5F.

¹⁴⁷ *Nomination of Alberto R. Gonzales to be Attorney General of the United States Before the S. Comm. on the Judiciary*, 109 Cong., 65 (2005) (emphasis added) [hereinafter *Nomination of Alberto R. Gonzales*].

¹⁴⁸ SONTAG, *supra* note 79, at 10.

¹⁴⁹ Tim Reid & Ray Marcello, *Abuse Photos Reignite Scandal of Abu Ghraib*, TIMES (London), Feb. 16, 2006, at 24.

¹⁵⁰ David Stout, *The Struggle for Iraq: Prisoner Abuse; More Abu Ghraib Pictures Broadcast on Australian TV*, N.Y. TIMES, Feb. 16, 2006, at A18.

¹⁵¹ *Id.*

¹⁵² *New Abuse Photos Show Need for Probe; This Wasn't Just the Behavior of a Few out-of-Control Troops*, STAR TRIBUNE (Minneapolis, MN), Feb. 17, 2006, at 14A.

¹⁵³ *Id.*

¹⁵⁴ *America and Its Allies Couldn't Have Got it Much More Wrong*, CANBERRA TIMES (Australia), June 30, 2004, at A21.

¹⁵⁵ Teresa Wiltz, *Torture's Tortured Cultural Roots*, WASH. POST, May 3, 2005, at C1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/02/AR2005050201699.html>.

¹⁵⁶ Luban, *supra* note 23, at 1446–47.

¹⁵⁷ *Id.* (citing JOHN SIMPSON & JANA BENNETT, *THE DISAPPEARED AND THE MOTHERS OF THE PLAZA: THE STORY OF THE 11,000 ARGENTINIANS WHO VANISHED* 109 (1985)).

¹⁵⁸ See generally Luban, *supra* note 23; Scarry, *supra* note 59.

¹⁵⁹ *Fictional “24” Brings Real Issue of Torture Home*, USA TODAY, Mar. 15, 2005, at 1D.

¹⁶⁰ David Luban, Op-Ed., *Torture American Style*, WASH. POST, Nov. 27, 2005, at B1.

¹⁶¹ 24: Day 4: 4:00 P.M. - 5:00 P.M. (Fox television broadcast Feb. 21, 2005).

¹⁶² CTR. FOR VICTIMS OF TORTURE, EFFECTS OF TORTURE AND WAR TRAUMA ON FAMILIES, <http://www.cvt.org/main.php/EffectsofTortureandWarTraumaonFamilies> (last visited Nov. 18, 2007).

¹⁶³ See generally DIANNA ORTIZ, *THE BLINDFOLD'S EYES: MY JOURNEY FROM TORTURE TO TRUTH* (2002).

¹⁶⁴ *Id.* at 10, 14.

¹⁶⁵ *Id.* at 10.

¹⁶⁶ *Id.* at 14.

¹⁶⁷ Evan Thomas & Michael Hirsh, *The Debate Over Torture*, NEWSWEEK, Nov. 21, 2005, at 26.

¹⁶⁸ *US Acknowledges Torture at Guantanamo; in Iraq, Afghanistan - UN*, AFX NEWS LIMITED, June 24, 2005, <http://www.forbes.com/work/feeds/afx/2005/06/24/afx2110388.html>.

¹⁶⁹ AM. CIVIL LIBERTIES UNION, *ENDURING ABUSE: TORTURE AND CRUEL TREATMENT BY THE UNITED STATES AT HOME AND ABROAD*, Apr. 27, 2006, available at <http://www.aclu.org/safefree/torture/25354pub20060427.html>.

¹⁷⁰ *New Rule Will Bar Evidence Gained Through Torture*, National Public Radio (NPR) radio broadcast, Mar. 22, 2006).

¹⁷¹ 18 U.S.C. § 2340A (2001).

¹⁷² Bybee Memo, *supra* note 5, at 1–2.

¹⁷³ *Id.*

¹⁷⁴ Pentagon Working Group, Working Group Report on Detainee Interrogation in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations, at 8–9 (Mar. 6, 2003), available at <http://news.findlaw.com/wp/docs/torture/30603wgrpt6.html> (page 8), <http://news.findlaw.com/wp/docs/torture/30603wgrpt7.html> (page 9).

¹⁷⁵ *Id.* at 5.

¹⁷⁶ R. Jeffrey Smith & Dan Eggen, *Justice Expands 'Torture' Definition*, WASH. POST, December 31, 2004, at A1, available at <http://www.washingtonpost.com/wp-dyn/articles/A37687-2004Dec30.html>.

¹⁷⁷ McCain Amendment, *supra* note 96.

¹⁷⁸ Jeffrey H. Smith, *Central Torture Agency?: Exempting the CIA from the McCain Amendment Sends the Wrong Signal to Our Officers*, WASH. POST, Nov. 9, 2005, at A31.

¹⁷⁹ McCain Amendment, *supra* note 96.

¹⁸⁰ *Id.*

¹⁸¹ As of October 2007, the last action on this bill was its referral to the House Committee on Foreign Affairs on March 6, 2007. U.S. bill tracking service, at <http://www.govtrack.us/congress/bill.xpd?bill=h110-1352>. See generally Amnesty International, <http://www.amnesty.org> (last visited Dec. 4, 2007); Act Against Torture, http://www.actagainsttorture.org/ten_things.html#things (last visited Dec. 4, 2007).

¹⁸² Wash. Legal Found. v. U.S. Dep't of Justice, 691 F. Supp. 483, 492 (D.D.C. 1988).

¹⁸³ See Ross E. Wiener, *Inter-Branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys*, 86 MINN. L. REV. 363, 386 (2001) (citing

Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J.L. & PUB. POL'Y 467, 489 (1998).

¹⁸⁴ Smith & Eggen, *supra* note 176.

¹⁸⁵ *Nomination of Alberto R. Gonzales*, *supra* note 147.

¹⁸⁶ *Id.*

¹⁸⁷ *Rice Spars with Democrats in Hearing*, CNN.COM, Jan. 19, 2005, <http://www.cnn.com/2005/ALLPOLITICS/01/18/rice.confirmation/> (discussing Rice's refusal to respond to questions about whether certain interrogation techniques amount to torture).

¹⁸⁸ Transcript of U.S. Senate Judiciary Committee Hearing on Judge Samuel Alito's Nomination to the Supreme Court (Jan. 10, 2006), *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/10/AR2006011001418.html> (last visited Oct. 29, 2007).

¹⁸⁹ *Id.* (quoting Alito as stating that “[t]he president is not above the Constitution and the laws. Now, there are issues about the interpretation of the laws and the interpretation of the Constitution.”).

¹⁹⁰ War Crimes Act of 1996, 18 U.S.C. § 2441 (2006). The Act provides for the prosecution of former members who committed war crimes while on active duty (“would allow for prosecution even after discharge”), *id.*, and civilians who commit misconduct while accompanying U.S. forces overseas. *Id.* at § 2441(c) (“whoever, whether inside or outside the United States, commits a war crime”).

¹⁹¹ *Id.* at § 2441(c).

¹⁹² 18 U.S.C.S § 2340A(a) (2000).

¹⁹³ *Id.*

¹⁹⁴ Uniform Code of Military Justice, 10 U.S.C. § 893, art. 93 (2007).

¹⁹⁵ CAT, *supra* note 14, at art. 5 cl. 2.

¹⁹⁶ Treatment of Prisoners of War, *supra* note 7, at art. 121.

¹⁹⁷ Julie B. Martin, *The International Criminal Court: Defining Complementarity and Divining Implications for the United States*, 4 LOY. INT'L L. REV. 107, 121 (“In the United States, high-level military and government officials are only infrequently investigated or prosecuted for official acts through civilian and military courts.”).

¹⁹⁸ Jane Mayer, *A Deadly Interrogation: Can the C.I.A. Legally Kill a Prisoner?*, THE NEW YORKER, Nov. 14, 2005, at 44.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² Reid & Marcello, *supra* note 149.

²⁰³ Robert L. Carter, *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 33, 33–34 (1991).

²⁰⁴ Katherine H. Setness, *Statutory Interpretation of Clean Water Act Section 1319(C)(2)(A)'s Knowledge Requirement: Reconciling the Needs of Environmental and Criminal Law*, 23 ECOLOGY L.Q. 447, 487 (1996); Jonathan Weber, *Corporate Crime of the 90s*, L.A. TIMES, Nov. 25, 1989, at A1.

²⁰⁵ Memorandum for George W. Bush, *supra* note 135 (stating that “it is difficult to predict the motives of prosecutors and independent counsels who may in the future decide to pursue unwarranted charges based on Section 2441 [the War Crimes Act].”).

²⁰⁶ Michael Isikoff, *Memos Reveal War Crimes Warnings*, NEWSWEEK, May 19, 2004, available at <http://msnbc.msn.com/id/4999734/> :

One lawyer involved in the interagency debates over the Geneva Conventions issue recalled a meeting in early 2002 in which participants challenged Yoo, a primary architect of the administration’s legal strategy, when he raised the possibility of Justice Department war crimes prosecutions unless there was a clear presidential direction proclaiming the Geneva Conventions did not apply to the war in Afghanistan. The concern seemed misplaced, Yoo was told, given that loyal Bush appointees were in charge of the Justice Department.

“Well, the political climate could change,” Yoo replied, according to the lawyer who attended the meeting. “The implication was that a new president would come into office and start potential prosecutions of a bunch of ex-Bush officials,” the lawyer said. (Yoo declined comment.)

²⁰⁷ U.S. Dep’t of Justice Office of the Legal Counsel, Memorandum for George W. Bush, President of the United States, at 2 (Jan. 25, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf>.

²⁰⁸ Posting of William Aceves to <http://www.amnestyusa.org/askamnesty/live/display.php?topic=38> (June 23, 2005).

²⁰⁹ SONTAG, *supra* note 79, at 122.

²¹⁰ *Id.* at 105.

²¹¹ *Id.* at 81.

²¹² *Id.* at 82.

²¹³ See Pamela Constable, Op-Ed, *Torture’s Echoes; What Chile Can Teach Us About Ourselves*, WASH. POST, July 17, 2005, at B3.

²¹⁴ SONTAG, *supra* note 79, at 12.

²¹⁵ *Gilliam v. American Broad. Cos.*, 538 F.2d 14, 25 n.13 (2d Cir. 1976).

²¹⁶ Alice Haemmerli, *Whose Who?: The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 492 n.54 (1999).

²¹⁷ See, e.g., *Rossner v. CBS, Inc.*, 612 F. Supp. 334, 340 (S.D.N.Y. 1985); David J. Kohs, *Paint Your Wagon—Please!: Colorization, Copyright, and the Search for Moral Rights*, 40 FED. COMM. L.J. 1, 26 (1988).

²¹⁸ *Rossner*, 612 F.Supp. at 340.

²¹⁹ Kohs, *supra* note 217, at 26.

²²⁰ Arthur Best, *The Talismanic Use of Incomprehensible Writings: An Empirical and Legal Study of Words Displayed in TV Advertisements*, 33 ST. LOUIS U.L.J. 285 (1989).

²²¹ Cusac, *supra* note 134.

²²² SONTAG, *supra* note 79, at 122.

²²³ Cusac, *supra* note 134.

²²⁴ *The Details Count for "24" Web Fans: They Keep on Posting, Even Right in Middle of an Episode*, DAILY NEWS OF L.A., Apr. 26, 2006, at U4.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ 24addict.com's site meter can be found on its homepage, at <http://www.24addict.com/> (last visited Oct. 31, 2007).

²²⁸ 24weblog.com's site meter can be found at <http://www.24weblog.com/about/> (last visited Oct. 8, 2007).

²²⁹ *Id.*

²³⁰ SONTAG, *supra* note 79, at 122.

²³¹ See John Podhoretz, *Moore than a Jerk, The Meaning of Fahrenheit's Succe\$\$*, THE N.Y. POST, July 2, 2004, at 31.

²³² *US Attorney General Presents Highest Civilian Award to Minnesota Based Center for Victims of Torture*, PR NEWSWIRE, Apr. 19, 2001.

²³³ Constable, *supra* note 213.

²³⁴ *Id.*