



EDITED BY  
**SCOTT A. ANDERSON**  
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# **CONFRONTING TORTURE**

**ESSAYS ON THE ETHICS,  
LEGALITY, HISTORY, AND PSYCHOLOGY  
OF TORTURE TODAY**

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History, and Psychology of  
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EDITED BY  
SCOTT A. ANDERSON  
AND MARTHA C. NUSSBAUM

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## CONTENTS

*Acknowledgments / vii*

Introduction / 1

SCOTT A. ANDERSON

### **PART I : A TRIUMPH OVER TORTURE, TOLD BY A SURVIVOR**

ONE / Tales of Terrorism and Torture: The Soft Vengeance of Justice / 21

ALBIE SACHS

### **PART II : PSYCHOLOGICAL PERSPECTIVES ON TORTURE**

TWO / The Many Faces of Torture: A Psychological Perspective / 43

WILLIAM GORMAN AND SANDRA G. ZAKOWSKI

THREE / Stoic Equanimity in the Face of Torture / 70

NANCY SHERMAN

FOUR / Gender Performance Requirements of  
the US Military in the War on Islamic Terrorism / 87

MARY ANNE CASE

### **PART III : TORTURE IN HISTORICAL CONTEXT**

FIVE / The Fragility of Evidence: Torture in Ancient Rome / 105

KATHLEEN M. COLEMAN

SIX / US Torture of Prisoners of War in Historical Perspective:  
The Role of Delegitimization / 120  
CHRISTOPHER J. EINOLF

SEVEN / Police Interrogation and Coercion in Domestic  
American History: Lessons for the War on Terror / 146  
RICHARD A. LEO AND K. ALEXA KOENIG

**PART IV : THE ETHICS OF TORTURE**

EIGHT / The Ticking Bomb Hypothetical / 177  
MARCIA BARON

NINE / Torture and Method in Moral Philosophy / 195  
JEFF MCMAHAN

TEN / Torture, Self-Defense, and Fighting Dirty / 219  
DAVID SUSSMAN

ELEVEN / Torture as Unjust Means of War:  
To Squelch the Sirens' Singing / 231  
SCOTT A. ANDERSON

**PART V : TORTURE IN US LAW AND POLICY**

TWELVE / Torture and Positive Law:  
Jurisprudence for the White House / 257  
JEREMY WALDRON

THIRTEEN / In Defense of Lawfare:  
The Value of Litigation in Challenging Torture / 294  
LISA HAJJAR

FOURTEEN / Tortured Prosecutions:  
Holding Private Military Contractors Accountable / 320  
GARRETT ORDOWER

*List of Contributors / 345*

*Index / 347*

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Lastly, this volume is intended in some small way to honor and compensate victims of torture in recognition of the harms visited upon them and their undiminished dignity and worth as people.

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All but four of the chapters of this volume appear in print here for the first time. The following four chapters have appeared elsewhere in some form or another but have been revised for this volume:

Chapter 1, Albie Sachs, "Tales of Terrorism and Torture: The Soft Vengeance of Justice," first appeared in his monograph *The Strange Alchemy of Life and Law* (Oxford University Press, 2009). It appears here with a preface specially written for this volume.

Chapter 3, Nancy Sherman, "Stoic Equanimity in the Face of Torture," contains material initially discussed in chapter 6, "In the Face of Torture,"



from her book *The Untold War: Inside the Hearts, Minds, and Souls of Our Soldiers* (W. W. Norton, 2010). The chapter included in the present anthology was written specially for it, however.

Chapter 8, Marcia Baron, "The Ticking Bomb Hypothetical," was written for this anthology but has appeared now in Mark Timmons, *Disputed Moral Issues: A Reader*, 3rd ed. (Oxford University Press, 2014).

Chapter 12, Jeremy Waldron, "Torture and Positive Law: Jurisprudence for the White House," was originally published in *Columbia Law Review* 105 (2005): 1681–1750. It has also been reprinted in largely the same version in his book *Torture, Terror, and Trade-Offs: Philosophy for the White House* (Oxford University Press, 2012). The version in the present anthology here has been edited for length and modestly updated.

# Introduction

SCOTT A. ANDERSON

Throughout human history, torture has repeatedly come into and fallen out of fashion as an acceptable method of punishment and investigative tool. So too proponents and detractors have argued over its propriety and usefulness, with debates being more or less continuous since Voltaire, Beccaria, and others made an issue of it in the mid-eighteenth century. One might have believed, however, that those on the side absolutely opposed to torture had carried the day, and that their arguments were so well defended and accepted at the turn of the twenty-first century that the question of using torture was largely closed, at least in public, intellectual discussion. Beginning with the Fourth Geneva Convention (in 1950), through the International Covenant on Civil and Political Rights (in 1976) and the UN Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment and Punishment (in 1987), a variety of international covenants and treaties prohibit torture unconditionally. Though it is clear that not all signatories to these agreements did give up using torture (France, for instance, is well known to have used torture in the pursuit of its armed struggle in Algeria), there had seemed to be a general agreement among Western democracies (along with almost all other countries) that torture was simply not an acceptable technique in war fighting, policing, or penal sanction. These agreements also provided grounds for criticism of countries that failed to sign or adhere to them.

Although the public acts and pronouncements of the United States would have suggested that its opposition to torture was broad and deep, we now know that this opposition was more fragile and conditional than one might have supposed prior to the attacks of September 11, 2001. While it is no doubt easiest to oppose the use of torture when there is no one who poses a serious threat of danger to you, there proved to be a surprising well

of support in the United States to employ harsh interrogation methods—including torture—against enemy combatants. The United States was also able to enlist allies with fewer compunctions about torture on its behalf. Besides the defenses of this activity by members of the Bush administration such as Dick Cheney, David Addington, John Yoo, and Jay Bybee, a number of high-profile intellectuals published justifications of using torture in academic and popular venues.<sup>1</sup> As several authors in this volume point out,<sup>2</sup> the United States has had significant experience torturing its enemies and even its own citizens (when suspected of lawbreaking). Nonetheless, one might have thought that a consensus against torture was pretty well established by 2001. Subsequent events raise the question of how such an apparent consensus could break down so quickly—not just among intellectuals and policy makers spoiling for a fight but among the populace as a whole. How did abusing and torturing prisoners suddenly become so popular?

The old debates about torture have now been revived with gusto. Emotions on the subject tend to run high, in part because the thought of torture seems to engage many of us at the core of our sense of humanity: torturing someone seems to be an unthinkable breach of humanity—theirs and ours. And yet, when confronted with horrendous events in war or the prospect of catastrophic damages to one's own country, many have been pulled to consider the merits of torture, especially as a tool to help prevent catastrophes or to defeat an enemy one considers barbarous.

The US government and its elected leaders in particular have shown a willingness to consider the use of torture as a tactic in prosecuting war aims and have been reluctant to investigate or prosecute cases in which US security personnel have been alleged to use torture, in violation of the United States' own and international laws. While the Bush administration protested that "the United States does not torture," a mountain of evidence now shows that it did just that. Despite its rhetorical reticence, the Bush administration seems to have been eager to use torture in the prosecution of its wars in Afghanistan and Iraq and thereby to reverse long-standing policy commitments against it. The administration was motivated by the view

1. See, e.g., Alan Dershowitz, "Want to Torture? Get a Warrant," *San Francisco Chronicle*, January 22, 2002, <http://www.sfgate.com/default/article/Want-to-torture-Get-a-warrant-2880547.php>; Richard Posner, "The Best Offense," *New Republic*, September 5, 2002; Eric Posner and Adrian Vermeule, "Should Coercive Interrogation Be Illegal?," *Michigan Law Review* 104 (2006): 671–708.

2. See esp. chap. 6, by Christopher J. Einolf, and chap. 7, by Richard A. Leo and K. Alexa Koenig, below.

that its enemies are both evil and extremely dangerous and thus pose (at least ultimately) a threat to the life and liberty of the US citizenry and that of other liberal Western democracies. Confronted with what it regarded as implacable foes, the Bush administration proved itself unable or unwilling to adhere to professed principles against torture, regarding it instead as a useful instrument of war. Thus, its actions, if not its pronouncements, proved consistent with its position on other kinds of contentious weaponry and techniques—such as nuclear bombs, cluster bombs, land mines, secret detention facilities, assassination. Though these techniques have been widely condemned, the Bush administration resisted (in its rhetoric, at least) taking them off the table as potential means for prosecuting its security aims.

The United States practiced torture during its prosecution of its “war on terror” despite the existence of domestic and international prohibitions on torture. Part of the underpinning of the United States’ legal case for allowing it to use what it called “enhanced interrogation techniques” was the view that some techniques, such as waterboarding, fell short of the threshold of causing sufficient pain and damage to count as torture.<sup>3</sup> In the wake of employing these techniques, we now have additional contemporary evidence that waterboarding and other techniques designed to pressure detainees to provide intelligence were in fact torturous and have caused long-term damage to those subjected to them.<sup>4</sup> The subsequent Obama administration diverged from its predecessor by both condemning the use of torture unequivocally and, on all evidence available so far, forgoing its use as a military means. Yet the Obama administration refused to abjure its predecessor’s other contentious means of war and even showed a willingness to engage in other novel methods (such as cyberwarfare). The US detention facility for enemy combatants at Guantanamo Bay remains open as of this writing, after Obama’s eight years in office, despite campaign promises to close it. And the Obama administration did not pursue prosecutions of any of those who engaged in or sanc-

3. Matt Apuzzo and James Risen, “Donald Trump Faces Obstacles to Resuming Waterboarding,” *New York Times*, November 28, 2016, [http://www.nytimes.com/2016/11/28/us/politics/trump-waterboarding-torture.html?\\_r=0](http://www.nytimes.com/2016/11/28/us/politics/trump-waterboarding-torture.html?_r=0).

4. “After enduring agonizing treatment in secret C.I.A. prisons around the world or coercive practices at the military detention camp at Guantánamo Bay, Cuba, dozens of detainees developed persistent mental health problems, according to previously undisclosed medical records, government documents and interviews with former prisoners and military and civilian doctors.” Matt Apuzzo, Sheri Fink, and James Risen, “How U.S. Torture Left a Legacy of Damaged Minds,” *New York Times*, October 9, 2016, [http://www.nytimes.com/2016/10/09/world/cia-torture-guantanamo-bay.html?\\_r=0](http://www.nytimes.com/2016/10/09/world/cia-torture-guantanamo-bay.html?_r=0).

tioned torture, despite its international and domestic legal obligations to do so.

At present, just after the inauguration of Donald Trump as president of the United States, the US stand on torture appears equivocal or perhaps even leaning toward reviving its use; at a minimum, it seems certain to rescind its recently clear commitment against its use. Torture was a minor but recurring campaign issue in the bitterly divisive campaign between Trump and Hillary Clinton, the Democratic nominee. Trump in particular argued throughout the campaign that not only was waterboarding acceptable but that the United States should do “a hell of a lot worse than waterboarding” in response to the threats from its enemies in the Middle East.<sup>5</sup> In other statements, Trump made his position on torture less clear, at times stating that “the United States is bound by laws and treaties” and that he would “not order our military or other officials to violate those laws and will seek their advice on such matters,”<sup>6</sup> and thus seemingly tempering or even reversing his earlier claims. His pick for secretary of defense, James Mattis, has also publicly argued against the effectiveness<sup>7</sup> and legality of the use of torture.<sup>8</sup> However, his vice-presidential pick, Mike Pence, said postelection regarding using torture, “We’re going to have a president again who will never say what we’ll never do,” meaning that the United States intends to leave options such as torture overtly on the table. And a draft executive order concerning the interrogation and treatment of “enemy combatant” detainees indicates that Trump remains open to reviewing current interrogation practices and to reviving the CIA’s use of “black site” prisons in places outside the United States, where the use of torture would be much harder to detect or punish.<sup>9</sup> Thus, despite its legal commitments under international and domestic law, the United States’ rejection of torture as a means of war is at present ambivalent and far from reliable.

5. Jonathan Swan, “Trump Calls for ‘Hell of a Lot Worse than Waterboarding,’” *The Hill*, February 6, 2016, <http://thehill.com/blogs/ballot-box/gop-primaries/268530-trump-calls-for-hell-of-a-lot-worse-than-waterboarding>.

6. Ryan Browne and Nicole Gaouette, “Donald Trump Reverses Position on Torture, Killing Terrorists’ Families,” CNN, March 4, 2016, <http://www.cnn.com/2016/03/04/politics/donald-trump-reverses-on-torture/>.

7. Jacqueline Klimas, “Did Mattis Just Talk Trump out of Bringing Back Torture?,” *Washington Examiner*, November 22, 2016, <http://www.washingtonexaminer.com/did-mattis-just-talk-trump-out-of-bringing-back-torture/article/2608043>.

8. Kristina Wong, “Pentagon: Mattis Still Opposes Torture despite Trump Comment,” *The Hill*, January 26, 2017, <http://thehill.com/policy/defense/316356-mattis-remains-opposed-to-torture-pentagon-says>.

9. Charlie Savage, “Trump Poised to Lift Ban on C.I.A. ‘Black Site’ Prisons,” *New York Times*, January 25, 2017, <https://nyti.ms/2ksIk2H>.

There seems therefore to be a striking divergence between, on the one hand, the legal and rhetorical absolutism with which torture has been condemned, especially in the second half of the twentieth century, and, on the other, the eagerness with which the US government, among others, has turned to torture when it seemed strategically useful. This divergence frames a puzzle that arises in thinking about the broad prohibition on torture: although torture is subject to absolute prohibitions in international law, it is not immediately apparent why torture is morally more problematic than other, deadlier activities that are at least sometimes accepted as necessary for the defense of a country's public safety and national security. Of course, torturing a person as punishment or for revenge or for the public spectacle of it will be hard, if not impossible, to justify; there seems to be no acceptable point to doing so, given that there are other, less inhumane methods of punishment. But torture has often been thought useful as a method of garnering information from reluctant captives, especially from enemies who can be given no other sufficient incentives to tell what they know. While the value of torture as an interrogation technique is hotly disputed, most people seem able to imagine themselves relenting under torture to confess many things (not necessarily all true) in order to gain some respite from their suffering. Hence, many if not most people suppose that under some circumstances, torture might be uniquely useful as a means of acquiring vital information from enemies with whom one is at war.

As with an individual's right of self-defense, a state's right to defend itself against foreign aggressors seems fundamental. When outsiders threaten to subordinate one's citizenry (or worse), few would deny that it is permissible to fight back, even to the point of killing large numbers of the enemy fighters and, as a side effect, some innocent civilians as well. But given the nature of modern warfare, this judgment would seem to provide the basis for an argument that torturing those fighters (or even civilians) might be acceptable under some circumstances: if X is an enemy, and if it is acceptable to kill enemies in self-defense, and if killing X is worse than torturing X, and if torturing X may be useful in a way that killing is useful in a war, then it would appear that under some circumstances, torturing one's enemy may be justifiable. Yet torture clearly seems to be more broadly and unconditionally condemned as the sort of activity that can never be justified.<sup>10</sup> If a civilized society is at least sometimes "licensed to kill," then why couldn't it also be licensed, sometimes at least, to torture?

10. See, e.g., the UN Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment and Punishment.

The apparent inconsistency here drives a great deal of discussion regarding torture as a means of war, and while none of the chapters here can be said to be favorable toward the use of torture, they are all sensitive to the sorts of difficulties in thinking about torture just described. But understanding how best to grapple with the ethical and policy problems involving torture requires a broader study of torture than any one discipline or approach can provide. Torture is a multidimensional phenomenon—one with a very long history—that grips the imagination and pervades popular culture. It not only operates on the body and psychology of its victims but also marks many of its perpetrators indelibly. It seems to flourish more robustly in some circumstances than in others—and particularly in those where a conflict exists between parties in which at least one of them discounts the humanity and dignity of its enemy. And though there is significant evidence that it is of dubious value for obtaining useful intelligence (and may often be counterproductive toward this goal), it retains a nearly iconographic quality as a demonstration of one's commitment to the justice and righteousness of one's own cause. Hence, those who seek to regulate or abolish its use face considerable difficulty in crafting policies and institutions that are resistant to its enduring, primal appeal.

Torture is a complex phenomenon that continually tempts us to oversimplify it; this is a temptation that we need to resist. The present volume addresses the challenges presented by torture by drawing together work by scholars in psychology, history, sociology, law, and philosophy in order to deepen and broaden our grasp of it. Each of the essays in this collection moves us closer to answering at least one of the following questions:

- How should we understand the impetus to use torture?
- Why does torture stand out as a particularly heinous means of war fighting?
- Are there any sound justifications for the use of torture?
- How does torture affect the societies that employ it?
- How can we develop ethical or political bulwarks to prevent its use?

This volume, and many of the chapters in it, arose out of a two-day conference, "Torture, Law, and War: What Are the Moral and Legal Boundaries on the Use of Coercion in Interrogation?," held at the University of Chicago Law School. Albie Sachs, now retired from serving as justice of the Constitutional Court of South Africa, gave a keynote address at this conference in which he grappled with all five of these questions; Sachs himself has been a victim of state terrorism and torture and now presents a forceful case against its use. This address provides the basis of the first chapter here

and does as much as perhaps any brief writing could do to make the broad spectrum of harms involved in torture manifest and salient for thinking about how societies can respond to it. For that reason, this essay stands by itself at the front of this volume as a portrait of the interwoven issues that make torture a compelling, multidimensional problem for scholars to tackle.

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Contemporary discussion of torture occurs against a backdrop of history, psychological research, domestic and international law and convention, media coverage, and the experiences of many victims and inflictors of torture. We also have a stock of fictional cases and hypothetical scenarios with which to test our proposals and reactions to various possible laws. Several of the most valuable lessons from the works herein concern the degrees to which actual experience and empirically informed studies of torture challenge our assumptions and intuitions about what torture is, how it works, why it is used, and what it is useful for.

To get oriented to the topic, it is helpful to consider one of the insights that historian Darius Rejali offers in his masterful *Torture and Democracy*. Torture (or at least the techniques torturers employ) does not come naturally to people but is instead learned from those who have tortured before.<sup>11</sup> Others have pointed out that torture is rarely the handiwork of a few individuals or even rogue units but is almost invariably the production of an institution, such as a municipal government or a military, that deliberately engages in it as part of its practices.<sup>12</sup> The phenomenon of torture—especially its use by states, armies, police forces, and the like—thus needs to be considered as a multiparty activity, organized by groups of some size and carried out against not just individuals but rather members of *groups* that are distinct from the group whose members are conducting the torture. Hence, understanding torture requires one to keep in view all the following parties at the time of the occurrence of torture (or before that time arrives):

torturer(s)

torture victim(s)

the agency/state employing and directing the torturers

11. Darius Rejali, *Torture and Democracy* (Princeton, NJ: Princeton University Press, 2007), 419–38.

12. See, e.g., David Luban, "Liberalism, Torture, and the Ticking Bomb," *Virginia Law Review* 16 (2005): 1425–61 at 1441–52.



- the legislative agents who craft the laws regulating the use of torture
- the group, organization, or cause the torture victim(s) represent(s)
- the society supporting the agency conducting the torture
- the informational/entertainment institutions in society that have previously depicted torture, real or imagined

After someone is tortured, at least four other parties are likely to be drawn into the situation:

- the family/friends/society of the torture victim
- the counselors/caregivers who may attend to the torture victim
- the judicial or regulatory system that may be charged with prosecuting torturers or preventing the recurrence of torture
- the news media that may report on the occurrence of torture (possibly distinct from the media mentioned above)

Each of these different parties is likely to have different stakes and incentives with respect to the occurrence of torture and to play differing parts in fostering or inhibiting torture. A complete accounting of torture will need to encompass the interrelations of all these disparate pieces. This volume, of course, attempts no such thing, but the variety of contributions and the different approaches contained herein do give a wider field of coverage to the multiple moving parts that play roles in any systematic, institutionalized employment of torture.

Consider, for instance, the various factors that belong to the “psychology of torture.” Torture as an interrogation technique aims to break the will of the resistant subject, in order to induce him to tell of things that he and his group desire to remain hidden. Of course, if information is the goal of torture, then one needs a way to filter out the false information that might be provided under torture and to hone in on the true. According to some experts, torture turns out to be a highly ineffective and possibly counter-productive way of gathering true information from resistant testifiers; one is more likely to succeed with most subjects by establishing rapport and trust and by convincing them of one’s own humanity and decency. This, however, is not a quick strategy in interrogation; and sometimes time is of the essence. Torture thus is used sometimes in order to alter a subject’s ability to withhold valuable information. But torture itself is usually neither a quick nor a foolproof strategy. Too much torture, or torture inartfully used, can kill or incapacitate a subject or destroy his will altogether. Moreover, harsh torture also tends to lose its incentivizing effect fairly quickly, thus

making it unsuited to facilitate interrogation over longer periods of time. Thus, the chance of achieving a successful interrogation using torture is not high and requires much greater sophistication in the use of torturous methods than one might initially suppose.

Psychologists have been architects of coercive interrogation techniques as well as healers tending to psychological wounds left as a consequence of those techniques. Research in psychology has helped us understand both the processes involved in humans' capacity to inflict such suffering on others and the psychological consequences for those who have suffered at the hands of the perpetrators, the latter allowing us to find paths to healing. Torture no doubt affects different persons differently, and so there are perhaps no universal truths about how victims of torture recover or what kinds of treatment help them. But those psychologists and counselors who have specialized in working with torture victims can help us understand the sort of longer-term damage that torture does to the victim's psyche, as well as the range of behaviors of which humans are capable. Like many other victims of trauma, those tortured have been rendered silent, initially lacking a language to comprehend and communicate their suffering. In contrast to many other traumatized people, those tortured live with the knowledge that their pain and powerlessness were the very ends of a torment sought by fellow human beings. They tend to feel torn apart from their own pasts and their communities and usually have lost some measure of fundamental trust in a meaningful or manageable world. Broadly speaking, the harm is shown in their silence, their withdrawal, their numbing, and their nightmares, as much as in their scars, burns, and broken bones.

Despite the uniqueness of each victim's story, certain themes commonly recur in the narratives of their suffering and the course of their recovery. The intents of torture have been called the breaking of body and spirit, and the effects are stark testimony to its effectiveness. Victims over time, however, show incredible resilience in their restoration of hope and connection. The process is often halting and impeded by the travails of exile and resettlement. The therapist and victim together face the depths of depravity reached by the torturer, as well as the capacity to endure and move beyond so much loss and hurt toward the creation, against all odds, of a life again worth living—the transformation from victim to survivor. At the Heartland Alliance Marjorie Kovler Center, mental health professionals have worked for decades to help survivors of officially sanctioned torture in their recovery from the psychological trauma of torture. On the basis of their clinical experience in counseling torture victims at the Kovler Center, William Gorman and Sandra Zakowski write here (chapter 2) of the impact of torture

on its victims, as well as the challenges confronted by those who come to their aid as counselors and advocates after the fact.

But the psychology of the hapless victim during an interrogation is just one aspect of the broader topic of “the psychology of torture.” One question that arises in the context of an armed struggle in which each side can anticipate that some of its members may be captured and tortured by the other concerns what a military can do to help gird its fighters against the possible use of torture, short of committing suicide (as is sometimes done). Since the United States’ involvement in the Korean War in the 1950s, it has trained its combatants in techniques to resist and endure torture—the famous SERE (Survival, Evasion, Resistance, and Escape) training, which, among other things, helps condition soldiers to the sorts of abuse that they might expect if captured by enemy powers. These techniques were developed in response to experiences of US POWs captured by North Korean and Vietnamese forces but were also based on the CIA’s own research into psychological abuse, manipulation, and the use of psychotropic drugs.<sup>13</sup> (SERE then also turned out to provide US interrogators with a kind of template for conducting abusive and torturous interrogations during its war on terror.)

However, a notable and ancient strand of philosophy seems to offer a different way of coping with torture: to adopt the worldview of the Stoic sage. As Admiral James Stockdale is famous for having done while in captivity in Vietnam, one might try to hold fast to the wisdom of Epictetus, a Greek slave in Rome who studied philosophy and wrote several canonical Stoic texts. Epictetus counseled that the kinds of pains and misfortunes that torture can visit upon one are of no real consequence compared with one’s internal goodness or virtue. Since torture and the threat of torture would seem to work by leveraging the wants, desires, fears, and aversions of the target, and since these are in some fashion matters under an agent’s direction, it would seem that one could at least endeavor to make oneself impervious to the assault of torture by simply declining to give weight to the harms that torture inflicts. In so doing, one may also, thereby, make the torture a waste of time and resources for the torturers, thereby making one less of a target for it.

Though some have managed such a feat, this is unsurprisingly more easily theorized than done. As Nancy Sherman argues in chapter 3, Stoicism in the face of torture is not a wholly plausible or entirely desirable strategy.

13. Jane Mayer, *The Dark Side* (New York: Doubleday, 2008), 157–60.

Not only is the sort of self-mastery required something that may not be achievable in the face of a determined assailant, but the denial of the body is itself a questionable response to the dire circumstances of an incarcerated target of torture. Some of the sorts of self-defeat that torture aims to achieve are in fact apt causes of shame, and the mere fact that these are not willed by the torture victim does not, by itself, remove the sense one may have that they demean and debase his being. Though one may seek affective desensitization as a strategy in response to torture, the fact that torture often forces upon oneself a lack of self-control means that it tends to undermine the sort of control a Stoic may reasonably aim to achieve in more normal circumstances.

There is also something to explain in the process by which torturers—those tasked with abusing others at the command of their supervisors—come to choose their techniques and to rationalize their behavior. While there are many paths to this kind of thing, a particularly interesting question is how American soldiers serving in Iraq could have been led to disregard official codes of conduct regarding the treatment of prisoners and instead engage in the abuse and torture of prisoners at places like Abu Ghraib. Mary Anne Case's contribution to this volume (chapter 4) finds the roots of this behavior in the sort of indoctrination to (hetero)sexism that is standardly part of military basic training and American culture more generally. She takes as her starting points some quotations from US soldiers who were involved in the detentions and interrogations of prisoners from Iraq and Afghanistan, including "You're telling me it's wrong to do to a prisoner what the army does to its own soldiers?" Her essay adds a new twist to Rejali's insight about the etiology of torture: many of the techniques used to frighten and degrade the prisoners subject to interrogation are techniques that are in fact commonly used in hazing rituals to indoctrinate young American men and women into norms of "typical" heterosexual conduct, including stylized abuse in support of gender norms. Since many interrogators and prison guards were thrust into their roles without sufficient specialized training and were nonetheless required to "soften up" those who would be interrogated, these soldiers would frequently just "go with what they knew" from their own experiences of ritual humiliation as military or fraternity recruits. Some of these soldiers expressed genuine surprise that such treatment, meted out to their captive prisoners, might be considered excessively harsh when such treatment is of a piece with what is regularly done to young American men and women in the course of their indoctrination into major public institutions in the United States. Hence, it

may be hard to explain to many who are now accused of torturing enemy prisoners why such behavior is beyond the pale as a matter of law when done to others with whom one is at war.

The chapters in part III look at the historical use of torture, turning up several lessons about the conditions that give rise to the practice of torture. One lesson is that the variety of uses and frequency of uses of torture appear to track the perceived social status of the victims of torture. In chapter 5 Kathleen Coleman provides a window on this by looking at the use of torture in ancient Rome. She argues that torture as a technique of interrogation in ancient Rome must be seen in the context of the degree of physical suffering that was deemed appropriate in the punishment of slaves and, later, other categories of disadvantaged persons: pain fills the vacuum created by absence of status. Under Roman law, slaves could be tortured to extract evidence and confessions of guilt. At various times under the empire, these sanctions were also applied to free persons. Yet, Roman jurists frequently questioned the efficacy of torture as a means of extracting the truth, whether from free persons or from slaves. At the same time, after the virtually universal grant of citizenship to all free persons in 212 CE, judicial savagery increased. Ultimately, the use of torture as both a means of interrogation and an instrument of punishment coalesced in the treatment of the late antique Christian martyrs, who undermined the entire purpose of torture by enduring it, thereby paradoxically demonstrating their innocence in the process of proving their guilt.

The other two essays in part III consider in particular the history of the United States' use of torture. In chapter 6 Christopher Einolf looks at its willingness to use torture as a means of combat and at the conditions under which it has appeared justified to US leaders and soldiers to employ it. Out of all the United States' international conflicts prior to the recent ones in Iraq and Afghanistan, American soldiers have used torture in only two: the Philippine-American War of 1899–1902 and the Vietnam War. A number of characteristics that these wars share with the recent conflicts may help to explain why torture was used in them but not in the many other wars the United States has fought. First, US soldiers fought a nonwhite enemy, and racism made it easier to dehumanize the enemy and justify the use of torture. Second, these were both counterinsurgency wars, in which the information gained from torturing prisoners had greater value than such information would have in a conventional war. Third, the enemy violated many of the laws of war themselves, which led US soldiers to conclude they were not legitimate combatants and therefore did not deserve the protections usually given to enemy soldiers. In the Philippine War and the Vietnam

War, field officers and soldiers made this moral determination and used torture in violation of official policy, although senior officials often looked the other way when torture occurred. Einolf argues that the current war on terror resembles these earlier conflicts in many respects but is exceptional in that President Bush and other high administration officials declared the enemy to be illegitimate and ordered the use of torture. Einolf concludes with the recommendation that preventing torture requires thinkers to take the moral reasoning of soldiers seriously and urges us to come up with arguments against torture that soldiers will recognize as valid. He also suggests that some adaptation of international law may also be needed in order for soldiers to consider the law to be relevant and fair.

The United States has also tortured many of its own citizens as part of routine police practice, as recently as the 1930s. As Richard Leo and K. Alexa Koenig describe in chapter 7, physically and psychologically coercive interrogation methods have been used by American police from the late nineteenth century to the present, though there has been a marked transition from more physical to more psychological and deceptive methods. The use of the "third degree" as a method of securing confessions was fairly standard practice in many different police departments, with its heyday in the 1920s and 1930s. A number of factors combined around that time to rein in the use of physical coercion by police departments, including several high-profile scandals in which innocents were convicted on the basis of false confessions; the report of the National Commission on Law Observance and Law Enforcement (Wickersham Report) excoriating the use of the technique as ineffective; and developments in constitutional law strengthening the rights of the accused to due process and against self-incrimination. Leo and Koenig go on to draw some lessons of the American domestic experiment with the third degree in the early part of the twentieth century for contemporary military interrogation practices in the early part of the twenty-first century.

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As the frequent resurgence of torture suggests, it is not hard to come up with seemingly sound reasons based in reputable principles for why torture might seem like the thing to do; absolute prohibitions of any sort often generate grounds for paradox. Philosophers can always arrange it so that adherence to such a prohibition will, in some conceivable circumstances, lead to results that would be worse than violating the prohibition. We needn't even look for cases where torturing one might save a number of others; we can think of circumstances in which a torture victim herself

might be better off if we were to violate a ban on torturing her instead of adhering to it (since in so doing, one might in fact save her from a worse fate at the hands of someone else). When some people and groups are willing to act badly to the detriment of others, it often creates possibilities where it would appear that by engaging in a “lesser evil,” one may prevent a greater one. By such reasoning, one can be led to do virtually any heinous act in order to prevent something even more monstrous. All one needs is grounds to believe that there is an adversary who is capable of such monstrosity and that committing a lesser evil is the only or best way to prevent it. If one’s adversary then reasons similarly, there would seem to be no limit to the carnage that could be furnished with a justification.

Ethics ought to take care to avoid leading us into such moral sinkholes, though it is not always obvious how to avoid them. Academic and popular discussions of torture often contemplate a particularly acute version of the “lesser-evils” argument: the “ticking bomb” scenario. When confronted with an evil action that will take some time to be completed, torture sticks out as a way to intervene in order to stop that action and prevent a foreseeably catastrophic consequence. It is of some import that the action be “evil,” in that it would therefore be one that the perpetrators have no right to commit and hence one that they are obligated to refrain from whether or not subjected to torture. In such circumstances, torture seems capable of justification not only because it may prevent a catastrophic consequence, but also because the agent committing the evil action has no grounds for complaint against those who would attempt to stop the action. The “victim” of torture, in this case, has it within her power to stop the torture and is anyway obligated to do that which the torturer demands. To kill a perpetrator who was in the process of such an act could be defended as a justifiable form of self-defense or defense of innocent third parties. If so, then torturing such an actor, at least if it holds some prospect of preventing the bad outcome, would appear to be justified, and thus, the absolute prohibition on torture appears hard to support.

In part IV several chapters take such scenarios seriously as starting points for reflection on the morality of torture. Marcia Baron (chapter 8) finds that reliance on the “ticking bomb” kind of hypothetical case has distorted reasoning about torture. She notes that those who use such scenarios to lever us into accepting torture tend to underdescribe or fudge the details in ways that render the cases unlike potentially real cases. For example, those who stipulate that there is a short window in which to gain information from a terrorist typically fail to acknowledge the fact that torture rarely if ever achieves its ends against a committed adversary in such a short time frame.

But if one were to allow that there was a longer time frame in which to use torture, then the scenario fails to score its point: with more time, means other than torture can be used to prevent the calamity, and other means of interrogation become feasible and much more likely to achieve results. Baron argues that rather than informing ethical reflection, such examples serve principally to reinforce an otherwise unremarkable ethical premise: namely, that in very rare dire circumstances, one may find it necessary to choose a very great evil in order to prevent an even greater evil. But those who argue from ticking bomb scenarios tend to claim more: to argue that decisions about torture are really just matters of calculating costs and benefits. On this view, there's no special reason for holding that torture is in principle impermissible. Baron maintains that whatever the merits of this view (which she does not favor), this inference does not follow from the mere possibility that some calamity in very unlikely circumstances would be prevented by a use of torture.

In some respects disagreeing with Baron, Jeff McMahan (chapter 9) is less sanguine about the possibility of undercutting the force of ticking bomb scenarios and similar hypothetical cases. McMahan notes that while philosophers have routinely complained about the sorts of thought experiments that have been used to justify torture, such thought experiments are quite typical of moral philosophy in general, yet raise far fewer objections when used to think about other topics. The grip of these scenarios, he thinks, can't be analyzed away, given the horrific consequences that might follow from refraining from means such as torture in hypothetical scenarios of the standard sort. Moreover, those who engage in evil actions render themselves morally fit for horrendous treatment, so lack grounds for complaint when it is meted out to them. Hence, he is not persuaded by any sort of moral absolutist rejection of torture. Nonetheless, he does think that there are pragmatic considerations that can justify an exceptionless legal ban on torture. The way to justify a complete ban on torture, he thinks, is in light of considerations of the effect that a rule would have on avoiding mistakes and the all-too-human tendency toward cruelty, which inclines us to use torture when it is in fact unjustified. An absolute prohibition on torture is justified because on balance no more flexible stricture on its use is likely to be as productive of good outcomes.

McMahan's chapter supports a ban on torture for consequentialist reasons, focusing rather closely on the extent to which acts of torture are likely to cause or prevent harm. Two other contributions consider how using or banning torture can affect relations between parties liable to be engaged in protracted violent struggles, thereby making such conflicts more or less



likely or, once started, more or less protracted. In chapter 10 David Sussman takes up a distinction bruited by Thomas Nagel between “clean” and “dirty” fighting. This distinction turns on understanding conflict, even in extreme situations, as having an inherent expressive function, such that combat should be understood as a way of addressing one’s opponent. While clean fighting, as part of its function, aims to uphold some minimal norms of interpersonal address, dirty fighting does not seek to “reply” to the wrongful act but rather strikes at the ordinary life of the enemy. Sussman argues that it is hard to apply this distinction with any consistency and finds Nagel’s own discussion of torture in his essay “War and Massacre” not very illuminating. He goes on to suggest some ways to amend the clean/dirty distinction in order to shed some light on the distinctive moral wrongs of torture.

My own contribution in chapter 11 focuses on how the context of war—in particular the evils that occasion war and the perils involved in fighting one—affects our thinking about torture and requires attention to the body of doctrine that is supposed to govern the conduct of war. A central element of both just war doctrine and the instantiation of humanitarian norms in international humanitarian law is the “principle of discrimination,” which grants protected status to civilians and anyone else (including combatants) who is “out of the fight.” The distinction between being in and out of the fight is crucial both for the possibility of limiting the horrors of the conduct of war and for making it possible to end active conflict and achieve reconciliation between adversaries. Because torture requires the capture and control of the subject of torture, such persons are necessarily at that point “out of the fight” and so are protected by the principle of discrimination. I argue that the absolute moral prohibition on torture in war can be defended by validating the reasonability and importance of these international agreements encoding the principle of discrimination, rather than needing to argue in the other direction—from the immorality of torture to the force of international laws banning its use. I also argue that a review of the sort of justifications given for torture by its apologists—particularly, the caricaturing of their enemies as “evil” and thus deserving of torture—points to the importance of making and adhering to international humanitarian law as a fence against easily understandable inclinations to commit atrocities in war.

Straddling the line between philosophy and legal theory, Jeremy Waldron’s contribution to this volume (chapter 12) opens part V and critically considers the legal reasoning put forward by lawyers and policy makers in the Bush administration as part of its war on terror. He considers whether

the United States should put in place laws and policies that would allow but regulate harsh interrogation that stops short of torture, in light of arguments that some have made in favor of permitting but strictly regulating the use of torture. Would it be better to be legally scrupulous and explicit about the border between torture and nontorture, so as to provide safe harbor for interrogators so long as they stop short of torture (or so long as they stay within the bounds of what counts as legally sanctioned torture)? Waldron rues the willingness of the Bush administration to attend much more to the letter than to the spirit of the domestic and international legal obligations of the United States and to engage in hairsplitting casuistry about the boundary between illegal torture and permissible harsh interrogation techniques. He argues that the United States' long-standing prohibitions on torture tout court should be regarded as an archetypal foundation for thinking about the proper function of the state. Torture is repugnant to the spirit of US law, he suggests, so what is needed is an understanding of the nature of its laws that will help it avoid the temptation to try to find wiggle room with respect to justifying uses of torture or near torture. While Waldron accepts here a version of legal positivism, which holds that the law just is whatever the law says it is, he argues that nonetheless the prohibition of torture is central to the spirit of the United States' protection of the freedom of the individual against state tyranny. After examining the function of some other legal archetypes, Waldron argues that the prohibition of torture rests deep in the United States' laws and state practices, and so there is no simple way to reconcile "legal" torture with the other principles embedded in its laws. One consequence, if Waldron is right that the prohibition is an archetype, is that breaching that line is likely to lead to much less personal security for Americans, since much of the formal protection of their personal security derives from the fact that they are (or at least legally should be) immune from any threat of physical abuse at the hands of the state, of which state-imposed torture is a paradigmatic violation.

The last two essays in the volume consider what further legal measures can be taken to prevent the United States from engaging in further uses of torture and similar activities and to seek to bring those who committed torture at its behest to justice. In chapter 13 Lisa Hajjar takes up the topic of the use of private lawsuits in courts, either domestic, foreign, or international, as a means to inhibit and redress the use of torture. Sometimes described (usually by its critics) as "lawfare," such legal suits create the possibility to use peaceful, dialectical means to stop democratic states (and others that have functioning, impartial judicial systems) from torturing their enemies and to bring those who have authorized or engaged in

torture to account after the fact. Such suits also present several questions with respect to their relationship to such democracies. If a government is popularly elected, the use of courts to alter its behavior portends the possibility that those who have the time and the access to such venues are using them to subvert the majority's will. But this depends on how one assesses the relationship between executive authority and the proper functioning of democracy. Hajjar argues that many of the critics of lawfare have conflated the will of the people with the will of those holding executive office. If so, then there is not necessarily a conflict between the use of courts to disrupt the executive's and the military's employment of torture and the idea that democratic principles should guide the state's conduct.

Another recent trend in US military policy, the increased use of private military contractors in combat roles overseas, further complicates the question of how the United States should handle instances of torture. While US law clearly prohibits torture in the United States, or elsewhere if done by US citizens or nationals, there is at least unclarity with respect to how the law governs the behavior of US contractors overseas, especially when their bases of operation are foreign, along with their employees. In chapter 14 Garrett Ordower argues that as the usage and roles of private military contractors expand, more situations will arise that aren't captured by current laws. But even if US law were clearer about whether their behavior was illegal, the US government has been practically unable or unwilling to pursue prosecutions. Ordower goes on to defend the view that the United States must create a more fully articulated legal regime that applies specifically to its military contractors in order to keep them accountable to US goals throughout the world.

The essays in this volume do not cover all aspects of contemporary thought on torture, but they collectively force to the forefront a number of questions that deserve continued discussion. What are the historical and cultural forces that shape attitudes toward torture, and can these be directed in ways that make torture less likely? Why do we take special umbrage at torture when seemingly worse infringements against humanity draw less attention? In what ways does torture harm the psyche, and what does it take to repair such damage? Can one make philosophical arguments about torture without undermining what is perhaps the most potent means of opposition to it: the visceral contempt for it displayed in Sachs's discussion? And how can we make do in a world where torture seems an inevitable fact of life at least in some quarters, if not perhaps at home?

PART I

A Triumph over Torture, Told by a Survivor



## Tales of Terrorism and Torture: The Soft Vengeance of Justice

ALBIE SACHS

Sometimes a small shock can be greatly educative. Arriving late at the conference on torture at the University of Chicago, my major preoccupation was to slip into a seat without disturbing the speaker. Then, as his words came through to me, I felt impelled to get up and walk out, as quietly as I had come in, but angrily. The shock came not from the manner of presentation—the reasoning was calm and precise—but from its content. The professor was applying cost-benefit analysis to the use of torture! I was stunned, and revolted. It was like weighing up the pluses and minuses of slavery or blackmail or child abuse . . . my mind rang up a quick list of social activities regarded as so intrinsically abominable in their totality as not to merit anything good at all to be said about their details. Then I recalled Shakespeare's words said to the bewildered Olivia in *Twelfth Night*, "This is Illyria, Lady." This was America, man. A debate on the pluses and minuses of torture could never have been held in Chile or Argentina or South Africa or Zimbabwe, where at different times torture had been used in devastating manner by state authorities and impinged severely on the national psyche.

It made me think why certain issues could not legitimately be debated in the USA today, while others could. Thus, I could not imagine anyone now being invited in the USA to do a cost-benefit analysis of slavery or segregation or sterilization eugenics, though once the pros and cons of all these practices had been "scientifically" discussed by scholars. The national consensus on these issues would be so powerful as to prevent such an invitation being given. Could it be—my mind speculated impulsively—that the academic imagination would be revolted only if torture was a now-repudiated practice being applied by Americans to Americans, and not an approved mechanism being applied by Americans to foreigners? The international consensus, as evidenced by the Convention against Torture,

indicated that torture was universally regarded as an undoubted and unqualified evil. The fact that torture in America did not evoke a spontaneous response of civilized horror was more telling in itself than the content of the paper. Then I try to tell myself that the very point of cost-benefit analysis is to exclude what is regarded as extrinsic moralism from the inquiry . . . but my brain answers that what is at stake is precisely the deep morality of the society and the role that respect for human dignity plays at its foundation, and that if respect for human dignity has a price beyond rubies, then the scales of any balancing process could never come down on the side of torture.

But soon it would be my turn to speak. Should I make my point by walking out? The only way I could calm my racing brain was to apply cost-benefit analysis to my participation in a debate with people using cost-benefit analysis to justify torture. I had to accept that you took conferences as they came, that this was where the debate happened to be in the USA, and that it was particularly important for perspectives from other countries to be introduced. Rather than suffer the awkwardness of a departure without speaking, I could let the shock I had undergone give a special rhetorical edge to my presentation. So, shortly afterward I went to the podium and gave my presentation as planned, emphasizing rather more strongly than I otherwise might have done that torture has to be looked at from the point of view not only of what it does to the victims but of what it does to the torturers.

I had given similar talks in many countries to many different audiences. By the time I received the transcript from Chicago I was working on a book dealing with how my subjective life experiences had later entered into objective reasoning as a judge on South Africa's Constitutional Court. I adapted the presentation for the book, adding extra material drawn from judgments (opinions) in which I had been involved. What follows below is a revised copy of the speech in the form I made it at the University of Chicago and then published as chapter 1 of *The Strange Alchemy of Life and Law*. Given its provenance, Oxford University Press, the publishers of that book, have kindly agreed to the publication of this slightly edited version here.

### 1. My experience as a "terrorist" and torture survivor

I was thirty-nine years old, quietly teaching law in exile at Southampton University, when I discovered I was a terrorist. I had been invited to attend a conference at Yale University's Contemporary History Department. But I

could not get a visa. Why? Because I was a member of the ANC, the African National Congress, led by Nelson Mandela, who had been commander in chief of Umkhonto We Sizwe (Spear of the Nation), set up to help overthrow apartheid in South Africa. And although I was simply earning my living as a rather innocuous law teacher in England, as a member of the ANC I was a terrorist. Happily, a few months later the political lobby group in Washington which backed the ANC turned out to be stronger than the group hired to promote the interests of the South African government. The State Department policy changed, and I was no longer a terrorist.

It was not simply the ignoble label of "terrorist" that was so objectionable. In South Africa, being treated as terrorists had brought enormous and terrible consequences for thousands and thousands of us. As terrorists, we could be detained without trial and subject to solitary confinement with no access to family, to lawyers, to anybody. Because? Because the authorities were combating "terrorism," fighting against what they called the total onslaught against South Africa. And they would bring in the threat of the Soviet Union, and a whole series of perils, the Black Peril, the Red Peril, and, when China became more powerful, the Yellow Peril, to justify what they called self-defense against terroristic acts. And we were arbitrarily plucked from our homes and our workplaces and found ourselves in jail.

How difficult it was to be brave! Before it happens, you think that when you are locked up you simply bare your chest, retain belief in your cause, and hold out forever. The reality is totally different. You are living in a little concrete cube. You stare at your toes, you stare at the wall. Your toes, the wall, your toes, the wall, you do not know how long it is going to last. There is nothing to do. There is no one to speak to. It is an inhuman existence. Human beings live in communities, they live with other people. There might be a few individuals who test their spiritual steadfastness by sitting alone on a column for years. I have a friend who is a Buddhist nun; she is silent for a month, for two months. She is in control, it is her choice. Solitary confinement is a nonchosen state, designed not to exalt your spirit through meditation but to break it down through isolation.

I can still remember how I would try to occupy myself and feel like a valid human being with an active brain and regular emotion. I would try to remember all the states of the United States of America. I think I once got up to forty-seven, but I could not write them down, so after slowly working my way through the alphabet, I would not be sure how many I had counted. I had two arms then, so at least I could get up to *J*. And then I started singing songs, once more going through the alphabet: "Always," "Because," "Charmaine"—quite an interesting profile of the hit tunes of



1963. (I mention in passing that the whole world knew when President Kennedy had been assassinated, except for one person: me. For about a week I had not even an inkling, I was kept in a world without news, until a security officer could not resist the urge to tell someone who still had not heard.) I would sing, trying to feel like a human being, a person living in the world:

I'll be living here, always, year after year, always. In this little cell that I know  
so well. I'll be living swell, always . . .

and I would be amused that I was using Noel Coward's upper-middle-class version of an Irving Berlin tune to keep my spirits up:

I'll be staying in, always, keeping up my chin, always. Not for but an hour,  
not for but a week, not for 90 days, but always.

I was being held under what was called the 90-day law, which allowed suspects to be locked up in solitary confinement for 90 days without charge. After 90 days of scratching a mark on the wall like a good prisoner, it's the 90th day. I am released, I am given my tie back, my suit is returned—the one that I had worn when I was arrested entering my advocate's chambers—my watch is returned to me, and I say, "I'm free, I'm free." And as I am walking out to the street, a sergeant comes up to me—he actually shakes my hand—and says, "I am placing you under arrest." And I am on my way back in again, giving up my watch, tie, and suit once more. Ninety days could become another 90 days and another 90 days and another 90 days.

Once you open that door to diminishing respect for the rule of law, you close the door to the rule of law, to habeas corpus, to standards of fair interrogation, to the right to a fair trial; the opening or the closing is never enough for the security people. Under pressure to get results, they always want more, and so they ask for 90 days, then 180 days, and eventually for endless detention. That was my first detention, for 90 days and then another 78 days, never knowing when it was going to end.

Two years later (and you don't get stronger each time you are detained), I was detained again and subjected to what I call torture by sleep deprivation. Keeping me up through the day, through the night, with a team of interrogators shouting at me, banging the table for ten minutes, total silence for ten minutes, replacing each other, rotating all the time. When I asked for some food, they seemed delighted and smirked as they set a plate

in front of me: I was pretty sure there was some drug in the food. And the next morning my body is fighting my will, my mind. The desire to sleep, to collapse, is just overwhelming. I knew of people who had held out for four days, for five days or seven days, and the longer they had held out, the more they had ultimately broken. They had lost all control whatsoever. I feared ending up like them. The theory was that you should hold out for thirty-six hours so that your colleagues could escape. But I had no one to protect; my information was two years old.

And this battle was not even about information. It was about breaking me. It was about showing that they were stronger, that they were more powerful. I was not thinking of Jean Paul Sartre at the time, but later I recalled his writing about torture in Algeria, and his pointing out that the objective of the relevant sections of the French military was not only to get information, it was to destroy the will, the confidence, the self-esteem of the people in captivity. There was a powerful racist dimension. They sought to dehumanize the people they were torturing by the very act of treating them in a subhuman way. They felt they were not only entitled to do what they were doing, they were obliged to do it because they were combating evil, crushing an inferior, threatening creature. And in the eyes of the interrogators I was in some ways even more terrible than the black people to whom racist ill-treatment had been historically applied. I was the pernicious white mastermind who was stirring up innocent souls, telling them they had grievances when in fact they were grateful to this government for making them better off than their counterparts in other parts of Africa.

It was the worst, worst moment of my life. It was not a hypothetical situation of the kind that some academics conjure up when discussing the costs and benefits of the government using torture. And, as in 99.9 percent of cases where forms of torture are used, there was no ticking bomb nearby when I collapsed on the floor, they poured water on me, and they lifted me up. I still remember those thick, heavy fingers prying my eyes open. I collapsed again, more water, the shoes shuffling around me, some brown, some black, and their sense of quiet, methodical urgency, the muted triumph as they were now breaking through my resistance. Any information I had at that stage was stale. Possibly they wanted to get me to be a witness against somebody who had also been in the resistance. That would have been a double triumph, because I could then have been projected as a traitor, as an instrument of the very state I had been opposing. They wanted hegemony, dominance, power, control, mastery. The practice was systematic, it was organized, it was condoned, it was part of policy. And it was integral to the whole system of white supremacy in our country, of retaining

an unjust system by using methods which were so ugly and awful that even in apartheid South Africa they were hidden and denied. The rotten apples were at the top of the barrel, not the bottom. Six months, a year, or two years later, the torturers would come to court and deny that these things had happened. The judges would look at the witnesses who alleged torture and would not see blood flowing or broken bones or burnt skin. They would just see a pale, nervous, stuttering accused person claiming abuse and go on to accept the confident counterassertions of the security police, who, after all, were claiming to protect the judges and their families from terrorist attacks. To their credit, there were judges who showed that even in the direst of situations, space existed for the exercise of independent judicial conscience. But sadly they were few in number.

## **2. The power of justice in the face of torture and terrorism**

I remember early on in my first detention thinking to myself that if ever one day I would be in a position of power and authority, I would never do this to another human being. When you are totally powerless, you try to imagine yourself in a situation of command in relation to those who are humiliating you. And what is the greatest power you can exert? It is not to do unto them what they are doing unto you. You are so weak that it is not even feasible, not even imaginable, that you can invert the power relationship. It is more emotionally credible to say to yourself, though I am hurting terribly, I remain superior to them—my standards and values are better than theirs, I have beliefs that are too deep for them to reach, I am a human being, I am fighting for justice, and I am struggling for freedom, I will never be like them. Somehow the strength of that belief, of being able to cling to a vision of a world based on magnanimity rather than on brutal tit-for-tat, gave me a sense of moral triumph that was extremely resilient. Years later when I was writing about the experience of being the target of a car bomb and losing an arm, I found myself repeatedly using the phrase “and that would be my soft vengeance”: if the person accused in a Mozambique court of being responsible for placing the bomb in my car is put on trial and the evidence is insufficient and he is acquitted—I wrote—that will be my soft vengeance, because we will be living under the rule of law. To gain freedom was a much more powerful vengeance than to impose solitary confinement and torture on the people who had done these things to us. To repay them in kind would have meant that we had become like them, that we had become gangsters and crooks and thugs—for a more

noble cause to be sure, but in the end no different from them, only stronger. Our souls would be like their souls, and our inhumanity would be inseparable from their inhumanity.

What made it particularly ironical that we should be punished as terrorists, and in some ways made it especially dreadful, was the fact we were actually strongly against terrorism. In the late 1960s and early 1970s, there were "isms" all over the place. Capitalism, socialism, imperialism, Stalinism, Trotskyism—only social democracy didn't fit into the "isms." And one of the "isms" that we had denounced on principle in our movement was terrorism. To respond in kind to the violence of apartheid was just wrong. Terrorism was based on the use of indiscriminate violence, directed at civilian people because they happened to belong to a particular group, race, or community. It was totally lacking in political intelligence. It was completely antithetical to our ideals. We were fighting for justice against the system of white supremacy, not against a race. And this lesson was repeated on all our platforms and in all our literature; I would not say *ad nauseam*, but endlessly, as a kind of a mantra of our struggle. For years we believed in the strategy of nonviolence. This was partly to avoid an ultimate racial bloodbath from which we might never recover; you can rebuild destroyed buildings, but it is far more difficult to repair damaged minds seething with hatred passed from generation to generation. So even when every avenue of peaceful protest was proscribed and our movement eventually embarked on armed resistance, we still denounced any resort to terrorism.

Thus at a time when other movements in the world were conducting spectacular plane hijacks, and many younger members of the ANC were asking why our leadership were refusing to put our struggle on the map through similar actions, our leadership gave an emphatic no. It was not just that our acting president, Oliver Tambo, might himself have been traveling on the plane, or somebody else who supported our cause. And it was not simply the danger that our manifestly just struggle against apartheid, against institutionalized racism, would come to be seen merely as a struggle for power and survival between two racial groups. We were preoccupied with the big question: Who was the enemy? The enemy was not a people, a population, but a system of injustice. When we used violence in our challenge to that system of injustice, it had always to be directed at the physical power and the structures of domination of that system, not at civilians. And I am convinced that the real reason, the deep reason, that led Oliver Tambo and other leaders of the ANC to repudiate terrorism was that they did not want us to develop the souls of terrorists. What does terrorism do

to those who use it? What kind of person do you become? How could you claim to be a freedom fighter when you kill indiscriminately? I am sure that was the underlying morality, sometimes stated, sometimes implicit. And it was a morality of justice that turned out to be strong, not weak. It constituted a powerful unifying force inside the ANC, enabling it to survive thirty years of exile with no major disputes or breakups, at a time when virtually all other exile movements splintered.

The story moves on to the intense debates we had in the ANC in exile in 1985. Perestroika was barely in its infancy then, so our dilemmas were not related to external international factors. The Berlin Wall was to fall only years later. We had a conference in a small town called Kabwe in Zambia, with Zambian troops surrounding the hall in case South African commandos came to blow us up. It was serious, very, very serious. There were three themes in particular that I remember being discussed. The first was what tactics and strategy we could permissibly use in our struggle. And I recall the speech of King Sabata Dalinyebo, a patriotic traditional leader from the Eastern Cape, who had refused to be a puppet of Pretoria and been forced into exile. I had been host to him and his family in Mozambique and lent him my bathing costume when we went to the beach—I had never lent bathing trunks to a king before! The theme he was now addressing was how to intensify the struggle to overthrow apartheid. He spoke in isiXhosa, so the small number of us who were culturally backward and could not understand what he was saying (African people had to understand English, the oppressors' language, but the oppressors did not have to understand the languages of the majority) had to wait for the translation. He addressed us in a very animated way, and the audience laughed; and five minutes later when we heard the translation, we also laughed. This was his story: "Two men are fighting, it's a stick fight, a very bitter one, they are angry and their wives are urging them on. The wife of Man A shouts: 'What's the matter, my husband? You are much stronger than him, and a better fighter, but he's defeating you? You are losing because you have a stick in only one hand, while your other hand is useless for fighting, because it is stupidly holding a blanket to cover your nakedness. Drop the damn blanket, forget your nakedness, and fight with both hands!'" That's when everybody laughed; and when I heard it five minutes later in English, that is when I laughed.

What he was saying was that because of the fear of being labeled terrorist, the ANC was unduly limiting its capacity to hit back. Some delegates were muttering in the corridors that until the whites cried when they bur-

ied their children, they would never understand the suffering of the African people. Yet the response of the delegates in the hall was in a very African way to just laugh quietly and gently, as if to say, we get your point, we hear your story, it's a powerful one, and we respect you for sharing it with us, but it is not exactly our policy. And the discussion simply moved on. I would have jumped up and said, "Comrade King [that was how we addressed him], the long-standing policy of the ANC has been to resist terrorism as an ideologically inappropriate instrument of struggle because blah, blah, blah." The African way was much more subtle, much less confrontational and abrasive. And the result was that the conference fairly and squarely rejected any idea of abandoning the long-standing and principled position of opposition to the use of terrorism.

The second major theme was one which directly involved me. I was then director of research in the Ministry of Justice in Mozambique, and Oliver Tambo had invited me to come to speak to him about "an important matter" in Lusaka, where the ANC had its headquarters. I was curious to know what the "important matter" was. Eventually I got to his small office. He asked about my health, my family, my work in Mozambique, and the political situation there. I remember being amused that one of the great leaders of the age had a rolled-up piece of newspaper and that he was swatting flies as we conversed. Finally, he came to the point. "You know, we have a problem in the ANC," he said, knocking out a fly with a deft flick. "We've captured a number of people whom we believe were sent by Pretoria to try and destroy the organization. But we don't have any regulations governing how captives should be dealt with. The ANC Constitution deals with annual general meetings, electing new leadership, and so on, and the policy of the organization. But it is silent on the treatment of people we are holding under our control, and we are not sure how to fill that gap." He paused, dispatched another fly, and then added in his polite, lawyerly way, "I'm sure it's very difficult to get appropriate regulation." And in my confident way I replied, "It's not too difficult; the international conventions make it very clear, no torture, inhuman, or degrading treatment." He looked at me and quietly said, "We use torture." He spoke with a bleak face. I couldn't believe it. The ANC, an organization fighting for freedom, using torture?

Years later I learnt that people who had been sent by Pretoria to destroy the leadership of the ANC and sabotage its operations were being held in ANC camps in Angola, and torture had been used against them. It turned out that the ANC leadership had instituted an inquiry and reported that ANC security had indeed used torture, defending themselves by saying

that their duty had been to protect the liberation struggle from imminent threats of harm. Now Oliver Tambo was calling me in as a legal person to help the organization establish and apply appropriate standards for dealing with the situation. And in the Oliver Tambo manner, he did not use his position as president of the organization in exile to issue a top-down statement decreeing what the standards should be. He asked me instead to draft a code of conduct which would then be democratically debated by the whole organization at a properly constituted conference.

The problem was to establish the rule of law for a liberation organization in exile, in a context where our host countries expected us to attend to our own legal problems. The document I eventually produced amounted to no less than a code of criminal law and procedure, adapted to the peculiar circumstances of an exiled and dispersed political organization. Of all the legal writings I have done in my life, two stand out as being far more important than any of my books or judgments. The one is the tiny note to be used in litigation that I smuggled out of jail to my mother in a thermos flask after my torture by sleep deprivation. The other, this Code of Conduct.

Oliver Tambo was a deeply thoughtful person who believed that the question of whether a liberation organization may use torture to protect itself from serious threats to its fighting capacity raised profound moral and philosophical questions. He was also a natural democrat who felt that the problem had to be grappled with not just by the leadership but by the whole membership. So the draft was put to all the members in exile (and to some members of the underground in South Africa) to be discussed in advance, so that the branches could take positions on the questions raised. The opinions of the branches were then collated and placed before the delegates at the conference.

I remember the debate vividly. There was overwhelming support for the Code of Conduct as a whole. The delegates were happy with the idea of classifying offenses against the organization into three categories, each with its own form of investigation, its own procedures, and its own penalties. This presupposed graduated responses to three main categories of people: those who were merely unduly disruptive at branch meetings; those who drove while drunk or committed offenses such as assaults or theft or abuse of women; and those who allegedly had been sent into the organization in order to kill its leaders and wreck its functioning. Tribunals akin to courts were established for the second and third categories, with judicial officers who would be independent, as well as the equivalent of prosecutors and defense counsel, and a right of appeal. It was clear at the conference that

the idea of establishing an appropriate system of legality inside the organization strongly appealed to the members.

But there was one issue that called for specific attention, a question that Oliver Tambo felt should not be fudged by the conference. It was whether the Code of Conduct should make special allowance in extremely grave circumstances for what were called "intensive methods of interrogation." One by one the young soldiers of Umkhonto We Sizwe came up to the platform and gave their answer: an emphatic no. They declared that the minute you allowed any exceptions or exemptions, elements of ANC security would use them to undermine the principle of not employing torture. They insisted that there be very clear standards and that absolutely no torture be used in any circumstances, whatever the euphemism used. They didn't enter the realms of reasoning of some who speak about where and when to draw the line. Can you torture someone to death because of a ticking bomb? Can you use electrodes or water suffocation or sleep deprivation? The young soldiers—and the not-so-young lawyers—were making unambiguous statements about the kind of people we were, what we were fighting for, and what our morality and core values were about. They had seen in practice how torture had dehumanized not only the tortured but the torturers themselves, transforming people who had been their friends, who had left school and university with them to join the freedom struggle, into behaving like brutes. In dealing with brutes, they had allowed themselves to become brutalized, even if only for brief spells. The speakers were adamant. They did not want to belong to an organization that used torture. Full stop.

It was an extraordinary moment for me. Here we were in exile, in perilous conditions facing an extremely powerful, well-organized, and quite ruthless enemy. At any moment there could be a commando raid or bombs dropped to take us out. Many of our friends had been tortured to death or assassinated. Yet I remember a young soldier going to the microphone and saying, "We are fighting for life—how can we be against life?" He didn't just mean life as creature existence, he meant life as an expression of the human personality, of human dignity. How could we violate the very spirit that kept our rebellion against injustice alive? It was extremely emotional for me to hear this. It corresponded not only to what I knew Oliver Tambo believed in, and what to me was axiomatic, but it touched on the core of what had enabled our members to endure the rigors of an extremely harsh struggle and bound us all together.

And it was also absolutely consistent with hard-won principles of international law.



### 3. There's nothing abstract or hypothetical about torture and terrorism

Looking at international law today, I do not see anything that speaks about a ticking bomb justifying evasion of the torture convention. Torture is torture, is torture. You go to Argentina, torture is torture. You go to Chile, torture is torture. A generation of people in these countries were subjected to torture; they know what it is. They have been through it, and they do not convert what is a huge historical experience still haunting the soul of the nation into a set of imaginary situations to be dealt with at a purely instrumental level, weighing up profits and losses in an analytical bookkeeping manner.

I now turn to something often left out of discussions on terrorism, namely, state terrorism. Far more people have been mutilated, exterminated, massacred, and killed through state terrorism than through the actions of what are called "irregular groups." And in addition to the power that states normally have to kill, maim, torture, and abuse, they also have the capacity to control the media, to terrorize people who otherwise might be witnesses, to impose silence for their deeds, and to establish impunity for themselves. I did not take part in the armed struggle. My job was to be a lawyer and a writer and, later, an antiapartheid activist in Europe and in the United States. Yet the armed struggle came to me. It did so in the form of state terrorism—a bomb placed in my car by South African security agents in Mozambique. I survived. Ruth First didn't survive the letter bomb sent to her at the Centre for African Studies at the Eduardo Mondlane University in Maputo. The Maputo cemetery is filled with people assassinated by South African commandos. We were surrounded by death. So when I temporarily regained consciousness in the Maputo Central Hospital, I just felt triumphant. I had survived. This moment that as a freedom fighter you spent every day wondering about, will it be today, will it be tonight, will it be tomorrow, will I be courageous when it happens to me? It had come, and I had survived, survived, survived. I knew, as a matter of total conviction, that just as I had recovered, my country was going to recover.

And so it came to pass, and eventually the Truth and Reconciliation Commission was set up to deal with the assassinations and tortures of the apartheid era. The commission was a powerful experience for us in South Africa. So many stories were told, and so many dimensions captured. It wasn't the facts, the data, the information that was important, not even the conclusions. It was seeing the faces, hearing the voices, noting the tears of the victims, and also the crying of the perpetrators as they acknowledged,

at least to some degree, their brutal conduct and now sought amnesty. It was real. These were our people, not strange and depersonalized individuals, "the enemy," "the torturers," and "the security police." It was Sergeant So-and-so. It was Mrs. So-and-so, speaking about her son who had come home with his hair falling out, his poisoned body dying. It was so vivid, a huge national drama in which we were all involved.

One story stood out unforgettably. It symbolized so much. It was the exchange between Tony Yengeni, who had been in the armed wing of the ANC, and Sergeant Benzien, who had tortured him and was now asking for amnesty. We saw on television Tony asking Sergeant Benzien to show the commission how he had put wet canvas bags over the heads of prisoners. "Show the commission how you would smother us until we thought we were drowning, that we would suffocate and die." The commission asked someone to lie on the floor, and the bag was put over his head and held there. "Now please show us how you held it there—how long you held it there." Sergeant Benzien knelt and kept the bag in place for quite a while. After he stood up, Tony asked him: "Can you explain how one human being can do this to another human being?" The sergeant started crying. This man who had had power of life and death, who had terrorized others, started crying. His eyes were puffy, his cheeks were red, and tears were streaking down. We saw this onetime state terrorist, under whose hands people might have died, crying, not because he had been physically man-handled but because he had been asked a simple question: How can one person do this to another person?

And somehow that became the dominant theme of the whole commission: How can people do these things to other people? It was asked with a sense of amazement, of horror. What was at stake was affirmation of the values of our society. It was not just a question of calculating losses and gains, of counterposing the advantages and disadvantages of certain types of state conduct. It was a question of what kind of people we were. What were we about? What kind of country did we live in? Did we have shame, and if so, what were the things that brought it upon us? And the firm corollary of all the testimony and reflection was that it must never happen again. Whoever you are and whatever your motivation, whatever your cause, there are some things human beings just don't do to other human beings. It was that image of the weeping former torturer that became perhaps the most remembered one of the whole truth and reconciliation proceeding.

Sergeant Benzien received his amnesty. He had told the truth. Sending him and the tens of thousands like him to prison, assuming the necessary evidence could have been found, would have achieved very little. But if we

got democracy in South Africa, I came to write, then roses and lilies would grow out of my amputated arm. And that would be my soft vengeance. Soft vengeance was powerful. The vow that I had made in solitary confinement was redeeming itself in my life, not as an ideological mechanism to smite others, but as a philosophical and emotional guide pointing to the kind of person I wanted to be, to the kind of country I wanted to live in, and to the sort of Constitution I wished to live under.

#### **4. Putting principle into practice in the new South Africa**

The story moves on. I was wearing a green gown and sitting in the Constitutional Court as a judge together with ten other judges, and I was called upon to consider the impact of terrorism on core principles of our new constitutional order. For much of their lives at least half of my colleagues on the Court would have been regarded as terrorists, and the other half as defenders of terrorists. Many of my colleagues had suffered the indignities not only of growing up in severe poverty but of being subject to humiliating practices simply because they were not white. The present chief justice of South Africa once told me wryly as we drove past a building in Durban that as a sixteen-year-old youth he had been obliged to line up naked there and be hosed down and inspected before being given his "pass." He added that as a youngster he could get by, that was life, but what he could not take was seeing men older than his father receiving the same treatment. Another of my colleagues had spent ten years as a prisoner on Robben Island. At least two others, I was sure, had done dangerous work in the underground. Then there were those who, despite having had quite different life experiences that had enabled them to become connoisseurs of good food, wine, and rare books, had as lawyers taken firm and principled stands against apartheid. The Court was very mixed, yet despite our varied life and professional experiences, all of us were totally dedicated to upholding the Constitution. More specifically, all of us were heart and soul in sympathy with the nonracial and nonsexist vision it projected and totally dedicated to upholding the idea of living in an open and democratic society based on human dignity, equality, and freedom.

For my part, I was convinced that if in the 1980s and earlier, we had not taken principled positions on questions of who "the enemy" was, what methods of struggle were legitimate, and how torture was to be prohibited, we would not have achieved what many today regard as the most progressive Constitution in the world. We had in effect created a Bill of Rights at the heart of our struggle, asserting in practical ways our determination to

retain our honor and dignity as freedom fighters and to reaffirm the principles of justice on which the struggle was founded. It had accordingly not been difficult to move to a constitutional order in a free South Africa based on these very same principles. Our Constitution, then, had deep roots in concepts that had guided us in struggle. It was made by ourselves on our own soil, after patiently following the most inclusive process possible. And its well-honed text, a product of six years of intense negotiations outside and inside Parliament, and finalized after review by our Court according to agreed principles, gave us the instrument to deal with some of the most difficult problems of our era.

One of these problems related to an issue which courts throughout the world were being called upon to address. It was whether persons accused of extremely wicked crimes were entitled to claim the protection of fundamental rights accorded by the very legal order they had apparently set out to destroy. This question lay at the heart of four matters that came to the Constitutional Court.

The first concerned the constitutionality of a provision in the law that established the Truth and Reconciliation Commission. It stated that persons who told the full truth about crimes committed in the course of political conflict would not only be entitled to amnesty from criminal prosecution but also be protected against claims for civil liability. The immunity from civil claims was challenged as violating the constitutional right to have one's disputes settled in a fair trial. This challenge was a forceful one, but it was rejected by the Court. We held that the Constitution had expressly declared in its epilogue that Parliament could adopt a law that would permit such indemnification. In a particularly eloquent judgment, Ismail Mahomed, deputy president of the Court and later chief justice of South Africa, explained how the achievement of truth and the laying of the foundations for reconciliation justified the choice that the legislature had made with regard to the best manner of dealing with past atrocities.<sup>1</sup>

The second case concerned Mr. Mohamed, who had apparently been involved in the blowing up of the American Embassy in Dar es Salaam. It was a terrible, terrible act, killing about sixty people, some Americans, even more Tanzanians. This was terrorism, pure and simple, not only causing maximum loss of civilian life but also challenging principles of international law through targeting an international diplomatic institution. After the explosion Mr. Mohamed came down to Cape Town under a false name

1. See the decision by Deputy President Mahomed in *Azapo and Others v. President of the Republic of South Africa and Others* (1996) (4) SA 671 (CC) at 35.

and registered as a refugee. The FBI tracked him down and without allowing him a lawyer, South African officials handed him over to face capital charges in the USA.

The judgment of our Court was unanimous. It indicated that there was no doubt that Mr. Mohamed could lawfully be sent to New York to face trial for the horrendous acts in which he had allegedly participated. But there were two aspects in respect of which the Court felt his rights under the Constitution had been violated. First, there had been no justification for denying him the right to receive legal assistance—the more serious the allegations, the greater the need for a lawyer. Second, and even more important, he should not have been handed over to the American authorities without a guarantee that if found guilty he would not be executed; in our very first case our Court had held unanimously that the death sentence violated the right to dignity and the right not to be subjected to cruel, inhuman, or degrading punishment.<sup>2</sup>

One could say it was easy enough for judges sitting in Johannesburg, far away from the problems of terrorism, to deliver a beautiful, pure judgment of little practical import. The fact is, bombs were going off at that time in Cape Town, my home city. We were faced with what can only be described as terrorism. A police investigator and then a magistrate were assassinated by what was said to be a Moslem fundamentalist group. It was a real threat to us. And yet we did not allow the fact that we were living in a very difficult time, with much anxiety and fear around, to influence the decision that we took. There were many voices calling for a return to detention without trial, and yet our country kept its nerve. The killers, the bombers, were caught through good police intelligence, through their ranks being penetrated, through well-prepared prosecutions. The primary breakthrough came because politically their group had become totally isolated, and they had lost their community base. And the more isolated they became, the easier it was to persuade people to give information about their activities, and the more difficult it was for them to find collaborators and safe houses. And now for a decade we have had no activities of that kind, and our Constitution remains intact.

The third case dealt with a trial for conspiracy to commit mass murder. The accused was Dr. Wouter Basson, referred to in the newspapers as “Dr. Death.” In the last years of apartheid Dr. Basson, a cardiologist of note, had been the head of the South African military’s bacteriological and

2. See the decision of the Constitutional Court of South Africa in *Mohamed and Another v. President of Republic of South Africa and Others*, CCT 17/01, May 28, 2001, at para. 39.

chemical warfare program. After democracy was achieved, he was put on trial on charges of fraud and conspiracy to murder. The trial judge acquitted him of all the fraud charges and also quashed the most serious charges against him, namely, that he had conspired in South Africa to develop and use poison in Namibia to asphyxiate about two hundred members of the South West African People's Organization (SWAPO), who were then taken out in a small plane and dropped into the ocean to drown and be eaten by sharks. The judge stated that it was not possible to try someone in South Africa for conspiracy to commit a crime outside the country's borders.

The matter was widely reported nationally and internationally and aroused considerable emotion in South Africa. The issue before us at that stage was simply whether the case raised a constitutional matter that could be heard by our Court. Writing separately I emphasized the seriousness of the alleged violations of ancient principles of international humanitarian law, now codified in the Geneva Conventions, and accepted as part of customary international law, which the Constitution called on us to apply. I then set out in detail the manner in which grave crimes against the laws of war were implicated. Having made these points, however, my judgment stressed that the seriousness of the charges should in no way attenuate Dr. Basson's right to a fair trial. If anything, I said, the horrendous nature of the charges against him highlighted the importance of a fair trial. It was precisely when alleged crimes threatened basic principles of legality and international law that the standards associated with the rule of law needed most to be maintained. In this way you do more than just hold an individual to account for breaching the law. You affirm the very principles that the individual is said to have placed under attack. You then defend the rule of law, not by abandoning its principles but by applying them.<sup>3</sup>

The fourth case concerned South Africans who had been planning what would have amounted to a terrorist attack elsewhere in Africa. About sixty South Africans, alleged to be mercenaries on their way to stage a bloody coup in Equatorial Guinea, were sitting in jail in Harare, where they had been arrested after their airplane had landed to pick up equipment. Their wives, lovers, and parents brought an urgent application to our Court asking us to apply the South African Bill of Rights to prevent them from being tortured in Zimbabwe and then being sent on to be tortured and possibly executed after an unfair trial in Equatorial Guinea. The case raised complex and novel questions about the relation between national and inter-

3. See my separate opinion (concurring with the majority) in *S v. Basson*, CCT 30/03 (2004), at para. 126.

national law. But we could not delay our decision for extensive research—what good would a beautifully prepared judgment have accomplished if it were delivered after the tortures and executions had taken place? So we convened hastily to hear argument during the Court recess. Mercenaries in the past had been responsible for the most heinous crimes in Africa; killers for hire, they were the enemies incarnate of the rule of law. Yet there was something intensely poignant in the way in which the families of the mercenaries sat in hushed groups in the Court chamber, listening respectfully to erudite arguments based on human rights principles that their partners and offspring were said to have despised.

We decided that our government was under an obligation to consider the families' requests seriously and to do everything within its power, choosing its own timing and methods, to ensure that South African citizens abroad, whatever they might have been planning to do, would not be subjected to unfair trials or to torture.<sup>4</sup> We wrote several judgments, disagreeing on several aspects. But all of us agreed that in the case of a threat of gross violations of human rights as protected by international law, the government was under a legal duty enforceable by the courts to do whatever it could at a diplomatic level to intervene.

At one stage during argument I said to counsel for the applicants, perhaps incautiously, that people who venture into a lion's den should not be surprised if they find a lion there. The press picked up the observation and there was even a cartoon based on it. The exchange with counsel is part of the rough-and-tumble of legal life and an important way of getting to legal truth. But in the end, we judges are accountable through the judgments we deliver and not the questions we ask.

It is difficult to analyze the impact that court decisions have on actual historical events. It may well be that the publicity given to the case and the evidence and arguments presented had more impact on public life than did the actual decision. Yet any amount of forensic combat, however bitter and prolonged, is better than a single bullet. Submitting the harsh conflicts of our times to legal scrutiny—conducted transparently and in the light of internationally accepted values of fairness and justice—was a telling rebuttal of mercenarism and violence, whether from or against the state. It responded in a practical way to the immediate issues and at the same time induced governments, judiciaries, and law enforcement agencies in three countries to engage with each other and carefully consider their powers and responsibilities under the international law. It reaffirmed to the South

4. *Kaunda and Others v. President of the Republic of South Africa*, CCT 23/04 (2004).

African public that we were living in a constitutional democracy in which all exercises of power were subject to constitutional control. It said something important about the kind of country in which we lived and about the importance of principled and reasoned debate. It underlined that we had moved from a culture of authority and submission to the law to one of justification and rights under the law.

Anybody sitting on a high court in any land must feel the pressures of the threatening and disturbing events of our times. It would be odd if each one of us were not sensitive to these realities as a judge, as a human being, and as a person. Yet we live in a period when I have felt myself proud not only to be a judge in South Africa, with its exceptional Constitution, but to belong to a worldwide community of judges who believe that basic rights and freedoms matter. The profession of which I am a part was honored when colleagues in the US Supreme Court took what I considered to be a principled and carefully motivated stand on Guantanamo Bay.<sup>5</sup> The same applied when colleagues in the House of Lords Judicial Committee in England took equally principled and well-reasoned positions on torture and on basic questions of what it meant to live in a free society.<sup>6</sup> If we judges are not here to say through our decisions something profound about what our country stands for when it is being tested, then we are not fulfilling our vocation as judges. And to the extent that I have seen colleagues of mine in other countries with legal structures that do not include the same expansive constitutional provisions that we have taking positions that keep alive in a meaningful way—not in a demagogic way but in a meaningful way—the core values of an open and democratic society, then not only do I take pride in our profession, I find burgeoning within myself the hope that at precisely the moments when we are most under stress, we will find the greatest intellectual and moral resources to protect what Lincoln called the “better angels” of ourselves.

5. *Boumediene v. Bush*, 553 U.S. 723 (2008).

6. See, e.g., *R v. Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte* (No. 1) [2000] AC 61 and (No. 3) [2000] AC 147 (HL) (former head of state charged with torture is liable to extradition and not entitled to state immunity); and *A and Others v. Home Secretary* [2005] 2 AC 68 (HL) (rejecting indefinite detention of foreign nationals suspected of terrorism who could not safely be deported). Lord Hoffmann, concurring separately, said at [97], “The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these.”





PART II

Psychological Perspectives on Torture



## CHAPTER 2

# The Many Faces of Torture: A Psychological Perspective

WILLIAM GORMAN AND SANDRA G. ZAKOWSKI

Torture changes nearly everyone caught up in its vortex, including victims and perpetrators, families and communities, professionals aspiring to be of assistance, and the many across the world who make accommodations with this dark flaw in human nature. A psychological inquiry can help us to understand the impact of these experiences, as well as indicate how individuals and states come to engage in torture or abet its practice, and how providers of mental health services are able to ameliorate the condition of those it afflicts.

We seek in this chapter to examine the common meanings of torture for both those who suffer it and those who cause it. We also describe what factors can turn the torturer toward such deviations of behavior and what the repercussions can be for a society in which it happens or an institution that becomes complicit with it. And finally we discuss the resiliency by which those tortured can find pathways of recovery and reintegration, along with possible ways in which such remediation can be promoted.

Our understanding of torture derives principally from our experience as clinicians, advocates, and educators in assisting traumatized refugees, asylees, and other immigrants in Chicago at the Heartland Alliance Marjorie Kovler Center, under the successive leaderships of Antonio Martinez, Mary Fabri, and Mary Lynn Everson since 1987. In addition, we have benefited much while providing training for a number of programs in other countries engaged in the treatment of trauma; and we draw upon the collective work of thirty-two centers in the United States (associated in the National Consortium of Torture Treatment Programs) and the larger network of more than one hundred and fifty centers in seventy countries worldwide (associated in the International Rehabilitation Council for Torture

Victims). They have broken new ground in therapeutic services for overcoming the ravages of torture.<sup>1</sup>

We are even more indebted to the many survivors who have found their way to the Kovler Center across unnumbered borders and entrusted our colleagues and us with their narratives of atrocities and endurance. They have taught us much about the firsthand realities of torture and what it entails and about the remarkable capacities of the human spirit for renewal.

Torture is a complex phenomenon with social, legal, political, philosophical, spiritual, and medical dimensions, and each occurrence is shaped by its specific cultural and historical context. As a psychological contribution to the present volume, we have put forward certain generalizations to try to complement other analyses of the problem, even though throughout all our encounters with victims of torture, few of the concerns that emerged lent themselves to easy categorical abstraction. The histories so variously told all revealed unique embodiments of suffering in the most personal and heartfelt of terms. More collective formulations risk blurring the distinctive contours of these individual accounts and obscuring the human face of each of the many survivors we have known. Instead, every report has been starkly singular; and in our judgment, it is not possible for anyone listening to such vital testimonies to reduce them simply to overarching themes and theories.

We also note that as we have sought to comprehend the magnitude of cruelty and pain that torture manifests, there remains an ineluctable element of mystery to it. We have no adequate answer to the critical question of how its infliction can still persist so prevalently in our times and be condoned so repeatedly in the higher precincts of power. Despite the foregoing considerations, it is incumbent upon all of us in this field to develop what inferences and conclusions we can on a greater scale in order to confront more effectively the malignancies that lead to and issue from the practice of torture. By trying to bring some insight to bear on what can motivate and support it, we hope to help explain some of its origins and suggest some general principles for its prevention and for alleviation of its consequences. We believe that mental health therapists and scholars have much to contribute toward these ends, even as there remains still more to learn on all sides of this international crime against humanity.

1. A comprehensive compendium of resources and related materials about torture and its treatment is available at <http://kspope.com/torvic/torture.php>.

### **1. Targets of torture: Victims and the scars they bear**

To suffer torture is inevitably a horrific event and one that often results in lasting bodily damage. The greatest outrage of torture, however, may be that in having debased and mangled its victims, it can leave gaping psychic and existential wounds to worsen long after the physical injuries have healed. Moreover, the abiding feelings of loss that accompany the torment often become harder to bear in its aftermath when victims no longer can as readily avail themselves of the familiar reassurances of refuge previously found either in solitude or in solidarity with others. Their waking flashbacks and sense of dread subsequently become all the more sinister when a tortured time transforms the very presence of ordinary people into a potential threat and when being alone comes increasingly to invoke feelings of alienation and abandonment. Whether the abuse is sadistically driven or occurs more as the bureaucratic by-product of a broader campaign of persecution, given its deliberate implementation by a fellow human being at close quarters, the pain can frequently entail the shattering of a fundamental sense of security and connection, leaving its victims temporarily or longer more bereft and distressed than those who suffer natural, impersonal, or accidental occurrences of trauma.

Although the specific rationales espoused by regimes that conduct torture seem as myriad as the techniques that their agents employ, its psychological significance for victims stems routinely from a single root. Its immediate purpose may be to extract cooperation or a confession from a prisoner, brutalize an enemy suspect, weaken a group's resistance to authority, wreak vengeance or impose punishment on an opposition party or a minority people, cow or subdue a general populace, or simply exercise obscene control over those weaker or more vulnerable or despised. Its principal effect, however, is to bring about disempowerment and terrorization, a breaking of body and spirit, through the causation of mental and physical pain.

Because of the intentional character of this action, its outcomes can exceed other kinds of harm. Since the essence of torture distinctively consists of an individual in control willfully and callously inducing agony in another who is defenseless, it contains then at its heart the betrayal of a basic bond among people, as an extreme instance of interpersonal violence. Accordingly, for many victims, their capacity for ordinary relatedness and affiliation is at least initially subverted. Their resultant outlook can encom-

pass an eradication of confidence and trust,<sup>2</sup> and feelings of estrangement have the serious potential of coalescing into lasting despair.

The extended psychological impacts of torture for the victim are subsumed under affective, behavioral, cognitive, and somatic headings, although as discussed in more detail below, cultural mediation of all reactions must be carefully weighed. Emotional costs vary across time and character and include problems with grief and depression, acute and chronic anxiety reactions, and an inability to manage or to express such feelings as affection or anger.

In the wake of the damage wrought by oppression, assault, and the many kinds of deprivation attendant to torture, complications of loss and unresolved mourning are frequently the most enervating impairments for a victim. Their manifestation can take a number of forms, from exhaustion, physiological ailments, disruptions in appetite or sleep, substance abuse, social conflicts, and feelings of impotence and anomie to profound existential and spiritual crises, hopelessness, and suicidal tendencies. Victims at times also contend with affect dysregulation or unaccountable mood swings, constant agitation, issues with rage, and difficulties in simply relaxing or performing daily routines. Additional emotional/behavioral concomitants may include diminished motivation or lack of a sense of purpose, efficacy, or enjoyment in customary habits and other pastimes—effects that in turn compound identity concerns about self-worth and life meaning.

While depressive reactions may be the most ubiquitous of psychological symptoms for torture victims, a spectrum of anxiety symptoms can constitute comparable immiseration. These range from panic attacks to long-standing restlessness, diffused fears, inability to attend to tasks at hand, phobic or obsessive preoccupations, and most prominently the syndrome identified as Posttraumatic Stress Disorder (PTSD). Furthermore, like depression, anxiety disorders in a number of instances are linked to or obscured by comorbid factors such as addictive behaviors, impulsivity, unrelenting nightmares, fluctuating concentration, or sexual dysfunction.

When PTSD was first introduced in 1980 in the *Diagnostic and Statistical Manual of Mental Disorders—III* of the American Psychiatric Association, it was defined as an understandable response to catastrophic events, and light was shed upon a condition too often dismissed previously as either a moral failing or a weakness of mind among, for example, combat vet-

2. Ronnie Janoff-Bulman, "Assumptive Worlds and the Stress of Traumatic Events: Applications of the Schema Construct," *Cognition* 7 (1989): 113–36.

erans and rape victims. Since then, it has been used to explain debilitating reactions to a range of overwhelming catastrophes: for example, armed violence, major accidents, natural disasters, and life-threatening attacks. With certain qualifications regarding cultural adaptation, it can also have considerable relevance to the struggles of torture victims more generally to manage their lives.

The symptoms of PTSD consist broadly of persistent hyperarousal, recurrent intrusive memories and reactions, avoidance of reminders of the trauma, negative affect or irritability, constriction or numbing of feeling, and dissociation from the present moment, among other criteria. Persons with traumatic disorders tend to react at times as if the earlier threat were still ongoing and attempt maladaptively to protect against it. They typically complain of sleep disturbances and often they respond with varied physical complaints, such as headaches, stomach distress, or other signs of chronic tension. They also tend to be more on edge, easily startled, and overly vigilant, and they can have difficulties with interpersonal relations, cognitive processes, and quotidian life functions. At other times, their status can be characterized by an affective flatness or emptiness, a feeling out of control, and a sense of derealization or depersonalization, as if they were dreaming or passive and secondhand observers of their experience rather than active participants in it.

Not infrequently, trauma victims may fear they are losing their minds, and a number of them turn to alcohol or drug abuse or other risk-taking behaviors in their effort to find relief. Some PTSD symptoms can also appear at first to be a kind of instinctive coping reaction to the exacting duress of torture. Thus, the mental reliving of the trauma can seem counterintuitively to serve as an attempt to subdue the lurking terror and a precautionary reflex against worse attacks. Likewise, hypervigilance can represent another kind of protective shield; and detachment and avoidance can offer a way to mitigate the fear of intimacy or the onslaught of flashbacks and similar reexperiencing symptoms, to allow one simply to get through the day. In the long term, however, these defensive ploys can become increasingly disabling. Although for some these symptoms may abate on their own over time, for others PTSD, when untreated, may last for years or even decades. For them it can lead to chaotic conduct, family dissolution, inability to find or keep a job, homelessness, social anomie, and self-destructive tendencies, as they continue to live out unwarranted patterns of responding long after getting away from the sites and sources of their original endangerment.

Closely related to emotional and behavioral problems are disturbances



in thought processes after torture. Victims may conversely report both involuntary, unwelcome recollections and an inability to recall other parts of their experience. Besides the disorganization of memory associated mainly with PTSD and the pessimism about life's worth common in depression, cognitive fixations about shame and guilt are a recurrent theme in the self-concept of other victims. They may condemn themselves or think they are censured by others for having been objects of assault and sexual abuse or witness to the torture and killing of fellow prisoners or family members and allies, or they may have been forced to collaborate with their captors at the expense of the people and values important to them. Even more onerous for some are the haunting ruminations about why they should have lived and found safe refuge in the aftermath when so many others did not.

The most dysfunctional cognitive debility issuing from the torture trauma, and one that fortunately is also rare in our observation, is the disorientation and more severe loss of reality associated with psychotic syndromes. At the extremity, for example, a justified mistrust and sense of intimidation can worsen to irrational suspicions and attitudes, delusions of encroaching but hidden menace, and other paranoid tendencies for individuals who already may have had some preexisting susceptibility to these reactions.<sup>3</sup>

Victims can at other times be less upset by their trauma than by the practical circumstances they later face in displacement, such as the inability in their new country of resettlement to raise their children as they were raised or attend to the burial of parents in their native homeland and visit ancestral gravesites or familiar places of worship to seek solace or find inspiration. The fact that they may have had to forsake family members when they escaped or are no longer able to provide for them can add still more to the burden of blame with which victims judge themselves or feel judged by their community. Some may come even to rue the core beliefs and commitments that previously guided their lives and led to their torture. Others, while not regretting their fighting or their sacrifices for a cause they believed in, may have to live with the knowledge that by leaving relatives or associates behind, they put them in greater jeopardy as substitute targets for retaliation.

Finally, in all discussion about psychopathology, the function of multicultural mediation must be carefully taken into account before concluding

3. Anthony P. Morrison, Lucy Frame, and Warren Larkin, "Relationships between Trauma and Psychosis: A Review and Integration," *British Journal of Clinical Psychology* 42 (2003): 331–53.

that differing attributions of meaning indicate mental illness rather than reasonable, albeit discrepant worldviews and divergent ways of understanding suffering and loss.<sup>4</sup> Many societies do not share the same linguistic, introspective, and psychogenic assumptions about angst or trauma that are so readily cited in our contemporary mental health parlance. Thus, it sometimes happens that victims turn for reassurance or explanation to a religious framework to make sense of what they have lived through, imbuing it with versions of interpretation such as fate, karma, or a divinely imposed test or punishment rather than considering it psychologically. While a more despairing individual may come to question the idea of a benevolent deity and feel a sense of desolation, a relatively robust frame of mind could help a person find resilience and a reconstituted strength of faith in a higher power or philosophy of life, which in turn might give rise to a renewed resolution to pursue his or her hopes and aspirations for the future.

In another instance, it may be more congruent in certain gender roles especially for men from many backgrounds to speak of physical or external troubles rather than to give voice to deeper hurts or vulnerability. They may therefore report somatic pain and fatigue or frustrations about employment rather than any underlying emotional distress about what they had to undergo. Of course, these surface complaints can have a realistic etiology in themselves, such as residual symptoms from beatings and burnings in captivity or socioeconomic hardships from dislocation and discrimination as immigrants. But in addition, they may reflect depressive or stress reactions coming out of the ordeals of torture; and if they are not recognized and resolved with cultural sensitivity, those travails may induce a sinking into malaise that raises the risk of suicide.

Psychological nosologies, moreover, are often situated in a distinctively Western individualistic perspective, while victims of torture often come from diverse collectivist and traditional cultures in the developing world. It can follow that a focus on intrapsychic hypotheses of illness or universalist presumptions of classification may lead to major misapprehensions of another's experience. With all such diagnoses, the medical model of disease, though widely and usefully employed, has also been faulted for tending at times to relocate the problem mistakenly from a societal or interactive nexus to a defective internal state. In short, it is critical to bear in mind that the same events and phenomena may have alternative significations

4. Arthur Kleinman, "Anthropology and Psychiatry: The Role of Culture in Cross-Cultural Research on Illness," *British Journal of Psychiatry* 151 (1987): 447–54; Ethan Watters, *Crazy Like Us* (New York: Free Press, 2010).

across different peoples, and misconstruing the struggles of a person as no more than a "disorder" can prove to be both discounting and pathologizing, serving further to victimize the individual.<sup>5</sup>

## 2. Torture's contagion beyond its immediate impact

The effects of torture are not limited to the suffering brought upon the solitary victim. From a systemic framework in developmental and ecological psychology, Urie Bronfenbrenner and Mary Harvey, among others, have called for a more comprehensive sociocultural exegesis of the interaction between the person and the environment.<sup>6</sup> This is all the more apt in speaking of the complexities of abuse within a ruling power structure.

Because a victim is embedded in reciprocal relations with the family and wider societal contexts, including legal and governmental institutions, the mauling of the individual by representatives of the prevailing authority becomes inextricably intertwined with its meaning for the surrounding community. Insofar as brutal force of the group violates basic human and civil rights of the person, the system becomes more imperious and amoral, and the victim and his or her world becomes more deracinated and tyrannized. The spreading blight of torture then is seen secondarily to infect numerous others who bear some relation to the victim in the home, the neighborhood, and by extension the entire body politic.

In other words, the act of torture by those in power and the larger milieu in which it transpires reflect a mutually corrosive cycle of causation. Whenever a society passively ignores, implicitly condones, or actively calls for such victimization, it abdicates generally recognized standards of civilized conduct and breaches the duty to do no harm that is owed the disempowered "other" throughout many codes of ethics. The injury therein is done not just to the hapless prisoner; the principles of human rights that protect all members of the community are undermined. Notwithstanding the need at times to penalize or incarcerate some members of a populace, the adage that a people and their leaders can be judged by how they treat their most vulnerable or defenseless charges attests to the corruption of a culture in which torture becomes tolerated.

Allowing abuse to become an acceptable routine, moreover, easily re-

5. Derek Summerfield, "A Critique of Seven Assumptions behind Psychological Trauma Programmes in War-Affected Areas," *Social Science and Medicine* 48 (1999): 1449–62.

6. Urie Bronfenbrenner, *The Ecology of Human Development: Experiments by Nature and Design* (Cambridge, MA: Harvard University Press, 1979); Mary R. Harvey, "An Ecological View of Psychological Trauma and Trauma Recovery," *Journal of Traumatic Stress* 9 (1996): 3–23.

sults in a widespread miasma of fear and silence, as exemplified in the reports about the "Dirty Wars" in Latin America in the 1980s.<sup>7</sup> A more encompassing perspective makes clear that after families come to share the intimidation and distress of their tortured members, the consequences can then radiate outward to the community and across the social map as a norm of calculated cruelty supplants the rule of law. Even worse, studies of the history of the Holocaust and other crimes against humanity have demonstrated that the legacy of such atrocities is transmitted over time as well as domains, with the trauma conveyed from one generation to the next.<sup>8</sup>

One of the foremost proponents of liberation psychology, Ignacio Martín-Baró, has warned that ignoring the systemic framework and reducing critical conditions to individual issues frequently means that neither their assessment nor their solution can be well founded.<sup>9</sup> In agreement, we believe that as terrible as the practice of torture can be for its victims, it is crucial to recognize as well that another implication of its inhumanity is that it can fray or even rend the social fabric required to propagate decent and civil relations for all.

A recent instance of such fallout can be seen in the revulsion both nationally and around the world in the wake of revelations of torture at Abu Ghraib and elsewhere under US authority or at the behest of the Bush administration. The implications for a society in which such wrongdoing can seem permissible are discussed further by Richard Leo and Alexa Koenig in chapter 7 of the present volume. They compare the contemporary scandal to the zeitgeist that first prompted abusive police interrogations in this country in the nineteenth century and then led to a loss of confidence in the whole legal system by early in the next century. We concur that there is a parallel possibility for general contamination endemic in torture, expanding from the perpetrator to the public at large, unless it is eradicated in its entirety.

In addition, we believe there is another, more specific cost that should be noted: the potential effects upon those who attend more directly to victims' accounts of their agony. Close and emotionally laden exposure to such descriptions can take a serious toll on responders and caregivers, who

7. Noam Chomsky, "The Culture of Fear," in *Colombia: The Genocidal Democracy*, ed. Javier Giraldo (Monroe, ME: Common Courage Press, 1996), 7–16.

8. Yael Danieli, *International Handbook of Multigenerational Legacies of Trauma* (New York: Plenum, 1998).

9. Ignacio Martín-Baró, "Toward a Liberation Psychology," in *Writings for a Liberation Psychology*, ed. Adrienne Aron and Shawn Corne (Cambridge, MA: Harvard University Press, 1994), 17–32.

may at first come to care about and identify with the victims too much and then, in reaction, to no longer care or identify with them enough. The results have been termed secondary or vicarious traumatization and compassion fatigue, when the helper, in listening, develops similar reactions to those of the victims, such as nightmares, obsessive thinking, and generalized stress, or else becomes burned out and inured to the suffering, no longer able to empathize with the victim.<sup>10</sup> Therefore, service providers must maintain a balanced interactive stance, avoiding the opposing snares of enmeshment or sympathetic merging with victims, on the one hand, and of an overly self-protective detachment from them, on the other.

It is not necessarily an easy matter for the helper to steer clear of both pitfalls and to guard against her or his own symptomatic susceptibilities or eventual emotional exhaustion. In order to maintain such working equilibrium when confronting torture's embodied realities, consultation with colleagues, continuing professional development, self-monitoring and self-help, and the personal values, relationships, and activities that sustain and restore helpers' well-being are as indispensable for themselves as are the understanding and skill they bring to their endeavor for the victim.

### 3. The makings of torture and its agents

Before moving from the vicissitudes of torture's toll on individuals and societies to issues involved in the process of recovery, we want to discuss briefly what we have gleaned on the other side about those who perpetrate torture. Our efforts and study allow us to offer several hypotheses about the factors that have prompted some to consent to torture others and the subsequent meanings that ensue for them in making such a choice.

Media depictions of torture have tended to focus on cases where high-profile suspects have been abused in an effort to gain intelligence deemed important, as if suggesting that those who did it were guided by a judicious weighing of costs and benefits for the greater good of society. Even if on a practical basis information gathering is the ostensible objective, there is strong evidence that rapport-building tactics for gaining a captive's coop-

10. Lillian Comas-Diaz and Amado M. Padilla, "Countertransference in Working with Victims of Political Repression," *American Journal of Orthopsychiatry* 60 (1990): 125-34; Yael Danieli, "Countertransference and Trauma: Self-Healing and Training Issues," in *Handbook of Post-traumatic Therapy*, ed. Mary Beth Williams and John F. Sommer Jr. (Westport, CT: Greenwood Press, 1994), 540-50; Yael Fischman, "Interacting with Trauma: Clinicians' Responses to Treating Psychological Aftereffects of Political Repression," *American Journal of Orthopsychiatry* 61 (1991): 179-85.

eration are a more reliable and effective means of obtaining useful knowledge than is the application of coercion and intimidation.<sup>11</sup>

The clinical experience with actual victims of torture worldwide suggests that cases made for the legitimacy of torture seem to exist more in the realms of abstract conjecture and dubious rationalization, because the many reported incidents we have heard about over the years happened for reasons far more arbitrary, incidental, or mean-spirited. It has appeared rather that torturers and their masters typically single out targets for abuse because their victims, for example, live in a society in violent turmoil, belong to the wrong party or cultural group or were in the wrong place at the wrong time, participate in human rights campaigns or political advocacy, or have a relative, friend, or associate suspected of subversion by authorities.

Neither we nor our colleagues have been told of any instance in which the torture was done because of any imminent risk the individual posed to the welfare of the populace, such as a “ticking bomb” scenario for the prevention of terrorism—the sort of pretext that is sometimes propounded by theorists or policy makers to support the recourse to torture. And while it may be possible that there are occasions when it is wielded with cold-blooded precision, we would argue that for the vast majority of the victims we have known it seems to be a much cruder instrument employed in a more indiscriminate and ill-defined manner.

Our conclusion based on the histories presented repeatedly in clinical evaluations and treatments is that the abuse tended to occur in a mundane if vicious and vengeful or vindictive set of circumstances, which we find indicative of the actual psychological vagaries of torture more often in a society. In its way, the lack of any semblance of legitimation for its official sanction makes the casual savagery more flagrant and at the same time, in Hannah Arendt’s term, more banal.<sup>12</sup>

What does drive the torturer more often to the act, we believe, is the lens through which the victim is viewed, not so much the motivating need to punish or protect. It appears axiomatic that for torture to be used or abetted by detention guards, military personnel, health professionals, intelligence officers, or other government figures, there must be a basic dehumanizing or even demonizing aspect to its focus. As a matter of fact,

11. US Senate Select Committee on Intelligence, “Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program,” Declassification Revisions, December 3, 2014.

12. Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Viking, 1963).

qualities of empathy or any sense of identification with the other would be antithetical to its application.

Philip Zimbardo has summarized a body of research that attests to the ease with which objectification and vilification of victims can be utilized by their torturers and other perpetrators of atrocities.<sup>13</sup> In order to banish the Golden Rule from the “black hole” of a basement dungeon or the more antiseptic and distant command centers in which torture receives authorization, it is essential to sever the cord inherent in a sense of common humanity. Not only does designating the victims as depraved or dangerous allow the use of brutality, but it can in itself deny them a claim to minimal human dignity and invite the torture as nothing less than what is due to those in such demeaning conditions of subjugation.

Furthermore, the evidence shows that as the infliction of injury in itself can distort how the victim is perceived, it perverts as well the self-image of the abuser and the enabling system with the hubris of unexamined rectitude, celebrated in Realpolitik slogans like “my country right or wrong” and “might makes right.” That is, the devaluing of targeted individuals or groups as inferior or marginal entities and regarding them as means rather than ends in themselves or, worse, as aliens, threats, or sources of societal maladies can also endow the side of the torturer with certain trappings of entitlement, however contrived or contingent. It then becomes easier to victimize the other, whether it be the waterboarding of a captive suspect for the sake of intimidation or retaliation or the “ethnic cleansing” of a population in the cause of a country’s manifest destiny or national security. By reducing the individual to an object of loathing, instead of a subject with whom one might find any commonality, the torturer can act unhindered by the normal compunctions about inhumane actions against the helpless other. An egregious instance can be seen in the posturing of public figures who boast of their readiness to torture as a measure of their resolve and political fortitude.

We have also noted that the acquiescence to torture is additionally advanced by society’s complicity under the guise of idle or indifferent bystanders. As detailed by Edwin Staub, an expert who has long studied the psychological roots of evil: “Acts that harm others, without restraining forces, bring about changes in perpetrators, other members of the group, and the whole system that make further and more harmful acts probable. In the course of this evolution, the personality of individuals, social

13. Philip Zimbardo, *The Lucifer Effect: Understanding How Good People Turn Evil* (New York: Random House, 2007).

norms, institutions and culture change in ways that make greater violence easier. . . . The usual moral principles and values that prohibit violence and protect people from being harmed become inapplicable to the victims."<sup>14</sup>

Amplifying upon this insight, Robert Sternberg has adapted the work of Albert Bandura and other social psychologists to propose that "the moral disengagement which leads to inhumanity stems from a series of variables, including the cognitive restructuring of inhumane conduct into allegedly benign or worthy conduct by moral justification, sanitizing language, disavowal of a sense of personal agency by diffusion or displacement of responsibility, disregarding or minimizing the injurious effects of one's actions, and attribution of blame to, and dehumanization of, those who are victimized."<sup>15</sup> Such constituent attitudes prepare the way into the ambit of torture and engender the abuser.

Castigation of the victim is not the only element contributing to a propensity for torture. Compelling behavioral investigations, such as Stanley Milgram's obedience studies and those who replicated them (e.g., Burger) and Zimbardo's Stanford prison studies, have demonstrated that normally well-mannered people can cause suffering, sometimes seemingly with little hesitation or at other times under ineffectual protest, when the context overpowers their customary civility and compassion.<sup>16</sup> Zimbardo argues that these many instances highlight how external and situational determinants often have greater influence than internal and characterological ones, despite popular belief to the contrary in appraising at least one's own conduct. Although we may prefer to think of ourselves as acting decisively according to our determinations about right and wrong, research has shown that often our behavior is shaped more in subtle but potent ways by the circumstances in which we are placed.

On the other hand, it should also be recalled that while Milgram emphasized how the setting could help bring one to inflict painful shocks on innocent participants, he found as well that personal attributes were

14. Edwin Staub, "The Roots of Evil: Social Conditions, Culture, Personality, and Basic Human Needs," *Personality and Social Psychology Review* 3 (1999): 179–92 at 182–83.

15. Robert Sternberg, "A Duplex Theory of Hate: Development and Application to Terrorism, Massacres, and Genocide," *Review of General Psychology* 7 (2003): 299–328 at 304.

16. Stanley Milgram, "Behavioral Study of Obedience," *Journal of Abnormal and Social Psychology* 67 (1963): 371–78; Jerry Burger, "Replicating Milgram," *American Psychologist* (2009): 1–11; Craig Haney, Curtis Banks, and Philip Zimbardo, "Interpersonal Dynamics in a Simulated Prison," *International Journal of Criminology and Penology* 1 (1973): 69–95; Zimbardo, *Lucifer Effect*.



instrumental,<sup>17</sup> and closer review of the research has suggested that the contextual component may not always be as strong as sometimes claimed.<sup>18</sup> Additional light is shed on the complex interplay between character and context by considering that in Milgram's experiments, when subjects being told to administer the punishment were placed in closer proximity to the intended victim, their level of compliance with the directives dropped by more than 30 percent. Not surprisingly, it appears that as even a casual relationship to and identification with the victim increased, the subjects' submission to authority and willingness to do injury declined.<sup>19</sup>

When one reflects then on the immediacy of the abuser to a victim in the typical enactment of torture, the question arises as to the psychological makeup of the torturers who proceed to follow reprehensible directives that the majority of Milgram's subjects would likely have refused. Clearly, not everyone will cooperate in a setting that invites or even requires them to hurt another. Research has further indicated that for those who do, several personality tendencies may differentiate them, including relatively higher measures on traits for authoritarianism or aggression and a lesser stage of ethical development, even though they remain within the wider range of normality.<sup>20</sup>

It seems reasonable to conclude that "blind" or unprincipled obedience is a product of both the setting that calls for it and variables within the individual that predispose him or her to cooperate, even if it leads to antisocial actions toward the victim at hand. Thus, we would propose, the reactions to the attacks on September 11, 2001, and the endorsement of "enhanced interrogations" by the Bush administration led relatively inexperienced and ill-trained personnel to torment alleged terrorists held outside the US legal system, too often under the auspices of or abetted by psychologists, as further discussed below.

In applying the perspectives about social influence cited by Zimbardo to the question of torturers, it becomes more plausible that when the acknowledgment of mutual humanity has been denied to intended victims (as they are stripped of their clothes, their dignity and self-respect, and

17. Stanley Milgram, *Obedience to Authority: An Experimental View* (New York: Harper and Row, 1974).

18. Thomas Blass, "Understanding Behavior in the Milgram Obedience Experiment: The Role of Personality, Situations, and Their Interactions," *Journal of Personality and Social Psychology* 60 (1991): 398–413.

19. Stanley Milgram, "Some Conditions of Obedience and Disobedience to Authority," *Human Relations* 18 (1965): 57–76; Milgram, *Obedience to Authority*.

20. Blass, "Understanding Behavior."

their social status and basic rights), the assertions of privilege and impunity by an individual in power can directly encourage assaults upon them, particularly when accompanied by official legitimization. Moreover, the very reality of their abject status can seem in turn to attest to the virtue of those possessing the capacity to violate them, often embellished by assertions of righteousness and political or ethnic hegemony. The process thereby descends in a sinister spiral from psychical debasement to physical violence to further disdaining and defiling the victim, and so on. Again in Staub's analysis: "Once they are part of an ideological-perpetrator group and participating in behavior that harms others, important changes seem to take place in people, including a progressive desensitization to others' suffering. . . . [T]he usual internalized prohibitions and controls are progressively lost in individual conduct in relation to devalued others."<sup>21</sup>

One further factor important to the formation of the torturer is the excuse some individuals make to obviate their moral responsibility under the rubric of following orders. Although this pretext was dismissed by international consensus in the Nuremberg Trials after World War II, claims of legalistic cover have apparently retained strong psychological cogency in many places where torture is practiced. As a result, the world community has only recently moved toward establishing forums for accountability, such as national Truth, Justice, and Reconciliation Commissions, War Crimes Tribunals, and the International Criminal Court, where testimony about abuse can right the record outside the normal jurisdictional borders and lead to identification, condemnation, and retribution for those responsible, creating a bulwark against the rationalizations for torture.

Despite the facility with which some can surrender judgments of conscience to the dictates of authority and treat victims as subhuman figures of contempt, the journey of transformation into a torturer is still not a simple one for many to make. Nor is it always easy afterward to live with a realization of the destructive nature of such a transition. One of the most searing accounts about torture in Iraq compiled by the International Human Rights Law Institute of DePaul University is not the testimony of a victim but of Jasim, a soldier in the Security Directorate. Coming from a presumably unexceptional background, he speaks of having been turned into "a beast with a damaged soul" and having "killed the mercy and love within my heart" when he was required by institutional commands to deliver extreme beatings to prisoners. His subsequent remorse is commensurate with the heinous nature of his conduct, and he is left alone at the end asking

21. Staub, "Roots of Evil," 187.

God "to free my conscience from its suffering" but knowing "nothing I can do would be enough for me to deserve forgiveness."<sup>22</sup>

Comparable self-recriminations were sounded recently by a civilian contractor for the US Department of Defense who "spent the first three months of 2004 torturing Iraqi prisoners. . . . We humiliated and degraded them, and ourselves." He went on to explain: "Our interrogations used approved techniques. . . . But with every prisoner forced up against a wall, or made to stand naked in a cold cell, or prevented from falling asleep for significant periods of time, we felt less and less like decent men. . . . As an interrogator, torture forced me to set aside my humanity when I went to work. It's something I've never been able to fully pick back up again."<sup>23</sup>

In John Conroy's exploration of how such evil can ensnare evidently ordinary individuals in its service, he has depicted the evolution of torturers in Zimbabwe, Greece, Uruguay, and the US military in Vietnam and Iraq. He references research that failed to identify any clearly defining personality pathologies that would set those who torture categorically apart from the general populations (notwithstanding the moderately authoritarian and hostile tendencies and limited moral reasoning cited above). In addition, after interviewing a number of men who admitted to having carried out multiple acts of torture, he concluded that although persuading them to talk with him was difficult, "invariably our meetings went well [and] I never met the monster I anticipated."<sup>24</sup> In fact, while most of the subjects expressed some recognition that their actions had been wrong, they seemed determined to no longer identify with the earlier self who had carried them out. Many tried to minimize culpability and excuse their conduct by faulting superiors or the system for having made them into torturers, demonstrating yet again the utility of a formal chain of authority in turning subordinates, however previously indistinguishable, into unfeeling functionaries. In the words of one, he was "a tiny bit of a psychopath . . . in a society behaving psychopathically, at least that is the way I have to put it all to rest for myself."<sup>25</sup>

In summary, the general descent into torture may begin when victims are first stigmatized and despised, which in turn, under official sanction, allows for the harshest of treatment, and then their resulting debilitated status is taken to justify all the more the violations of their human rights,

22. Daniel Rothenberg, *Testimonies: Iraq History Project* (Chicago: International Human Rights Law Institute, DePaul University, 2007), 27–35.

23. Eric Fair, "Owning Up to Torture," *New York Times*, March 20, 2016, SR 9.

24. John Conroy, *Unspeakable Acts, Ordinary People* (Berkeley: University of California Press, 2000), 122.

25. *Ibid.*, 120.

even if later the rationales do not hold. On the larger scale of the state, average citizens may be twisted into torture's willing accomplices as fears of terrorism, persecution of a vulnerable group, or demonization of an enemy give impetus to generalized eruptions of xenophobia and targeting of violence against the other.

It is clear, correspondingly, that in the absence of effective accountability, the 1948 Universal Declaration of Human Rights and the Convention against Torture established by the United Nations in 1987 will remain as aspirations rather than as the mandates for humane exercise of authority that they were meant to be. In actuality, as Michael Gilligan and Nathaniel Nesbitt concluded from their review of the matter, the prevalence of the use of torture in the world increased between 1985 and 2003. Although 75 percent of all nations had signed the conventions prohibiting torture by 2003, almost 70 percent were found to have engaged in it that year, and the promulgation of international humanitarian "norms" against the use of torture did not appear to lead to any diminution of its use in reality.<sup>26</sup>

We are left with the conclusion that on both individual and national levels, in the absence of meaningful deterrence, the practice of torture, which has gone on unabated, will continue because of the victimizers' control over others, their denial of any empathic connection with them, and their denigration of the victims' helplessness or inferior status. The calculation that torture can serve the goals for domination or scapegoating allows for campaigns against even random victims under the guise of necessity or national security. Therefore, the circumstantial and personal factors that can prompt its use must be outweighed by the countervailing force of far greater societal condemnation and prosecution by rule of law. If not, psychology and history have shown its likelihood will be undiminished. Across the continents and centuries and in both democratic and totalitarian regimes, wherever uncurbed power, fear, hatred, or even indifference toward the other holds sway, there lurks the potential for such barbarity to be made acceptable.

#### **4. The challenges and opportunities for the recovery and reintegration of survivors of torture**

From discussion of torture's meanings for its victims and agents and for the society wherein it festers, we briefly turn our attention now to its sequelae

26. Michael J. Gilligan and Nathaniel H. Nesbitt, "Do Norms Reduce Torture?," *Journal of Legal Studies* 38 (2009): 445–70 (citing Amnesty International reports).

in the subsequent lives of its survivors, in terms of hardships both encountered and overcome. During our services at the Kovler Center, we necessarily have dealt only with those survivors of persecution who were able to flee and relocate to the Chicago area, seeking refuge from the endangerment they experienced in their countries of origin. Although many of the casualties of torture do not manage to find safe passage and complete the journey to become political refugees or asylees in a new land, we propose that in manifold respects the hurdles faced are similar wherever they are situated, as are the general steps toward their rehabilitation, turning from victimhood to survivorship.

For all survivors, the aftermath of torture regularly involves a discontinuity and dislocation from one's earlier life and community. Nevertheless, for those who become émigrés, the typical rigors of escape and establishing sanctuary in a much different society and trying to start another life there can significantly add to the trauma that had necessitated the exile in the first place.<sup>27</sup>

Torture is typically inimical to victims' core assumptions about security and affiliation, and afterward it can force many of them to find their way as strangers in an unfamiliar world deprived of most of the supports to which they had been accustomed. For these individuals, as noted above, a wary and vigilant outlook seems a sensible strategy to protect against repetitions of their tragedy. Despite their having reached presumably more hospitable surroundings and no longer being in actual harm's way, a troubled mentality can persist as worries about surveillance or harassment by current figures of authority bring to mind the violence suffered at the hands of equivalent officials in the lands they left behind.

In the United States, formal settings such as the austere and seemingly adversarial venues of immigration courts or other government offices that survivors have to frequent may also give rise to acute anxiety because of their institutional resemblance to prior sites of maltreatment. Still more detrimental at times is the system of Homeland Security seizures, detentions, and deportations to which survivors have been increasingly subjected in recent years when they enter the country seeking asylum without legal permit. The indeterminacy of the duration and outcome of their internments and the long and growing waits for a hearing when seeking asylum can seem yet another iteration of their powerlessness, reminding them of

27. John Orley, "Psychological Disorders among Refugees: Some Clinical and Epidemiological Considerations," in *Amidst Peril and Pain: The Mental Health and Well-Being of the World's Refugees*, ed. Anthony J. Marsella and Thomas Bornemann (Washington, DC: American Psychological Association, 1994), 193–206.

the bureaucratic conditions under which the torture was condoned and to which they fear they will be made to return.

Even for those not confined in detention centers, the continued forebodings in exile can lead to a reluctance to leave the relative protection of their homes, compounding their marginalization and the difficulties in taking care of various needs. Too often victims may fail to follow the legal requirements of applying for asylum because they are afraid to venture out to seek the information needed for that daunting process. Some survivors in addition try to avoid fellow compatriots, who they fear could include clandestine agents putting their families or associates at risk back home or conspiring to repatriate the survivors for imprisonment or execution there. The apprehension, whether or not based in fact, robs victims of commonplace opportunities to connect with potentially supportive kindred groups, further contributing to feelings of separation and peril.

Considering such worries, it is understandable that the case managers, counselors, or other health care professionals at a torture treatment center, together with an attorney or an asylum officer, may be the first persons in whom the victim comes to confide, but even then a simple act of human relatedness is not something to be taken for granted. The creation of a reassuring connection with helpers is a tenuous first step in the treatment of torture trauma and may take much longer than is generally needed in other therapeutic alliances.

The psychological barriers to accessing care are one more aftereffect of the erosion of trust from such standard techniques of the torture chamber as rape and sexual humiliation, crowding or extended isolation, insults to religion or threats to loved ones, and lack of minimal hygienic conditions, which insidiously distort one's self-concept and capacity to relate to others. Beyond the physical adversities, such practices seem designed to demoralize their targets as much as possible. Victims have commented to us in retrospect that they were treated worse than animals, and they express incredulity at how one human being can act toward another in such abhorrent ways.

The impact often remains incapacitating for a long time, convincing some victims that they no longer belong among "normal" people nor deserve aid or simple regard from others. The irony is that they not infrequently had held highly responsible positions as teachers, nurses, doctors, or political, religious, or labor leaders, assisting others in their home countries; and clinicians who work with them may come to stand in awe of their personal qualities and accomplishments.

The trials of victimization are commonly intensified further before asy-

lum is attained when victims are impoverished, lack adequate housing, and are unable to work because of their undocumented status and language and cultural impediments, inducing feelings of impotence, frustration, and failure. Rather than being able to take sufficient care of their families, the transient conditions of dependency that confront many emigrants and displaced people on arrival in a new country can be particularly troubling for survivors of torture. Not only does their plight signify perhaps a drastic departure from their former positions of respect, but the forced reliance on others for basic necessities may seem reminiscent of the earlier invidious conditions of captivity, when their very lives were at the disposal of the torturer.

As they run the gauntlets of immigration and the legal process, some victims may decline needed assistance in an effort to reassert independence and a semblance of control and self-esteem in their lives. Because accepting help may seem at odds with their sense of identity or pride, programs offering it to victims should do so with great care lest a show of the power differential with a helper inadvertently re-create the dynamics of their earlier abject weakness when subjected to the caprice of their captors.

In an alternative scenario, tortured refugees may actively seek support but be overly deferential even if wronged, convinced that they have no right to protest, given their straitened circumstances and their traumatic scarring. Moreover, along with the stress of reacclimation, many victims find that anniversaries of their ordeals or news of adverse political events and other tragedies in their countries of origin or elsewhere in the world can trigger excruciating recollections. From these several examples, it should be evident that restoring autonomy, safety, self-efficacy, and some prospects for peace of mind can be central challenges in the overall recovery from torture.

It is important to balance the grimness of the picture presented thus far, however, by heeding as well the more salutary developments after torture and resettlement for an impressive number of other survivors. All who are involved in this field can attest to the striking ability in a significant proportion of the victims to prevail over their many quandaries. It is an oft-noted observation that many of these individuals are able to find strength in regenerated commitments of spiritual faith and moral convictions, relational and communal bonds, personal identity and engagement, and determination to create better lives for themselves and their families, whatever their psychological and situational challenges. It seems at times almost as if they returned from the depths of depravity that defined their torture with a surer grasp on what is most important and positive in life.

Having lost their habitual support networks when they had to abandon their homelands, they still are often able to make good use of psychosocial, medical, legal, and other humanitarian services and community resources needed to reestablish their lives in their new environs. In these displays of resilience and "traumatic growth," they convincingly give the lie overall to the torturer's intent to leave them in their victimhood as no more than the shattered remnants.

The psychiatrist and former prisoner Viktor Frankl, in his classic account of three years in the Auschwitz concentration camp, posited that finding a definitive meaning in life enables one to endure or even to surmount some of the worst extremities of suffering.<sup>28</sup> Certainly we have seen this borne out repeatedly, albeit at times in halting and uneven progression, in our work with the survivors who were able to escape their oppression and find new beginnings in the United States. Their characters and the principles that they have held to or sometimes rediscovered or forged anew served to sustain them through their tribulations, often with deeper appreciation for their foundational view of life.

In line with much observation of torture survivors in the field, George Bonanno has disputed the frequently assumed conclusion that most experiences of trauma result in psychologically profound disability. Instead, he argues that many individuals who have gone through a range of dire events akin to what those at our center have endured can eventually emerge as strong as or stronger than before. They prove able to go on with their lives, if not unscathed, at least largely unimpaired, drawing upon a vital capacity to rebound from almost unimaginable devastations, and even display greater psychological dimensions of health in response. Similar to their counterparts who move beyond the plights of torture, exile, and all the ensuing transitions, many other survivors of trauma also display the unmistakable qualities of resilience.<sup>29</sup>

Of course, not all who have been exposed to torture show such benign adaptations in their subsequent lives. In some cases, as described above, the symptoms of traumatic disorders, other anxiety conditions, and depressive reactions, as well as more existential suffering and crises, can remain a grueling affliction. For them, Judith Herman's triphasic conceptualization of the therapeutic process of recovery offers a seminal model for the con-

28. Viktor Frankl, *Man's Search for Meaning: An Introduction to Logotherapy*, 3rd ed. (New York: Simon and Schuster, 1994).

29. George A. Bonanno, "Loss, Trauma and Human Resilience: Have We Lost the Human Capacity to Thrive after Extremely Aversive Events?," *American Psychologist* 59 (2004): 20–28.



struction of treatment approaches.<sup>30</sup> It calls for establishing or restoring first a sense of safety, then in a more benign time reconstructing a meaningful and experiential narrative for the trauma, and lastly reconnecting to one's relational world, which the trauma seemed to obliterate. Each of these undertakings can be painstaking and complex, and the process of working through them is usually more circular and uneven than linear or steady.

We have noted that the formation of security tends to begin slowly in the treatment relationship with torture victims. The helper needs to exercise much patience, empathic understanding, and cultural sensitivity to foster a gradual emergence of interpersonal trust and respect. Within this process of rehabilitation, the sense of safety can then be seen to expand into other parts of the person's world. Likewise, the relaying of the trauma story is rarely a simple endeavor, but empirical investigations have shown that narrative techniques for calibrated reexposure to the felt memories of pain and loss within the rapport of a reassuring therapeutic engagement allow them gradually to be integrated.

When the distressing events from the past are repeatedly rendered with experientially increasing verisimilitude over time in the safer confines of the clinical dialogue, they can be transformed into more manageable cognitive schemas. The past accordingly no longer must function as a stuck or unmetabolized syndrome or a distorted definition of one's entire being as victim. The raw fragments composing traumatic themes may instead be gradually assimilated into a more unified and manageable field of meaning. Steps along this trajectory occasionally include symbolically rendering one's story, giving testimony at public hearings or tribunals or in similar forums, seeking acknowledgment or compensation when feasible, offering forgiveness, or carrying out other meaningful rituals for restoration and relief.

Lastly, the processes of reconnecting are comparably complicated. Finding a renewed sense of continuity between one's past, prior to the trauma, and one's present helps the survivor to regain a sense of hope and openness toward the future. These changes can also be accompanied by a corresponding improvement in the broader array of relationships over time. As one survivor put it, "I refuse to let them win by remaining a broken life."

Although it is outside the scope of this chapter to explain in greater detail the mechanisms of treatment for the ravages of torture, it should be apparent from the preceding general outline that the means of remedy and healing can be highly varied. For those most troubled by its effects, the

30. Judith Herman, *Trauma and Recovery* (New York: Basic Books, 1997).

efforts to overcome their anguish consist of many unforeseen turns and almost always involve steep gradients of challenge for themselves and often as well for those accompanying them in their recovery. Progress can also be significantly promoted with medical and pharmacological interventions as well as adjunct and holistic treatments, including case management for basic needs, group and community approaches, psychosocial education and activities, expressive modalities like art and music therapy or movement techniques, pastoral counseling and spiritual guidance, massage and body work, systemic and occupational therapies, and culturally relevant and traditional healing ceremonies or customs.

### **5. The psychology profession as a case example regarding prisoner abuse and torture**

As noted in our introduction, psychology together with allied disciplines in psychiatry, social work, nursing, and other mental health fields has been active in documenting and treating the negative consequences that torture can have for victims and their families and communities. Many in these professions have advocated for the elimination of all forms of abusive techniques and concomitant human rights violations in American detention centers, arguing that such measures are not only inconsistent with international standards for the treatment of prisoners but also unlikely to lead to their proclaimed objectives. They have refuted the assertion that the aim of seeking information to save lives justifies the grievous excesses of punishment that torture involves, not only because these constitute crimes against humanity but also because such methods in reality are typically ineffective and often result in false confessions simply to try to end the suffering.

By contrast, psychological evidence has lent cogent support to the recommendation of methods to gain accurate knowledge through relationship building with the suspect, which further proves the use of torture to be unnecessary and even counterproductive.<sup>31</sup> This position was advanced on expedient as well as humanitarian grounds in the "Statement on Interrogation Practices" prepared for the House Committee on Armed Services and signed by former military interrogators and security experts in 2006,<sup>32</sup>

31. For illustrative arguments, see Jean Maria Arrigo and Richard V. Wagner, "Psychologists and Military Interrogators Rethink the Psychology of Torture," *Peace and Conflict: Journal of Peace Psychology* 13 (2007): 393–98; Clark McCauley, "Toward a Social Psychology of Professional Military Interrogation," *Peace and Conflict: Journal of Peace Psychology* 13 (2007): 399–410.

32. Peter Bauer, "Statement on Interrogation Practices," July 31, 2006, reprinted in George

and it was reiterated and amplified by the 2014 Study Report of the Senate Select Committee on Intelligence, discussed earlier.<sup>33</sup>

Despite the efforts of many in psychology to prevent torture and reduce its harm, we believe that the dangers of accommodation with officially established abusive practices are paradoxically illustrated in recent times in our profession by the activities of a number of other well-established psychologists and the controversial position first taken by the American Psychological Association (APA) on the matter in the years following the September 11, 2001, attacks on the United States.<sup>34</sup> During this period, unlike the American Psychiatric Association, the American Nursing Association, and other professional groups, the APA claimed, over the objections of many of its members, that psychologists can play an acceptable role in overseas facilities that use “enhanced techniques” for interrogation of prisoners while denying them due process and other basic widely recognized protections. Critics argued that the association was seeking competitive advantage with the federal government in terms of greater access to funding and influence.

There is ample documentation that American psychologists, along with other health care providers, were complicit in the planning for and at times the enactment of punitive coercion of prisoners at the Guantanamo Bay Naval Station, the Detention Center at Bagram Air Base, and Abu Ghraib prison, and similar settings (see, e.g., the Central Intelligence Agency inspector general’s report of May 2004 and other recently declassified government documents cited by Physicians for Human Rights<sup>35</sup>). Psychological consultants and officers have been identified as key participants in the development and application of euphemistically termed “soft abuse” that leaves only psychic but not physical markers later, such as mock executions and threats to family, extended physical stressors, nudity and sexual violations, religious transgressions, prolonged seclusion, and exposure to excesses of noise, light or darkness, and heat or cold.

As Physicians for Human Rights stated, at the heart of the program was “an unproven theory that exposing detainees to uncontrollable stress

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Hunsinger, ed., *Torture Is a Moral Issue: Christians, Jews, Muslims, and People of Conscience Speak Out* (Grand Rapids, MI: William B. Eerdmans, 2008), 268–70.

33. Senate Select Committee on Intelligence, “Committee Study.”

34. Steven Miles, *Oaths Betrayed: America’s Torture Doctors*, 2nd ed. (New York: Random House, 2009).

35. See <http://washingtonindependent.com/56175/the-2004-cia-inspector-generals-report-on-torture>, May 7, 2004, accessed January 7, 2012; Physicians for Human Rights, “Aiding Torture: Health Professionals’ Ethics and Human Rights Violations Revealed in the May 2004 CIA Inspector General’s Report,” August 2009, accessed January 7, 2012, <http://physiciansforhumanrights.org/library/reports/aiding-torture-2009.html>.

and trauma would disrupt normal mechanisms of resistance and create 'learned helplessness' and dependence [inducing] total compliance. . . . At the time the CIA program began, the existing evidence suggested that coercive approaches to interrogation did not work and were counterproductive. Nevertheless, psychologists contracted by the CIA promoted this theory, improvised and applied various torture techniques, and reported outcomes in line with their contention that these techniques facilitated detainee compliance and cooperation with interrogation."<sup>36</sup> On its side, the APA argued that the presence of psychologists at sites where torture was conducted helped in effect to curb its practice.

Seeming to many to qualify the APA's supposedly unequivocal stand against torture, it expressed a willingness to collaborate with the interrogation policies of the Bush administration in its "war on terror"; and it compounded concerns about its stand when it adopted, in the 2002 revision to its Code of Ethics, the tenet that ethical duty can yield on occasion to legal or organizational requirements. Eight years later and in response to much contentious protest, the association made a critical correction to the standards in question, reaffirming the primacy of ethical responsibilities when the principles of human rights are at odds with official regulations, other legal authority, or institutional directives.<sup>37</sup> Thus, just obeying orders could no longer be used as an ethical defense in such instances.

Criticism of APA policy nevertheless continued from both within the organization and beyond, most tellingly in the investigations reported in 2014 by the *New York Times* journalist James Risen. He uncovered evidence of a pattern of collusion by the profession with the Central Intelligence Agency and the Department of Defense regarding the cooperation of psychologists with abusive methods of interrogation. He concluded that the APA "put its seal of approval on those close ties—and thus indirectly on torture."<sup>38</sup>

Although the APA disputed Risen's findings, its board of directors com-

36. Physicians for Human Rights, "Nuremburg Betrayed: Human Experimentation and the CIA Torture Program," June 2017, [http://physiciansforhumanrights.org/assets/multimedia/phr\\_humanexperimentationreport\\_executivesummary.pdf](http://physiciansforhumanrights.org/assets/multimedia/phr_humanexperimentationreport_executivesummary.pdf).

37. In a public statement issued at the time, the APA stated: "Previously, it appeared that if psychologists could not resolve such conflicts, they could adhere to the laws or demands of an organization without further consideration. That language has been deleted and this new sentence added: '*Under no circumstances may this standard be used to justify or defend violating human rights*'" (italics in the original). American Psychological Association, <http://www.apa.org/news/press/releases/2010/02/ethics-code.aspx>, February 24, 2010, accessed January 7, 2012.

38. James Risen, *Pay Any Price: Greed, Power, and Endless War* (New York: Houghton Mifflin Harcourt, 2014), 178.

missioned an independent review of the issues by David Hoffman, a former federal prosecutor, and his associates in the law firm Sidley Austin. The seven-month investigation interviewed more than 150 people and examined over 50,000 documents, and in 2015 it produced a 542-page report further revealing the extent of involvement by the association and a number of its leaders in support of psychology's roles to promote abusive practices for detainees in the war on terror.<sup>39</sup>

Among many similar reactions to the report's conclusions, the executive director of the Association for Psychological Science stated that the APA had "abused its privileged position and failed miserably in its responsibility to protect the public,"<sup>40</sup> and the executive director of Physicians for Human Rights wrote that the APA "must take stock of the pain and suffering it caused by contributing to the torture program [and] recognize the corruption that fueled an unconscionable dismantling of ethical standards aimed at ensuring that psychologists do no harm."<sup>41</sup>

The APA's own Special Committee for the Independent Review termed the findings of the report extremely troubling and determined that serious action was required, despite objections to the report by certain other members, most notably a number who were found at fault in it.

As a result of the report, several highly placed officials in the organization resigned their positions, and at the 2015 APA annual convention, its council of representatives reversed previous policy and voted 157 to 1 for a resolution prohibiting its members from assisting in any manner national security interrogations for military or intelligence entities. The association also brought related policies into conformity with the United Nations Convention against Torture. In doing so, it helped rectify the institutional maneuvering made over the previous decade by this major health organization and related prominent professionals, which in the eyes of many helped enable the Bush administration's adoption of tactics widely condemned as torture.

Even though not all the psychologists involved in the interrogation program were members of the APA, no finding of fault by the organization's ethics office or state licensing boards has been made to date against anyone

39. David Hoffman, Danielle Carter, Care Viglucci Lopez, Heather Benzmilller, Ava Guo, S. Yasir Latifi, and Daniel Craig, "Independent Review Relating to APA Ethics Guidelines, National Security Interrogations, and Torture," revised September 4, 2015.

40. M. B. Marklein, "Psychologists in Crisis over Findings on 'Torture' Allegations," *University World News*, July 2015.

41. Donna McKay, "The Brutal Toll of Psychologists' Role in Torture," *Huffington Post*, August 2015.

implicated in wrongdoing despite increasing calls to hold these individuals responsible for violation of the primary ethical injunction never to do harm. However, a lawsuit was filed in October 2015 in the Federal District Court in Spokane, Washington, by the American Civil Liberties Union on behalf of two former prisoners and the estate of a third man who likely died of hypothermia during his detention and abuse. The defendants in the case are two psychologists, James Mitchell and John Bruce Jessen. The psychologists have been called by CIA officials architects of the interrogation program, a designation they dispute despite having reportedly billed the government \$81 million for their work. They also deny that the harsh techniques they devised and advocated, such as prolonged stress positions and sleep deprivation or the repeated slamming of a prisoner into walls, were likely to cause any lasting harm.<sup>42</sup> To the contrary, the *New York Times* found “a pattern of long-term damage among dozens of former detainees subjected to brutal treatment by the United States [including] depression, anxiety, withdrawal and flashbacks.”<sup>43</sup> At the time of this writing, the case is scheduled for trial in September 2017.

## **6. A personal concluding note on working with survivors of torture**

We would like to end with a positive comment based on our experiences providing supportive and rehabilitative services to victims of torture. We take exception to the notion that such engagement must prove a disheartening endeavor. As we have described, it can indeed be an intense and complicated effort, but it is also one of much satisfaction. And well apart from our personal reactions, the work demonstrates repeatedly that despite the designs of torture, it fails in so many instances to permanently undo the spirit. Like our many colleagues in this field, we deem it a privilege to be able to bear witness to the life stories of the survivors with whom we work and, by participating in the restoration of some measure of their well-being, to thereby try to lessen in however modest a degree the pall that torture casts over the civilized world.

42. Sheri Fink and James Risen, “Psychologists Open a Window on Brutal C.I.A. Interrogations,” *New York Times*, June 21, 2017, <https://www.nytimes.com/interactive/2017/06/20/us/cia-torture.html>.

43. Ibid., citing Matt Apuzzo, Sheri Fink, and James Risen, “How U.S. Torture Left a Legacy of Damaged Minds,” *New York Times*, October 9, 2016, <https://www.nytimes.com/2016/10/09/world/cia-torture-guantanamo-bay.html>.

## CHAPTER 3

# Stoic Equanimity in the Face of Torture

NANCY SHERMAN

The torturer . . . deals with my soul: every day he folds the flesh aside and exposes my soul to the light; he has probably seen many souls in the course of his working life; but the care of souls seems to have left no more mark on him than the care of hearts leaves on the surgeon.

—J. M. Coetzee<sup>1</sup>

In this way, writes the South African novelist J. M. Coetzee, the torturer becomes hardened to the pain he inflicts. But the tortured, too, seeks indifference. Consider the reflections of Jacobo Timerman, an Argentine Jew and editor and publisher of the newspaper *La opinión* from 1971 until his arrest in April 1977 by an extremist faction of the Argentine army. He was held captive for thirty months and tortured and interrogated inside the army's clandestine prisons. He offers advice for those who may face torture: "Memory is the chief enemy of the solitary tortured man—nothing is more dangerous at such moments. But I managed to develop certain passivity-inducing devices for withstanding torture and anti-memory devices for those long hours in the solitary cell. I refused to remember anything that bore on life experience—I was a *professional stoic* dedicated to this task."<sup>2</sup> Timerman points us to my specific interest in this chapter—namely, Stoic equanimity in the face of torture.<sup>3</sup> In particular, I want to ask: In what ways, if any, is Stoic equanimity a plausible armor for enduring torture? More generally, is the case of torture instructive for understanding Stoic equa-

1. J. M. Coetzee, *Waiting for the Barbarians* (New York: Penguin, 1980), 118.

2. Jacobo Timerman, *Prisoner without a Name, Cell without a Number* (New York: Knopf, 1981), 36 (emphasis added).

3. For a related treatment of some of this material, see Nancy Sherman, *The Untold War: Inside the Hearts, Minds, and Souls of Our Soldiers* (New York: W. W. Norton, 2010), chaps. 5–6.

nimity as a form of resilience and mode of well-being? Admittedly, I pick an extreme case, but I believe we can learn something about more ordinary cases by considering equanimity in the hard case.

As Timerman fashions it, his “professional stoicism” is a “mechanism of withdrawal” that helped him avoid lapsing into “that other mechanism of tortured solitary prisoners”: namely, rapport building with a jailor or torturer.<sup>4</sup> Stoicism allowed him to cast aside “all logical emotions and sensations—fear, hatred, vengeance—for any emotion or sensation meant wasting useless energy.”<sup>5</sup> Memories of his wife and children, and emotional longings for them, are a “penetration from the outside world” that a victim of torture cannot afford to indulge.<sup>6</sup> “The image of my wife’s face is unbearable in this place.”<sup>7</sup> If he is to survive, he must be a “blind architect,” reconstructing a world from the stimuli of his new, perverted environment—the moans and hysterical screams, the odor of the latrine that matches his own skin’s stench, the violent sound of metal and barking dogs, the constant shouting of guards meant to “intimidate and confuse prisoners.”<sup>8</sup>

Timerman appeals to a popularized notion of stoicism as a technique of dissociating from painful aspects of reality that would either sap him of mental energy or weaken control. My interest here and in other recent writings is ancient Stoicism as a philosophical doctrine of emotions and form of moral therapy.<sup>9</sup> But certain aspects of popularized stoicism, perhaps not surprisingly, bear a relation to ancient versions. And popularized ancient versions of Stoicism have themselves been used to endure torture’s horrors. So in a prescient moment on September 9, 1965, James Stockdale, then a young naval aviator, muttered to himself as he was shot down by

4. Timerman, *Prisoner without a Name*, 37. On a visit to Guantanamo Bay Detention Center in autumn 2005, I was told by the commanding officer, Maj. Gen. Jay W. Hood, that rapport building, not harsh “fear-up” techniques, is the preferred interrogation technique at Guantanamo. For more on army-sanctioned interrogation techniques, see *Intelligence Interrogation*, Army Field Manual FM 34-52 (Washington, DC: Headquarters, Department of the Army, September 28, 1992). I discuss this document in my symposium paper “Torture and the Stoic Warrior: Torturers and the Tortured,” *South African Journal of Philosophy* 25 (2006): 77–88. For reflections on my trip to Guantanamo and the use of psychologists and psychiatrists in interrogation, see my op-ed, “Mind Games at Gitmo,” *Los Angeles Times*, December 12, 2005.

5. Timerman, *Prisoner without a Name*, 35.

6. *Ibid.*, 85.

7. *Ibid.*, 84.

8. *Ibid.*, 83.

9. See Nancy Sherman, *Stoic Warriors: The Ancient Philosophy behind the Military Mind* (New York: Oxford University Press, 2005). I also take up issues of Stoicism and resilience in *Untold War*.



the North Vietnamese, “Five years down there at least, I’m leaving behind the world of technology and entering the world of Epictetus.”<sup>10</sup> Before he deployed to Vietnam, a professor at Stanford had given him as a parting gift Epictetus’s *Enchiridion*. In an uncanny way, Stockdale committed it to memory and soon was relying on it in what would become seven and a half years of imprisonment in the Hanoi Hilton, two and a half years of which were in solitary confinement. As head of the chain of command of POWs in the Hanoi Hilton, Stockdale made Stoicism the backbone of his leadership style.

By looking at examples such as these as well as Stoic texts, I ask how and whether Stoicism can defend against a fundamental vulnerability that torture aims to lay bare—namely, that one will use one’s will against oneself in acts of collusion and self-betrayal.<sup>11</sup> This is at the heart of the moral challenge torture poses to its victims, and if any philosophy should be able to address the issue squarely, it is Stoicism.

I pave the way for exploring this issue by discussing a number of other topics en route. First, I very briefly review Stoicism’s break with Aristotelian notions of happiness or well-being; second, I take up the Stoic conception of *apatheia* (freedom from emotions) and explore whether and how a sage can still have emotions; third, I consider notions of physical pain and the endurance of bodily torture. I conclude by raising the challenges complicity poses for a viable notion of Stoic mastery.

### 1. Stoicism’s break with Aristotelian *eudaimonia*

The ancient Greek Stoics break with the Aristotelian claim that *eudaimonia*—well-being, happiness, or flourishing—requires both the internal goods of virtue and practical wisdom and the external goods of health, prosperity, honor, good fortune, and the like. The Stoic revision hangs on an understanding of the formal criteria of happiness: if happiness is to be, as ancient ethical theories stipulate, not only the most complete and self-sufficient good but also the most stable and permanent good,<sup>12</sup> then it must be re-

10. James Bond Stockdale, “Courage under Fire: Testing Epictetus’s Doctrines in a Laboratory of Human Behavior,” speech delivered at the Great Hall, King’s College, London, November 15, 1993, [http://media.hoover.org/sites/default/files/documents/978-0-8179-3692-1\\_1.pdf](http://media.hoover.org/sites/default/files/documents/978-0-8179-3692-1_1.pdf), p. 7.

11. For a very stimulating investigation of this, which very much inspires my own discussion, see David Sussman, “What’s Wrong with Torture?,” *Philosophy and Public Affairs* 33 (2005): 1–33.

12. See Aristotle, *Nicomachean Ethics* 1.7, for an articulation of these formal criteria. For his concerns about the impact of luck, see *Nicomachean Ethics* 1.9–11, esp. 1099b20–25.

stricted to what one can best control: namely, the excellence of rational agency, or virtue. Moreover, ordinary emotions, such as pleasure and pain, desire and fear, and their many subtypes, insofar as they are paradigmatically attachments or aversions to external goods, will not be constitutive of perfect virtue. Granted, the Stoics still leave room for less emotionally driven preferences and aversions to external goods. Thus, the sage “selects” health as “in accord with nature” and “disselects” disease as “contrary” to it. And he would prefer a life off the rack rather than on it. But these are ultimately only “indifferents”; they are not genuine goods and evils that can make a substantive difference to happiness. A life of torture, on the rack, ought not to derail either virtue or well-being.

Ancient and modern readers alike have viewed this conception of happiness as wildly counterintuitive.<sup>13</sup> The Stoics seem guilty of propounding a wildly revisionist theory of happiness that has little application to anything that resembles flesh-and-blood human. And yet many a reflective person has turned to Stoic consolations, with varying degrees of success.

A first question to consider is just how free the sage will be from the stress and perturbations of emotional life. This is critical for understanding what Stoic resilience under torture might look like.

## 2. Protoemotions and “good emotions”

There are two critical qualifications to the notion of sage-like freedom from emotions. First, the Stoics note that even the sage will experience proto-emotional phenomena (*propatheia*) that are involuntary. These phenomena contrast with ordinary, full-fledged emotions, which, according to the Stoics’ cognitivist view, are voluntary and fully assented-to appraisals. So, they say, a sage may experience tremors and blushing or turn pallid when caught off guard by a fright or sudden lapse of confidence. But a true sage never allows these preemotions to turn into full emotions. He nips them in the bud. More accurately, he does not assent to the impulsive impressions.

Seneca’s *On Anger* (first century CE) and Aulus Gellius’s *Attic Nights* (second century CE) are among the sources for this doctrine of *propatheia*. So Seneca tells us that a preemotion of anger is that “first mental jolt which affects us when we think ourselves wronged. This steals upon us.” Similarly, we may be “incited” by the “martial sound of trumpets” or a

13. See, e.g., Cicero, *On Moral Ends*, trans. Raphael Woolf, ed. Julia Annas (New York: Cambridge University Press, 2001), 4.52. Also see 4.53–58 for the accusation that Zeno was just playing with words, “altering the terminology,” in his excluding certain goods from happiness.

"gruesome painting" or the "grim sight of the justest punishment." "The fiercest soldier may tremble a little as the signal is given for battle," and "a great general's heart is in his mouth before the lines have charged against one another." But starts and startles like this are not themselves full-fledged emotions: "If anyone thinks that pallor, falling tears, sexual excitement or deep sighing, a sudden glint in the eyes or something similar are an indication of emotion or evidence for a mental state, he is wrong; he fails to see that these are just bodily agitations." They are like the "urge to yawn when someone else yawns" or "blinking when fingers are flicked at the eye."<sup>14</sup> They become proper emotions only with "the mind's assent." Insofar as the sage withholds assent, he can experience these emotional arousals with impunity.

Aulus Gellius reports a similar view. He was once aboard a ship with a Stoic when they were caught in a violent storm. The Stoic got jittery and grew pale, and Aulis asked him tactfully, how could this be? The Stoic answered by appeal to the teachings of Epictetus: that even the mind of the sage "must shrink and feel alarm" at the occurrence of some terrifying sound or sight. But, he added, the sage never voluntarily assents to these impressions as genuine evils in the offing. "He rejects and scorns them." He sees in them nothing that ought to excite fear.<sup>15</sup>

A less noted but insightful source is Philo of Alexandria (b. 20 BCE). Unlikely to have had direct familiarity with the writings of either Seneca or Gellius, Philo offers probably an independent source of earlier, ancient Greek doctrine.<sup>16</sup> In his allegorical reconstruction of Abraham as a Stoic sage, he puzzles over Genesis 23:2–3.<sup>17</sup> "Abraham came to bewail Sarah and to mourn." How can this be? How can the patriarch, as Stoic sage, actively grieve? Philo answers that Abraham merely "*came* there to grieve." Unlike a weaker man, Abraham the sage, once aroused by a seductive impression, was able to withhold full assent to the impression: "But excellently and carefully does (Scripture) show that the virtuous man did not

14. Seneca, *On Anger* 2.3.2, in *Seneca: Moral and Political Essays*, trans. John M. Cooper and J. F. Procopé (Cambridge: Cambridge University Press, 1995).

15. *Attic Nights of Aulus Gellius*, trans. John C. Rolfe (Cambridge, MA: Harvard University Press, 1927), 19.1.1–21.

16. See Margaret Graver, "Philo of Alexandria and the Origins of the Stoic *Propatheiai*," *Phronesis* 44 (1999): 300–325. I use her translations from that article in quoting Philo. See John Dillon, *The Middle Platonists* (Ithaca, NY: Cornell University Press, 1996); also John Dillon and Abraham Terian, "Philo and the Stoic Doctrine of *Eupatheiai*: A Note on *Quaes Gen* 2.57," *Studia Philonica* 4 (1976–77): 17–24.

17. On Philo and the use of allegorical interpretation of the Bible, see Ronald Williamson, *Jews in the Hellenistic World: Philo* (Cambridge: Cambridge University Press, 1989), 144–200.

resort to wailing or mourning but only *came there* for some such thing. For things that unexpectedly and against his will strike the pusillanimous man weaken, crush, and overthrow him, whereas everywhere they merely bow down the man of constancy when they direct their blows against him, *and not in such a way as to bring (their work) to completion*, since they are strongly repelled by the guiding reason, and retreat.”<sup>18</sup> Philo goes on to urge that the petitioner in prayer should follow Abraham’s model and again not assent to sudden and seductive impressions that momentarily derail the will: “When something happens against one’s will,” one should not be paralyzed “fixed in prayer” nor “entirely rapt and moved and drawn toward this,” but should instead “gradually go toward it, and retire before the end is reached.”<sup>19</sup> In other words, at those very moments when emotional rapture is about to take hold, the supplicant, intent on moral progress, should resist and reinsert agency. Philo resorts in these passages to the language of physical movement—to go toward an emotion but retire before reaching. In other places, he explains that the mental act of assent is what is critical. Thus, in Genesis 17 Abraham laughs when he thinks to himself that he, a centenarian, is going to father a child. Again, how is it that a sage, free of emotional disturbance, can laugh? Philo explains that Abraham is really only *thinking* the thoughts that make him laugh. And to entertain a thought is not *to assert* it: “For unworthy words spoken by tongue and mouth fall under transgressions and punishment. But those which are in the mind are not at all guilty.”<sup>20</sup>

According to Stoic doctrine, then, certain emotional responses are compatible with sage-like equanimity. Whether *we* draw the line as the Stoics do and call such arousals emotions or not, the Stoic point is that these kinds of affective phenomena, unlike more robust emotions, are involuntary *and* can be shaken off quickly. But we might disagree on both counts. We might argue that many emotions proper, and not just arousals at the

18. Philo, *Questiones et solutiones in Genesim* (hereafter *QGen*) 4.73 (emphasis added), trans. Graver.

19. *QGen* 4.73, trans. Graver.

20. *QGen* 3.56, trans. Graver. Recall here Augustine’s problem of nighttime erections and seminal fluids. Is he in control or not? The Stoics, as with Aristotle in *De motu animalium*, would argue that it is involuntary movement. But Richard Sorabji notes that because of Augustine’s misunderstanding of a text by Aulus Gellius (a text in which Gellius himself apparently made a one-letter, philological change in a word used by Epictetus and thus helped to create the misunderstanding), Augustine went on to conclude that these were real voluntary emotions and actions. And so follows much Christian teaching about male erections! Aquinas is clearer that male nocturnal emissions are only a first movement, an involuntary “preemotional” impulse. For the complicated botch-up, see Richard Sorabji, *Emotion and Peace of Mind: From Stoic Agitation to Christian Temptation* (Oxford: Oxford University Press, 2000), 375–84.

penumbra of emotional experience, have an element of the involuntary. Moreover, even if we restrict ourselves to starts and startles, we might challenge the assumption that the most resolute of subjects can regain control after undergoing the most violent versions of these jolts. Torture seems to be a lab for just that kind of experiment.

Indeed, one would expect that there is a substantive difference between prolonged and/or harsh exposure to what psychologists call “traumatic stressors” and more titrated exposures in relatively controlled conditions (such as perhaps administered to those who are learning how to survive torture, for example, in training schools<sup>21</sup>). It is not hard to imagine that even the most resilient Stoic sage would suffer degraded capacities for resistance after chronic exposure to the tools of terror.

Seneca is concessive on just this point. Although ever eager to downplay many varieties of fear as idle (and himself insistent that prerehearsal of dreaded evils can remove much of the shock and awe that is part of terror), he nonetheless concedes that torture and, in particular, its “visuals” are effective methods for engendering dread, even in those practiced to resist:

Picture to yourself under this head the prison, the cross, the rack, the hook, and the stake which they drive straight through a man until it protrudes from his throat. Think of human limbs torn apart by chariots driven in opposite directions, of the terrible shirt smeared and interwoven with inflammable materials, and of all the other contrivances devised by cruelty. . . . It is not surprising, then, if our greatest terror is of such a fate; for it comes in many shapes and its paraphernalia are terrifying. . . . [O]ther troubles are of course not less serious. . . . They are, however, secret; they have no bluster and no heralding; but these, like huge arrays of war, prevail by virtue of their display and their equipment.<sup>22</sup>

Seneca’s remarks are, in part, a salvo to his countrymen on the “cruel contrivances” to which Rome had grown accustomed for sport entertainment, notably gladiator games, which drew rich and poor alike to the Coliseum. But his observations are also prescient in understanding *why* the spectacle

21. Such as at the US SERE (Survival, Evasion, Resistance, and Escape) course at Fort Bragg.

22. Seneca, *Epistles*, trans. Richard Gummere (Cambridge, MA: Harvard University Press, 1989), 14.3–6. Sadly, the hook is still a spectacle of torture, as demonstrated by its presence in the Saddam era “Black Hole” room that was converted for use by US Special Forces Intelligence interrogation teams in Baghdad. See Eric Schmitt and Carolyn Marshall, “In Secret Unit’s ‘Black Room,’ a Grim Portrait of U.S. Abuse,” *New York Times*, March 19, 2006, accessed January 7, 2012, <http://www.nytimes.com/2006/03/19/international/middleeast/19abuse.html>.

of torture can psychologically traumatize its victims. As Judith Herman instructs in her landmark 1992 book, *Trauma and Recovery*, certain threats and encounters with violence are traumatic “because they overwhelm the ordinary human adaptations to life.”<sup>23</sup> Here, Seneca anticipates this general point. “Displays” of imminent and intimate brutality “coerce and master the mind,” leaving us powerless. They overwhelm the human capacity for coping. The brute and violent images—“the disembowelled entrails of men,” “human limbs torn apart by chariots,” “the cross,” “the rack,” “the hook,” “the stake”—all are meant to convey that human sensory and reactive capacities can absorb only so much before shutting down in terror.

Seneca points to a kind of torture that has as its principal function spectacle and the show of power. Perhaps this—that is, torture primarily for the end of satisfying the sadistic needs of the torturer<sup>24</sup>—is harder to endure than torture for the purpose of extracting intelligence, where the victim may believe, correctly or not, that he has some control in stopping the torture. Seneca also suggests that torture that introduces novel methods that one could not prerehearse in any way (physically or in imagination) is likely to be harder for victims to resist. This seems to make sense. But the critical point is that he seems to acknowledge that some impressions of dread lead not only to jolts and shocks but to full-blooded terror in even the most resistant person. Even if the responses are involuntary, in the sense that the victim refuses to assent that such impressions represent genuine evils, they nonetheless grip, endure, and are not easily thrown overboard.

While the Stoics introduce preemotions (*propatheiai*) as a way to explain away certain kinds of emotional arousal in the life of a sage, they introduce good emotions (*eupatheiai*) as a way to embrace and reclaim other kinds of emotional response. “Good emotions” are cultivated affects that track recalibrated values and thus replace the valuations implicit in ordinary emotions. The sage is not insensible but moved, voluntarily, by new, equable affective responses. These new emotions correspond in rough, taxonomic type to the old emotions. So the Stoics categorize ordinary emotions into four basic genera: desire and fear, pleasure and distress. These and their subspecies involve appraisals of apparent goods and evils in the future (as in the case of desire and fear) or appraisals of apparent goods and evils in the present (as in the case of pleasure and distress). The “eupathic,” or “good,” versions are meant to retain some of the quality of ordinary

23. Judith Herman, *Trauma and Recovery* (New York: Basic Books, 1992), 33.

24. For versions of sadistic cruelty and perhaps torture, see Seneca at 2.5. For a fuller discussion of types of torture, see Sherman, “Torture and the Stoic Warrior.”

emotions, but without their excess and misappraisals.<sup>25</sup> The result is that they are experienced as calm, smooth, and fully rational or “consistent.” So, in lieu of fear will be rational caution (*eulabeia*), described in some texts “as well-reasoned shrinking” or “avoidance” (*ekklisis*); in lieu of desire will be rational wish (*boulêsis*), described as “well-reasoned stretching” or “desiring” (*orexis*); in lieu of pleasure will be joy (*chara*) or “well-reasoned swelling” (*eparsis*).<sup>26</sup> Significantly, there is no correlate to distress in the new taxonomy. Why? Cicero suggests that the sage, constitutionally, can do no evil and so will never experience the sort of moral distress or dejection that comes with doing it.<sup>27</sup> In this sense, there is nothing parallel to a non-sage’s regret, remorse, or shame. The importance of this will be apparent in a moment.

How to construe “good emotions” is left vague in the texts. One possible interpretation is that good emotions remain “sensitive to” external goods, but always as merely indifferents that cannot affect happiness. Alternatively, they are “responsive” only to virtue and vice, with indifferents the objects not of emotion at all but only of emotionless selection and rejection. But this second interpretation may leave us wondering whether a sage really still traffics in the ebb and flow of daily life in a recognizably human way.<sup>28</sup>

One way to assuage concerns here is to combine the two interpretations. Rational caution, for example, is not just an abstract aversion to the possibility of future vice (“not having any of it,” so to speak) but wariness experienced precisely on those occasions that give rise to fear in non-sages and cause them to buckle. It is a caution, perhaps signaled by a preemotional startle that warns a sage to steel himself against succumbing to the fear of death or to the dread of being tortured.<sup>29</sup> Rational caution mobilizes precisely where fear or dread might paralyze.

It may be that the most resilient torture victims do cultivate just that

25. This move brings to mind Kant’s pathological emotions and their “practical” counterparts in the virtuous person.

26. For an account, see Cicero, *Tusculan Disputations* 4.12–13, in *Cicero on the Emotions: “Tusculan Disputations” 3 and 4*, trans. and ed. Margaret Graver (Chicago: University of Chicago Press, 2002). Also see Diogenes Laertius, *The Lives of Eminent Philosophers*, trans. R. D. Hicks (Cambridge, MA: Harvard University Press, 1970), 7.116.

27. Cicero, *Tusculan Disputations* 3.77.

28. This is the concern of John Cooper in “The Emotional Life of the Wise,” accessed January 7, 2012, <http://www.princeton.edu/~johncoop/Papers/Stoics-EmotionalLife12.04.pdf>. I am grateful to him for correspondence on these questions.

29. See *ibid.* for a development of this notion. In this sense, it is a bit like Freud’s notion of signal anxiety—a warning signal to defend oneself against a possible conflict or temptation.

kind of wily vigilance. James Stockdale once described his POW mind-set to me in the terms of Solzhenitsyn's Ivan Denisovich—as a “slow moving cagey prisoner.” Another Vietnam era POW told me that he kept in his head a long list of dead baseball players so that he could readily blurt out those names and not those of his battle buddies when his captors demanded intelligence.<sup>30</sup> But it is too quick to think that wily caution could fully blot out all dread or pain in situations when one is thoroughly at the mercy of another's power, as, for example, when one is forcibly held under water for 20–40 seconds and made to feel as if drowning. The Stoics may of course answer that what seems to be dread is in fact just physiological arousal and, as such, a response that falls beneath the threshold of a proper emotion. But this seems just to give dread a different name.

Dread is anticipatory. What about feelings that are retrospective, such as shame that one *has broken* and revealed information, or shame that one *has sought comfort* in the rapport cultivated by a torturer? What of shame that one *has come to see oneself with contempt* through the eyes of the torturer? Aren't these appropriate, even fine and morally noble responses to having been forced to do things that are demeaning and that one profoundly disavows?

Officially, the Stoic leaves no room for the sage to feel these emotions. For they are forms of moral distress, and the sage does no wrong for which to feel such distress.<sup>31</sup> If one is truly acted upon, coerced and forced, then virtue is not compromised. And if one has cooperated in some way, then one is less than a sage. But it is hard not to imagine some sense of contribution in one's own torture, experienced by even the most resistant agent—such as the perception that one could have done more to resist, that one failed to exploit to its fullest a potential moment for rebellion, or that one acquiesced too easily to an interrogator's bid for rapport and trust. These are moments of losing control in the presentation of who one is.<sup>32</sup> And they are moments for which shame seems all too reasonable. The shame is not just backward looking but forward looking—a way to help restore a sense of dignity and moral identity.

30. Many Holocaust survivors tell of how clever use of their skills and some moxie were factors that kept them alive. On the predicament of the intellectual, who does not always have those concrete skills, see, e.g., Jean Améry, *At the Mind's Limits* (Bloomington: Indiana University Press, 1980).

31. For a challenge to the Stoics on just this point, see Cicero, *Tusculan Disputations* 3.77.

32. On shame as a failure of agency (and not, as it is traditionally understood, a failure to reach an image of self-perfection), see David Velleman, “The Genesis of Shame,” *Philosophy and Public Affairs* 30 (2001): 27–52 at 42.



### 3. Stoics on the body in pain

I have been considering the role of Stoic “enlightened” emotions as armor in the face of torture. But there is another way to cast the protection of Stoicism in torture. And this is through the Stoic’s radical view of the body. Epictetus insists that physical torture cannot really harm you because your body is not really you. On or off the rack, the body is an “indifferent,” something apart from both self and your ultimate happiness. For the Stoic, there is no notion of what Sigmund Freud will later call “the bodily ego,” the idea of a person embodied, with the body as the frontier of self. Rather the body, for Epictetus, is more of a disembodied medium in which things just happen passively. Pain may be in your body, but *you* are “out of body,” to give it the modern gloss. “Our body, then, is not our own, but subject to everything stronger than itself,” teaches Epictetus.<sup>33</sup> “Do you not know that it is a slave to fever, gout, eye-disease, dysentery; to a tyrant[?]”<sup>34</sup> It is just a “poor overburdened ass,” weighted down by its physical needs and baggage, so many “bridles, pack-saddles, shoes, barley, fodder for the ass. Let these go.”<sup>35</sup> The humor and hyperbole show Epictetus playing the role of Socratic gadfly for his young listeners. But the general view is in earnest.

Cicero registers a blunt complaint about the call for bodily detachment. The Stoics “show concern for nothing but the mind, as if human beings had no body.”<sup>36</sup> “When it comes to a happy life,” he complains, the Stoics argue that “the amount of bodily advantage has no relevance at all.”<sup>37</sup>

Still, there is something appealing in the idea of experiencing pain passively, whether through Stoic detachment or other forms of dissociation. Here the experience of victims of rape and child abuse sheds some light on enduring torture. Wynona Ward, a lawyer and advocate for abused women and herself a victim of repeated sexual child abuse, told me once that after a car accident in which she badly injured her leg, she reported to the doctor that she was experiencing no pain at all. Her leg did not even seem to be a part of her. She explained this as an attitude of disembodiment that she had internalized after years of abuse by her father.<sup>38</sup> Another victim described “depersonalization” aptly to her therapist. She saw her child-

33. Epictetus, *The Discourses of Epictetus*, trans. Robin Hard, ed. Christopher Gill (London: Everyman, 1995), 4.1.66.

34. *Ibid.*, 3.22.40–41.

35. *Ibid.*, 4.1.79–80.

36. Cicero, *On Moral Ends* 4.36.

37. *Ibid.*, 3.43.

38. From Wynona Ward in conversation.

hood abuse from the vantage point of someone "floating on the ceiling," detached and dissociated from the site of unbearable pain.<sup>39</sup> Out of body, she could watch passively, as a spectator, safe and distant.

However, for other victims of rape and abuse, shame and complicity are the predominant feelings, even if there is also detachment or dissociation. They experience the conflict of being forcibly and brutally acted upon, without consent or the possibility of retaliation, *and* yet feeling like a player in the drama, acquiescent, giving parts of their bodies to another for abuse. The passivity/complicity poles produce a sense of disgust and shame: disgust at the alienated and polluted body that can long bear the marks of someone else's brutal will, and shame that through comportment, appearance, or gesture, one has been an agent in the act, even though one's personal agency might have been badly compromised.<sup>40</sup> In other cases, the shame is not so much about complicity as about a failure to block an *impression* of complicity.

Torture often reveals a similar inner conflict. In addition to the physical and psychological pain of torture, there is the moral anguish of experiencing oneself as complicit in the torture. Torture subjects view themselves as accepting the terms of their existence and as at once resisters and partners in their own cruel torture. Consider the remarks of Shafiq Rasul, a freed Guantanamo detainee from Britain, who described the kind of actions that landed him in solitary isolation for a month.<sup>41</sup> He said he had been punished for "hogging" an apple at mealtime. He "hogged" it, he explained, because he thought he might become "peckish" later on. His words are telling. What he describes here is a kind of complicity, the complicity of accepting the complete patheticness of being reduced to justifying his ravenousness in terms of his future desires. He forced himself to be accountable

39. From conversation with psychiatrist and trauma specialist Rich Chefetz. On the treatment of dissociative identity disorders, see Richard Chefetz, "Disorder in the Therapist's View of the Self: Working with the Person with Dissociative Identity Disorder," *Psychoanalytic Inquiry* 20 (2000): 305–29; Richard Chefetz, "The Paradox of 'Detachment Disorders': Binding-Disruptions of Dissociative Process," *Psychiatry: Interpersonal and Biological Processes* 67 (2004): 246–55. Also see Karen Way, "How Metaphors Shape the Concept and Treatment of Dissociation," *Psychiatric Clinics of North America* 29 (2006): 27–43. See, too, Francine Shapiro and Louise Maxfield, "Eye Movement Desensitization and Reprocessing (EMDR): Information Processing in the Treatment of Trauma," *Journal of Clinical Psychology* 58 (2002): 933–46.

40. The point of much cognitive-behavioral therapy (CBT) in the treatment of trauma is to allow patients to renarrate events more positively and with greater self-empathy. For an account of CBT in the treatment of rape victims, see Edna Foa and Barbara O. Rothbaum, *Treating the Trauma of Rape: Cognitive-Behavioral Therapy for PTSD* (New York: Guilford Press, 1998).

41. Delivered at "The Voices of Guantánamo," a conference held at George Washington Law School, March 20, 2006.

for a reasonable response to the press of his bodily needs. But he knows that in the perverted world of his detention, no rational account will excuse. He did what he wasn't supposed to do. He lives in two worlds: one in which he rebels against the perverted sense of justice in order to keep sane, another in which he is forced to accept its rules and regulate his most basic wants and needs according to its logic. In the end, he makes himself accountable.

The conflict suggests that resisting torture is not primarily or simply a matter of dissociating from bodily or psychological pain.<sup>42</sup> Torture invokes a sense of personal and moral agency in the very experience of helplessness.<sup>43</sup> The victim is not *just* a victim. There is engagement, a feeling of accountability for what is happening. In this sense it is an environment, par excellence, in which to be Stoic and show effort and mastery, an environment in which to be cautious and wary and deny that *real* moral evil is happening. But it is also an environment of severely *compromised* personal agency, where the victim experiences himself both as internalizing the perverted governance and attitudes of torturers and as being frustrated in his ability to resist them. It is an environment of shame.

The body and what is done to it is not so easily split off from the will, even when that will is coerced in the worst way. We are bodily beings, subject to the reactions, desires, and injuries inherent in our bodies, however much we protect ourselves by techniques of disembodiment.

#### 4. Torture and the will

Stoic detachment from the body and ordinary emotions is an attempt to bolster self-mastery and minimize the use of self against self. In James Stockdale's own Stoic lab in prison in Hanoi, he emphasized the positive moments of mastery and resistance. He did sit-ups in leg-irons, commanded an active chain of command within the cell block from solitary confinement, devised ways to bloody himself so he would not be paraded on TV as a propaganda item, instructed others on how to resist in similar

42. The idea that torture is nothing more than extreme pain is what made the "torture memo" by Jay Bybee (then head of the Office of Legal Counsel) notorious: according to Bybee's memo, conduct falls short of torture unless it inflicts pain at a level "associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result." For this memo and others pertaining to the torture debate, see Karen Greenberg and Joshua Dratel, *The Torture Papers: The Road to Abu Ghraib* (New York: Cambridge University Press, 2005).

43. Again, see Sussman, "What's Wrong with Torture?," on this important point.

ways—much of this conveyed through code tapped on walls, swished in the sound of brushes against the inside of a crap bucket, and so on. These are all acts of resistance, attempts to resist the collusion and rapport that the torturer or interrogator wants so desperately as the preferred method of conducting business. They are attempts at resisting complicity. Haleh Esfandiari, a Middle East scholar at the Woodrow Wilson International Center for Scholars in Washington, DC, described a similar approach she took to enduring three months of solitary imprisonment at the notorious Evin prison in Iran in 2007. She told me that she did rigorous step exercises for hours on end each day. She washed her clothes each day and hung them out to dry; she dressed in a clean T-shirt and pants for dinner daily, like a British schoolgirl, though this was only for a meal in solitary confinement. Being in charge of ritual and decorum was her way to restore her dignity. Jacobo Timerman, too, describes trying to resist the wished-for image of the torturer as omnipotent, as the author of ever-new ignominious forms of torture and degradation that could fully subordinate him. But he concedes that in some cases, in “unimportant matters,” “it’s best to acknowledge and accept the torturer’s omnipotence.”<sup>44</sup>

His point is that some acquiescence to the torturer’s omnipotence will not be self-annihilating; other moments of compliance may. It is a matter of selective acceptance (and, at times, strategic acceptance—a matter of giving the torturer a little leverage).

But of course the choices aren’t always a person’s own, and some moments pick themselves and force collusion without particular caution or wariness. Consider a case of being prevented from exercising control of body functions that are typically loci of self-control. From detainees just released from Guantanamo, I have heard some speak of their ordeals of being “processed” for eight to ten hours by US troops at Bagram Airfield, skimpily dressed in freezing cold weather, made to walk in circles with bare feet on sand mixed with shards of glass, denied use of toilets, urinating and defecating on themselves, and then shackled in stress positions for a ten-hour flight to Guantanamo Bay, hooded, eyes taped, and, again, denied permission to relieve themselves except on themselves.<sup>45</sup>

Peeing or shitting on yourself, because you are denied more decent forms of relief, is a salient form of experiencing yourself as an agent, a do-er, without agency—you *let yourself* do it. The case is *neither* like that of a toddler who has not yet mastered bladder control nor like that of an infirm

44. Timerman, *Prisoner without a Name*, 40–41, 67.

45. From “Voices of Guantánamo.”

person who has lost it. This is actively *doing it* (and of willfully controlling it up to a certain point), and yet it is *being made to do it*. It is experiencing oneself as helpless in one's adult agency. It is humiliating and it is regressive. Here what is vulnerable is the will and the psychological distress of using that will against yourself. Even if you are somehow able to dissociate from your body and its pain and identify instead with your capacity to make choices guided by virtue and reason, as a trained Stoic may be, this is still an affront. It is a misuse of your will and power to choose. You are consigned to use your agency in a betrayal of what you know, in principle, is still a matter of your control.

"The chair," a device used in force-feeding hunger-striking detainees in Guantanamo, presents a slightly different case of force and collusion.<sup>46</sup> A decision to go on hunger strike is itself a complicated matter and, depending on circumstances, may or may not be an autonomous or reflective choice. But assume a hunger striker chooses to strike in a modestly reflective way and *accepts* or, better, *acquiesces* to the consequence, in the sense of not forcibly protesting the anesthetized insertion of feeding tubes in the nose. In such cases, the victim is unlikely to have accepted as part of the anticipated bargain that he would be strapped to a chair, prevented from movement or purging, force-fed diuretics and laxatives, and then forced to urinate and defecate on himself.<sup>47</sup> Here the issue, again, is less about physical pain than about a particular form of psychological and moral anguish—namely, anguish directed at the perversion of your will, experienced as though it were (at least partially) brought about by your own hands. A cruel mockery is made of the victim's attempt to take charge of his body by a hunger strike. Inserting a feeding tube is itself a way to undermine that agency. Making the victim then defecate on himself is a way of getting him to experience himself as colluding in the mockery.<sup>48</sup>

46. On this, see Eric Schmitt and Tim Golden, "Force-Feeding at Guantánamo Is Now Acknowledged," *New York Times*, February 22, 2006. I discussed the use of "the chair" with detainee attorney Kristine Huskey on March 24, 2006; Huskey represented Omar Khadr, the young Canadian charged with war crimes under the Military Commissions Act of 2006. For an account of her legal representation of detainees, see Kristine Huskey, "Standards and Procedures for Classifying 'Enemy Combatants': Congress, What Have You Done?," *Texas International Law Journal* 43 (2007): 41–54. For an account of some of her visits to Guantanamo to represent detainees, see Kristine Huskey, "The 'Sex Interrogators' of Guantánamo," in *One of the Guys: Women as Aggressors and Torturers*, ed. Tara McKelvey (Emeryville, CA: Seal Press, 2007).

47. As reported by Brig. Gen. Stephen Xenakis, former commanding general of the Southeast Regional Army Medical Command, during remarks at the conference "Voices of Guantánamo," and broadcast by CSPAN that evening.

48. It is also a way to get hunger strikers to stop striking of their own will. So detainee attorney Kristine Huskey reported that her client, after hearing screaming in an adjoining cell

Here another scene from J. M. Coetzee's *Waiting for the Barbarians* is illuminating. The reflections are those of the old South African magistrate who, as punishment for consorting with a tribal woman, becomes himself the victim of state torture, like the tribal Barbarians over whom he once ruled:

In my suffering there is nothing ennobling. . . . What I am made to undergo is subjection to the most rudimentary needs of my body: to drink, to relieve itself, to find the posture in which it is least sore. . . . My torturers were not interested in degrees of pain. They were interested only in demonstrating to me what it meant to live in a body, as a body, a body which can entertain notions of justice only as long as it is whole and well, which very soon forgets them when its head is gripped and a pipe is pushed down its gullet and pints of salt water are poured into it till it coughs and retches and flails and voids itself.<sup>49</sup>

Coetzee describes a version of "the water cure," or what the drowning torture was euphemistically called by American troops who practiced it in the Philippines at the turn of the nineteenth century.<sup>50</sup> "Waterboarding" is its newer name, but the practice is as old as the Spanish Inquisition.<sup>51</sup> The point, Coetzee writes, is to reduce the victim to a body, who gasps for air and craves only to breathe and to stop the suffocation. The torturer takes away the most basic areas of human functioning and control—breathing, drinking, urinating, and defecating. And in being robbed by another of what a person could otherwise and "should" otherwise be able to control, the victim is mocked and humiliated in his helplessness.<sup>52</sup>

In response to this, Epictetus instructs that we ought to practice greater detachment. We should say of our body and, too, of the persons who torture, "they are nothing to me." In short, we should practice the indifference

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from a detainee strapped to the chair, said, "I won't strike again if it amounts to torture." From author's conversations with Huskey, March 24, 2006.

49. Coetzee, *Waiting for the Barbarians*, 115.

50. See Paul Kramer, "The Water Cure," *New Yorker*, February 25, 2008, 38–43.

51. For a discussion, see NPR's coverage, "Waterboarding: A Tortured History," by Eric Weiner, November 3, 2007, accessed January 7, 2012, <http://www.npr.org/templates/story/story.php?storyId=15886834>. For the Inquisition's use of the water cure, or *tormenta de toca* (a phrase referring to the piece of cloth held over the victim's mouth), see Henry Charles Lea, *A History of the Inquisition of Spain* (London: Macmillan, 1907).

52. For an account of the recent practice, see Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (New York: Doubleday, 2008), 171–74.

(or the dissociation) that trauma itself might induce. That indifference may, in the short run, be adaptive in enduring torture and ordeals, though current evidence suggests that extreme dissociation may exacerbate traumatic symptoms afterward.<sup>53</sup> Perhaps this is so because it perverts a healthy sense of how we live in bodies that *we*, and not evil outsiders such as omnipotent tormentors, use to express our intentions, emotions, and will. Even when a tormentor usurps that control, individuals may still feel they betray themselves by the very fact that another *can* control them in basic domains where they believe they *ought* to have greater control.

If this is the case, then even a broadly Stoic view may still leave the torture victim vulnerable to a sense of being forced *to use herself against herself* in the most degrading ways. The coercion in some sense shows up as a crack in self-control. Stoic armor is not fully impervious.

53. See Cheryl Koopman, Catherine Classen, and David A. Spiegel, "Predictors of Post-traumatic Stress Symptoms among Survivors of the Oakland/Berkeley, Calif., Firestorm," *American Journal of Psychiatry* 151 (1994): 888–94.

## Gender Performance Requirements of the US Military in the War on Islamic Terrorism

MARY ANNE CASE

Among the many disturbing reports to have emerged from a variety of venues at which the US military has conducted interrogations of Islamic male detainees since September 2001 are those detailing exploitation of sexual and gender stereotypes and taboos as a central part of efforts to humiliate and degrade detainees. It appears from reports that female US military personnel were often deliberately used in this process. For example, army linguist Kayla Williams reports being told to say sexually humiliating things in Arabic to naked male prisoners;<sup>1</sup> other female military personnel were allegedly instructed to degrade Muslim prisoners through forced cross-sex contact or exposure or through touching of prisoners with items apparently soaked in menstrual blood.<sup>2</sup> Frequent attempts seem to have been made to feminize the detainees themselves—for example, by forcing them to pose in sexually submissive postures or in women's underwear.<sup>3</sup>

This chapter forms part of a larger project initially undertaken for a July 2007 conference "Sexual Abuse and Exploitation of Women in Violent Conflict" at the Netherlands Defense Academy under the auspices of the Feminism and Legal Theory Project and subsequently presented at a number of other venues in addition to the University of Chicago Law School conference that underlies this volume. A brief summary of the project appeared as Mary Anne Case et al., "Gender Performance Requirements of the U.S. Military in the War on Islamic Terrorism as Violence by and against Women," *Proceedings of the Annual Meeting* (American Society of International Law) 102 (2008): 270–78.

1. Kayla Williams and Michael E. Staub, *Love My Rifle More than You: Young and Female in the U.S. Army* (New York: W. W. Norton, 2005), 247.

2. Carol Leonnig and Dana Priest, "Detainees Accuse Female Interrogators, Pentagon Inquiry Is Said to Confirm Muslims' Accounts of Sexual Tactics at Guantanamo," *Washington Post*, February 10, 2005, A1.

3. See, e.g., Seymour M. Hersh, "The General's Report," *New Yorker*, June 25, 2007, [http://www.newyorker.com/reporting/2007/06/25/070625fa\\_fact\\_hersh#ixzz1ztYxPy1y](http://www.newyorker.com/reporting/2007/06/25/070625fa_fact_hersh#ixzz1ztYxPy1y).



My chapter considers the ways in which these practices harm not only the detainees targeted by them and the personnel involved in perpetrating them but also the rule of law, the cause of sex equality, and even the United States' effectiveness in investigating terrorist activity.

My analysis is structured around three quotations: two from interrogators, one from a detainee. When I first began my research, I had thought that a central focus of this chapter would be the ways in which stereotypes about "the other," in particular about Arab Muslims, influenced abusive practices. But my most surprising finding was that precedents for both the sexualized abuse and a very high percentage of the nonsexualized abuse practices could be found in what soldiers themselves experienced in military hazing. The abuse was not simply about treating the prisoners as "the other." Much of it involved doing to "them" what is done in the military by one US soldier to another. Rather than needing to imagine or to learn from anthropologists of the Arab mind how sexualized abuse might make the detainees feel, soldiers could recollect how it made *them* feel, and the soldiers also tried to use their own experience as a justification for what they inflicted on the detainees. As one of the US military interrogators in Afghanistan put it, "You're telling me it's wrong to do to a prisoner what the army does to its own soldiers?"<sup>4</sup>

How did the abuse make those subjected to it feel? In the words of one detainee, "They wanted us to feel as though we were women, the way women feel and this is the worst insult, to feel like a woman."<sup>5</sup> Anyone who has looked at the way single-sex military academies in the United States such as the Virginia Military Institute traditionally treated recruits, regularly comparing them to women as a means of denigrating them,<sup>6</sup> knows that being made to feel like a woman can also seem insulting and degrading to average American males, not just to Arab Muslims.

Although the descriptive fact that many practices were common both to fraternity and military hazing and to detainee treatment caused commentators such as Rush Limbaugh to claim the treatment of detainees was nothing to worry about, it confirms in me the conviction that we should worry

4. Chris Mackey and Greg Miller, *The Interrogators: Inside the Secret War against Al Qaeda* (New York: Little, Brown, 2004), 96.

5. Al-Shweiri quoted in Scheherezade Faramarzi, "Former Iraqi Prisoner Turns against His American Jailers for Humiliating Him as Allegations of U.S. Torture Are Investigated," AP, May 3, 2004.

6. See, e.g., Mary Anne Case, "Two Cheers for Cheerleading: The Noisy Integration of VMI and the Quiet Success of Virginia Women in Leadership," *University of Chicago Legal Forum* 1999 (1999): 347–80 (setting forth some of my observations of the court-ordered integration of the Virginia Military Institute).

more than we do about hazing.<sup>7</sup> The use of feminization as a means of degradation is harmful not only to sex equality but also to military effectiveness. As an inspiration for the techniques used by interrogators in the war on terrorism, many participants and commentators have pointed to the SERE (Survival, Evasion, Resistance, and Escape) training that US military personnel have been put through since the time of the Cold War to prepare them to resist interrogation if captured.<sup>8</sup> The Communist bloc interrogation techniques which SERE was originally designed to enable US soldiers to resist and the adversative training techniques prevalent in boot camps and at military academies share the purpose and effect of breaking down the person subjected to them by exposing his vulnerabilities. This is seen to be useful in producing the abject submission that is a common goal of both Cold War Communist interrogation and basic training and is for both a prelude to rebuilding a new man along new lines. But breaking down detainees is not or should not be the goal of interrogation in the war on terror—unlike prisoners of the North Koreans, of Stalin, or of the Vietcong, persons detained by the United States in the war on terrorism serve no useful purpose when they make false confessions;<sup>9</sup> what the United States wants or should want from them is first and foremost reliable information, not submission.

Although gentler interrogation techniques have a proven track record and are favored by most experts as the best means for obtaining reliable information, during the Bush administration harsh techniques were in favor among policy makers, among those handling detainees, and even, over time, among interrogators, including some who began by using gentler techniques effectively. The best explanation for this is given in the third of the three quotations around which I have organized my analysis, spoken by an interrogator seeking to justify using harsher techniques: "They'll

7. For a similar argument, see Eileen L. Zurbriggen, "Sexualized Torture and Abuse at Abu Ghraib Prison: Feminist Psychological Analyses," *Feminism and Psychology* 18 (2008): 301–10.

8. See, e.g., Mark Danner, "After September 11: Our State of Exception," *New York Review of Books*, October 13, 2011, <http://www.nybooks.com/articles/archives/2011/oct/13/after-september-11-our-state-exception/?pagination=false>.

9. Some of those critical of harsh interrogation techniques have noted that the Bush administration did indeed have some use for false confessions, albeit an ultimately destructive and perverse one. Thus, Ali Soufan, whose FBI team had obtained reliable and useful information from high-value detainees using gentle methods, observed that, when his team was replaced by others using harsh methods, "[u]nder torture, Ibn al-Shaykh al-Libi gave the information they wanted to hear, which turned out to be false, and that information was used to justify the Iraq War." Amy Davidson, "Q. & A.: Ali Soufan," *New Yorker*, May 17, 2012, <http://www.newyorker.com/online/blogs/closeread/2012/05/q-a-ali-soufan.html#ixzz1vT1RTUxW>.

think we are total fucking pussies—we can't let them fuck us every time."<sup>10</sup> This is the flip side of feminization—just as it is important to make the detainees feel like women, it is the worst thing imaginable to feel or look like a woman yourself. On this the Arab Muslim detainees and the American soldiers can agree.

This flip side of the problematic, the need to be perceived as masculine even at the cost of being effective, to value the appearance of strength over the reality,<sup>11</sup> is also one familiar to students of gender dynamics in the United States, as can be illustrated through the example of the report of the Christopher Commission,<sup>12</sup> whose purpose was to investigate and fix, not sex and gender inequality, but violence in the Los Angeles Police Department in the aftermath of the Rodney King incident, in which members of the department severely beat a black suspect. The commission's recommendations can be summarized as an injunction to the police, at every stage of the process from hiring to training to evaluation, to cease confusing masculinity with effectiveness and instead to begin to value effective techniques gendered feminine. The lessons of the Christopher Commission have been lost in the war on terrorism, however, as those carrying it out, from high-level Bush administration officials on down, have prioritized not looking vulnerably weak and feminine over not being vulnerable.

### 1. Doing to "them" what was done to "us"

Agent Jack Bauer of the TV series 24 has become the iconic media image of an emphasis on macho harshness for both fans such as Justice Scalia and critics such as Scott Horton.<sup>13</sup> My focus in this chapter, by contrast, will be on the other image from popular media most often invoked in connection with detainee abuse: what went on at Abu Ghraib, said James Schlesinger, chairman of an advisory panel appointed in 2004 by Secretary of Defense Donald Rumsfeld to investigate abuse allegations, was "kind of 'Animal House' on the night shift."<sup>14</sup> Schlesinger's reference to the popular film

10. Mackey and Miller, *Interrogators*, 349.

11. Cf. *Dothard v. Rowlinson*, 433 U.S. 321, 339 (Rehnquist, J. concurring in part), which suggests that, apart from actual sufficient strength, the "appearance of strength" should be seen as a job qualification for prison guards.

12. Report of the Independent Commission on the Los Angeles Police Department (1991).

13. See Scott Horton, "How Hollywood Learned to Stop Worrying and Love the (Ticking Bomb)," *Harper's*, March 1, 2008, <http://www.harpers.org/archive/2008/03/hbc-90002531>.

14. See, e.g., Julian Borger, "Pentagon Blamed over Jail 'Sadism,'" *Guardian*, August 25, 2004, <http://www.guardian.co.uk/world/2004/aug/25/iraq.usa>.

comedy about a college fraternity reinforced the claim previously pressed by Rush Limbaugh that the abuse of detainees "was hazing, it was an out-of-control fraternity prank."<sup>15</sup>

In the course of my research, I came gradually and somewhat reluctantly to the conclusion that conservative commentators such as Limbaugh had an underappreciated point when they repeatedly stressed how much the practices used to abuse detainees had in common with hazing, not only in fraternities but in military academies and boot camp.<sup>16</sup>

The use of boot camp hazing as inspiration for harsh interrogation practices is explicitly acknowledged by both US and British interrogators, with the logs of the Guantanamo interrogation of Mohammed al-Qahtani, the so-called twentieth hijacker,<sup>17</sup> making repeated reference to a "Drill Instructor approach" to interrogation<sup>18</sup> and the UK Ministry of Defense eventually conceding to the commission of inquiry into the death in British custody of detainee Baha Mousa "that drawing an analogy between a Tactical Questioner or Interrogator and a drill sergeant is unhelpful and this will be removed from relevant documentation."<sup>19</sup> A comparison of the list of acts of "intentional abuse of detainees by military police personnel"<sup>20</sup> documented in the Taguba Report with the abusive practices documented

15. Andrew Seifter, "Limbaugh Returned to Downplaying Abu Ghraib Prisoner Abuse as 'Hazing' and 'an Out-of-Control Fraternity Prank,'" *Media Matters*, August 31, 2004, <http://mediamatters.org/research/2004/08/31/limbaugh-returned-to-downplaying-abu-ghraib-pri/131754>. Unlike Limbaugh, Schlesinger seems not to have intended to minimize the seriousness of the abuse by invoking *Animal House*, since he also called it "sadism on the night shift at Abu Ghraib." He seems to have used the analogy to an out-of-control fraternity to stress his report's finding that there was "no policy of abuse" but rather "sadism that was certainly not authorized." "Report: Abu Ghraib Was 'Animal House' at Night," CNN, August 25, 2004, [http://articles.cnn.com/2004-08-24/us/abughraib.report\\_1\\_abu-ghraib-panel-member-advisory-panel?s=PM:US](http://articles.cnn.com/2004-08-24/us/abughraib.report_1_abu-ghraib-panel-member-advisory-panel?s=PM:US).

16. Some similar practices have also been reported in state prisons in the United States. See, e.g., Sean Selman, "Prisons Expand 'Pink' Program," *Montgomery Advertiser*, October 20, 1995, B1. Because some of the perpetrators at Abu Ghraib had prison guard experience, I was initially more inclined than I am now to focus on prison precedents.

17. See, e.g., Adam Zagorin, "Exclusive: '20th Hijacker' Claims That Torture Made Him Lie," *Time*, March 3, 2006, <http://www.time.com/time/nation/article/0,8599,1169322,00.html>.

18. See, e.g., the log entries for 1115, December 23, 2002, and 1145, December 24, 2002, in the "Interrogation Log: Detainee 063," available at *Time's* website, <http://www.time.com/time/2006/log/log.pdf>.

19. Natalie Wirth, "Update on the 'Harsh' Approach and Legal Audit of Tactical Questioning and Interrogation Policies and Training," report to the Baha Mousa Public Inquiry, March 7, 2011, [http://www.bahamousainquiry.org/f\\_report/vol%20iii/Part%20XVI/ch2/MIV012736.pdf](http://www.bahamousainquiry.org/f_report/vol%20iii/Part%20XVI/ch2/MIV012736.pdf).

20. Maj. Gen. Antonio M. Taguba, *Article 15-6 Investigation of the 800th Military Police Brigade*, May 2004, 16, [http://www.npr.org/iraq/2004/prison\\_abuse\\_report.pdf](http://www.npr.org/iraq/2004/prison_abuse_report.pdf) (hereafter Taguba Report).

by scholars of hazing shows analogues for virtually all practices, including “[p]unching, slapping, and kicking”; forcing victims to “wear women’s underwear” and to “masturbate”; “arranging [them] naked . . . in a pile” “in various sexually explicit positions” or with wires or dog leashes attached to their bodies; writing derogatory slurs on victims’ bodies; “threatening [them] with rape”; “sodomizing [them] with [objects such as] a chemical light and perhaps a broom stick”; “beating . . . with a broom handle”; and “[p]ouring cold water on naked” victims.<sup>21</sup> Still defending her actions after her release from prison, former army reservist Lynndie England, prominently featured as a perpetrator in Abu Ghraib abuse photographs, insisted, “this happens at colleges, in dorm rooms, or whatever here in the US all the time[;] . . . similar humiliation tactics and physical exertions, everybody goes through that in boot camp in the military.”<sup>22</sup>

To be very clear, my agreement with Limbaugh and England is descriptive and not normative. The descriptive fact I document in this chapter—that practices were common to hazing and to detainee treatment—causes Limbaugh and England to think the treatment of detainees was nothing to worry about. In this chapter, I shall press for the opposite normative conclusion, urging that hazing is a more serious problem with more widespread deleterious consequences than generally acknowledged.<sup>23</sup>

As a descriptive matter, one important thing to notice about the migration of practices from hazing to detainee abuse is that abuse is not simply about treating the prisoners as “the other.” It is “doing to them what was done to us.” This is evidence not only of the limits of the torturer’s imagination, as Darius Rejali’s work documents,<sup>24</sup> but also of the influ-

21. All the direct quotations and examples enumerated in this paragraph are taken from finding number 6 of the Taguba Report, 16–17. Cf., e.g., Michelle A. Finkel, “Traumatic Injuries Caused by Hazing,” in *The Hazing Reader*, ed. Hank Nuwer (Bloomington: Indiana University Press, 2004), 171, 176, which enumerates similar practices.

22. Interview by BBC’s Hilary Anderson of Lynndie R. England in “The Inside Story of Abu Ghraib,” August 13, 2009, [http://news.bbc.co.uk/2/hi/programmes/world\\_news\\_america/8200803.stm](http://news.bbc.co.uk/2/hi/programmes/world_news_america/8200803.stm).

23. In an interview with *Salon*, Carol Burke made a similar point when the Abu Ghraib photos were first revealed, drawing on the research into military culture she had done for her 2004 book *Camp All-American, Hanoi Jane, and the High-and-Tight: Gender, Folklore, and Changing Military Culture* (Boston: Beacon Press, 2004). Having drawn numerous detailed parallels between the practices at Abu Ghraib and military hazing rituals, Burke argued that although “[m]ost people are not seeing Abu Ghraib in any way in relationship to military culture . . . unless you look at this in the context of all these other abuses, you’re not going to do anything other than deal with the symptoms.” See Suzy Hansen, “The Military’s Hazing Hell,” *Salon*, June 4, 2004, [http://www.salon.com/2004/06/04/carol\\_burke/](http://www.salon.com/2004/06/04/carol_burke/).

24. “In case after case, we find availability, habit and memory shape how torturers choose. . . . What is the worst thing that you remember being done to you? Remember that and

ence of what can be called the lawyering imagination. As interrogator Chris Mackey put it in the context of another abusive practice, sleep deprivation:

I never wavered in my commitment to the [Geneva] Conventions, but I did begin to say, "Well, how can we justify this?" It was like confronting a tax question back at the office: this is what we want the answer to be. How do we interpret the tax code so that we have "substantial authority" to justify the conclusion we want? . . . The abiding theme of the Conventions is you can never treat prisoners worse than you treat your own men. And it was in that interpretation that I saw some wiggle room for us.<sup>25</sup>

To sum up once again this part of my analysis using the question an interrogator in Afghanistan put to his superior officer, "You're telling me it's wrong to do to a prisoner what the army does to its own soldiers?"<sup>26</sup>

Many of the practices to which this analysis applies are not gendered practices. For example, the military interrogator here quoted was protesting his reprimand for using stress positions, "saying he had put his prisoner in the same exact position that army drill sergeants put young troops in when somebody screws up in boot camp. The same position drill sergeants had put him in."<sup>27</sup> The analysis also applies to forms of labor as punishment, such as the use of detainees to stir buckets of burning human excrement:<sup>28</sup> the burning of excrement is a necessary task for the army in the field, often assigned in the way that, for example, KP (Kitchen Patrol) duty was to men in the army in World War II, as a routine low-level punishment for members of the military themselves.

Similarly, sexualized violence is routinely used in the military as a form of punishment or discipline. Compare, for example, accounts of detainee treatment at Abu Ghraib with Anthony Swofford's autobiographical *Jarhead: A Marine's Chronicle of the Gulf War and Other Battles*. Not only is

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do it to this person." Darius Rejali, *Torture and Democracy* (Princeton, NJ: Princeton University Press, 2007), 19.

25. Mackey and Miller, *Interrogators*, 96. A similar perverse form of lawyering seems to have gone into the Justice Department's approval of the use on detainees of interrogation methods reverse engineered from SERE training. "Nothing was approved that had not been used on U.S. soldiers during training," White House legal adviser Timothy Flanagan told a reporter in Tara McKelvey, *Monsterring: Inside America's Policy of Secret Interrogations and Torture in the Terror War* (New York: Basic Books, 2007), 31.

26. Mackey and Miller, *Interrogators*, 96.

27. Ibid.

28. See, e.g., Tara McKelvey, "Unusual Suspects," *American Prospect*, January 14, 2005, <http://prospect.org/article/unusual-suspects>, which details the experience of a female detainee assigned this task.

Swofford by his own account punished with the task of burning excrement ("shitter detail," as he calls it) and threatened with branding while forcibly restrained by his fellow soldiers, but he also goes into great detail concerning an activity for which he uses the term of art "field fucking," which he defines as simulated sodomy perpetrated on someone in the unit who has transgressed in some way or was thought to be getting above himself.<sup>29</sup> The victim of field fucking is held down; sometimes, as at Abu Ghraib, slurs are painted on his body; and fellow members of the unit proceed, it seems only to pretend, but to pretend fairly convincingly and dramatically, to subject him to anal rape. As Elizabeth Hillman points out, "sexualized humiliation, taunting and abuse [have long been] a part of American military culture,"<sup>30</sup> with servicemen perpetrating on one another for decades abuses similar to those they inflicted on detainees at Abu Ghraib.<sup>31</sup>

Specialist Joseph Darby, who worked at Abu Ghraib, explained to reporter Anderson Cooper why he initially laughed when he saw a screensaver photograph of a pyramid of stacked naked men on a prison computer: he thought the naked men were fellow soldiers. "I didn't realize it was Iraqis, because we lived in prison cells too. I laughed and then I realized it was prisoners. They were forced to do it."<sup>32</sup> Several of those who have criticized the use of practices on detainees that they still defend when used on fellow soldiers have relied on the distinction that the detainees "were forced to do it."<sup>33</sup> While detainees are, of course, in a much worse position than soldiers, it would be a mistake to overestimate the freedom of soldiers subjected to abuse. Scholars of hazing have demonstrated exactly how rarely even participants in fraternity hazing feel free to leave. And soldiers are faced not only with physical retaliation from their comrades but with legal retaliation, including imprisonment for crimes from insubordination

29. Anthony Swofford, *Jarhead: A Marine's Chronicle of the Gulf War and Other Battles* (New York: Simon and Schuster, 2005), 99–102, 51, 20–23.

30. Elizabeth L. Hillman, "Guarding Women: Abu Ghraib and Military Sexual Culture," in *One of the Guys: Women as Aggressors and Torturers*, ed. Tara McKelvey (Emeryville, CA: Seal Press, 2007), 111–12.

31. See, e.g., *ibid.*, 115–16, where Hillman describes a 1956 court-martial for simulated sodomy on a prisoner in a military stockade, and 117–18, where she describes a 1963 court-martial for an "indecent and lewd act" that included simulated writing by one sailor on another's backside.

32. Daniel Schorn, "Exposing the Truth of Abu Ghraib," *60 Minutes*, December 10, 2006, updated June 21, 2007, [http://www.cbsnews.com/2100-18560\\_162-2238188.html](http://www.cbsnews.com/2100-18560_162-2238188.html).

33. Thus, the officer who was asked how it could be wrong to subject a prisoner to stress positions that the interrogator himself had been ordered to assume responded, "Cavanaugh, you volunteered for basic training!" Mackey and Miller, *Interrogators*, 96.

to desertion, if they seek to act on the assumption that they are free to leave or to demand that abuse perpetrated on them be stopped.

On the other hand, a surprising number of sexualized practices inflicted on detainees were also engaged in by soldiers themselves in circumstances that do not seem at all coercive. For example, Charles Graner, who was one of the ringleaders of the sexualized abuse at Abu Ghraib, reportedly poured fluorescent fluid from a broken light bulb on his own penis as well as on those of the detainees, exhibited himself as well as detainees nude and glowing, and photographed himself as well as the detainees in sexually explicit positions.<sup>34</sup> Susan Sontag is right when she says, "It is surely revealing, as more Abu Ghraib photographs enter public view, that torture photographs are interleaved with pornographic images of American soldiers having sex with one another."<sup>35</sup> It is not just revealing of the pornographic imagination, however; it also reveals that treating the other like the self doesn't always translate into treating the other well. No orientalist fantasies or anthropological investigation of the Arab mind<sup>36</sup> would have been necessary for soldiers who could generalize from their own experience of sexualized abuse how it made those subjected to it feel.<sup>37</sup>

34. Compare, e.g., Tara McKelvey, "A Soldier's Tale: Lynndie England," *Marie Claire*, May 19, 2009, <http://www.marieclaire.com/world-reports/news/lynndie-england-1>, who describes how "Graner took pictures of himself having anal sex with England" and "pulled his shorts down, poured the contents of a Chem-Light onto his penis, and walked around naked," with, e.g., the Taguba Report, which enumerates among the abusive acts perpetrated "photographing naked . . . detainees," "[f]orcibly arranging detainees in various sexually explicit positions for photographing," and "[b]reaking chemical lights and pouring the phosphoric liquid on detainees."

35. Susan Sontag, "Regarding the Torture of Others," *New York Times*, May 23, 2004, <http://www.nytimes.com/2004/05/23/magazine/regarding-the-torture-of-others.html?pagewanted=all&src=pm>.

36. Much of the reporting done suggested that books such as *The Arab Mind* (New York: Scribner, 1973), written by cultural anthropologist Raphael Patai and prominent on the shelves and reading lists of the US military, had directly inspired abuse practices by implanting in military personnel stereotyped assumptions concerning how Muslim men would react to contact with women, to impugning of their sexual honor, to disgrace associated with nudity, and to challenges to masculinity. I have carefully read *The Arab Mind*, and while it does paint Arabs, including their sexual practices and attitudes, with a very broad stereotyping brush, I can find no trace in it of any obvious inspirational source for the abusive practices for which there are so many more direct sources on point in the US military culture of hazing. Far from a handbook of ideas for abusive treatment, or even a critique of Arab sexual attitudes, *The Arab Mind* reminded me of nothing so much as the many popular—at once potentially somewhat informative, somewhat amusing, and somewhat offensive—broad-brush portraits of national character seemingly intended at least in part to give visitors, whether on holiday or on business, some sense of what they will be facing. Examples include cultural anthropologist Kate Fox's *Watching the English: The Hidden Rules of English Behaviour* (London: Hodder and Stoughton, 2004).

37. Another way of putting this is that if the prisoners had not been Arabs or Muslims, I am not sure how different the behavior toward them would have been.



The use of feminization as a means of disciplining, establishing rank, and breaking individuals down is staggeringly common throughout the military.<sup>38</sup> This brings me back to the second of the three quotations around which I am organizing my analysis. One of the detainees said of his treatment, "They wanted us to feel as though we were women, the way women feel and this is the worst insult, to feel like a woman."<sup>39</sup> Most of the commentators who have focused on this comment have described this reaction as peculiarly true of Muslim men in the Arab world. But single-sex military academies in the United States traditionally compared recruits to women as a means of denigrating them, and being made to feel like a woman can also seem insulting and degrading to conventional American males. Indeed, a serious argument made by opponents of integrating women into the federal military academies, and later into the Citadel and the Virginia Military Institute, was that as a result of coeducation these sorts of successful degradation practices would either be off-limits or would cease to be effective.<sup>40</sup> As Christine Littleton put it, in her critique of the Virginia Military Institute's adversative method's reliance on "gender-based (misogynist) epithets": "Picture the poor drill instructor

38. As noted above, this chapter was first prepared for a conference organized by the Netherlands Defense Academy. Participants included military personnel from a number of countries around the world. When I asked the direct question of how universal a practice it was in the military to use comparison to women as a means of denigration, I was told by organizer Martha Fineman that the Dutch cadets and officers among whom she was sitting said that they did not denigrate people by comparing them to women; rather, they denigrated them by comparing them to homosexuals. That this happens in a military that has long admitted openly gay soldiers in a nation that was the first in the world to recognize same-sex marriage may, according to Dutch law professor and gay rights activist Wibren Van der Burg, be related to the prevalence in colloquial Dutch of the derogatory term "*mietje*," originally short for "sodomite" but now as deracinated from its origins as "punk" (originally a young male who sexually services an older one) is in colloquial American English. Comparison to homosexuals was also part of the sexualized abuse of male detainees at Abu Ghraib. See, e.g., the Taguba Report, quoting a witness to the effect that detainees, albeit in the context of an investigation into a homosexual rape, were called "all kinds of names such as 'gays,' do they like to make love to guys" as they were stacked naked into positions simulating anal intercourse.

39. See Faramarzi, "Former Iraqi Prisoner Turns against His American Jailers" (quoting al-Shweiri). It may not take something as extreme as sexual humiliation to make some Arab Muslim men "feel like women," however. The documentary film *Baghdad Hospital, Red Zone* contained the following dialogue between Shiite men and the wounded woman they were accompanying to the hospital in an ambulance:

Woman: "Bring back Saddam. It wasn't like this under him."

Man: "They make us feel like women, sitting at home and afraid."

40. See, e.g., *United States v. Virginia*, 518 U.S. 515, 543 (1996), quoting representatives of West Point and the Virginia Military Institute to this effect.

who screams 'What are you—a woman?' at a female 'rat.'"<sup>41</sup> (The answer is, yes, that's exactly what I am. You want to make something of it?)

The denigration of soldiers themselves by comparing them to women is something it seems that all those involved in detainee abuse have experienced in their training and may be carrying over. Even the suggestion given to female linguist Kayla Williams that she critique the detainees' sexual organs and sexual performance apparently comes out of SERE training—that is to say, from the experience of denigration inflicted on US soldiers themselves.

## 2. Interrogation and the norms of masculinity

What difference does it make if women participate in this sexual humiliation? On one level, suggest some of the critics, not much. The title of one of the first collections of academic essays analyzing female participation in detainee abuse was *One of the Guys*.<sup>42</sup> In some respects, however, as I shall discuss, it makes a great deal of difference.

First, however, let me consider, not simply how abuse techniques are sexed, but how they are gendered. Communist bloc interrogation techniques and the adversative training techniques prevalent in boot camp and at military academies are designed to break down the person subjected to them, in order, as noted above, to produce the abject submission that is a common goal of both and to facilitate a transformation of the subject's personality.

Those who have made the most detailed and systematic studies of the effectiveness of interrogation techniques seem to agree that it is not the harshest techniques but the gentler ones that have the best track record of producing reliable information. What emerges from published first-person narratives by interrogators at Abu Ghraib and in Afghanistan, Guantanamo, and elsewhere bears this out: harsh techniques may be more tempting, they certainly may be more masculine, but the gentler techniques—"fear down" and "ego up" are terms of art for two of them—have been shown to be much more effective in eliciting accurate, useful information.<sup>43</sup>

41. Christine A. Littleton, "Double and Nothing: Lesbian as Category," *UCLA Women's Law Journal* 7 (1996): 1–25 at 13n41. When I observed them, the favored term of denigration among Virginia Military Institute cadets was "maggot," like the official term "rat," a low form of life and politically acceptable because not explicitly gendered. But, of course, "maggot" is only one letter off from the more familiar (and gendered) epithet "faggot."

42. Edited by Tara McKelvey.

43. See, e.g., Ali Soufan, *The Black Banners: The Inside Story of 9/11 and the War against Al-*

Nevertheless, during the Bush administration harsh techniques were favored, particularly by policy makers and those they put in charge of handling detainees. The third of the three quotations around which I've organized my analysis seems to offer the best explanation for such a preference: "They'll think we are total fucking pussies—we can't let them fuck us every time."<sup>44</sup> This concern was voiced by an interrogator in Afghanistan in response to his superior officer's insistence that the interrogator stop imposing harsh stress positions on a detainee who had expressed hatred for Americans. Consistent with my argument that US military personnel are using their own treatment as a model for their treatment of the prisoners, the interrogator's first line of defense when told, "You can't discipline prisoners for being glib," is that the officer himself "make[s one of his military subordinates] carry a pallet of water to the break room because he rolls his eyes at you at morning meetings." Only when the officer responds that as "the asshole sergeant" he can impose discipline on his men that interrogators may not on the detainees does the interrogator make explicit his fear of feminization.<sup>45</sup>

Experts have for decades called into question the equation of masculine harshness with good law enforcement practice. Without having as their mandate either sex or gender, the 1991 Christopher Commission's investigation into the Los Angeles Police Department came back with a series of recommendations that said, in effect, that Los Angeles has in the past constructed the role of police officer in a thoroughly masculine way. It sought to hire people who are aggressive; what it should want are good communicators. It sought them from the armed forces; it should seek them from among social workers. The whole model of policing has been gendered masculine, but it might be more effective if gendered feminine.<sup>46</sup> The response of the Los Angeles City Council was, let's hire more women, let's

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*Qaeda* (New York: W. W. Norton, 2011) (Soufan is a former interrogator for the FBI); Matthew Alexander and John Bruning, *How to Break a Terrorist: The U.S. Interrogators Who Used Brains, Not Brawn, to Take Down the Deadliest Man in Iraq* (New York: Free Press, 2008) (Alexander is a former senior military interrogator in Iraq).

44. Mackey and Miller, *Interrogators*, 349.

45. *Ibid.*

46. For further discussion of the gendered dimensions of the Christopher Commission report, see Mary Anne Case, "Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence," *Yale Law Journal* 105 (1995): 1–105 at 86–94; Mary Anne Case, "Police Mistakes in Ferguson Involve Gender as Well as Race: The Forgotten Lessons of Los Angeles' Christopher Commission," *Huffington Post*, September 11, 2014, [http://www.huffingtonpost.com/mary-anne-case/police-mistakes-in-ferguson\\_b\\_5793494.html](http://www.huffingtonpost.com/mary-anne-case/police-mistakes-in-ferguson_b_5793494.html).

have a goal of at least 43 percent women on the force.<sup>47</sup> But the message of the Christopher Commission was not so much to hire more women as to value effective techniques gendered feminine and not to confuse masculinity with effectiveness.

As noted above, however, the lessons of the Christopher Commission have been lost in the war on terrorism. Ironically, the war on terrorism has taken a toll on the use of effective policing methods perceived to be feminine, not only in the Middle East, but in the domestic policing context as well. Susan Faludi reports:

Penny Harrington, the first female police chief of Portland, Oregon, heard a recurring refrain as she made the rounds as a consultant to regional police departments. "There was this attitude of 'Oh, we don't need to hire women anymore.'" . . . Among those repeat emotions she witnessed was "rage at any woman who spoke out." Law enforcement agencies, she noted, were also increasingly shifting funds from community policing—where many female police officers has distinguished themselves—to all-male "counterterrorist squads" stocked with absurd amounts of firepower financed by the Department of Homeland Security.<sup>48</sup>

Similarly, the favored interrogation technique is not "fear down" or "ego up" but a new technique called "fear up harsh," with "harsh" being the operative word.

The most disturbing of the new interrogation techniques was developed deliberately to exploit what were understood to be devout Muslim objections to cross-sex contact and referred to as "Invasion of Space by Female."<sup>49</sup> Female interrogators who used this technique at Guantanamo on detainees such as Mohammed al-Qahtani explicitly sexualized their performance, rubbing not only fake menstrual blood but cheap perfume on the prisoner, straddling him, observing as he was strip-searched, and hanging pornographic pictures around his neck. David Becker, civilian supervisor for the military interrogation teams at Guantanamo, explained that the purpose behind this technique was to make the prisoner "feel unclean [so]

47. See Marc Lacey, "Council Raises Hiring Goal for Women Officers," *Los Angeles Times*, April 14, 1994, B3.

48. Susan Faludi, *The Terror Dream: Fear and Fantasy in Post-9/11 America* (New York: Metropolitan Books, 2007), 86.

49. See, e.g., Jane Meyer, "The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees Was Thwarted," *New Yorker*, February 27, 2006, [http://www.newyorker.com/archive/2006/02/27/060227fa\\_fact](http://www.newyorker.com/archive/2006/02/27/060227fa_fact).

he would have to stop praying." It should have come as no surprise that al-Qahtani's response to this technique was not to become more cooperative but instead to become "so enraged that he lunged at the woman."<sup>50</sup>

Among the many disturbing aspects of this technique is that it reinforces rather than undercuts Muslim stereotypes, not only of women, who are already often associated with *fitna*, or disorder, but also of the West. As reporter Seymour Hersh warned, in a speech to the ACLU, because of "the sexual stuff we've done" to Arab Muslims in detention, the United States has lost the support even of moderate Arabs, who now "see us as a sexually perverse society."<sup>51</sup>

### Conclusion: The upshot for sex equality

The US military had promulgated a different set of gender performance requirements before the official pronouncement of the war on Islamic terrorism. These requirements, imposed on Lieutenant Colonel Martha McSally while she was a US Air Force fighter pilot stationed in Saudi Arabia at around the turn of the millennium, are in some ways diametrically opposite and in others eerily similar to those of "Invasion of Space by Female."<sup>52</sup> McSally brought a constitutional lawsuit against the US military because it had ordered her on all trips off base in Saudi Arabia always to be accompanied by a male and to veil fully in an abaya, the all-encompassing garment that is the Saudi instantiation of hijab, or modest covering of women's bodies.<sup>53</sup> McSally's complaint made clear that these were not requirements of the Saudi government, and no comparable requirements were imposed on US military men, who were prohibited from wearing local dress, whereas McSally was forced to do so. McSally ultimately got the

50. See Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (New York: Doubleday, 2008). As psychologists have documented, "People react in different ways to being treated in humiliating ways: some just become depressed, some get openly angry, and others hide their anger and plan revenge." See Evelin Gerda Lindner, "Women and Terrorism: The Lessons of Humiliation," in "Targeting Women," special issue, *New Routes: A Journal for Peace Research and Action* 6 (2001): 10–12.

51. Seymour Hersh, speech to the 2004 ACLU Membership Conference, <http://www.aclu.org/2004memberconf/live/july7.html>.

52. I discuss McSally's case in Mary Anne Case, "Feminist Fundamentalism as an Individual and Constitutional Commitment," *American University Journal of Gender, Social Policy and the Law* 19 (2011): 549–76 at 574–76, from which the account of the facts in this paragraph is taken.

53. See Amended Complaint of Petitioner at para. 11, *McSally v. Rumsfeld*, No. CV-02481 (D.D.C. May 3, 2002), dismissed with prejudice per stipulation of the parties, No. CV-02481 (D.D.C. April 24, 2004) (D.D.C. 2001).

US Congress by voice vote to overturn the policy, largely out of sympathy for her as a poor Christian woman forced to present herself in Muslim dress. Very little attention or vocal sympathy was given by members of Congress to her equally earnest, equally strong claim that the US military violated her constitutional right to equal protection on grounds of sex because it not only treated her differently from men but did so in a way that undermined her command authority.

The combination of the US military's respect for and accommodation of Muslim sensibilities concerning the proper behavior of women in the case of personnel like McSally and its deliberate exploitation and violation of those sensibilities in interactions with Muslim detainees not only systematically reinforces extremist Muslim assumptions about women but also adds up to a systematic subordination of women. Both the exploitation and the accommodation have at their root a repudiation of sex equality. This would be bad enough even if it had trade-offs in the form of actionable intelligence, increased national security, or better foreign relations, but it is even worse when, as in the case of sexualized abuse of prisoners, it produces only harms along every dimension and no benefits.

My chapter has looked past narrow categories of acceptable or appropriate victimhood for women<sup>54</sup> and focused in part on women as perpetrators and men as victims of gender-based violence. Its emphasis has been not just on sex but on gender—that is, on characteristics coded masculine or feminine, sometimes irrespective of and sometimes inflected by the maleness or femaleness of the persons exhibiting these characteristics. Rather than ignore or underplay intersectionality, the chapter has sought to turn the intersectional lens in an unexpected direction, at those in power, not just at those on the bottom. It reinforces the lesson that not only Arab Muslims but white Anglo-Saxon Protestant soldiers like Charles Graner and Lynndie England form part of an intersectional category with a culture and a race. In this way, it has something in common with my ongoing project on feminist fundamentalism, in which Martha McSally's constitutional challenge to the US military's abaya requirements has a prominent place.<sup>55</sup> Feminist fundamentalism, as I define it, is an uncompromising commitment to the equality of the sexes as intense and at least as worthy of respect

54. For the suggestion that scholars of international human rights look past narrow categories of female victimhood, see, e.g., Fionnuala Ni Aolain and Catherine Turner, "Gender, Truth, and Transition," *UCLA Women's Law Journal* 16 (2007): 229–79 at 262.

55. See Mary Anne Case, "Feminist Fundamentalism and Constitutional Citizenship," in *Gender Equality: Dimensions of Women's Equal Citizenship*, ed. Joanna Grossman and Linda McClain (New York: Cambridge University Press, 2009), 197.

as, for example, a religiously or culturally based commitment to female subordination or fixed sex roles. One of my central purposes in pursuing a feminist fundamentalist project is to disrupt the often-perceived dichotomy between feminist or liberal universalism, on the one hand, and local cultural commitments, on the other, by insisting that we in the liberal, feminist, constitutional West have our localized cultural commitments, too, which are at least as important to us as the local cultural commitments of others are to them. Among the cultural commitments we should defend are equality and freedom with respect to sex and gender. Whether critiquing the cultural commitments of the US military as manifest in its use of feminization as degradation or defending the cultural commitments of the US constitutional order as manifest in its repudiation of "fixed notions concerning the roles and abilities of males and females,"<sup>56</sup> I am not rejecting but embracing intersectional analysis. I have just shifted the intersectional lens away from an exotic and subordinated "other" and toward the dominant culture in the United States.

56. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982).

PART III

Torture in Historical Context





## CHAPTER 5

# The Fragility of Evidence: Torture in Ancient Rome

KATHLEEN M. COLEMAN

Narratives and metaphors of torture constitute virtual “background noise” across the whole spectrum of Roman culture. The key concept underpinning both the ubiquity of references to torture and the technical complexity of its application is the institution of slavery. The fundamental notion that a slave was a human chattel meant that he (or she) was the property of the master to treat as he wished. Furthermore, a slave could not enjoy the trust that was automatically owed to a free person, and coercion was therefore required to ensure that a slave’s testimony could be believed. Similarly, punitive measures that might involve monetary sanction for the freeborn could not be applied to a chattel, which, by definition, could only be owned and could not itself own anything. Hence, sanctions had to be applied to the physical person of the slave, and in accordance with the necessity to distinguish them from the sanctions available to be applied to free persons, sanctions applied to slaves had to be more painful and protracted than the punishments visited upon free persons for the same crime. Hence, the gradual evolution of “aggravated” death penalties, chiefly crucifixion, burning alive, and exposure to wild beasts.<sup>1</sup>

Similar status distinctions operated when torture was used as a means of interrogation. Slaves were considered distinctly inferior to free persons and therefore required especially severe treatment to elicit an appropriate response. Free persons were largely exempted from being subject to torture, except for those who had been tried and condemned, thereby effectively demonstrating flaws of character that were unworthy of free status and thus symptomatic of an inherently servile nature. This fall from grace was

1. K. M. Coleman, “Fatal Charades: Roman Executions Staged as Mythological Enactments,” *Journal of Roman Studies* 80 (1990): 44–73 at 55–57.

justified by the legal fiction whereby condemned persons were accorded the status of *servitus poenae*, slavery entailed by the penalty, which enabled them to be coerced into giving evidence against their accomplices. In later years, the further step whereby suspects became liable to torture to extract confession matched the increasing brutalization of the legal system in the later Roman Empire.

The evolution of the juridical framework in which torture was applied is, however, hard to reconstruct from scattered fragments in our extant sources, most notably Justinian's *Digest*, and raises manifold legal questions that are far from resolved in contemporary scholarship.<sup>2</sup> In examining what can be learned from Roman history about the function and impact of the use of coercive interrogation techniques, modern scholars are obstructed by the fragmentary nature of the sources and the largely imaginary contexts from which they are derived. Torture is not discussed *in extenso* in any surviving Roman tract; nor are any court proceedings extant that describe interrogation under torture, except for brief comments in the acts of the Christian martyrs. We are forced to rely on incidental anecdotes, usually focusing on the inefficacy of torture, in which bravery in the face of tyranny is presented as a moral *exemplum*; when these anecdotes are related in works of fiction, their historicity is even more difficult to determine. While graphic visual images capture the suffering of prisoners subjected to brutal treatment, such as exposure to wild beasts, the context is often lacking, and furthermore, the purpose here is punishment rather than interrogation. Hence, the dilemma facing the historian of torture in antiquity is essentially the same as the problem of investigating it in the modern world: in the absence of verifiable documentary evidence, what are we to make of the sources available to us?

In what follows, I shall illustrate and comment on a variety of the forensic possibilities provided by the extant writings from ancient Rome and note some of the difficulties that confront scholars attempting to describe Roman practices involving torture. I shall also highlight some of the central aspects of those practices, the predominant attitudes toward torture, and the role that torture played in defining social distinctions. The most important points are, first, that torture was largely reserved for use against those of lower status or those who, due to the severity of their crimes,

2. Technical issues cannot be treated comprehensively in a short survey. For a summary of recent bibliography, see Janne Pölonen, "Plebeians and Repression of Crime in the Roman Empire: From Torture of Convicts to Torture of Suspects," *Revue internationale des droits de l'antiquité* 51 (2004): 217–57 at 217–18n1.

had forfeited the protections associated with their status. Second, while torture was thought to be a means of securing truth, at the same time—paradoxically—it was recognized that it was likely to produce falsehoods and injustice. And, third, although the use of torture appeared ordinary and unremarkable in discussions of life and law, it also bore special scrutiny and required defense against critics who found it unreliable or futile.

### 1. Reflections of torture in literary sources

In analyzing literary references to torture, the image of a mirror may be helpful. Sometimes the reflection is dim; sometimes it is distorted. But, however imperfectly, it does reflect something real. Although we lack a systematic discussion of torture in extant texts, the subject recurs frequently in virtually the entire spectrum of ancient literature, from the more documentary genres to the most extravagant fiction. A small representative sample may illustrate the sorts of evidence that survive regarding the use of torture in the Roman world.

The principle that every literary instance reflects a kernel of realism is well illustrated by a passage of great rhetorical power in Cicero's indictment of Verres, the Roman governor of Sicily from 73 to 71 BCE, who was accused of extortion. When the Sicilian fleet was annihilated by pirates, the admiral, Cleomenes (whose wife was alleged to be having an affair with Verres), was let off, whereas Verres arraigned the captains instead. One of them, Furius (whose Roman name Cicero stresses), delivered in his own defense a speech he had written in prison, detailing how Verres had undermined the fighting power of the fleet by granting exemptions from duty in exchange for bribes. Cicero describes how, after delivering his testimony, Furius was beaten across the face with rods (*virgis oculi verberabantur*), and at the climax of the passage he quotes the captain's *obiter dicta* (Cicero, *Against Verres II* 5.113): "non posse Verrem testis interficiendo testimonium extinguere" (Verres may kill the witnesses, but he cannot put justice to death).<sup>3</sup> Cicero's speech was, in fact, not delivered, since Verres took himself off into exile after the first stage of the trial, and so we should not assume the veracity of these charges. But the cameo rests upon the assump-

3. Quotation from L. H. G. Greenwood, trans., *Cicero: The Verrine Orations*, vol. 2, rev. ed. (Cambridge, MA: Harvard University Press, 1953), 591. The word translated here as "justice" (*testimonium*, lit. "evidence") is a conjecture by William Peterson, editor of the Oxford Classical Text (1907; 2nd ed., 1917); the passage in the surviving manuscripts is corrupt: see W. Peterson, "Emendations of Cicero's *Verrines*," *Classical Review* 18 (1904): 208–12 at 212.

tion that, while witnesses might be subjected to torture, it was not a regular means of interrogation for a Roman of free status.

Verres's flouting of the rules associated with the practice of torture fits the stereotype of the tyrant in Roman thought. Cicero's portrayal emphasizes the four characteristics that the Greeks and, subsequently, the Romans traditionally associated with the figure of a tyrant: *vis* (violence), *superbia* (arrogance), *libido* (lust), and *crudelitas* (cruelty).<sup>4</sup> These same traits are the hallmark of Cicero's invective against other targets of attack, including his archenemies Catiline and Mark Antony. Such a "checklist" of characteristics may seem very mechanistic to us, with our increasingly subtle understanding of the complexities of human psychology, but this kind of compartmentalized thinking may have been prompted by conventions such as the repertoire of masks on the dramatic stage, in which the actor playing the role of a tyrant wore a frowning mask typically associated with tyranny.<sup>5</sup> From such a figure one could expect nothing but irrational and overbearing behavior, manifested in such actions as subjecting to torture categories of persons who should have enjoyed immunity from it.

If oratory is intended for an actual forensic situation, declamation is purely epideictic, that is, for show. It embraces a repertoire of sensational themes, such as "the woman who was tortured by the tyrant for her husband's sake" (Elder Seneca, *Controversiae* 2.5). Taking the function of this declamatory exercise into account, we can examine the common understanding that it manifests regarding the use and significance of torture. Torture is mentioned quite matter-of-factly in the statement of the theme:

A wife, tortured by a tyrant to find out if she knew anything about her husband's plot to kill him, persisted in saying she did not. Later her husband killed the tyrant. He divorced her on the grounds of her barrenness when she bore no child within five years of marriage. She sues him for ingratitude.

The torture inflicted on the woman is graphically described (2.5.4):

The apparatus of cruelty is deployed against a miserable woman; the instruments that break the spirit even of men by their very look are set forth to extract the secrets in a woman's breast. The tyrant attacks with intimidation before torture—racks her with threats: she is silent. She sees the tyrant's set

4. J. Roger Dunkle, "The Greek Tyrant and Roman Political Invective of the Late Republic," *Transactions of the American Philological Association* 98 (1967): 151–71 at 159–60.

5. *Ibid.*, 170.

face, his threatening eyes: she is silent. She could have done you no greater service had she borne you children. Her limbs are cut by whips, her body broken by lashings, the blood forced out of her very vitals: she is silent. I don't know whether she will give children to the state: she has given it a tyrannicide.<sup>6</sup>

Here, the incidence of torture is used to exemplify tyrannical behavior and to magnify the significance of resistance to tyranny, a resistance the more heroic for being displayed by a woman.<sup>7</sup> Declamation cannot verify the incidence of torture in the Roman world, but it reflects the circumstances in which it was familiar: to extract the truth from witnesses.

The novel can be a similarly useful source of corroborating evidence about historical practices and attitudes, despite the highly embellished and fictionalized scenario within which these attitudes and practices are embedded. The main protagonist of Apuleius's *Metamorphoses*, also known as *The Golden Ass*, is a man called Lucius, who was thought guilty of a robbery. He had escaped (and subsequently been turned into a donkey), but the immediate aftermath of the alleged robbery is described by an eyewitness later in the story (Apuleius, *Metamorphoses* 7.2):

The evidence pointing to his being the miscreant was not slight, for he had made off at the very time when the crime was committed, and had not been seen anywhere since. . . . The assumption was that his slave, who was discovered in his lodging there, would reveal his master's crimes and future intentions, but though the magistrates had taken him into state custody, and next day had inflicted sundry tortures on him, almost squeezing the life out of him, he had not made any such declaration.<sup>8</sup>

Lucius's slave is automatically examined under torture (although it is a fundamental premise of Roman law that slaves are not to give evidence against their masters), but the procedure fails, in that the slave does not have anything to say. So the authorities themselves have to hunt for Lucius, who

6. Quotations from Michael Winterbottom, trans., *The Elder Seneca: Declamations*, vol. 1, *Controversiae Books 1–6* (Cambridge, MA: Harvard University Press, 1974), 317, 321.

7. The grisly description of the processes of torture, the moral ambiguity of the victim's position, and the rhetorical moves by the narrator to strengthen the credibility of the case have been interpreted as signs that the concept of torture caused the author discomfort: see Victoria Emma Pagán, "Teaching Torture in Seneca *Controversiae* 2.5," *Classical Journal* 103, no. 2 (2007/8): 165–82.

8. P. G. Walsh, trans., *Apuleius: The Golden Ass* (Oxford: Oxford University Press, 1994), 120–21.

proves elusive, being now disguised as a donkey. Fiction may seem a dubious source of historical detail, but Apuleius's picaresque novel is important precisely because it offers a depiction of the low-status poor, who are typically ignored in our sources for antiquity. To quote a fundamental demonstration of the use of the novel as a historical palimpsest, it "offers us alternative models—of *the operations of justice* or the nature of economic life outside the towns—to those which we generally accept."<sup>9</sup>

Historiography might be judged the most credible literary source for the practice of torture, but precisely the "literary" quality of ancient historical discourse is key to understanding how to read it, since even a passage of the most skeptical of historians is not expressed with the objectivity that we would demand of documentary evidence. In Tacitus's account of the reign of Nero (54–68 CE), he ascribes to a freedwoman named Epicharis a key role in recruiting influential people to join the Pisonian conspiracy against the emperor in 65 CE. The plot was revealed, and one by one the key players named the rest, including Epicharis (Tacitus, *Annals* 15.57):

Meanwhile Nero, recalling that on Volusius Proculus' information Epicharis was being detained, and deeming her womanly body unequal to pain, ordered her to be mauled by torture. But in her case neither beatings nor fires nor the torturers' anger (all the fiercer, lest they be spurned by a female) prevailed over her denials of the imputations. Thus was the first day of inquisition passed. On the next, when she was being dragged back to the same rackings by the conveyance of a chair (she was unable to stand on her dislocated limbs), she attached to the canopy of the chair, in the manner of a noose, the banded fastening which she had torn from her bosom, and, inserting her neck and straining with the weight of her body, she expelled her now faint breath—a woman and freedwoman defending, by her more brilliant example in such an extremity, others whom she scarcely knew, when the freeborn—men and Roman equestrians and senators, all untouched by torture—were each betraying the dearest of those to whom they were bound.<sup>10</sup>

Stripping away the emotional charge to this passage, and the moralizing tone, it is possible to see why the situation qualified for such sensational treatment by Tacitus: interrogation under torture, normally associated with

9. Fergus Millar, "The World of the Golden Ass," *Journal of Roman Studies* 71 (1981): 63–75 at 75 (emphasis added).

10. A. J. Woodman, trans., *Tacitus: The Annals* (Indianapolis: Hackett, 2004), 332.

slaves, is here employed against a freed (and hence now free) person; the grounds are an accusation of treason, which rendered even the upper classes liable to servile treatment.

That torture was taken for granted as a standard procedure in Roman courts in the fourth century CE is apparent from its depiction in a bilingual manual originally composed for children, then adapted for adults, which includes a "colloquium" describing a day in the life of a school-child, getting up, getting dressed, going to school, etc.<sup>11</sup> One of the scenes takes place *in foro*, "in the forum": a man accused of theft is brought before the judge and interrogated. The Latin text, for which a literal Greek translation is supplied, reads as follows: "torquetur, quaestionarius pulsatur, ei pectus vexatur, suspenditur, crescit, flagellatur fustibus, vapulat, pertransit ordinem tormentorum, et adhuc negat. puniendus est: perit poena, ducitur ad gladium." The translation reads: "He is tortured, the interrogator strikes him, his chest gets a beating, he is hung up (at the whipping-post), . . . he is beaten with cudgels, he is flogged, he goes through a series of tortures, and he still refuses (to speak). He must be punished: his torment is over, he is led off for execution." The last phrase, *ducitur ad gladium*, here translated as "led off for execution," may possibly mean that the accused is condemned to the "indirect" death penalty of service as a gladiator;<sup>12</sup> but, either way, this passage of linguistic instruction via scenes of everyday life vividly illustrates how routine was the use of torture as a means of interrogation. The phrase translated as "series of tortures" (*ordinem tormentorum*), a concept otherwise unattested, suggests that modes of torture followed a recognized sequence. And, strikingly, it does not work, since the accused does not give in.

## 2. Torture in Roman law

Legal texts from the Roman world mention torture only sporadically, but their evidence offers striking confirmation of the details that can be pieced together from the literary sources. We cannot reconstruct anything approaching a continuous chronological narrative of the evolution of torture in Roman legal thought and practice, but it will become clear from what

11. Text and translation are quoted from the *editio princeps* by A. C. Dionisotti, "From Ausonius' Schooldays? A Schoolbook and Its Relatives," *Journal of Roman Studies* 72 (1982): 83–125 at 105.

12. Peter Garnsey, *Social Status and Legal Privilege in the Roman Empire* (Oxford: Oxford University Press, 1970), 157n4.



follows that the use of torture was sensitive to the status of different potential victims, and practices were adapted to accommodate changes in the social structure, ultimately increasing the acceptability of torture as part of investigative practices.

The use of torture in Rome, like the use of punishment, was highly sensitive to the status of the party against whom it was used, and articulations in the various statuses are reflected in the legal rules that governed the application of torture. Differences in the application of both torture and punishment were predicated upon basic legal distinctions between free persons and slaves and between citizens and *peregrini* (freeborn foreigners). The strength of these principles is illustrated by the grounds that were required to justify deviation from them. In particular, such deviations were usually limited to crimes of considerable magnitude. For instance, it seems that certain emperors subjected *peregrini* and even citizens to torture, as in the case of Epicharis under Nero; in the instances involving citizens the charge was invariably *maiestas* (treason), although it appears that *peregrini* could be tortured on other charges as well.<sup>13</sup> Slaves in general enjoyed no protection from capital punishment or torture, except that under the Republic they were not allowed to be examined under torture in order to extract evidence incriminating their masters. Against this backdrop, Augustus introduced a law that enforced the sale of slaves in such cases, so that they could be interrogated for evidence against persons who had previously owned them but did so no longer. Nonetheless, this expedient seems to have been limited to cases involving *maiestas*.<sup>14</sup>

From at least the time of Hadrian (reigned 117–38 CE), the range of possible punishments was further calibrated to differences in the status of miscreants with the emergence of a “dual penalty system.” Free persons were differentiated as relatively privileged (*honestiores*) or relatively humble (*humiliores*) and subjected to punishments with corresponding degrees of severity.<sup>15</sup> After Caracalla bestowed an almost universal grant of citizenship upon all free persons in the empire in 212 CE, the impulse to distinguish between grades of privilege gained momentum and becomes visible also in the application of coercive forms of interrogation.<sup>16</sup> From a remark of

13. P. A. Brunt, “Evidence Given under Torture in the Principate,” *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Römische Abteilung)* 97 (1980): 256–65 at 259.

14. Deduced from Dio, *Roman History* 55.5.4, and Tacitus, *Annals* 2.30.3 and 3.67.3, by Brunt, “Evidence Given under Torture,” 257.

15. Garnsey, *Social Status and Legal Privilege*, 153–72.

16. Brunt, “Evidence Given under Torture,” 263.

the Severan jurist Modestinus, to the effect that soldiers were exempt from plebeian punishments and torture, it can be inferred that other categories of free person were subject to both those treatments.<sup>17</sup> Torture of witnesses of low rank may have been reserved for instances where a witness gave contradictory testimony;<sup>18</sup> torture was believed to be an instrument for eliciting the truth. It is significant that, by the time of the jurist Ulpian (193–235 CE), the term *quaestio*, meaning, in general, “investigation” and, in particular, “judicial investigation,” becomes the term for examination under torture (*Digest* 47.10.15.41): “‘quaestionem’ intellegere debemus tormenta et corporis dolorem ad eruendam veritatem” (By “interrogation” we mean the application of torment and physical pain to extract the truth).<sup>19</sup>

The circumstances under which torture was administered to free persons are not well understood, but it has recently been argued that, to be liable for torture, a free person had first to be convicted of a capital crime; such a conviction reduced him to a status with the technical designation *servitus poenae*, that is, slavery entailed by the penalty: as a result of his conviction he was excluded from the civic community. Hence, he could be liable to torture, the purpose of which was not to extract a confession—he had already been found guilty—but to force him to reveal the identity of his accomplices.<sup>20</sup> The abuse of this principle, whereby convictions are handed down for the express purpose of torturing a witness, is explicitly forbidden in a rescript of Hadrian (*Digest* 48.18.21); a further abuse, whereby execution is delayed so that the status of the condemned can be exploited in order to torture him into informing against others, is attested by the jurist Gaius (*Digest* 48.19.29). Torturing a condemned party to extract evidence against accomplices facilitated the torturing of suspects in order to extract a confession;<sup>21</sup> ultimately, the use of torture to force a confession replaced its use to extract the names of accomplices. It is clear, however, that certain privileged categories of free persons, such as decurions (town councilors), were exempt from the condition of *servitus poenae*,<sup>22</sup> and that it was therefore the lowest category of free persons (i.e., plebeians) who, along with slaves, were liable for torture under Roman law.

17. Further evidence: *ibid.*, 263–65.

18. *Ibid.*, 264.

19. My translation.

20. Pölönen, “Plebeians and Repression of Crime,” 219.

21. *Ibid.*, 255.

22. *Ibid.*, 232, based upon a principle enunciated by the emperor Antoninus Pius (*Digest* 50.2.14).

### 3. The pros and cons of torture

In one of his works on rhetoric, Cicero, instructing his son in the techniques of oratory, adduces arguments rejecting implicit criticism of interrogation under torture. His purpose is to illustrate the structure of rhetorical argument rather than to debate the ethics of torture, but the passage suggests, at the very least, that doubts about the validity of the use of torture were conceivable and might be countered by the points that Cicero puts forward here (*Partitiones oratoriae* [*Rhetorical categories*] 117–18):

But if interrogation of witnesses under torture, or the demand for such interrogation, will help the case, first you must support the institution of interrogation under torture, and talk about the efficacy of pain and about the attitude of our ancestors (*dicendum de vi doloris, de opinione maiorum*), who would undoubtedly have rejected the whole practice if they had disapproved of it. You must also talk about the procedures at Athens and Rhodes, very civilized societies, in which—a thoroughly repellent practice—free men and citizens are tortured. And you must talk about the procedures established by our wisest citizens, who, while they would not allow slaves to be tortured into giving evidence against their masters, did, however, think that torture should be employed in cases of incest and, likewise, in the case of the conspiracy that occurred during my consulship. The argument that is customarily used to undermine evidence extracted under torture should be laughed to scorn and declared formulaic and childish.<sup>23</sup>

Cicero stresses “efficacy of pain” (*vis doloris*), without explicitly claiming that it has the power to extract truth from witnesses. He appeals also to the precedent of previous generations—the time-honored concept of *mos maiorum* (the custom of our ancestors), which preserves the status quo. He categorically rejects the practice of torturing free men and citizens in the manner of Athens and Rhodes and argues that slaves should not be tortured into giving evidence against their masters, except in cases of incest or conspiracy. But the arguments of those who oppose torture he belittles without analysis. We should not assume that this passage expresses Cicero’s own views, since he is explicitly demonstrating how to structure a rhetorical argument rather than making a statement of belief; but the example

23. Quotation adapted from H. Rackham, trans., *Cicero: De oratore III, De fato, Paradoxa Stoicorum, De partitione oratoria* (Cambridge, MA: Harvard University Press, 1948), 401.

that he has chosen is a telling illustration of the acceptability of torture as a coercive technique suitable for interrogating slaves.

Doubts about the efficacy and epistemic value of torture are also evident some 250 years later in a passage from Ulpian discussing the relationships between accused and witness that preclude the use of torture upon the latter. In *De officio proconsulis* (Duties of a governor), Ulpian defines torture as “res fragilis et periculosa et quae veritatem fallat” (a chancy and risky business and one which may be deceptive; *Digest* 48.18.1.23) and identifies a number of problems with it (*Digest* 48.18.1.9–10, 23–25, 27):

It is also laid down that a freedman is not [to be] tortured in a capital case affecting his patron. Nor indeed, as our emperor and his deified father wrote in a rescript, should a brother [be tortured] in [a capital case affecting] his brother, adding the reason that a person should not be tortured [to give evidence] against someone against whom he [can]not be compelled to give evidence against his wish. . . . It is stated in constitutions that reliance should not always be placed on torture—but not never, either; for it is a chancy and risky business and one which may be deceptive. For there are a number of people who, by their endurance or their toughness under torture, are so contemptuous of it that the truth can in no way be squeezed out of them. Others have so little endurance that they would rather tell any kind of lie than suffer torture; so it happens that they confess in various ways, incriminating not only themselves but others also. Moreover, you should not place confidence in torture applied to [a person’s] enemies, because they readily tell lies. Not, however, that [all] confidence in torture should be lost where enmity is alleged. And it is [only] when the case has been investigated [that you will know] whether you can have confidence or not. . . . If a person should confess to wrongdoing of his own accord, he should not always be believed; for sometimes people confess out of fear or for some other reason.<sup>24</sup>

Notably, the arguments that Ulpian deploys here are not moral but practical. He identifies four problems with employing torture as a technique of interrogation: some people have the toughness or endurance to resist torture or despise it; some people lie under torture to avoid pain, thereby enabling false incriminations; under torture, a person’s enemies usually tell lies; spontaneous admissions of guilt may be made out of fear. An ancient

24. Quotation from Alan Watson, ed., *The Digest of Justinian: English Translation* (Philadelphia: University of Pennsylvania Press, 1985).

text questioning the morality of torture is lacking, and there is little reason to suppose that this lack should simply be attributed to the serendipity of the surviving record.

#### 4. The interrogation of Christian martyrs: The case of Euplius

As noted above, accounts of Christian martyrdoms occasionally describe the preceding trial in some detail and thus allow us to glimpse the application of coercive techniques of interrogation. Such accounts are likely to be loaded so as to heroize the martyr and vilify the Roman authorities, and their transmission is in many cases extremely muddled, consisting of competing Greek and Latin recensions that contradict each other. But some of them appear to be based on transcripts of actual court records (how reliably we cannot know) and therefore have the potential to illustrate the function and impact of coercive interrogation with some plausibility. From these accounts, we see that the uses for torture expanded, although its efficacy was still far from assured.

The trial of a certain Euplius in 304 CE, during the reign of the emperor Diocletian, is one such instance. The Greek recension of the *Acts of Euplius* purports to transcribe the court proceedings on April 29; the Latin version, which is fuller, dates the proceedings to August 12.<sup>25</sup> Euplius appears outside the courtroom in Catania in Sicily, carrying the scriptures, which had been banned by Diocletian. He shouts out that he is a Christian. The governor, Calvisianus, invites him in, cross-examines him about the books he is carrying and how they came into his possession, and then tells him to read aloud from them. Euplius reads two verses from the Gospels of Matthew and Mark, and after further brief cross-examination, Calvisianus announces, “quoniam innotuit eius confessio, tradatur tortoribus, interrogetur sub tormentis” (Since the admission of his crime is clear, let him be handed over to the torturers and questioned under torture). The purpose of the torture is to make Euplius recant. The governor repeatedly promises to stop the torture if Euplius will recant by worshiping the gods of the traditional Roman pantheon. Eventually, the governor returns to his office and writes out a sentence of execution by beheading. Euplius is executed with the Gospels slung around his neck.

We do not know Euplius’s background, although his name is Greek. We do not know whether he was a slave. We do not know how much of the

25. Both recensions are included in Herbert Musurillo, ed. and trans., *The Acts of the Christian Martyrs* (Oxford: Clarendon Press, 1972), 312–19, whose translation I adopt here.

transcript is authentic. But it is important for what it reveals about how torture was *perceived*. In its application to persons charged with the crime of Christianity, the aim of the *quaestio* (interrogation) is not to reveal the crime of the accused but, rather, "to force the accused to obliterate [his] crime."<sup>26</sup> It is clear from the trial of Euplius, however, that, from the perspective of the governor, this aim is still related to the revelation of truth. Here is a brief exchange between the pair of them. "While he was being tortured, Euplius said: 'Thanks be to you, Christ. Protect me, who suffer for your sake.' Calvisianus' reaction is to say: 'Stop this madness, Euplius. Worship the gods, and you will be set free.'"

As Calvisianus sees it, Euplius is in the grip of *insania* (madness), and interrogation under torture should make him admit the true state of affairs by worshiping the traditional pantheon. From Euplius's perspective, his story has been consistent, torture or no torture, and no matter how "guilty" he is in the eyes of the worldly authorities, his consistency under torture has proven his innocence before God. Being a Roman citizen used to guarantee protection from summary execution: *civis Romanus sum*, "I am a Roman citizen!," as another victim of Sicily's tyrannical governor Verres kept shouting when he was being crucified at Messina, the modern Messina (Cicero, *Against Verres II* 5.158–64); in fact, a Roman governor held the nominal power of life and death over his subjects, but force of convention required him to respect the citizen's appeal to Rome. Now Euplius repeats over and over again, *Christianus sum*, "I am a Christian!," which effectively overrides the efficacy of torture by aligning him with the higher, and supreme, authority of God. This opposition between the ways of the world and those of heaven is a constant feature of early Christian texts, including the humblest of epitaphs. The paradoxical interpretation that the Christians imposed upon the practice of torture is vivid endorsement of Ulpian's verdict: torture does not work.

## Conclusion

A thousand years of Roman history are not static, and punishment appears to have become more extreme from the mid- to late empire, although the apparent intensification may be attributed to an increasing sensitivity—and, therefore, hostility—toward violence in our sources.<sup>27</sup> While torture

26. Lucy Grig, "Torture and Truth in Late Antique Martyrology," *Early Medieval Europe* 11 (2002): 321–36 at 328.

27. Ramsay MacMullen, "Judicial Savagery in the Roman Empire," *Chiron* 16 (1986): 147–66.

was not generally employed as a penal instrument, its use in interrogation does, like the severity of punishment, seem to have intensified, as it began to be employed on suspects and witnesses higher up the social scale, at least in cases involving treason. Under the Republic, it was confined to slaves; indeed, their testimony could not be admitted *except* under torture. With the passage from Republic to empire—to all intents and purposes, to monarchy—there is a discernible impulse to infringe status boundaries in applying torture in circumstances where the security of the state, embodied by the emperor, was threatened. The stereotype of the Greek tyrant, prone to torture dissenters, is played out in the attitudes to torture in imperial Rome.

The willingness with which the Christian martyrs withstood both coercive interrogation and the most extreme punishments undermined the principles on which the Roman penal system was based. Instead of forcing the miscreant to recognize the “true way” of the traditional state religion, coercive interrogation, where it was legally applicable, enabled the Christian to demonstrate, in the most sensational manner, unwavering belief in the essential truth of Christianity. Whether or not it is possible to detect anxiety about the efficacy of torture in the classical Roman authors, the logic with which Ulpian exposes its flaws is matched by the sensational success with which the martyrs co-opted torture to prove the veracity of what they held to be true. It is important to note that both the attitude of the authorities who sanctioned torture and the stoicism of the accused who withstood it were formed in a society in which physical pain was a daily reality that could scarcely be alleviated. This reality, too, may have contributed to the notion that it was appropriate to inflict pain upon those whose lack of status demanded correspondingly degrading treatment.<sup>28</sup>

While the charges laid against Verres indicate that torture was sometimes employed against persons who were exempt from it under the law, it was also part of standard legal practice; the application of torture to those whose lack of status demanded it meant that torture was publicly acknowledged and publicly administered. Why it was condoned and sustained, despite its proven inefficacy (Ulpian, at least, was convinced of its inherent flaws), is part of the story of the unquestioned acceptance of slavery, whose essential immorality is condemned by a single dissident voice from classi-

28. For a vivid sketch of the range of instruments of torture that are mentioned in literary sources as familiar apparatus, see T. P. Wiseman, *Catullus and His World: A Reappraisal* (Cambridge: Cambridge University Press, 1985), 5–10.

cal antiquity, that of a fourth-century Christian steeped in Platonism, Gregory of Nyssa.<sup>29</sup> In antiquity, as it does today, the accommodation of torture depended upon deep-seated assumptions about the nature of society and the proper treatment of persons different—or perceived as different—from those who wield power.

29. Peter Garnsey, *Ideas of Slavery from Aristotle to Augustine* (Cambridge: Cambridge University Press, 1996), 80–84, 240–43.



## US Torture of Prisoners of War in Historical Perspective: The Role of Delegitimization

CHRISTOPHER J. EINOLF

In the scholarly and popular commentary on the use of torture in the current wars in Iraq and Afghanistan, there has been relatively little examination of historical precedent. Some writers have made brief references to the Philippine War of 1899–1902 and the Vietnam War, but few have examined these conflicts in depth.<sup>1</sup> This chapter provides historical perspective on American soldiers' current use of torture by examining the military's use of torture against prisoners of war in earlier conflicts. While the focus of the essay is torture, to treat the subject adequately one must also examine other types of violence against noncombatants, including the killing of prisoners of war and the use of force against civilians. As this chapter reviews only eleven wars, all fought by a single country, it cannot claim to have found conclusive support for any theory of torture, but it can advance hypotheses derived from these data for further testing. The chapter derives three main hypotheses from the historical data:

1. *American soldiers have used torture only in counterinsurgency conflicts.* Out of the eleven major wars in US history prior to the recent wars in Iraq and Afghanistan, soldiers used torture in only two: the Philippine War of 1899–1902 and the Vietnam War. Like the wars in Afghanistan and Iraq, these conflicts pitted the US military against military forces who were not under state authority and who used guerrilla and terrorist tactics.

2. *The nature of counterinsurgency conflict increases the perceived usefulness of torture to soldiers.* In conventional wars, most prisoners of war have little information of use to the enemy, and there are many other ways to gather intelligence. In counterinsurgency conflicts, there are few ways to discover

1. An important exception is Darius Rejali, *Torture and Democracy* (Princeton, NJ: Princeton University Press, 2007).

the identity and location of guerrilla opponents other than interrogation. This makes it much more tempting to use torture in these wars than in conventional conflicts. This essay does not take up the question of whether torture actually is an effective way of gathering information; for my purposes here, it matters only that field officers and soldiers perceive it to be effective and therefore have an incentive to use it.

3. *Soldiers often regard insurgent combatants as engaging in illegitimate war tactics, thus apparently providing a moral justification for the use of torture in response.* Guerrilla and terrorist opponents use tactics that violate the laws of war, such as disguising themselves as civilians, hiding themselves and their weapons among civilian populations, attacking civilians, and torturing and killing American prisoners. When enemy soldiers repeatedly violate the laws of war, American soldiers and officers in the field often decide that they are illegitimate combatants who do not deserve the protections given to prisoners of war. The term "illegitimate combatants" has no meaning in law, and in any case military and international law prohibits torture absolutely, regardless of whether an enemy combatant qualifies for prisoner-of-war status. This essay uses the term "illegitimate" to refer to soldiers' perceptions of the enemy, not to any legal status.

The two reasons for the use of torture are complementary explanations, not competing ones. While soldiers may perceive torture to be an effective way of gathering intelligence, they have not used it against all enemies. My analysis suggests that moral concerns have restrained them from using torture against those they perceive to be legitimate combatants. Against opponents perceived to be illegitimate, however, soldiers have felt justified in suspending the usual restriction on torture. Thus, American field officers and soldiers have used torture both because they thought it was useful and because they thought their opponents deserved it.

This essay proceeds as follows. After discussing the definition of torture and controversies over the interpretation of this definition, I trace the past treatment of prisoners of war in American history. American troops treated prisoners well in most conventional conflicts against state opponents but mistreated and sometimes tortured prisoners in conflicts with non-state guerrilla forces. After a brief discussion of how soldiers have perceived torture to be useful, I turn to the main theoretical contribution of this essay: how soldiers' perception of opponents as illegitimate develops and how this perception has led soldiers to engage in torture. The next section shows how this process of delegitimization contributed to the use of torture during the recent conflicts in Afghanistan and Iraq.

The conclusion to this essay argues that preventing torture requires pol-

icy makers to take the moral reasoning of soldiers seriously and to develop arguments against torture that soldiers will recognize as valid. It also argues that leaders must clearly elucidate the requirements of law for field officers and soldiers to follow. Since field personnel are tempted to label guerrilla opponents illegitimate and use this label to justify torture, leaders must clearly emphasize that torture is forbidden regardless of the actions or prisoner-of-war status of opponents. Finally, if leaders find an effective and legal way to punish opponents who violate the laws of war, this may reduce the incentive for field officers and soldiers to use torture as a way of taking retribution into their own hands.

## 1. What is torture?

The UN Convention against Torture defines torture as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>2</sup>

The United States signed the Convention against Torture in 1990, but did so while asserting a number of “reservations, understandings, and declarations” that limit the applicability of some of the terms of the definition as it binds in US law. And while some areas of US law incorporate the UN definition explicitly, somewhat different definitions of torture are contained elsewhere in the US legal code.<sup>3</sup> Uncertainty also arises in determining how severe abuse or inhumane treatment must be for this treatment to rise to the level of torture, as the threshold of severity is not clearly defined

2. The text of the United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment is available on the website of the UN Office of the High Commissioner for Human Rights, accessed January 8, 2012, [http://untreaty.un.org/cod/avl/pdf/ha/catidtp/catidtp\\_e.pdf](http://untreaty.un.org/cod/avl/pdf/ha/catidtp/catidtp_e.pdf). US reservations, understandings, and declarations to the Convention are described in Manfred Nowak, “What Practices Constitute Torture? US and UN Standards,” *Human Rights Quarterly* 28 (2006): 809–41.

3. Gail Miller, *Defining Torture* (New York: Benjamin N. Cardozo School of Law, 2005).

in domestic or international law, particularly in regard to psychological torture.<sup>4</sup>

The US Army's regulations and field manuals, which govern the behavior of guards and interrogators, enumerate a number of types of mistreatment that are severe enough to qualify as torture and are therefore prohibited. Army Field Manual 34-52, *Intelligence Interrogation*, defines physical torture to include electric shock, beatings, the infliction of physical pain and discomfort through the administration of drugs or chemicals, sleep deprivation, and the denial of food and medical treatment. Physical torture also includes the infliction of pain by binding the limbs, imprisonment in extremely confined spaces, and forcing individuals to maintain stress positions. Mental torture includes mock executions, abnormal sleep deprivation, and chemically induced psychosis.<sup>5</sup>

This essay focuses on torture but it is important to keep in mind that torture is only one type of violence against prisoners of war and other non-combatants. While its use in recent conflicts is shocking, torture has been used on only a small number of people when compared with other forms of violence against noncombatants in the past: the mass killings from aerial bombings in World War II and later conflicts, the intentional killing of noncombatants in conflicts with Native Americans, and the civilian deaths from starvation and disease that accompany all wars. While the causes and prevention of such violence are outside the scope of this essay, we cannot understand the use of torture in isolation from its circumstances, which include the deployment of these other types of violence.

## 2. US treatment of prisoners of war in conventional conflicts

The United States fought eleven major wars prior to the recent conflicts in Iraq and Afghanistan: the War of Independence, the War of 1812, the U.S.-Mexican War of 1846–48, the Civil War, the Spanish-American War, the Philippine War of 1899–1902, World War I, World War II, the Korean War, the Vietnam War, and the Gulf War. While this essay does not discuss the hundreds of minor campaigns and interventions fought in US history,

4. Ibid.; Nowak, "Practices"; David Luban and Henry Shue, "Mental Torture: A Critique of Erasures in U.S. Law," *Georgetown Law Journal* 100 (2012): 823–63.

5. *Intelligence Interrogation*, Army Field Manual FM 34-52 (Washington, DC: Headquarters, Department of the Army, September 28, 1992), 1-8 to 1-9, available for download from the Library of Congress, accessed January 8, 2012, [http://www.loc.gov/rr/frd/Military\\_Law/pamphlets\\_manuals.html](http://www.loc.gov/rr/frd/Military_Law/pamphlets_manuals.html); David E. Graham, "The Treatment and Interrogation of Prisoners of War and Detainees," *Georgetown Journal of International Law* 37 (2005): 61–93.

I did review the literature on these campaigns and found little evidence of the use of torture against captured combatants.<sup>6</sup> I also examined the use of force against Native American tribes and found many reports of violence against noncombatants, including rape, the massacre of prisoners, mutilation of bodies, and taking body parts as trophies, but almost no evidence of torture.<sup>7</sup> Out of the eleven major conflicts in US history, American soldiers tortured prisoners in only two: the Philippine War and the Vietnam War.<sup>8</sup> In the twentieth century the Central Intelligence Agency (CIA) taught torture to many US allies fighting against guerrilla opponents and participated in this torture as well. In its training programs at the School of the Americas, the US military also taught torture techniques to Latin American allies fighting counterinsurgency wars, but direct use of torture by the military is limited to the Philippine War and the Vietnam War.<sup>9</sup>

While the laws of war developed throughout this period, the general principles behind the laws of war did not change. One principle of the laws of war is the distinction between combatants, against whom violence is permitted, and noncombatants, against whom violence is forbidden or greatly limited. A second principle is the distinction between legitimate and illegitimate combatants as a general category in military law. While military law does not use these terms specifically, the concepts underlie the logic of the Lieber Code and the Geneva Conventions. The two principles are linked, because for soldiers to spare noncombatants from violence, they must be able to distinguish combatants from noncombatants. Legitimate combatants are those who distinguish themselves from civilians: they wear a distinctive uniform and are registered in the service of a state army. Illegitimate combatants are those who do not distinguish themselves from civilians, either by hiding among civilians, by disguising themselves as

6. Max Boot, *The Savage Wars of Peace: Small Wars and the Rise of American Power* (New York: Basic Books, 2002); Ellen C. Collier, "Instances of Use of United States Force Abroad, 1798 to 1993," Report of the Navy Historical Center, 1993, accessed January 8, 2012, <http://www.history.navy.mil/wars/foabroad.htm>.

7. I found only a single detailed account of the use of torture on a Native American prisoner, the Apache chief Mangas Coloradas. His captors burned him with bayonets heated in a campfire, and when he fought back, they shot him. This appears to be an isolated instance of sadism, as his captors were not trying to obtain information. David Roberts, *Once They Moved like the Wind: Cochise, Geronimo, and the Apache Wars* (New York: Simon and Schuster, 1993).

8. For a detailed survey, see Paul Joseph Springer, "American Prisoner of War Policy and Practice from the Revolutionary War to the War on Terror" (PhD diss., Texas A&M University, 2006).

9. Alfred W. McCoy, *A Question of Torture: CIA Interrogation, from the Cold War to the War on Terror* (New York: Metropolitan Books, 2006); Lesley Gill, *The School of the Americas: Military Training and Political Violence in the Americas* (Durham, NC: Duke University Press, 2004).

civilians, or by fighting without sanction from state authority.<sup>10</sup> In 1997 Protocol I to the Geneva Conventions dropped the requirement that combatants had to wear a uniform and insignia to qualify for prisoner-of-war status, but to date the United States has not verified this protocol.

The laws of war give extensive protections to legitimate combatants, including the right to surrender and the right to be treated well in captivity. Illegitimate combatants have always been protected against torture but do not receive the same protections as combatants eligible for prisoner-of-war status. In the nineteenth century, the law gave these fighters no legitimate status and treated them as bandits or murderers, subject to summary execution upon capture. In the present day, the appropriate treatment of such fighters is unclear, and this lack of clarity has led to abusive treatment and torture despite the absolute prohibition of torture against any person, whether that person is a prisoner of war or a captured illegitimate combatant.

One problem with the laws of war is that there is little way to enforce them other than retaliation, and retaliation generally falls on people distinct from those responsible for war crimes. For example, an army might reduce the food or shelter given to enemy prisoners as a way of forcing the opposing army to improve treatment of their own prisoners. This type of retaliation was considered legal in the nineteenth century but was outlawed by the Geneva Conventions.

At the time of the War of Independence, there were no international treaties on the laws of war, but there was a tradition of customary law that officers recognized and followed. Customary law required armies to accept enemy surrenders and to give prisoners of war adequate food, clothing, and shelter. The United States followed the dictates of customary law and treated prisoners of war humanely during the War of 1812<sup>11</sup> and the US-Mexican War of 1846–48.<sup>12</sup> Both conflicts were conventional ones fought by state armies, in which the enemy also treated US prisoners of war humanely, so it is not surprising that the United States reciprocated in its treatment of enemy prisoners.

An exception to the humane treatment of prisoners occurred in the War of Independence. The British did not recognize the United States as an

10. Michael E. Howard, *The Laws of War: Constraints on Warfare in the Western World* (New Haven, CT: Yale University Press, 1994).

11. Donald R. Hickey, *The War of 1812: A Forgotten Conflict* (Urbana: University of Illinois Press, 1989).

12. John S. D. Eisenhower, *So Far from God: The U.S. War with Mexico, 1846–1848* (New York: Random House, 1989); Paul Foon, *A Short, Offhand, Killing Affair: Soldiers and Social Conflict during the Mexican-American War* (Chapel Hill: University of North Carolina Press, 2004).

independent country and considered American soldiers to be British subjects in rebellion. Fear of retaliation prevented the British from executing American prisoners as traitors, but the British kept prisoners in very poor conditions of detention. Thousands of American prisoners died in British prison ships and jails, and the British refused American requests to improve prison conditions. After extensive negotiation, the United States finally reduced the food and shelter given to British officers in American captivity, in an attempt to force the British to treat American prisoners better.<sup>13</sup>

During the Civil War, the United States did not recognize the Confederacy as an independent state, and its official policy labeled Confederate prisoners as American citizens engaged in treason. In practice, however, as long as Confederate soldiers wore uniforms and fought in organized formations on the open field of battle, US authorities treated them as if they were soldiers of a recognized state. Confederates who disguised themselves as civilians to fight as guerrillas received different treatment, as will be discussed in the next section. Toward the end of the war, US authorities reduced the rations and clothing available to Confederate prisoners, in retaliation for the inadequate care US prisoners received in Confederate prisons.<sup>14</sup>

Good treatment of prisoners of war continued in the Spanish-American War,<sup>15</sup> the conventional war phase of the Philippine War,<sup>16</sup> World War I,<sup>17</sup> World War II,<sup>18</sup> Korea,<sup>19</sup> and the Gulf War.<sup>20</sup> The laws of war changed dur-

13. Larry G. Bowman, *Captive Americans: Prisoners during the American Revolution* (Athens: Ohio University Press, 1976); Edwin Burrows, *Forgotten Patriots: The Untold Story of American Prisoners during the Revolutionary War* (New York: Basic Books, 2008); Charles G. Metzger, *The Prisoner in the American Revolution* (Chicago: Loyola University Press, 1971).

14. Michael P. Gray, *The Business of Captivity: Elmira and Its Civil War Prison* (Kent, OH: Kent State University Press, 2001); William B. Hesseltine, ed., *Civil War Prisons* (Kent, OH: Kent State University Press, 1962); Charles W. Sanders, *While in the Hands of the Enemy: Military Prisons of the Civil War* (Baton Rouge: Louisiana State University Press, 2005).

15. Charles J. Dutton, "American Prison Camp," *Commonweal* 33 (1941): 270–71.

16. Brian McAllister Linn, *The Philippine War, 1899–1902* (Lawrence: University of Kansas Press, 2000).

17. Richard B. Speed, *Prisoners, Diplomats, and the Great War: A Study in the Diplomacy of Captivity* (New York: Greenwood Press, 1990).

18. Robert B. Billinger Jr., *Hitler's Soldiers in the Sunshine State: German POWs in Florida* (Gainesville: University of Florida Press, 2000); Judith M. Gansberg, *Stalag: U.S.A.; The Remarkable Story of German POWs in America* (New York: Thomas Y. Crowell, 1977); Arnold Krammer, *Nazi Prisoners of War in America* (New York: Stein and Day, 1979); Simon P. MacKenzie, "The Treatment of Prisoners in World War Two," *Journal of Modern History* 66 (1994): 487–520; Bob Moore and Kent Fedorowich, eds., *Prisoners of War and Their Captors in World War II* (Oxford: Berg, 1996).

19. Patricia Wadley, "Prisoner-of-War Administration, United Nations Command," in *Encyclopedia of the Korean War: A Political, Social, and Military History*, ed. Spencer C. Tucker (Santa Barbara, CA: ABC-CLIO, 2000).

20. Alberto Bin, Richard Hill, and Archer Jones, *Desert Storm: A Forgotten War* (Westport,

ing this time. Whereas customary law held armies to only vague and general standards for the good treatment of prisoners, the Hague Convention of 1907 and the Geneva Convention of 1949 guaranteed a large number of specific rights and provided for Red Cross monitoring of prisoner-of-war camps to ensure those rights were protected.<sup>21</sup> These conventions also forbade countries to retaliate against prisoners in their custody for the enemy's mistreatment of their soldiers—a stricture the United States has generally upheld. Although the Japanese in World War II, the North Koreans in the Korean War, and the Iraqis in the Gulf War mistreated American prisoners, the United States did not retaliate but continued to uphold the Geneva Conventions in its own treatment of prisoners of war.

While American soldiers generally take prisoners in conventional wars, there are exceptions. In every conflict, American soldiers sometimes shot enemy soldiers when they tried to surrender, owing to the emotions of anger and fear that affect soldiers' actions in the heat of battle.<sup>22</sup> However, killing prisoners after the acceptance of their surrender rarely occurred. During World War II, there were two documented massacres of German and Italian prisoners of war in the campaign to take Sicily, but senior commanders quickly intervened to punish the offenders and prevent further killings.<sup>23</sup> The United States took very few Japanese prisoners during World War II, primarily because most Japanese soldiers refused to surrender, but there are some accounts of Japanese soldiers who tried to surrender only to be killed by American troops.<sup>24</sup> Once the Japanese entered prisoner-of-war camps, however, they were treated well.<sup>25</sup> There is only one report of torture during World War II, and it was an unusual circumstance: American military police tortured seven German prisoners of war to force them to confess to murdering other German prisoners who had given information to American authorities.<sup>26</sup>

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CT: Praeger, 1998); Michael J. Mazarr, Don M. Snider, and James A. Blackwell Jr., *Desert Storm: The Gulf War and What We Learned* (Boulder, CO: Westview Press, 1993).

21. Howard, *Laus of War*.

22. Joanna Bourke, *An Intimate History of Killing: Face-to-Face Killing in Twentieth-Century Warfare* (New York: Basic Books, 1999).

23. James J. Weingartner, "Massacre at Biscari: Patton and an American War Crime," *Historian* 52 (1989): 24–39.

24. John W. Dower, *War without Mercy: Race and Power in the Pacific War* (New York: Pantheon, 1986); Hirofumi Hayashi, "Japanese Deserters and Prisoners of War in the Battle of Okinawa," in *Prisoners of War, Prisoners of Peace: Captivity, Homecoming, and Memory in World War Two*, ed. Bob Moore and Barbara Hatley-Broad (Oxford: Berg, 1995), 49–58.

25. Ulrich Strauss, *The Anguish of Surrender: Japanese POWs of World War Two* (Seattle: University of Washington Press, 2003).

26. Meredith Lentz Adams, *Murder and Martial Justice: Spying and Retribution in World War II America* (Kent, OH: Kent State University Press, 2011).



There are also exceptions to the general rule that American soldiers treated prisoners humanely while in captivity. The United States often went into wars with insufficient planning for the care of prisoners of war, meaning that the food, shelter, and clothing given to prisoners were inadequate. In the eighteenth and nineteenth centuries, US soldiers subjected prisoners of war to physical punishments similar to those meted out to their own troops. Soldiers sometimes beat prisoners at the time of capture, and guards occasionally abused prisoners of war, just as they sometimes abused inmates in civilian prisons. At the end of World War II, food shortages across Europe and the limitations of Allied shipping caused deaths from hunger among German prisoners in Europe, but this was due to logistical difficulties, not an intentional policy.<sup>27</sup> Despite these exceptions, most prisoners held by the US military have received humane treatment.<sup>28</sup>

In conclusion, retaliation is a partial explanation of the mistreatment of prisoners by American forces but not a complete one. In some wars enemy mistreatment brought about American retaliation, but in many wars it did not. Even when there was retaliation, as in the War of Independence and the Civil War, retaliation was limited to a reduction in the food and shelter given to prisoners of war and did not include torture or killing. The next section proposes an alternative explanation for the variation in the use of torture against prisoners.

### 3. US treatment of prisoners in counterinsurgency conflicts

Counterinsurgency warfare presents soldiers with a unique set of practical and moral challenges. Guerrilla armies often disguise themselves as civilians, hide soldiers and supplies among civilian populations, and engage in terrorist attacks against civilians suspected of collaborating with the enemy. Guerrilla armies often refuse to take prisoners and sometimes torture the prisoners they do take. Counterinsurgency forces face the practical challenge of determining the identity of guerrillas and locating them within the civilian population. They face the moral challenge of complying with the laws of war when their enemy gains an advantage by refusing to do so.

Torture is only one of the tactics that American counterinsurgency forces might adopt in fighting guerrilla forces and it has historically been used only rarely. It has been much more common for American forces

27. Günter Bischof and Stephen E. Ambrose, eds., *Eisenhower and the German POWs: Facts against Falsehood* (Baton Rouge: Louisiana State University Press, 1992).

28. Springer, "American Prisoner of War Policy and Practice."

to take action against the civilian populations that guerrillas use for support. These tactics have included destroying the property of civilians suspected of supporting guerrillas, forcibly relocating civilians to government-controlled areas, and depriving civilians of food and necessities as a means of depriving guerrillas of supplies.

While such actions have caused much suffering among innocent non-combatants, American commanders and soldiers argue that the guerrillas are morally responsible for this suffering, as their disregard of the distinction between combatant and noncombatant makes such tactics necessary. Counterinsurgency experts stress the importance of selectively targeting those who support the insurgents while minimizing the damage done to loyal or neutral civilians.<sup>29</sup> Unfortunately, soldiers have not always applied this principle in the field, placing more importance on their own short-term tactical goal of killing insurgents than on the broader political goal of winning civilian support or on the humanitarian goal of sparing innocent lives.

US military responses to guerrilla tactics by its enemies in war have generally been harsh, but they have only sometimes involved the use of torture. A survey of the four historical conflicts involving insurgent tactics is instructive for understanding the conditions that inspire soldiers to torture. US soldiers first faced guerrilla opponents in the US-Mexican War. While this war was primarily a conventional struggle, the Mexican army did use guerrilla tactics. Mexican guerrillas harassed American supply lines, ambushed American patrols, and hid among the civilian population to make sniper attacks against soldiers occupying Mexican cities. In response, American commanders declared guerrillas who disguised themselves as civilians or who hid among civilians to be unlawful combatants. If captured, they would not be treated as prisoners of war but would be treated as bandits, given summary trials by military commissions, and executed if convicted. US commanders also tried to separate guerrillas from their civilian support base by holding civilian communities responsible for guerrilla attacks originating from their location. US troops destroyed civilian property selectively as punishment for hiding or supporting guerrillas.<sup>30</sup>

In the Civil War, the US Army faced a much greater threat from guerrillas and adopted much harsher measures. While guerrillas in the US-Mexican War had been merely a nuisance, guerrillas in the Civil War posed

29. Thomas R. Mockaitis, *Iraq and the Challenge of Counterinsurgency* (Westport, CT: Praeger, 2008).

30. Eisenhower, *So Far from God*; Foos, *Killing Affair*.

a major threat to Union operations. Confederate guerrillas inflicted severe damage on Union supply lines, made it difficult for Union officers to control occupied Southern territory, and attacked Unionist civilians, making it difficult for the Union to reassert political control over the occupied South. Field commanders responded to guerrilla attacks as they had in the US-Mexican War, by executing captured guerrillas and by punishing civilians suspected of assisting them.

When Southerners challenged these acts as illegal, field commanders asked the central government for legal guidance.<sup>31</sup> In response, the Lincoln administration called upon Francis Lieber, a distinguished legal scholar, to draw up a legal code regulating the actions of the army in the field. Lieber's code, published as General Orders 100 in 1863, became the foundation for US military law over the next half century. It also influenced European legal thinkers, and parts of it were incorporated into the 1907 Hague Convention and the 1949 Geneva Convention. While it did not use the terms "legitimate" and "illegitimate combatants," the Lieber Code distinguished between those who wore uniforms and fought in organized, state-sanctioned units and were eligible for prisoner-of-war protections and combatants who disguised themselves as civilians and fought without state sanction. It bound soldiers to accept the surrenders of legitimate combatants and to treat them humanely in detention but stated that illegitimate combatants could be executed upon capture as bandits (art. 82). Notably, article 16 of the Lieber Code also banned torture, stating, "Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions."<sup>32</sup>

While the Lieber Code justified the trial and execution of guerrillas as bandits, the Confederate government threatened to execute Union prison-

31. Noel C. Fisher, *War at Every Door: Partisan Politics and Guerrilla Violence in East Tennessee, 1860–1869* (Chapel Hill: University of North Carolina Press, 1997); Mark Grimsley, *The Hard Hand of War: Union Military Policy toward Southern Civilians, 1861–1865* (Cambridge: Cambridge University Press, 1995); Robert R. Mackey, *The Uncivil War: Irregular Warfare in the Upper South, 1861–1865* (Norman: University of Oklahoma Press, 2004); Kenneth W. Noe, "Exterminating Savages: The Union Army and Mountain Guerrillas in Southern West Virginia, 1861–1862," in *The Civil War in Appalachia: Collected Essays*, ed. Kenneth W. Noe and Shannon H. Wilson (Knoxville: University of Tennessee Press, 1997), 104–30; Sean Michael O'Brien, *Mountain Partisans: Guerrilla Warfare in the Southern Appalachians, 1861–1865* (Westport, CT: Praeger, 1999).

32. "Instructions for the Government of the Armies of the United States in the Field," General Orders 100, April 24, 1863, accessed January 8, 2012, in Yale University's Avalon Project: Documents in Law, History, and Diplomacy, [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp); Richard Shelly Hartigan, *Lieber's Code and the Law of War* (Chicago: Precedent, 1983).

ers in reprisal. A few Union commanders executed captured guerrillas but discontinued the practice when the Confederacy made good on its threat. Instead, some field commanders simply shot guerrilla prisoners upon capture and stated in official reports that they had refused to surrender or were shot while attempting to escape. By keeping their actions secret, these Union officers made it less likely that their own prisoners would be executed in retaliation.<sup>33</sup>

The Lieber Code allowed Union commanders to punish civilian populations for supporting guerrillas, and when Confederate guerrillas attacked Union supply columns, Union officers generally held the nearest Southern town responsible. In some cases they levied a fine on the town, and in other cases they destroyed civilian property. At times they burned entire towns in reprisal.<sup>34</sup> In guerrilla-contested areas of Missouri, Union commanders tried to deprive guerrillas of their source of recruits and supplies by forcing civilians to leave the countryside and live in Union-controlled towns. Any men found in these depopulated areas were assumed to be guerrillas and could be shot on sight.<sup>35</sup>

While American soldiers did not use torture in the counterinsurgency campaigns of the Civil War, they did use torture in the counterinsurgency campaigns of the Philippine War of 1899–1902. The United States claimed possession of the Philippine Islands after defeating the Spanish fleet in the Spanish-American War, but a Filipino nationalist movement refused to accept US sovereignty. The American army fought the Filipino nationalists and defeated them in a series of conventional battles during 1899 and 1900, taking thousands of prisoners in the process. While the United States did not recognize the Filipinos as soldiers of a valid state, the army adopted a policy similar to that of the Civil War. As long as the Filipinos wore uniforms, fought in organized units, and obeyed other laws and customs of war, the United States treated them as if they were legitimate soldiers and gave them prisoner-of-war status. In an effort to win the affection and allegiance of the civilian population, US authorities released almost all these soldiers after a few months upon their promise not to take up arms again.<sup>36</sup>

33. Noe, "Exterminating Savages."

34. Grimsley, *Hard Hand of War*.

35. Thomas Goodrich, *Black Flag: Guerrilla Warfare on the Western Border, 1861–1865* (Bloomington: Indiana University Press, 1995).

36. Paul A. Kramer, *The Blood of Government: Race, Empire, the United States, and the Philippines* (Chapel Hill: University of North Carolina Press, 2006); Brian McAllister Linn, *The U.S. Army and Counterinsurgency in the Philippine War, 1899–1902* (Chapel Hill: University of North

After a year of battlefield defeats, the Filipino resistance abandoned conventional warfare and turned to guerrilla resistance instead. The strength of this resistance varied from province to province, and in many areas the resistance was quite strong. Filipino soldiers disguised themselves as civilians and hid weapons and supplies in civilian homes. In towns under US occupation, the Filipinos operated a shadow government, collecting revolutionary taxes from civilians and assassinating civilians who collaborated with the United States.

The Filipino guerrillas turned out to be much more difficult to defeat than the Filipino conventional armies. US law on the treatment of guerrillas was still governed by the Lieber Code, and American commanders used it to justify policies similar to those used in the Civil War. They destroyed civilian property in retaliation for guerrilla attacks and resettled civilians from guerrilla-controlled rural areas to towns controlled by the United States. They destroyed crops and embargoed local shipping, depriving both civilians and guerrillas of much of their food supply. The army had used a strategy of forced resettlement of civilians in the Civil War, but they implemented the strategy on a much larger scale in the Philippines and caused much greater suffering and many more deaths.

American soldiers executed some captured guerrillas, but they did this perhaps less often than they had in the Civil War. Pragmatic reasons, not humane or legal ones, dictated this practice. The US Army knew it could never catch all the guerrillas hiding in the Philippine wilderness, so it used a strategy of harassment instead. They embargoed food shipments to guerrilla-controlled areas, resettled civilians to deprive the guerrillas of their support, and sent military patrols out to pursue them. When starvation and exhaustion had sapped the guerrillas' will to fight, American officers negotiated surrender agreements. They then co-opted resistance leaders by giving them positions in the US-controlled civilian government. By offering the Filipino insurgents generous surrender terms, the army spared itself the trouble of hunting down and killing the enemy.

While American troops had destroyed civilian property, relocated civilians, and executed guerrilla prisoners in earlier wars, the Philippine War was the first time that American soldiers used torture. Because officers tried to keep their use of torture secret, its prevalence is difficult to quantify, but

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Carolina Press, 1989); Linn, *Philippine War*; Glenn A. May, "Private Presher and Sergeant Vergara: The Underside of the Philippine-American War," in *Reappraising an Empire: New Perspectives on Philippine-American History*, ed. Peter W. Stanley (Cambridge, MA: Harvard University Press, 1984), 35–57; Stuart Creighton Miller, "The American Soldier and the Conquest of the Philippines," in Stanley, *Reappraising an Empire*, 13–34.

a recent study found over seventy documented cases.<sup>37</sup> Some field officers considered torture a good solution to the military problems the army faced in the Philippines. The US Army had enough manpower and good weapons but lacked intelligence. In some provinces, the army succeeded in recruiting Filipinos as scouts and spies, and in these areas, the army made relatively little use of torture. In other areas, however, the independence movement succeeded in maintaining control over the civilian population, and the United States could not get good intelligence from local allies. In some of these areas, field officers used torture to get the information they wanted. As the war went on, torture spread from these areas to other areas and by the end of the war was prevalent in much of the theater of conflict.<sup>38</sup>

The US Army's torture techniques included beating, death threats, and inducing pain by hanging prisoners by their limbs, but the main torture method was "the water cure." The water cure had several variations. Sometimes soldiers forced prisoners' heads underwater until they nearly drowned, but more often they forced water down the victim's throat, causing intense pain from internal swelling. Sometimes soldiers kicked the victim's distended stomach, used a pump to fill the stomach more quickly, or used water containing dirt, salt, or sewage.<sup>39</sup> The use of water to inflict pain in this way is not obvious and had no prior history in the United States. It seems likely that American soldiers learned this torture while in the Philippines, and the evidence suggests that they learned it from local allies, who in turn probably learned it from the Spanish.<sup>40</sup>

The US Army also faced guerrilla forces in the Vietnam War, and it used tactics similar to those used in the Philippine War. They destroyed the property of civilians suspected of supporting the Vietcong and resettled civilians into government-controlled villages. The treatment of prisoners of war was more complicated. The United States classified North Vietnamese combatants as enemy prisoners of war, entitled to the full protections of law, but it considered South Vietnamese guerrilla fighters to be citizens in rebellion against their own government, to be prosecuted under the crimi-

37. Glenn A. May, *Battle for Batangas: A Philippine Province at War* (New Haven, CT: Yale University Press, 1991); Brian McAllister Linn, "The Struggle for Samar," in *Crucible of Empire: The Spanish-American War and Its Aftermath*, ed. James C. Bradford (Annapolis, MD: U.S. Naval Institute Press, 1993).

38. Christopher J. Einolf, *America in the Philippines, 1899–1902: The First Torture Scandal* (New York: Palgrave Macmillan, 2014); Linn, *U.S. Army and Counterinsurgency*; Linn, *Philippine War*; May, *Battle for Batangas*.

39. Einolf, *America in the Philippines*; Linn, *Philippine War*; May, "Private Preshers and Sergeant Vergara"; Kramer, *Blood of Government*; May, *Battle for Batangas*.

40. May, "Private Preshers and Sergeant Vergara"; Rejali, *Torture and Democracy*, 280.

nal law of South Vietnam. The South Vietnamese tortured and killed Vietcong prisoners, and US intelligence officers relied upon the information the South Vietnamese gained through torture.<sup>41</sup>

American soldiers learned torture techniques from the South Vietnamese, who had themselves learned torture techniques from the French. These techniques included beating, stress positions, confinement in small cells called "tiger cages," near drowning, and electric shock torture using field telephones as a power source. American reactions to the use of torture by their South Vietnamese allies varied: some officers protested against it, some ignored it, some encouraged it, and some imitated it. As in the Philippine War, officers concealed their use of torture, making it impossible to quantify how often it occurred.<sup>42</sup>

In addition to the US military, the CIA worked extensively with the South Vietnamese government, and the CIA supported and encouraged its ally's use of torture.<sup>43</sup> The CIA and South Vietnamese army used torture much more often than the US military. The CIA and South Vietnamese also tortured with the support and encouragement of senior leadership, while the senior leadership in the US military forbade torture and tried to prevent it. As Darius Rejali writes, the US Army and Marines had "an underground subculture of military interrogators who shared techniques tolerated and shielded by midlevel commanders. These soldiers were careful to hide what they did from superiors and were quite aware of military rules prohibiting torture."<sup>44</sup>

Of the four wars in US history that involved counterinsurgency fighting, American soldiers used torture in only two. What distinguished the counterinsurgency campaigns of the Civil War and the US-Mexican War from the Philippine War and the Vietnam War? Racism does not seem to be a sufficient cause, as American soldiers did not use torture against Mexicans, whom they considered to be a different and inferior race. The

41. Michal R. Belknap, *The Vietnam War on Trial: The My Lai Massacre and the Court-Martial of Lieutenant Calley* (Lawrence: University Press of Kansas, 2002).

42. Mark Moyar, *Phoenix and the Birds of Prey: The CIA's Secret Campaign to Destroy the Viet Cong* (Annapolis, MD: Naval Institute Press, 1997); Charles Fourniau, *Vietnam: Domination coloniale et résistance nationale, 1858–1914* (Paris: Indes Savantes, 2002); Rejali, *Torture and Democracy*.

43. Citizens Commission of Inquiry, ed., *The Dellums Committee Hearings on War Crimes in Vietnam: An Inquiry into Command Responsibility in Southeast Asia* (New York: Vintage, 1972); Ellen Frey-Wouters and Robert S. Laufer, *Legacy of a War: The American Soldier in Vietnam* (Armonk, NY: M. E. Sharpe, 1986); David H. Hackworth and Julie Sherman, *About Face* (New York: Simon and Schuster, 1989); Anthony B. Herbert with James T. Wooten, *Soldier* (New York: Holt, Rinehart, and Winston, 1973).

44. Rejali, *Torture and Democracy*, 581.

difference may be the importance of defeating counterinsurgency. In the US-Mexican War and Civil War, the counterinsurgency campaigns were a side issue, and difficulties with guerrillas ceased once the army won the conventional war. However, the Philippine War was exclusively a counterinsurgency war after 1899, and counterinsurgency was an important part of the Vietnam War throughout the conflict. As the need to defeat insurgents was stronger in the latter two wars, the incentive to use torture was stronger. A second possible explanation is that soldiers do not engage in torture unless some precedent for torture exists in the conflict area. Rejali has demonstrated that torturers generally learn the techniques of torture from other torturers. Without a tradition of torture to draw from, it may not have occurred to US soldiers to torture captives, or they may not have known how to do so effectively.<sup>45</sup>

This survey of the US historical experience has shown that American soldiers have used torture only in counterinsurgency conflicts, but not in all counterinsurgency conflicts. Two possible explanations for the use of torture exclusively in counterinsurgency conflicts are the perceived usefulness of torture in gaining information about insurgents and the perception of guerrilla opponents as illegitimate enemies. As this study examines only eleven conflicts, in the history of only a single country, there are neither enough cases nor enough diversity in the cases to fully test these hypotheses. Furthermore, these factors are at best necessary, but not sufficient, causes of torture, as there were two counterinsurgency conflicts in the sample in which soldiers did not use torture. This chapter advances these factors as plausible, partial causes of torture, not as complete or proven explanations of torture. The next section more fully describes how the perception of illegitimacy may encourage soldiers to use torture.

#### 4. Torture and the moral world of soldiers

It is tempting to assume that soldiers who torture and kill civilians and prisoners have totally lost their moral bearing and to attribute their actions to racial prejudices, anger, frustration, the desire for revenge, and blind obedience to illegal orders. While emotions and obedience are part of the explanation of atrocities, it is incorrect to assume that atrocities occur in a moral vacuum. Rather, it is reasonable to see soldiers as exercising a sense of morality in combat settings, albeit a different one from the moral reasoning they use in civilian life. While the moral reasoning that leads to the

45. See Rejali, *Torture and Democracy*.



use of torture is problematic, it is important to recognize that soldiers and officers routinely engage in such reasoning. If one wishes to convince them that torture is morally unjustifiable, one must take into account how they may justify the morality of torture in their own minds.

Military historians have noted that warfare is a cultural practice, with rules and norms of its own,<sup>46</sup> and legal historians have noted that informal norms of behavior, or the "cultural regulation of violence," have historically played a more important role in warfare than formal laws.<sup>47</sup> Each side in a conflict has its own idea of what constitute legitimate acts in wartime, and what constitute violations of the rules. When one side perceives the other as having violated those rules, that side may feel justified in violating the rules as well.

American soldiers have sometimes encountered enemy forces who violated the laws of war by disguising themselves as civilians, attacking civilians, and torturing or killing American prisoners. They have also confronted enemies using guerrilla tactics such as ambushes, snipers, booby traps, and mines, and hiding to avoid combat unless the odds are strongly in their favor. While these tactics are permitted by formal law, soldiers perceive them as dishonest, unfair, and cowardly. On these grounds, US soldiers may regard guerrilla opponents as illegitimate combatants.

I use the term "delegitimization" to describe the process by which soldiers come to view their enemy as illegitimate and undeserving of the protections that are due by law or custom to captured enemy combatants. The psychologist Daniel Bar-Tal has used this term to describe a wide range of processes by which enemy groups are placed outside the purview of moral action, but my use has a different and narrower meaning.<sup>48</sup> My theory of delegitimization draws upon the ideas of sociologist Donald Black, who argues that "conduct regarded as criminal is often quite the opposite. Far from being an intentional violation of a prohibition, much crime is moralistic and involves the pursuit of justice."<sup>49</sup> For example, many crimes of violence are motivated by moralistic retribution for a past insult, a past attack, or a sexual transgression by the target. The perpetrators do not consider their actions to be criminal but see them as justified punishment for their target's offenses.

46. John Keegan, *A History of Warfare* (New York: Knopf, 1994).

47. Howard, *Laws of War*.

48. Daniel Bar-Tal, "Causes and Consequences of Delegitimization: Models of Conflict and Ethnocentrism," *Journal of Social Issues* 46 (1990): 65–81.

49. Donald Black, *The Social Structure of Right and Wrong*, rev. ed. (San Diego, CA: Academic Press, 1998), 27.

My argument that soldiers use moral arguments to justify torture also has a source in the work of the psychologist Martha Huggins. In her interviews with Brazilian torturers, she found that they made a moral distinction between themselves, whom they saw as morally "good" torturers, and other torturers, whom they viewed as morally "bad." Huggins's "good" torturers saw themselves as well-trained, self-controlled, and skilled professionals, who used torture only for the legitimate purpose of protecting the state from criminals and subversives. By contrast, immoral torturers were poorly trained, unskilled, and unprofessional and gained sadistic pleasure from torture or failed to control their feelings of anger during interrogation. Immoral torturers did not act in defense of the state but tortured for pleasure or economic gain.<sup>50</sup>

Racism can foster delegitimization. American soldiers treated prisoners humanely in a number of wars against nonwhite opponents, including the US-Mexican War, the Korean War, and the Gulf War, so racism alone does not seem to cause the abuse of prisoners. However, American soldiers may be more likely to perceive violations of the laws of war by a white enemy to be aberrations, but violations of the laws of war by a nonwhite enemy to be indications of the enemy's savage or inferior true nature. In World War II, for example, Americans blamed Nazi fanatics for massacres of US soldiers and other atrocities, while holding the majority of Germans blameless. On the other hand, Americans considered Japanese atrocities to be an indication of the true Japanese character. This different perception led American soldiers to accept the surrender of German prisoners, whereas they sometimes killed those few Japanese soldiers who attempted to surrender.<sup>51</sup>

While delegitimization is the most commonly used moral justification for torture, soldiers have used other arguments to justify torture as well. One strategy is to argue that the interrogation methods used are not really torture. For example, one military adviser to the South Vietnamese admitted that the interrogators he supervised abused prisoners, but he denied that they used torture. "Were they tortured? It depends on what you call torture. Electricity was used by the Vietnamese, water was used, occasionally some of the prisoners got beat up. Were any of them put on the rack, eyes gouged out, bones broken? No, I never saw any evidence of that at all."<sup>52</sup> In the Philippines, many officers argued that the water cure was

50. Martha K. Huggins, "State Violence in Brazil: The Professional Morality of Torturers," in *Citizens of Fear: Urban Violence in Latin America*, ed. Susan Rotker (New Brunswick, NJ: Rutgers University Press, 2002), 141–51.

51. Dower, *War without Mercy*; Hayashi, "Japanese Deserters and Prisoners of War."

52. Moyar, *Phoenix*, 91.

not really torture. At his court-martial, one officer disputed whether “any man of experience” would call the water cure “cruel” or “harsh.” Another claimed that the water cure “merely frightened” prisoners “and in no way harmed” them.<sup>53</sup>

A second strategy used to justify torture is to argue that the end justifies the means. One Filipino officer wrote that in order to win the war, “certain things will take place not intended by the higher authorities,” and “the ‘water cure’ and other unauthorized methods will be resorted to in spite of the strictest instructions.”<sup>54</sup> An intelligence officer described how torture was used to get a suspected insurgent to lead soldiers to a hidden weapons cache. He stated, “I fully believe that such methods are necessary and justifiable under the circumstances,” but added that he “would not be able to protect any whose employment of such methods became a matter of complaint or scandal.”<sup>55</sup> At his court-martial, an officer argued that the water cure “has saved more lives of both Filipinos and Americans . . . than any other measure that has been made use of in the warfare in the Philippines,” and that “this was the true standard of the humanity of any form of punishment.”<sup>56</sup>

The argument that the end justifies the means may also help explain why soldiers and field commanders kept the use of torture secret. Most critics have assumed that soldiers kept torture secret to avoid punishment, but the evidence indicates that the desire to win the war may also have been a motive. Field officers and soldiers felt that winning the war in the Philippines was important for the United States, and that this goal was so important that it justified the use of torture. Furthermore, soldiers felt that civilians and policy makers back home, who had not experienced the brutal nature of the Philippine War, would not understand why torture was necessary. By keeping torture secret, they were able to continue using what they believed to be an effective and necessary tactic.<sup>57</sup>

## 5. Justifying torture in the current global war on terror

There are many explanations for the use of torture against prisoners in what the Bush administration called “the global war on terror.” Proposed causes

53. Einolf, *America in the Philippines*, 184.

54. Linn, *U.S. Army and Counterinsurgency*, 223.

55. *Ibid.*, 224.

56. Einolf, *America in the Philippines*, 185.

57. See Einolf, *America in the Philippines*.

include military training,<sup>58</sup> obedience to implied orders,<sup>59</sup> loyalty to peers, poor discipline, racism, emotions of fear, anger, and revenge, "deindividuation," dehumanization,<sup>60</sup> and the diffusion of ethical responsibility that occurs in hierarchical bureaucracies.<sup>61</sup> These causes are not mutually exclusive and seem to interact with one another in causing torture. I propose delegitimization not as an alternative to these causes but as one further explanation of why torture occurred.

While delegitimization was present in early wars, senior leadership attempted to prevent this delegitimization from leading to torture. In both the Philippines and Vietnam, the senior military leadership prohibited torture, and field officers and soldiers used torture without authorization from their superiors. Senior commanders often looked the other way when torture occurred, but there is little evidence that they directly encouraged or ordered it.

The US military's recent use of torture at Guantanamo was extraordinary in that the secretary of defense, Donald Rumsfeld, ordered torture to occur, to the point of being personally involved in deciding which techniques would be used on which prisoners.<sup>62</sup> Rumsfeld then ordered personnel with experience at Guantanamo to improve intelligence gathering at Abu Ghraib in Iraq. Rumsfeld did not order torture there, but by transferring Guantanamo personnel to Abu Ghraib and ordering them to improve intelligence collection there, he encouraged the transfer of torture techniques from Guantanamo to Iraq.<sup>63</sup>

While this essay focuses on the use of torture by the military, it is important to note that the CIA has also been involved in torture in the present war on terror. CIA involvement in torture is not new, although historically

58. Mika Haritos-Fatouros, *The Psychological Origins of Institutionalized Torture* (London: Routledge, 2003).

59. Stjepan Mestrovic, *The Trials of Abu Ghraib: An Expert Witness Account of Shame and Honor* (Boulder, CO: Paradigm, 2007).

60. Philip Zimbardo, *The Lucifer Effect* (New York: Random House, 2007).

61. Guy B. Adams, Danny L. Balfour, and George E. Reed, "Abu Ghraib, Administrative Evil, and Moral Inversion: The Value of 'Putting Cruelty First,'" *Public Administration Review*, September/October 2006, 680–93.

62. Reed Brody, *Getting Away with Torture? Command Responsibility for the U.S. Abuse of Detainees* (New York: Human Rights Watch, 2005).

63. Ibid.; Seymour Hersh, *Chain of Command: The Road from 9/11 to Abu Ghraib* (New York: HarperCollins, 2004); Joseph Margulies, *Guantánamo and the Abuse of Presidential Power* (New York: Simon and Schuster, 2006); Senate Armed Services Committee, "Inquiry into the Treatment of Detainees in U.S. Custody," November 20, 2008, accessed January 8, 2012, [http://armed-services.senate.gov/Publications/Detainee%20Report%20Final\\_April%2022%202009.pdf](http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf).

the CIA has more often supervised torture by the intelligence services of other nations than engaged in torture on its own.<sup>64</sup> High administration officials discussed and approved the use of sleep deprivation, slapping, pushing, and near drowning (also called "waterboarding") against these prisoners, and the CIA carried out these orders.<sup>65</sup>

The military engaged in torture in at least two places, and the reasons for torture differed in each location. At Guantanamo Bay, military personnel carried out torture under direct orders from the secretary of defense, while at Abu Ghraib military personnel carried out torture without orders. There is evidence of torture at other locations in Iraq and Afghanistan, but I will focus on these two locations as they are the best documented.

At Guantanamo Bay, Secretary of Defense Donald Rumsfeld authorized a set of coercive techniques that included stress positions for up to four hours, sensory deprivation, solitary confinement for up to thirty days, interrogations for up to twenty hours, and forced nudity.<sup>66</sup> To justify this treatment, the Bush administration argued that terrorist detainees do not qualify for prisoner-of-war protections under the Geneva Conventions, as they are not uniformed soldiers fighting for a state authority, nor do they meet the requirements for recognition as an organized non-state resistance movement.<sup>67</sup>

The only protection that the Bush administration recognized as applicable to these detainees was the UN Convention against Torture, which prohibited torture against any person, regardless of that person's status or crimes. To get around this protection, the administration's lawyers argued that that near drowning, stress positions, solitary confinement, and sensory isolation did not cause "severe" suffering and therefore did not constitute torture. These actions were "merely" cruel, inhuman, and degrading treatment. The Bush administration argued that such treatment was illegal against prisoners of war but allowed against unlawful combatants. As the

64. McCoy, *Question of Torture*.

65. Jan Crawford Greenburg, Howard L. Rosenberg, and Ariane de Vogue, "Sources: Top Bush Advisors Approved 'Enhanced Interrogation,'" ABC News, April 9, 2008, accessed January 9, 2009, <http://abcnews.go.com/thelaw/lawpolitics/Story?id=4583256&page=1>. The officials present at these meetings included Vice President Richard Cheney, National Security Advisor Condoleezza Rice, Secretary of Defense Donald Rumsfeld, Secretary of State Colin Powell, CIA Director George Tenet, and Attorney General John Ashcroft.

66. Brody, *Getting Away with Torture*; Senate Armed Services Committee, "Inquiry into the Treatment of Detainees."

67. These criteria are "being commanded by a person responsible for his subordinates," "having a fixed distinctive sign recognizable at a distance," "carrying arms openly," and "conducting their operations in accordance with the laws and customs of war." Third Geneva Convention, art. 4.A.2.

Geneva Conventions state that prisoners not meeting the requirements for prisoner-of-war status "shall be treated humanely in all circumstances," this is a legal argument that few outside the Bush administration have accepted.<sup>68</sup>

Delegitimization provides one explanation for the use of torture at Abu Ghraib. Administration officials linked Iraqi insurgents with al-Qaeda terrorists, even though there was little connection between the two. The army did not use the designations "prisoner of war (POW)" or "enemy prisoner of war (EPW)" to refer to prisoners but used the words "detainee," "security detainee," and "person under control." Military officials stated that the Geneva Conventions applied in Iraq but then stated that prisoners at Abu Ghraib and in Afghani prisons were not prisoners of war entitled to Geneva protections.<sup>69</sup> While torture of prisoners is illegal regardless of whether they are entitled to Geneva protections, the lack of these protections delegitimized these prisoners and contributed to soldiers' perception that there were no restrictions on their treatment. As one soldier stated, "We were pretty much told that they were nobodies, that they were just enemy combatants," he said. "I think that giving them the distinction of soldier would have changed our attitudes toward them."<sup>70</sup>

As US soldiers in Iraq viewed Iraqi detainees as illegitimate combatants, they felt that these combatants did not deserve the protections given to prisoners of war. US soldiers learned torture techniques from CIA officers who visited Abu Ghraib and from personnel with experience at Guantanamo. Soldiers at Abu Ghraib did not have access to administration legal reasoning about the different statuses of CIA, Guantanamo, and Iraqi prisoners and saw no reason not to use techniques that had been approved at other locations. Several authors have traced how the transfer of personnel from Guantanamo to Abu Ghraib encouraged the transmission of interrogation techniques, including torture.<sup>71</sup>

The UN Convention against Torture forbids the torture of any individual, regardless of their prisoner-of-war status. Similarly, legal scholars are almost unanimous in condemning the Bush administration's interpreta-

68. 1977 Geneva Protocol I, art. 75; Brody, *Getting Away with Torture*; Hersh, *Chain of Command*; Margulies, *Guantánamo*; Senate Armed Services Committee, "Inquiry into the Treatment of Detainees."

69. Brody, *Getting Away with Torture*.

70. Douglas Jehl and Andrea Elliott, "Cuba Base Sent Its Interrogators to Iraqi Prison," *New York Times*, May 29, 2004, accessed January 8, 2012, <http://www.nytimes.com/2004/05/29/world/the-reach-of-war-gi-instructors-cuba-base-sent-its-interrogators-to-iraqi-prison.html?pagewanted=all&src=pm>.

71. Zimbardo, *Lucifer Effect*; Hersh, *Chain of Command*.

tion of the Geneva Conventions. However, the correct application of the Conventions to prisoners taken in Iraq and Afghanistan is a complex issue upon which scholars disagree.<sup>72</sup> While the Geneva Conventions clearly state the responsibilities of states to prisoners of war, they are less clear on what protections apply to armed individuals who do not qualify for prisoner-of-war status, other than to note that they "shall be treated humanely in all circumstances."<sup>73</sup> It is also unclear what procedure states should use to determine whether captured fighters are prisoners of war or unlawful combatants. The clarification of the laws of war and their application to current combat situations is an important task facing legal scholars, human rights advocates, and policy makers.

## Conclusion

This review of the history of torture by US soldiers links the use of torture with the practical and moral challenges soldiers face in wars against guerrilla and terrorist opponents. In practical terms, guerrillas and terrorists gain an advantage over American soldiers by disguising themselves as civilians, hiding among the civilian population, and ignoring humanitarian laws protecting civilians from violence. The importance of intelligence in counterinsurgency warfare provides an incentive for soldiers to use torture in interrogations. In moral terms, guerrilla and terrorist violations of the laws of war tempt American soldiers to retaliate with their own violations and provide American soldiers with a moral justification for not applying those laws to their opponents. The Geneva Conventions and international humanitarian law provide extensive guidance on how armies should act, but have few legal mechanisms for responding to opponents who violate those laws.<sup>74</sup>

History holds two lessons for current policy makers. First, new military situations often require new laws or new interpretations of existing laws.

72. Jennifer Elsea, "Treatment of 'Battlefield Detainees' in the War on Terrorism," in *The Treatment of Prisoners: Legal, Moral, or Criminal?*, ed. Ralph D. McPhee (New York: Nova Science, 2006), 129–82; Francoise J. Hampson, "Detention, the 'War on Terror' and International Law," in *The Law of Armed Conflict: Constraints on the Contemporary Use of Military Force*, ed. Howard Hensel (Aldershot, UK: Ashgate, 2005), 131–70; Srividhya Ragavan and Michael S. Mireles Jr., "The Status of Detainees from the Iraq and Afghanistan Conflicts," *Utah Law Review* 2005 (2005): 619–76.

73. 1977 Geneva Protocol I, art. 75.

74. C. Greenwood, "Ensuring Compliance with the Law of Armed Conflict," in *Control over Compliance with International Law*, ed. W. E. Butler (Dordrecht: Martinus Nijhoff, 1991), 195–204.

The United States faced such a situation during the Civil War, when guerilla attacks threatened to cripple the Union military effort, and no formal legal framework existed to deal with the threat. The government responded with the Lieber Code, which attempted to balance the rights and safety of civilians and captured enemy soldiers with the goal of winning the war. The Lieber Code drew upon established principles of law but interpreted them in new ways to apply to new conditions of combat. The US government published the new law, which ensured that field commanders would understand it, and also gave Congress and the courts the opportunity to challenge or modify it.

The United States faces a similarly novel military threat today. The laws of war contain rules for the treatment of soldiers of the type of non-state entities that commonly existed when those rules were formulated: colonial independence and secession movements. As long as soldiers in these non-state armies acted like legitimate soldiers by wearing a distinguishing uniform or insignia, answering to a command authority, bearing arms openly, and respecting the other laws of war, they have been covered by the protections of the Geneva Conventions just as if they were the soldiers of a recognized state.

The current laws of war contain no rules for the treatment of terrorist groups, a type of non-state military actor not anticipated by the drafters of the Geneva Conventions. While some have argued that suspected terrorists should be treated under the auspices of domestic criminal law, others have stated that these groups are too different from conventional criminals and pose too great a threat to receive such treatment. In the nineteenth century, soldiers gave unlawful combatants short military trials and then executed them as murderers and bandits. Whether or not justified at that time, this would not be an acceptable solution today. Armed terrorist and insurgent groups occupy an uncertain legal space between criminal and military law, and no clear precedent exists on how to treat them.<sup>75</sup>

While a specific recommendation is beyond the scope of this essay, there are many writers who have proposed legal regimes to meet the new terrorist threat, using the existing customary and written laws of war as a basis.<sup>76</sup> There is good reason to preserve the distinction contained in the Lieber Code and the Geneva Conventions between combatants entitled

75. Thomas E. Ayres, "Six Floors' of Detainee Operations in the Post-9/11 World," *Parameters: The U.S. Army War College Quarterly* 35 (Autumn 2005): 33–53; Michael H. Hoffman, "Rescuing the Law of War: A Way Forward in an Era of Global Terrorism," *Parameters: The U.S. Army War College Quarterly* 35 (Summer 2005): 18–35.

76. Ayres, "Six Floors"; Hoffman, "Rescuing the Law of War."



and not entitled to prisoner-of-war status. Part of the point of the protections given to prisoners of war is to incentivize states, armies, and other groups and individuals to adhere to the laws of war. Giving prisoner-of-war protections to all combatants might be humane to captured fighters but would be unjust to the civilians and soldiers who suffer from those fighters' actions. Terrorists and insurgents who hide among civilian populations should not be granted the same status and rights as prisoners of war but should retain some rights and protections as human beings. Scholars, lawyers, advocates, and policy makers should work together on the complex issues of these combatants' legal status, the protections they deserve, and the procedures to be used to prosecute and detain them.

Any such reinterpretation or revision of the laws of war should be done openly and with discussion from many parties, as befits a democratic society. In 1863 the Lincoln administration openly published the Lieber Code for public review. By contrast, the Bush administration kept its reinterpretation of the law secret, refused to share power with Congress, and changed its policy only when forced by Supreme Court decisions or congressional action. A more appropriate policy would be to draft a legal framework for handling terrorist detainees, to publish this legal framework openly, and to work with Congress, the courts, and international bodies to make sure this policy complies with both domestic and international legal standards.

The second historical lesson is that policy makers who want to prevent torture must take into account the social world and moral reasoning of soldiers. While most civilians consider torturing prisoners to be clearly immoral, the issue is not so clear to soldiers. By taking soldiers' moral thinking on torture seriously, policy makers will be better able to convince soldiers that torture is immoral and to convince them to obey the law.

It would probably not be possible to convince soldiers fighting enemies who violate the laws of war that their enemies deserve the protections of prisoners of war. No soldier would take seriously the argument that an enemy who disguises himself as a civilian and tortures and kills civilians and prisoners deserves prisoner-of-war status and treatment. Instead, commanders could argue that soldiers should treat all prisoners humanely because the treatment of prisoners reflects on the honor and image of the US military, whether or not the prisoners deserve it.<sup>77</sup>

Training soldiers in military ethics, as the US army did after Abu Ghraib, may be helpful for avoiding subsequent similar atrocities. However, any

77. Paul Robinson, "Ethics Training and Development in the Military," *Parameters: The Journal of the U.S. Army War College* 37 (Spring 2007): 22–36.

classroom-based ethics training will be weak in comparison to the real-life pressures of combat. Accordingly, commanders not only should encourage soldiers to comply voluntarily with ethical rules about the treatment of prisoners but should also monitor the behavior of soldiers and officers and punish violators. This punishment should fall on both the soldiers who commit violent acts and the commanders who fail to prevent them.

In conclusion, this study has demonstrated both strengths and weaknesses in the history of the American military's treatment of enemy prisoners. In general, US soldiers have treated enemy prisoners of war humanely, and they have deviated from humane treatment only in response to widespread enemy violations of the norms and laws of just warfare. However, in some counterinsurgency conflicts against enemies perceived to be illegitimate, some American soldiers used torture. To prevent future torture, the American government may need to create a new legal framework to accommodate prisoners suspected of committing terrorist acts. Commanders should take the moral reasoning of soldiers seriously when conducting ethics training and should monitor soldiers closely to prevent further abuses.

## Police Interrogation and Coercion in Domestic American History: Lessons for the War on Terror

RICHARD A. LEO AND K. ALEXA KOENIG

Modern democracies have long forgotten their own histories of torture.

—Darius Rejali<sup>1</sup>

The use of torture during interrogations conducted by US Army Special Forces, military police, the Central Intelligence Agency (CIA), the Federal Bureau of Investigation (FBI), and private contractors during the war on terror (“post-9/11 interrogators” or “intelligence interrogators”) has, by now, been widely documented.<sup>2</sup> American agents have routinely used physically and psychologically coercive techniques during detainee interrogations in Guantanamo Bay, Iraq, and Afghanistan.<sup>3</sup> These techniques have included beatings, brutal assaults, slapping, walling, strangulation, painful stress positions (e.g., forced sitting, standing, or kneeling for agonizing lengths of time), hooding, mock executions and burials, burning with lit cigarettes, electrical shocks, death threats, intense isolation, sleep depriva-

1. Darius Rejali, *Torture and Democracy* (Princeton, NJ: Princeton University Press, 2007), 266.

2. Mark Danner, *Torture and Truth: America, Abu Ghraib, and the War on Terror* (New York: New York Review of Books, 2004); Joseph Margulies, *Guantánamo and the Abuse of Presidential Power* (New York: Simon and Schuster, 2006); Andy Worthington, *The Guantánamo Files: The Stories of the 774 Detainees in America's Illegal Prison* (Ann Arbor, MI: Pluto Press, 2007); US Senate, Select Committee on Intelligence, *The Senate Intelligence Committee Report on Torture: Committee Study of the Central Intelligence Agency's Detention and Interrogation Program* (London: Melville House, 2014). Of course, there are also well-documented instances in which individuals from these same institutions publicly and privately resisted pressure to torture. See, e.g., Ali Soufan, *The Black Banners: The Inside Story of 9/11 and the War against Al-Qaeda* (New York: W. W. Norton, 2011).

3. Alfred W. McCoy, *A Question of Torture: CIA Interrogation, from the Cold War to the War on Terror* (New York: Metropolitan Books, 2006).

tion, exposure to extremes of cold and heat, forced nudity, sexual humiliation, bombardment with loud music, prolonged exposure to bright strobe lights, sensory and auditory deprivation, confinement in boxes, the use of attack dogs and waterboarding.<sup>4</sup> In addition, the CIA has outsourced torture to other countries through its program of “extraordinary rendition,” where the coercive interrogation techniques used on detainees have been even more brutal and extreme.<sup>5</sup> The use of physical and psychological coercion has been documented by human rights organizations,<sup>6</sup> journalists,<sup>7</sup> scholars,<sup>8</sup> government investigators,<sup>9</sup> interrogators,<sup>10</sup> and detainees themselves.<sup>11</sup> As Alfred McCoy has written, “There is no longer any need, well

4. International Committee of the Red Cross, *ICRC Report on the Treatment of Fourteen “High Value Detainees” in CIA Custody* (Washington, DC: International Committee of the Red Cross, 2007); Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (New York: Doubleday, 2008).

5. Stephen Grey, *Ghost Plane: The True Story of the CIA Torture Program* (New York: St. Martin’s Press, 2006); Peter Jan Honigsberg, *Our Nation Unhinged: The Human Consequences of the War on Terror* (Berkeley: University of California Press, 2009).

6. ICRC Report on the Treatment of Fourteen “High Value Detainees” in CIA Custody; Physicians for Human Rights, *Broken Laws, Broken Lives: Medical Evidence of Torture by US Personnel and Its Impact* (Cambridge, MA: Physicians for Human Rights, 2008); Laurel Fletcher et al., *Guantánamo and Its Aftermath: U.S. Detention and Interrogation Practices and Their Impact on Former Detainees* (Berkeley: Human Rights Center, University of California, 2008).

7. Mayer, *Dark Side*; Mahvish Rukhsana Khan, *My Guantánamo Diary: The Detainees and the Stories They Told Me* (New York: Public Affairs, 2008); Seymour M. Hersh, *Chain of Command: The Road from 9/11 to Abu Ghraib* (New York: HarperCollins, 2004); David Rose, *Guantánamo: The War on Human Rights* (New York: New Press, 2004).

8. Honigsberg, *Our Nation Unhinged*; Denbeaux et al., *Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data*, Seton Hall Law School, 2006, accessed January 8, 2012, [http://law.shu.edu/publications/guantanamoReports/guantanamo\\_report\\_final\\_2\\_08\\_06.pdf](http://law.shu.edu/publications/guantanamoReports/guantanamo_report_final_2_08_06.pdf); Laurel Fletcher and Eric Stover, *The Guantánamo Effect: Exposing the Consequences of U.S. Detention and Interrogation Practices* (Berkeley: University of California Press, 2009).

9. Maj. Gen. Antonio M. Taguba, *Art. 15-6 Investigation of the 800th Military Police Brigade*, 2004, accessed January 8, 2012, <http://news.findlaw.com/hdocs/docs/iraq/tagubarpt.html>; US Department of Justice, *A Review of the FBI’s Involvement in and Observations of Detainee Interrogations in Guantánamo Bay, Afghanistan, and Iraq*, 2008, accessed January 10, 2012, <http://www.justice.gov/oig/special/s0805/final.pdf>.

10. Erik Saar and Viveca Novak, *Inside the Wire: A Military Intelligence Soldier’s Eyewitness Account of the Life at Guantánamo* (New York: Penguin Press, 2005); Tony Lagouranis and Allen Mikaelian, *Fear Up Harsh: An Army Interrogator’s Dark Journey through Iraq* (New York: NAL Caliber Press, 2007); Matthew Alexander and John R. Bruning, *How to Break a Terrorist: The U.S. Interrogators Who Used Brains, Not Brutality, to Take Down the Deadliest Man in Iraq* (New York: Free Press, 2008).

11. Moazzam Begg, with Victoria Brittain, *Enemy Combatant: My Imprisonment at Guantánamo, Bagram, and Kandahar* (New York: New Press, 2006); Murat Kurnaz, *Five Years of My Life: An Innocent Man in Guantánamo* (New York: Palgrave Macmillan, 2006); Michelle Shephard,

into the war on terror, to ask whether the United States has engaged in the systematic torture of suspected terrorists."<sup>12</sup>

Many of these accounts have proceeded as if the use of torture by American officials is a dramatic break from the past. For example, Jane Mayer writes, "for the first time in its history, the United States sanctioned government officials to physically and psychologically torment U.S.-held captives, making torture the official law of the land in all but name."<sup>13</sup> In one sense this is correct: the Bush administration took the unique position that the applicable laws that govern the use of torture—in this case, the Geneva Conventions—did not apply to the US government.

But in another sense, this is incorrect: the use of torture by American interrogators and the tacit sanctioning of torture by US officials are not new. During the first three decades of the twentieth century, American *domestic* police routinely used torture—a variety of physically and psychologically coercive interrogation techniques known as "the third degree"—to extract information during interrogations.<sup>14</sup> With rare exceptions,<sup>15</sup> this domestic history has been all but ignored by scholars who study the contemporary use of torture by American officials abroad. Some appear not even to be aware of its existence. For example, McCoy has written that "America's initial contact with torture" occurred during World War II,<sup>16</sup> yet the use of institutionalized torture in the United States actually began much earlier.

In this chapter, we discuss the history of the third degree to shed more light on the current torture debate. There are numerous parallels between third-degree techniques that American domestic interrogators used in the early twentieth century and coercive techniques that American intelligence interrogators have used and have been using in the early twenty-first. Although there are also important historical and institutional differences, the parallels are striking. Our domestic history suggests important lessons for better understanding the dynamics and consequences of intelligence-related torture and highlights possible pathways to reform.

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*Guantanamo's Child: The Untold Story of Omar Khadr* (Mississauga, ON: John Wiley and Sons, 2008).

12. McCoy, *Question of Torture*, 188.

13. Mayer, *Dark Side*, 7–8.

14. Richard A. Leo, "The Third Degree and the Origins of Psychological Police Interrogation in the United States," in *Interrogations, Confessions, and Entrapment*, ed. G. Daniel Lassiter (New York: Kluwer Academic, 2004), 37–84 at 55.

15. See, e.g., Rejali, *Torture and Democracy*.

16. McCoy, *A Question of Torture*, 21.

### 1. The third degree in domestic American history

While there is some debate over the origins of the term, "third degree" seems to have originally referred to the rigorous tests necessary to attain the master rank in Freemasonry. The term was subsequently transposed in police folklore to signify the third stage of the criminal investigation process, following arrest and custodial confinement.<sup>17</sup> "Third degree" appears to have become synonymous with coercive interrogation in popular parlance around the turn of the twentieth century,<sup>18</sup> though its usage in police circles dates back to at least the 1870s.<sup>19</sup> The third degree was officially defined as "the employment of methods which inflict suffering, physical or mental, upon a person in order to obtain information about a crime."<sup>20</sup> It encompassed a variety of coercive interrogation techniques: purely physical techniques, purely psychological techniques, and many that were both physically and psychologically oriented. As journalist Ernest Jerome Hopkins wrote, "There are a thousand forms of compulsion; our police show great ingenuity in the variety employed."<sup>21</sup> Regardless of the tactic used, the logic of the third degree involved the infliction of terror and pain to elicit compliance and extract admissions.

Owing to the paucity of historical evidence, it is unclear whether the third degree was practiced systematically by modern American police from the time the police were first established—in the middle of the nineteenth century—or became a regular investigative method in subsequent years. By the closing decades of the nineteenth century, however, newspaper and popular media frequently reported allegations of third-degree violence.<sup>22</sup> On the basis of government commission studies and documents, we know now that the 1910s and especially the 1920s were the heyday of the third degree, when the use of coercive interrogation by police was routine,

17. Jerome Skolnick and James Fyfe, *Above the Law: Police and the Excessive Use of Force* (New York: Free Press, 1993), 43.

18. Edwin Keedy, "The Third Degree and Legal Interrogation of Suspects," *University of Pennsylvania Law Review* 85 (1937): 761–77.

19. George Walling, *Recollections of a New York Chief of Police* (New York: Caxton Books, 1887).

20. National Commission on Law Observance and Law Enforcement, *Report on Lawlessness in Law Enforcement* (Washington, DC: US Government Printing Office, 1931), 19 (hereafter Wickersham Report).

21. Ernest Jerome Hopkins, *Our Lawless Police: A Study of the Unlawful Enforcement of the Law* (New York: Viking Press, 1931), 194.

22. Mark Haller, "Historical Roots of Police Behavior: Chicago, 1890–1925," *Law and Society Review* 10 (1976): 303–23 at 319.

systematic, and widely practiced in American police stations.<sup>23</sup> Police biographies and autobiographies,<sup>24</sup> journalistic accounts by police reporters,<sup>25</sup> and even suspects who received the third degree<sup>26</sup> have provided firsthand observation that the third degree was rampant across the country from the latter part of the nineteenth century through at least the first three decades of the twentieth.

### A. *Third-degree techniques*

Most fundamentally, the third degree involved direct and explicit use of physical violence, usually in the form of beatings—beatings, for example, with nightsticks and blackjacks, pistol butts, leather saps, slabs of wood, chairs, and even baseball bats. Suspects were whipped, kicked, punched, and mauled with these and other instruments, such as rubber hoses, brass knuckles, boxing gloves, copper-bound rulers, and leather straps. Sometimes the beatings lasted for hours and were administered by multiple officers. The injuries to suspects frequently left marks that were visible long afterward. Some police beatings (“hospital cases” in police jargon) were so vicious that suspects required immediate medical aid; some suspects spent days, even weeks, recovering from their injuries. In rare cases, suspects were beaten so severely that they died in custody or in jail.<sup>27</sup>

New York reporter Emmanuel Lavine, who spent twenty-five years observing the police, reported that the brute application of physical force—what police referred to as a “shellacking,” “massaging,” or “workout”—was routine and systematic during station house questioning, and he estimated that 70 percent of criminal cases were solved by confessions wrung from in-custody suspects. Lavine wrote, “there is nothing, from the police point of view, exceptional or startling in the application of the third degree; it is simply a part of the normal routine.”<sup>28</sup>

During the era of the third degree, there were also documented forms of physical abuse that did not involve beatings. For example, police interrogators sometimes used heat, fire, or electricity to coerce suspects. Third-degree methods relying on heat or fire included rubbing lighted cigars against a

23. Wickersham Report, 4.

24. Cornelius Willemse, *Behind the Green Lights* (New York: Alfred A. Knopf, 1931).

25. Emanuel Lavine, *The Third Degree: A Detailed and Appalling Expose of Police Brutality* (New York: Garden City, 1930).

26. Willie Sutton, *Where the Money Was* (New York: Viking Press, 1976).

27. Hilda Ageloff, “The Third Degree,” *New Republic*, November 28, 1928, 28.

28. Lavine, *Third Degree*, 5.

suspect's extremities, torturing a suspect with lighted matches, burning a suspect's skin with red-hot pokers, tying a suspect's hands around a hot-water pipe in the station house, or placing a suspect's body against a furnace.<sup>29</sup> Perhaps the most well-known third-degree technique relying on heat was "the sweat box," which involved placing a suspect (sometimes for hours or days at a time) in a small, dark cell adjoined by a stove in which miscellaneous materials were burned to produce scorching heat and pungent odors. Third-degree methods relying on electricity included administering electric shocks and forcing suspects to walk barefoot on an electrically wired mat or carpet. In one city, police invented a technique colloquially known as "the electric monkey," which consisted of a storage battery connected to a step-up device with two terminals: one pole was put against the suspect's spine and another pole was held in the suspect's hands as currents charged through his body.<sup>30</sup>

Most forms of coercive interrogation, however, were intended to be deniable in court and thus had to be invisible. The most famous method of inflicting pain without leaving marks involved hitting the suspect with a rubber hose, which did not break the skin.<sup>31</sup> To accomplish the same effect, police also used pieces of tire; blackjacks soaked in water and wrapped in a handkerchief or covered with soft leather; and sausage-shaped sandbags lined with silk.<sup>32</sup> A variation of this tactic, known as "the taps," involved tying a suspect to an armchair and then striking him on the side of the head at three-second intervals.<sup>33</sup> Other prominent forms of deniable coercion included administering tear gas to a suspect; choking a suspect with a necktie, rope, or towel; bending a suspect's fingers or twisting his wrists or arms backward; forcing a suspect to stand for hours on end, often while manacled; hooding suspects with wooden boxes; and forcing a suspect to strip and placing him in an interrogation cell with freezing temperatures or in a tub filled with cold water.<sup>34</sup>

Perhaps one of the most notable methods of deniable coercion—at least from the standpoint of our era—was the use of "the water cure." This involved using water to elicit the sensation of drowning. The water cure

29. F. Dalton O'Sullivan, *Crime Detection* (Chicago: O'Sullivan, 1928); Charles J. Murphy, "Third Degree: Another Side of Our Crime Problem," *Outlook* 151 (1929): 522–26.

30. Wickersham Report, 139.

31. *Ibid.*, 126.

32. *Ibid.*, 61, 118.

33. Charles Franklin, *Third Degree* (London: Robert Hale, 1970), 60.

34. Richard A. Leo, *Police Interrogation and American Justice* (Cambridge, MA: Harvard University Press, 2008), 48–50.



could be administered in a number of ways. For example, American interrogators sometimes simply held a suspect's head in water until he almost drowned; thrust a hose into a suspect's mouth or down his throat; or forced a suspect to lie on his back (sometimes strapping him down) while water was poured into his nostrils, sometimes from a dipper, until he was nearly suffocated.<sup>35</sup> The water cure represents modern-day variations of a torture method that was popular during the Middle Ages.<sup>36</sup>

Some third-degree police methods—such as sleep and food deprivation—combined both physical and psychological coercion, while others were primarily psychological. According to the Wickersham Report, the most common form of coercive interrogation consisted of prolonged, incommunicado questioning—during which suspects were hidden from friends, family, and especially their attorneys and the courts—under conditions of extreme psychological pressure. Suspects were detained for long periods and questioned in relays without cease, sometimes without pause for rest or food or even a chance to sit down.<sup>37</sup> Sometimes suspects were not even booked prior to questioning; sometimes their arrests were concealed from the police blotter for days at a time so that no attorney could locate them (a common police practice known as “losing” the suspect); sometimes police charged suspects with a different unsolved felony case every forty-eight hours to avoid having to release them from custody; and sometimes suspects were forced or tricked into signing affidavits disavowing their attorneys altogether.<sup>38</sup> Suspects were often confined in overcrowded “incommunicado” or “third-degree” cells that were cold, dark, damp, filthy, and windowless and were infested with cockroaches, mosquitoes, or rats.<sup>39</sup>

During incommunicado interrogation detectives often “grilled” and “sweated” suspects in exhaustive relay questioning that frequently involved severe verbal bullying. One common and well-known tactic was to shine a blinding strobe light on a suspect's face. Another was to require a suspect to remain standing for hours on end, slapping or jolting the suspect whenever his knees sagged or he started to fall asleep.<sup>40</sup> Other forms of psychological coercion included mock executions and assaults—arranging for loud screams, groans of agony, the thud of falling bodies, and other bloodcurdling noises to emanate from an adjacent room—as well as ex-

35. Wickersham Report, 67–68.

36. Rejali, *Torture and Democracy*, 280.

37. Wickersham Report, 71–72.

38. Leo, *Police Interrogation*, 52.

39. Wickersham Report, 4, 71.

40. *Ibid.*, 118.

plicit threats of physical injury. Suspects were often threatened with death or severe bodily injury. Some were hung out of windows or down staircases (sometimes upside down and handcuffed or manacled at the ankles), threatened with mob violence or violence to their families, or told at gunpoint that they would be shot and killed if they did not confess.<sup>41</sup>

### *B. The third-degree system*

The third degree in America was not merely a collection of physical and psychological torture techniques; it was also a system for coercing information, administering punishment, and dispensing street justice. Because it was never openly legitimate in America, the third degree thrived on secrecy. Most third-degree interrogation occurred during secret detention in isolated locations, including the patrol wagon, police basements, police garages, and sometimes even hotels or morgues. But usually police administered the third degree at the station house in back rooms or rooms upstairs. Most police stations had interrogation cells—known as “incommunicado” or “third-degree” rooms—specifically designed for this purpose. In some places, such as New York City, they were equipped with instruments of torture.<sup>42</sup> Police also “third-degreed” suspects at outlying police stations so that journalists would be less likely to learn about it, friends and family would be less likely to intervene, the accused would be less able to contact a lawyer or bail bondsman, and high-ranking officials could more easily deny any knowledge of the process.

The third degree required the complicity of other criminal justice officials, who often denied that the third degree existed. Jail keepers and bondsmen were silent. Prosecutors publicly denied any knowledge of the third degree, though they privately acknowledged its existence and sometimes even justified its use. In some instances, prosecutors even participated in third-degreed suspects.<sup>43</sup> Trial judges were complicit too. Like other criminal justice officials, they were silent and seemingly indifferent.<sup>44</sup> As Hopkins wrote, “judicial responsibility for this abuse is great.”<sup>45</sup> Judges knowingly permitted the illegal detention and false imprisonment on which the third degree thrived and virtually always upheld confessions that were alleged to be the product of third-degree methods (and in some

41. Leo, *Police Interrogation*, 53–54.

42. Hopkins, *Our Lawless Police*, 212–13.

43. Wickersham Report, 48.

44. *Ibid.*, 7.

45. Hopkins, *Our Lawless Police*, 121.

instances bore the marks of violence). Although police could be fined, suspended, sued civilly, or criminally indicted and prosecuted for their coercive methods, third-degree practices were almost always tolerated by police leaders, prosecutors, and judges. Coerced confessions were typically upheld in court, regardless of the defendant's injuries or the methods police employed.<sup>46</sup> Only under exceptional circumstances were police punished for brutal interrogation practices.<sup>47</sup> As Sedgwick observed, "The third degree is known to all who have associated with policemen, but it is one of those things which is winked at and tolerated."<sup>48</sup> Even defense attorneys sometimes failed to challenge it because of the difficulty of corroboration and judicial indifference to their claims.

Although the primary purpose of the third degree was to incriminate suspects by forcing confessions, police also used it to exact retribution, unleashing "revenge beatings."<sup>49</sup> American police also used the third degree to generate "confessions" to justify baseless arrests or illegal detentions, protect the identity of their informants (who did not need to reveal their identity once there was a confession), induce plea bargains (thus covering up unlawful arrests, detentions, and interrogation methods), and compel "undesirables" to leave town.<sup>50</sup> The third degree became an entrenched system of dispensing justice. Hopkins described the third degree as a "pre-trial secret inquisition" and argued that "our police are getting not so much evidence as verdicts. . . . The third degree is our predominating type of trial for crime. It tries more men, convicts more men, acquits more men, in felony cases, than the regular trial courts ever see."<sup>51</sup> The third degree thus became a means through which police were able to transcend their investigative role, increase their power, and circumvent adversarial rules designed to prevent the concentration and abuse of state power.

## 2. The decline of the third degree

During the 1910s and 1920s, the third degree was frequently publicized by media and civic organizations, and in some cities police complained that

46. Bates Booth, "Confessions and Methods Employed in Procuring Them," *Southern California Law Review* 4 (1930): 83–102.

47. O. G. Villard, "Official Lawlessness: The Third Degree and the Crime Wave," *Harper's Magazine*, October 1927, 605–24.

48. A. C. Sedgwick, "The Third Degree and Crime," *Nation*, June 15, 1927, 667.

49. Lavine, *Third Degree*, 109–12.

50. *Ibid.*

51. Hopkins, *Our Lawless Police*, 196, 200–204.

they were perpetually on the defensive against impropriety charges.<sup>52</sup> In the muckraking tradition of the Progressive Era, newspapers regularly reported police abuses and decried violent interrogation practices in popular editorials, graphically describing the disfiguring injuries that sometimes resulted. Plays were written about the third degree and performed in theaters. In detective fiction and motion pictures, the third degree was treated as a standard police practice. Bar association committees, civil liberties groups, and grand juries investigated custodial police abuses and issued reports. Sometimes police officers joined the fray by publicly defending and justifying their third-degree methods in news stories, articles, and books.<sup>53</sup>

Although detectives regularly broke the law with impunity at multiple stages of the criminal process, the system of third-degree abuses eventually began to cast doubt on the legitimacy of criminal justice in America. The public increasingly came to question the accuracy of police investigative work and the credibility of detectives' testimony in court. Jurors complained about police in voir dire, expressed skepticism about prosecutions that relied on confessions, and discounted police testimony at trial. Prosecutors blamed acquittals and hung juries on discredited police work. Others lamented that the third degree had led to a crisis of confidence in American criminal justice, imperiling prosecutions and the predictability of trial outcomes. As Lavine observed, "true or false, juries are coming to believe anyone who accuses the police of using the 'third degree.' The result is that the reputation the police have won militates against their own efforts."<sup>54</sup>

This crisis of confidence in American justice was not just about the accuracy of criminal prosecutions, however. More was at stake. The third degree had precipitated a loss of trust in the legal system as a whole. The police were perceived in many quarters as not merely coercive but also dishonest and lawless, which translated into a fundamental distrust of law enforcement. As Hopkins noted, "the requirement of secrecy has given the third degree one more of its obvious characteristics, and that is its sneakiness. There is always an air of furtiveness, an impression of covering-up. . . . The facts may be successfully concealed, but the sneakiness cannot."<sup>55</sup> Popular criticism of police interrogation practices culminated in 1931 with the publication of volume 11 of the Wickersham Report, the *Report on Lawlessness*

52. Leo, *Police Interrogation*, 69.

53. B. O. Chisolm and H. H. Hart, "Methods of Obtaining Confessions and Information from Persons Accused of Crime," in *The Fifty-First Congress of the American Prison Association* (New York: Russell Sage Foundation, 1922).

54. Lavine, *Third Degree*, 144.

55. Hopkins, *Our Lawless Police*, 208.

in *Law Enforcement*, which created a national scandal. Thoroughly documented, the report revealed that police brutality in general and the third degree in particular were practiced extensively and systematically in police departments across the country. Its findings were immediately popularized by Hopkins's book *Our Lawless Police* and by many national newspaper and magazine stories. Although journalists, grand juries, legislative committees, bar associations, and civil liberties groups had all leveled such charges against police in the past, no source had provoked nearly as much public controversy as the Wickersham Report.

Use of third-degree interrogation declined dramatically, if unevenly, in the following decades. Initially, however, some police departments attacked the report's legitimacy and accuracy. The International Association of Chiefs of Police denounced it as "the greatest blow to police work in the last half-century"<sup>56</sup> and formed a special committee to refute its findings. As Zechariah Chafee, one of its authors, pointed out, the report "was greeted with two answers which the police regarded as conclusive: first there wasn't any third degree; and second, they couldn't do their work without it."<sup>57</sup>

Following the report's release, J. Edgar Hoover, the chief of the FBI, immediately launched both internal and external attacks on third-degree practices. Hoover actively promoted more professional (i.e., nonabusive) forms of interrogation. He realized that public perceptions of police abuse undermined not only the image of policing but also the goal of conviction, since coerced confessions are usually inadmissible in court. The FBI began to emphasize "scientific" forms of criminal investigation—such as crime laboratories, fingerprinting technology, national identification records, police journals, and the Uniform Crime Reports—so as to render coercive interrogation obsolete. "Third degree methods, the ill-trained officer might think, perhaps a severe beating, will force a confession," Hoover stated. "But the trained officer, schooled in the latest techniques of crime detection, will think otherwise—he will go to work, locating a latent fingerprint, a heel-print in the mud or a toolmark on the safe."<sup>58</sup>

Two very different groups ultimately came together to eliminate the third degree: police leaders and progressive social reformers. Within policing, the move to reform interrogation practices was part of a much broader

56. Leo, *Police Interrogation*, 70.

57. Donald L. Smith, *Zechariah Chafee, Jr.: Defender of Liberty and Law* (Cambridge, MA: Harvard University Press, 1986), 10.

58. Jerome Frank and Barbara Frank, *Not Guilty* (New York: Doubleday, 1957), 185.

agenda to professionalize the structure, function, and public image of policing.<sup>59</sup> Police reformers recognized that in order to increase the social status of police work, they needed to change the public perception of police investigators as poorly trained, inefficient, and corrupt. They sought to transform policing from a politically dominated working-class occupation into a politically autonomous and respectable middle-class profession. And with the development of so-called scientific techniques of crime detection, American police began to perceive, for the first time, that violent interrogation tactics were no longer necessary to obtain confessions.

Whereas in the 1920s many police leaders and detectives had publicly defended third-degree interrogation methods as necessary for controlling crime, by the 1940s police leaders universally condemned the third degree. With the spread of so-called scientific forms of crime detection, as well as new training and education requirements, American police soon came to see the third degree as not only unprofessional and illegal—as clearly articulated in the 1936 US Supreme Court opinion *Brown v. Mississippi*<sup>60</sup>—but also less effective at eliciting confessions than modern interrogation techniques, and thus dispensable. As one FBI agent aptly noted, “the special agent questioning a prisoner uses no special compulsions. . . . The third degree isn’t necessary when you’ve got the facts. Special agents get the facts.”<sup>61</sup>

The chief symbol of modern scientific interrogation was the polygraph, informally known as the lie detector. Police reformers hoped it would replace the third degree as a means of investigating suspects and eliciting confessions. They considered it more effective than the third degree because it relied on a different psychology: suspects might harden their resolve against physically abusive interrogators, but they could not fool the polygraph or deny its results. Reformers also believed that the polygraph would produce more accurate results and was not apt to induce false confessions. Further, confessions elicited by psychological methods were less likely to be challenged by defense attorneys, thrown out by judges, and questioned by juries than those extracted through the third degree. The polygraph and other modern, “scientific” methods of interrogation would render the third degree unnecessary, a relic of policing’s pre-professional era.

59. Samuel Walker, *A Critical History of Police Reform: The Emergence of Professionalism* (Lexington, MA: Lexington Books, 1977).

60. 297 U.S. 278 (1936).

61. Melvin Purvis, *American Agent* (New York: Garden City, 1936), 102.

Yet the polygraph by itself was not an adequate substitute for the third degree. Police reformers also turned to the field of psychology, which, like the polygraph, carried the symbolism and authority of modern science. The signal event in the development of a modern psychology of interrogation was the rise of the police interrogation training manual. Since the 1940s, these manuals have defined the structure, practice, and culture of American police interrogation. They have allowed police managers to socialize officers and detectives into the norms of professional interrogation and define the limits of their discretion. Police manuals have also taught generations of detectives the strategies of psychological interrogation. Along with in-house and national training programs, the interrogation training manual was the primary mechanism through which American police professionalized their interrogation practices.

The third degree has long since become the exception rather than the norm in police work. In response to the Wickersham Report and internal pressures to professionalize, the third degree appears to have declined dramatically from the 1930s through the 1950s, though violence sometimes persisted in some smaller and more rural departments. By the middle of the 1960s, the revolution in American domestic interrogation practices seemed complete: police interrogation had become almost entirely psychological, and the third degree had collapsed under the weight of its own contradictions. Indeed, as the President's Commission on Criminal Justice and the Administration of Justice declared in 1967, "Today the third degree is virtually non-existent."<sup>62</sup> Police interrogators in the 1960s were no longer criticized for the use of force or duress but for failing to give or properly announce Miranda rights to silence and legal counsel before commencing custodial questioning.

Ultimately, the two master strategies through which police replaced the third degree—behavioral lie detection and police-invented techniques of psychological manipulation—created an alternative interrogation practice.<sup>63</sup> These strategies professionalized the image and practice of domestic police interrogation while simultaneously improving the ability of the police to solve crimes.

In less than two generations, the third degree, once a common practice and later a national disgrace, virtually disappeared from American policing.

62. Frank Zimring and Richard Frase, *The Criminal Justice System: Legal Materials* (Boston: Little, Brown, 1979), 132.

63. Leo, *Police Interrogation*.

### 3. Parallels between the era of the third degree and the war on terror

Comparing the rise and fall of the third degree to today's use of torture offers lessons regarding why law enforcement resorts to coercion, what its effects are, why it does not work, and why coercive interrogation practices must, ultimately, defer to more humane techniques. Interrogations conducted during these eras share an intimate—if largely overlooked—relationship. Recognizing this relationship can help us better understand the dynamics and consequences of coercive interrogations and outline potential paths to reform.

#### *A. Parallels between third-degree and "enhanced" interrogation techniques*

Like their domestic predecessors, post-9/11 intelligence interrogators—working on behalf of the United States—have engaged in torture and other cruel treatment. As during the era of the third degree, they have relied on illicit detention, secrecy, "losing" suspects, and inflicting physical and psychological abuse.

Interrogation-related abuse became especially rampant during the first few years after 9/11. Numerous human rights organizations have documented the physical tactics employed during those early interrogations, which included beatings, electrocution, mock executions, strangulation, waterboarding, sleep deprivation, subjection to freezing temperatures, and even questioning detainees while they were undergoing surgery.<sup>64</sup> The International Committee of the Red Cross produced a report in 2007, leaked to the public in 2009, which revealed that two detainees had been waterboarded dozens of times. The report detailed how interrogators would use methods that included "slapping, punching, kicking to the body and face," and placing a collar around a detainee's neck and using the collar to forcefully "bang the head and body against the wall."<sup>65</sup> Stress positions were also employed: several detainees—naked and often without access to a toilet—were forced to stand with their arms extended and chained above their heads for up to three months.<sup>66</sup> One detainee repeatedly endured

64. Fletcher et al., *Guantánamo and Its Aftermath*; Human Rights Watch, *Locked Up Alone: Detention Conditions and Mental Health at Guantánamo* (New York: Human Rights Watch, 2008), accessed January 10, 2012, [http://www.hrw.org/sites/default/files/reports/us0608\\_1.pdf](http://www.hrw.org/sites/default/files/reports/us0608_1.pdf); Physicians for Human Rights, *Broken Laws*.

65. ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody, 8.

66. *Ibid.*



forced confinement. One box in which he was trapped was so small that his body had to be contorted. It quickly became so “hot and difficult to breathe” that he fell asleep or passed out.<sup>67</sup>

A report released in November 2008 by researchers at the University of California, Berkeley, also documented the physical abuses perpetrated on detainees.<sup>68</sup> One former detainee explained how he had watched a co-prisoner be so severely beaten for insisting on his innocence that blood began to flow out of his cell.<sup>69</sup> Physical torture became most visible in the deaths of individuals like Mullah Habibullah and a man known only as “Dilowar,” who were beaten to death while handcuffed, their arms shackled above their heads. The medical examiner who performed Dilowar’s autopsy reported that the detainee, who was later understood to have been innocent, had been hit so severely and frequently that his body tissue “had basically been pulpified.”<sup>70</sup>

Psychological techniques that left few marks were, however, also utilized, largely to avoid public condemnation. This was especially true at Guantanamo, which was located closer to the United States than other detainment facilities and thus threatened easier access for American reporters and lawyers, some of whom would be quick to condemn unconstitutional practices. *Leave No Marks*, a report released in August 2007, especially criticized the prevalent use of interrogation techniques that were difficult to trace but no less difficult to endure than their more physical counterparts. As during the era of the third degree, such techniques included extreme sleep deprivation; threats of harm to the detainee and his family; confinement in excruciatingly cold rooms without clothes or blankets; sensory bombardment with loud noises and strobe lights; sexual humiliation; prolonged isolation; and sensory deprivation. The last technique, which included placing ear muffs and hoods on detainees so they could neither see nor hear, as well as thick gloves to eliminate touch perception, could induce visual, auditory, and sensory hallucinations in just a few hours.<sup>71</sup> Additional techniques, such as forced nudity, desecration of the Quran, and threatening to turn detainees over to individuals or countries known to practice torture, were also commonly employed. A practice known as the

67. Ibid., 13–14.

68. Fletcher et al., *Guantánamo and Its Aftermath*.

69. Ibid., 49–50.

70. Mayer, *Dark Side*, 225.

71. Scott Allen et al., *Leave No Marks: Enhanced Interrogation Techniques and the Risk of Criminality* (Washington, DC: Physicians for Human Rights and Human Rights First, 2007), 31, <https://www.humanrightsfirst.org/wp-content/uploads/pdf/07801-etn-leave-no-marks.pdf>.

"frequent flyer program" required the constant shuttling of a detainee between interrogation sites to wear him down by continually subjecting him to interrogation, disrupting his sense of continuity, and ensuring he never received more than a couple hours of sleep.<sup>72</sup> This program closely paralleled the early twentieth-century police practice of questioning suspects in nonstop relays while moving them between stations.

Despite these similarities, most of the extreme interrogation techniques used during the war on terror—referred to by the intelligence community as "harsh" or "enhanced" techniques—do not appear to have been inspired by third-degree practices. Instead, demonstrating just how readily our domestic history with torture has been overlooked, the tactics were reverse engineered from the military's Survival, Evasion, Resistance, and Escape (SERE) program: a program designed to train military personnel how to resist torture techniques utilized by *other* countries.<sup>73</sup>

### *B. Parallels with the third-degree system*

Those who approved and now defend the use of enhanced interrogation techniques, such as former vice president Dick Cheney and former Department of Justice attorney John Yoo, have repeatedly stressed the uniqueness of the war on terror to justify their use, despite acknowledging their impropriety for police.<sup>74</sup> However, digging below surface differences between ideologies affiliated with the war on terror and the era of the third degree reveals that here, again, similarities predominate.

During the war on terror, the primary argument used to justify harsh interrogation practices has been that the United States is responding to extraordinary circumstances in extraordinary times: thus, under a "totality of the circumstances" analysis the United States should be permitted to engage in more coercive techniques than would normally be allowed.

There are two problems with this argument. First, it blatantly contradicts

72. Carrie Johnson and Josh White, "Audit Finds FBI Reports of Detainee Abuse Ignored: Tactics Continued against Detainees," *Washington Post*, May 21, 2008.

73. Mayer, *Dark Side*, 157–58; Fletcher et al., *Guantánamo and Its Aftermath*, 10–11.

74. John Yoo, *War by Other Means: An Insider's Account of the War on Terror* (New York: Atlantic Monthly Press, 2006); Steven G. Bradbury, US Department of Justice Office of Legal Counsel, *Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, Re: Application of United States Obligations under Article 16 of the Convention against Torture to Certain Techniques That May Be Used in the Interrogation of High Value al Qaeda Detainees*, May 30, 2005 (hereafter Memo 4); John Ward, "Exclusive: Cheney Defends War on Terror's Morality," *Washington Times*, December 18, 2008, accessed September 17, 2009, <http://www.washingtontimes.com/news/2008/dec/18/cheney-defends-morality-of-war-on-terror>.

the requirement in the UN Convention against Torture, as ratified by the United States, that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture."<sup>75</sup> Second, the war on terror is not an unprecedented phenomenon: the concept of a potentially unending war against a difficult-to-identify foe has been previously invoked. During the era of the third degree, the concept of a "new" kind of war similarly permeated society: "American police developed a working ideology—based on the idea of a war on crime . . .—through which they justified their lawlessness."<sup>76</sup> Thus, if American police openly admitted the third degree existed, they usually rationalized it as either necessary to achieve their objectives or excusable given the circumstances, all the while excoriating their critics for failing to understand the police perspective. Police also justified the third degree by appealing to necessity. "At times heroic methods must be resorted to gain desired ends," one Memphis police chief stated.<sup>77</sup> Cornelius Willemse went even further, declaring that police were at war with crime and the third degree was their primary weapon.<sup>78</sup> Hopkins pointed out that "[a]ll arguments openly stated on behalf of unlawful police work come down in the end to the phrase: this is war."<sup>79</sup> Not surprisingly, this necessity argument has been echoed post-9/11, when "a new system of law was devised to vanquish what [then president] Bush described as a new kind of enemy in 'a war unlike any other.'"<sup>80</sup> Thus, both the police and the government have leaned heavily on the argument that ends justify the means: that especially harsh interrogation tactics are necessary to elicit information from the most heinous criminals.

A second frequently cited distinction used to justify the use of especially cruel techniques in the post-9/11 context is that the criminal justice system and the US military represent two different paradigms and thus are incomparable. The predominant goal of police interrogation is to gather incriminating evidence to secure a criminal conviction with respect to an already-committed crime. By contrast, the purpose of military interrogation is to gather advance intelligence that will, presumably, save lives.

75. Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, December 10, 1984, 1465 U.N.T.S. 113 (entered into force June 26, 1987), art. 2, para. 2.

76. Leo, *Police Interrogation*, 66.

77. Wickersham Report, 41.

78. Willemse, *Behind the Green Lights*, 344–56.

79. Hopkins, *Our Lawless Police*, 318.

80. Mayer, *Dark Side*, 7.

In the war on terror, this latter emphasis gave rise to such controversial practices as secret rendition: "Instead of holding suspects accountable for previously committed crimes, [rendition] was used to gather evidence of future crimes not yet committed—for which there was not sufficient evidence to prove guilt under the ordinary rule of law. . . . Rendition thus became an enforcement mechanism for the Bush Administration's pre-emptive criminal model, disrupting and punishing suspects before they were provably guilty."<sup>81</sup> Through secret rendition, detainees could be isolated and punished in a manner that would clearly be illegal in a domestic context. Yet even the practice of rendition has a parallel in the era of the third degree, when suspects were moved from station to station to avoid detection, inflict punishment, and elicit preconviction information. Thus, any differences in *purpose* seem to have played out surprisingly similarly in practice and may not be as important as inferred.

Another context in which different purposes led to similar results involves the use of secrecy. In the early twentieth century, hiding coerciveness helped police ensure that confessions would be admissible in court, since coerced confessions are generally inadmissible. During the war on terror, the US government, while less concerned with convictions, has faced internal and external pressure to appear to adhere to international human rights norms. Not only has the United States been a vociferous instigator and supporter of human rights with respect to prisoner treatment in other countries, but the United States, as a signatory to the Convention against Torture, cannot legally employ torture for any reason, even to discover and repress an attack against the United States.<sup>82</sup> Because of this, it was critical to the government's ability to use torture that it be hidden, and secrecy similarly became the norm.

Notably, a plan was needed in case information about abusive detainee treatment leaked. This resulted in the argument made by the US Department of Justice's Office of Legal Counsel (OLC) that treatment that is torture in a police context is not necessarily illegal when engaged in by the CIA since the police and CIA are regulated by different legal authorities: the former by the Constitution, the latter by the Geneva Conventions.<sup>83</sup> However, since the two standards are generally recognized as equivalent, even by the US government, this argument was disingenuous.

The OLC also scrambled to establish legal cover for the most abusive

81. *Ibid.*, 108.

82. Convention against Torture, art. 2, para. 2.

83. Memo 4.

practices. In the “torture memos,” the OLC strained international and domestic law, presumably to immunize interrogators and their superiors from eventual prosecution. The OLC concluded that even waterboarding and extreme sleep deprivation—techniques the United States had condemned as torture when used by other nations and for which the United States had previously prosecuted its own servicemen—were legally permissible. The memos also approved forced nudity, shoving detainees into false walls, slapping detainees in the face and abdomen, chaining detainees in painful stress positions, confining detainees in boxes, dousing detainees with cold water, and shackling detainees from the ceiling by their wrists.<sup>84</sup> The OLC argued that for such practices to constitute torture, interrogators would have to engage in them with the specific intent to inflict severe physical or mental suffering. Since the predominant intent behind using harsh interrogation techniques would presumably be to obtain intelligence and not just to inflict pain, the OLC reasoned, most (if not all) of the techniques would be legal.<sup>85</sup> This dangerous analysis opened up a universe of torture-related techniques for interrogators because it meant that no technique could be considered torture so long as the primary intention behind its use was the gathering of intelligence.

The OLC simultaneously argued that the various tactics were not severe enough to equal torture. The OLC concluded in 2005 that techniques such as cramped confinement, stress positions, walling, and slapping detainees, while painful, would not “even approach . . . the ‘severe’ level required to violate [prohibitions against torture].”<sup>86</sup>

This tendency to corrupt language and distort legal analysis to redefine the crime of torture so that it is all but impossible to commit is nothing new. As noted above, in the early twentieth century, many American police redefined the third degree as something other than coercive interrogation. Indeed, some suggested that the controversy was no more than a semantic

84. Ibid.

85. Ibid. The need for prosecutors to establish that a perpetrator had a “specific intent” to torture has been codified in US law. See David Luban and Henry Shue, “Mental Torture: A Critique of Erasures in U.S. Law,” *Georgetown Journal* 100 (2012): 823–63. Per Luban and Shue’s analysis, only “sadistic torture” would therefore qualify as torture. This requirement was reportedly motivated by a desire to protect domestic law enforcement who might engage in “police brutality” and was only subsequently used to protect CIA contractors and other US agents from prosecution. See Memo 4, 20.

86. Steven G. Bradbury, US Department of Justice Office of Legal Counsel, *Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, Re: Application of 18 U.S.C. §§ 2340–2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees*, May 10, 2005, 60 (Memo 3).

misunderstanding. Some denied it outright. And some denied its existence by shifting the focus from the interrogation to the suspect's confession, implying that the interrogation could not be coercive if the confession was voluntary (a tautology that has little meaning). Finally, some police suggested that the third degree was employed only against hardened criminals or individuals known to be guilty, as if thereby to justify its use. This has its parallel in a tactic used by the Bush administration, which repeatedly stressed detainees' status as the "worst of the worst" and as "hardened operatives" in response to questioning about particularly harsh interrogations.

#### 4. Lessons for the war on terror: Getting past torture

At bottom, both police and intelligence interrogations raise concerns about the limits of governmental power, the morality of means, the abuse of rights, and the reliability of interrogation-induced statements. The similarities between police and intelligence interrogations, with respect both to techniques used and to underlying ideologies, appear far more significant than their differences. Because intelligence interrogations are rarely recorded or leave a publicly accessible paper trail, they are difficult to study empirically. Thus, scrutinizing the lessons learned during the era of the third degree may offer the greatest potential for advancing reform during the war on terror.

##### A. *Parallels*

Many lessons can be learned from our history with the third degree. The first, and perhaps most crucial, is that torture rarely works.<sup>87</sup> It frequently results in false confessions—information the suspect thinks the interrogator wants to hear, offered to elicit relief from the distress of interrogation—and not the truth. During the era of the third degree, the use of coercive methods repeatedly led innocent suspects to confess falsely to escape the violence and psychological duress of continuous questioning.<sup>88</sup> Evidence that this has also taken place during the war on terror is now public. For example, Jane Mayer has documented how one former detainee falsely

87. Jeanine Bell, "Behind This Mortal Bone: The (In)Effectiveness of Torture," *Indiana Law Journal* 83 (2008): 339–61; Lisa Hajjar, "Does Torture Work? A Sociolegal Assessment of the Practice in Historical and Global Perspective," *Annual Review of Law and Social Science* 5 (2009): 311–45; Leo, *Police Interrogation*.

88. Leo, *Police Interrogation*.

confessed after the FBI threatened to torture his family,<sup>89</sup> while media testimony from former detainees suggests that providing false information in response to coercive interrogation techniques may have been common.<sup>90</sup>

The second lesson is that torture spreads. In the era of the third degree, the use of torture expanded the range of objectives that police perceived they could achieve through interrogation. Although the purpose of interrogation in theory was to elicit truthful information to aid police in investigating crimes, under the third-degree regime, the purpose in practice became primarily to incriminate the accused by forcing confessions. Police were not discovering evidence so much as creating it through coercion. Police also often used the third degree to exact punishment and retribution, unleashing "revenge" beatings. In addition, police used the third degree to extract confessions that justified baseless arrests or illegal detentions, protected the identity of their informants, induced plea bargains, and compelled undesirables to leave town.<sup>91</sup> The third degree became an entrenched system of administering punishment and dispensing justice. By formally accusing suspects of criminal activity, police partially usurped the prosecutorial function of district attorneys; by adjudicating the guilt or innocence of suspects, police partially usurped the fact-finding function of juries; and by employing physical force or psychological duress against suspects, police partially usurped the punitive function of courts. The third degree thus expanded not only in quantity—by the 1910s and 1920s it had become a routine and integral part of everyday police work—but also in function.<sup>92</sup> It became a means through which police were able to transcend their limited fact-finding role, increase their power, and circumvent adversarial rules designed to prevent the concentration and abuse of police power.

In addition, torture spreads with regard to its geographic use; it spreads in terms of severity; and it spreads with regard to the categories of people against whom it is used.<sup>93</sup> In the war on terror, the first of these is evident in the employment of certain enhanced interrogation techniques that were originally authorized only for Guantanamo but that quickly emigrated to detention facilities in Afghanistan and Iraq.<sup>94</sup> While the government tried to

89. Mayer, *Dark Side*, 118.

90. Johnson and White, "Reports of Detainee Abuse Ignored."

91. Lavine, *Third Degree*.

92. John Conroy, *Unspeakable Acts, Ordinary People: The Dynamics of Torture* (Berkeley: University of California Press, 2000).

93. *Ibid.*; Leo, *Police Interrogation*.

94. US Senate Committee on Armed Services, *Inquiry into the Treatment of Detainees in U.S. Custody*, November 20, 2008.

limit especially harsh tactics to a single facility, such containment proved futile in practice. The movement of interrogators, interpreters, and other military and affiliated personnel between interrogation sites virtually ensured that methods approved for Guantanamo would diffuse beyond its borders.

Abusive interrogation practices also have a propensity to become increasingly cruel. Alberto Mora, former general counsel of the navy, has cited the phenomenon of "force drift," in which ever harsher methods are used to try to extract information from detainees. He explained in a critique of the Pentagon's interrogation practices that "the level of force applied against an uncooperative witness tends to escalate."<sup>95</sup> John Conroy, in his description of torture used by Israel in the late 1980s, has similarly described how Israeli soldiers who tortured gradually became "more difficult to control," resulting in increasingly vicious treatment.<sup>96</sup>

The categories of people who may be tortured also tend to expand. Conroy has written, for example, that in medieval Europe, while "children, the elderly, pregnant women, knights, barons, aristocrats, kings, professors, and, usually, the clergy" were generally exempt from torture, that changed as torture became more common.<sup>97</sup> More recently, Mayer has noted a similar phenomenon with secret renditions: while rendition was originally confined to a "small, discrete set of suspects," it quickly spread to include a much wider "and ill-defined population that the administration termed 'illegal enemy combatants.'"<sup>98</sup>

The third lesson is that torture corrupts.<sup>99</sup> In the era of the third degree, the use of torture encouraged police corruption and lawlessness at arrest, during interrogation, and at trial. American police illegally detained suspects in order to apply the third degree; circumvented the law requiring immediate arraignment by not booking the suspect until they first interrogated him or by not charging him so that they could hold him longer;<sup>100</sup> and violated the laws of arrest by "losing" the suspect for days, if not weeks, on end.<sup>101</sup> By coercing false confessions and false accusations, American police were illegally manufacturing false evidence. And the third degree encouraged police lawlessness in court as police perjured themselves to

95. Fletcher et al., *Guantánamo and Its Aftermath*, 23.

96. Conroy, *Unspeakable Acts*, 16; see also Chris Mackey and Greg Miller, *The Interrogators: Inside the Secret War against Al Qaeda* (New York: Little, Brown, 2005), 471–72, 476.

97. Conroy, *Unspeakable Acts*, 29–30.

98. Mayer, *Dark Side*, 108.

99. Leo, *Police Interrogation*.

100. Lavine, *Third Degree*.

101. Hopkins, *Our Lawless Police*.



ensure that judges would allow coerced confessions to be used. Police also knowingly suborned perjury from witnesses whom they had coerced into making false accusations and identifications. Although they were illegal, third-degree practices were almost always tolerated by police leaders, prosecutors, and judges. Coerced confessions were typically upheld in court, regardless of the methods police employed or the defendant's injuries.<sup>102</sup>

In the war on terror, interrogators have sometimes lost the ability to control when and where they torture<sup>103</sup> and have fallen victim to post-traumatic stress and other psychological ramifications. In addition, torture can corrupt not only individuals but also the underlying rationales of institutional policies and practices. A particularly famous example is that of the American Psychological Association, which notably prioritized the US government's desire to have psychologists participate in war on terror-related investigations over a more traditional understanding of psychologists' ethical obligation to "do no harm."<sup>104</sup> Torture has also corrupted the evidence-gathering process, rendering even accurate information inadmissible when wrongdoers are finally brought to court.<sup>105</sup> This is especially evident in the refusal by Susan Crawford, the Bush administration official in charge of the military commissions at Guantanamo, to prosecute Mohammed al-Qahtani because she had concluded that the interrogation techniques used on al-Qahtani included torture, and thus the information obtained from him was inherently unreliable.<sup>106</sup> While prosecutions were not a major concern of interrogators in the early years after 9/11, that concern grew as calls increased to prosecute those who remained at Guantanamo or else permit their release. The harsh tactics employed by post-9/11 interrogators boomeranged back to ensure that many of those detainees who should have been prosecuted potentially could not be, since information obtained by coercive means is usually inadmissible in domestic courts. The inability to effectively prosecute endangers society, befuddles our judicial system, and creates a quandary for the government, which must figure out what to do with those men who are believed dangerous but are virtually immune from domestic prosecution.

Rejali has persuasively argued that "clean" tortures are preferred by de-

102. Booth, "Confessions and Methods Employed in Procuring Them."

103. Rejali, *Torture and Democracy*, 524.

104. David Luban, "The APA Scandal," *Just Security*, July 13, 2015, accessed February 4, 2016, <https://www.justsecurity.org/24577/apa-scandal>.

105. Leo, *Police Interrogation*.

106. William Glaberson, "Detainee Was Tortured, a Bush Official Confirms," *New York Times*, January 14, 2009.

mocracies since they leave few marks and thus are less likely to threaten either prosecutions or government reputations. However, the use of physically coercive techniques has marred the US government's legitimacy, just as it did with police during the era of the third degree. Ultimately, interrogations involving torture and other illegal cruelty often go wrong because they (1) elicit false information and thus do not generate reliable information and/or (2) damage the reputation and thus the legitimacy of those who are sworn to uphold the law.<sup>107</sup>

Both negatives have resulted during the war on terror. First, detainees such as Ibn al-Shaykh al-Libi and Abu Zubaydah provided false information while tortured, an outcome that wasted US resources as false leads were pursued.<sup>108</sup> False information terrorized the American public in the wake of 9/11, as citizens were unnecessarily subjected to high-level alerts in response to faulty intelligence.

Second, the United States' reputation has suffered. As Mora warned, "there [have been] serving U.S. flag-rank officers who maintain that the first and second identifiable causes of U.S. combat deaths in Iraq—as judged by their effectiveness in recruiting insurgent fighters into combat—[have been], respectively, the symbols of Abu Ghraib and Guantanamo."<sup>109</sup> Abusive questioning has bruised the United States' integrity and unnecessarily endangered military and civilian lives. Ultimately, as reported in one article analyzing the effectiveness of torture, "[a]t a very high cost, the U.S. case confirms that torture does not work. . . . Its use spreads, its harms multiply, and its corrosive consequences boost rather than diminish the threat of terrorism."<sup>110</sup>

### B. Ways out

So what are possible ways out of the mess in which the United States has found itself? The government's earliest attempt, the revision of the Army

107. Ariel Neuman and Daniel Salinas-Serrano, "Custodial Interrogations: What We Know, What We Do, and What We Can Learn from Law Enforcement Experiences," in *Educating Information: Interrogation—Science and Art*, ed. Intelligence Science Board (Washington, DC: National Defense Intelligence College, 2005), 200, accessed January 10, 2012, <http://www.fas.org/irp/dni/educing.pdf>.

108. Andrew Sullivan, "One Tortured Lie: That's All It Took for War," *Sunday Times* (London), April 26, 2009.

109. Alberto J. Mora, *Statement of Alberto J. Mora, Senate Committee on Armed Services Hearing on the Treatment of Detainees in U.S. Custody*, June 17, 2008, accessed January 10, 2012, [http://www.fas.org/irp/congress/2008\\_hr/061708mora.pdf](http://www.fas.org/irp/congress/2008_hr/061708mora.pdf).

110. Hajjar, "Does Torture Work?," 336–37.

Field Manual—a handbook designed to guide military interrogation practices—is unlikely to facilitate much change on its own.<sup>111</sup> Although the manual was revised in 2006 to make torture less likely, “[t]he military’s traditional doctrine for acceptable interrogation tactics [already] explicitly forbade torture and other abuse. The field manual warned that coercion produced unreliable results, including false confessions,” yet coercion still occurred.<sup>112</sup> The danger, therefore, did not emanate from weaknesses in the field manual but from the gap that loomed between policy and practice.

Several factors that aided reform in the police context could help close that gap. As explained above, four factors contributed most to the demise of the third degree: (1) increasing recognition by police that it was counter-productive; (2) pressures from an emerging era of professionalism; (3) recognition of the problem by political officials; and (4) a Supreme Court decision, *Brown v. Mississippi*,<sup>113</sup> which outlawed torture and mandated change. Each offers important lessons for the war on terror.

First, harsh interrogation tactics may become obsolete as military interrogators and their civilian counterparts increasingly accept that there are more effective means of interrogation—for example, if they discover (or rediscover) that psychological methods of rapport building and persuasion are better at eliciting reliable, actionable intelligence than coercive techniques. There are certainly individuals within the FBI, CIA, and military who have argued this perspective; indeed, it was the debate *within* interrogation circles that initially brought many detainee abuses to light. Increasingly, this view is gaining ground among government and military actors, both because many sincerely believe rapport building is the more effective approach, and because it better reconciles with domestic and international prohibitions against torture.

Second, change can occur if interrogators are increasingly held accountable to legal norms that forbid coercive interrogation. This may take place in response to demands by human rights activists, academics, and others that government officials be prosecuted or otherwise sanctioned for the distorted legal analyses that authorized abuse.<sup>114</sup> Scholarship that demon-

111. *Human Intelligence Collector Operations*, Army Field Manual FM 2-22.3 (Washington, DC: Headquarters, Department of the Army, September 6, 2006).

112. Mayer, *Dark Side*, 189.

113. 297 U.S. 278 (1936).

114. The likelihood that US government officials will be legally sanctioned for torture-related practices any time in the near future (at least through international trials) is slim. For an overview of the legal and political challenges to this, see Eric Stover, Victor Peskin, and Alexa Koenig, *Hiding in Plain Sight: The Pursuit of War Criminals from Nuremberg to the War on Terror* (Berkeley: University of California Press, 2016).

strates the dangers of “torture-lite” techniques—which may not be illegal on their own but can quickly become so in the aggregate<sup>115</sup>—is also helping shift the moral, legal, and political acceptability of a range of previously “borderline” practices.

Third, coercive techniques will become less acceptable—and less frequently employed—as war on terror cases increasingly bleed over from a military regime into a domestic one, a process that began with detainees bringing habeas cases in Article III courts. Interrogators will face increasing pressure to meet domestic evidentiary standards, such as prohibitions against coerced confessions, in the face of strong institutional norms that decry torture.<sup>116</sup>

Fourth, the increased professionalization of interrogations by US forces could speed the demise of coercive interrogation practices, just as it did for American policing. A push to professionalize interrogation should lead to the development of norms that eschew abusive tactics in favor of more scientific methods. The US military has endured enormous criticism, both internally and externally, for assigning many of its least experienced and qualified interrogators to question detainees and providing them with grossly inadequate training.<sup>117</sup> The image of young, inexperienced interrogators struggling to elicit intelligence from the “worst of the worst” has strained the perceived competence and professionalism of the US military, its contractors, and civilian intelligence agencies. Indeed, some critics have suggested that because of pressures to hit the ground running,<sup>118</sup> few interrogators ever read any standard operating procedures focused on detainee treatment, which understandably limited their effectiveness. Refocusing interrogator training toward standard operating procedures, as well as relevant sections of the Army Field Manual, would be a simple and important step toward reform.

There have also been calls to create “highly trained and dedicated” interrogation specialists within the military structure, modeled after domestic law enforcement specialists such as hostage negotiators.<sup>119</sup> Most servicepersons are trained as generalists; this model would require expanded train-

115. See, e.g., K. Alexa Koenig, Eric Stover, and Laurel E. Fletcher, “The Cumulative Effect: A Medico-legal Approach to United States Torture Law and Policy,” *Essex Human Rights Review* 6 (2009): 145–68; Jennifer Wolfendale, “The Myth of ‘Torture Lite,’” *Ethics and International Affairs* 23 (2009): 47–61.

116. Kim Lane Scheppele, “Hypothetical Torture in the ‘War on Terrorism,’” *Journal of National Security Law and Policy* 1 (2006): 285–340.

117. See, e.g., Taguba, Art. 15-6 *Investigation of the 800th Military Police Brigade*, 10.

118. See, e.g., *ibid.*, 43.

119. Neuman and Salinas-Serrano, *Custodial Interrogations*, 233.

ing on effective and acceptable techniques. As pointed out by Chris Mackey, a former interrogator, and his coauthor Greg Miller, significant pressure to extract information from detainees in Afghanistan, combined with little guidance as to the most effective means to do so, became a dangerous recipe that resulted in abuse.<sup>120</sup> Increased specialization would help mitigate this danger by facilitating institutional memory and helping ensure that interrogators consistently employ techniques that are effective *and* legal.

Finally, systematic research into the efficacy of “harsh” interrogation techniques is desperately needed.<sup>121</sup> There is no public scientific consensus as to which interrogation techniques are most effective in a militarized context, where time is often of the essence and adrenaline runs high. The military, CIA, and FBI rarely permit observation and evaluation of their techniques by academics, but empirical research could identify especially effective interrogation strategies that walk on the “right” side of the law. It is especially critical that such institutions investigate cultural differences with respect to the effectiveness and propriety of various techniques. For example, with which cultural groups might shame versus fear or guilt-based tactics be most appropriate and/or effective?<sup>122</sup> And how are shame, fear, and guilt differently triggered among populations? Greater multicultural understanding would facilitate the attainment of accurate information and lessen the likelihood of both deliberate and inadvertently cruel treatment.

The beginning of the end of the third degree was signaled by official recognition that there was a problem. This occurred in three ways: through some police leaders arguing for change; through publication of the 1931 Wickersham Report, which publicly condemned the brutality that had permeated America’s police stations; and in the form of a Supreme Court case, *Brown v. Mississippi*, which established that confessions elicited through police torture would be inadmissible as evidence and thus placed official pressure on the police to change their practices to secure convictions.

The need for reform became widely evident just three years into the war on terror. One of the earliest official recognitions of problematic interrogations came in 2004 in the form of the Taguba Report, a military

120. Mackey and Miller, *Interrogators*.

121. See, e.g., Jean Maria Arrigo and Richard V. Wagner, “Psychologists and Military Interrogators Rethink the Psychology of Torture,” *Peace and Conflict: Journal of Peace Psychology* 13 (2007): 393–98 (noting a “scarcity of pertinent psychological knowledge to inform the public debate on the ethics of torture interrogation of terrorist suspects” and discussing the conclusion reached by several former US Army interrogators and research psychologists that, on the basis of the best-available qualitative data, “torture interrogation does not yield reliable information”).

122. Neuman and Salinas-Serrano, *Custodial Interrogations*, 232–33.

investigation into the abuse of prisoners at Abu Ghraib. Major General Antonio Taguba's confirmation that detainees had been hooked up to electrical wires, sodomized, beaten, dressed in women's underwear, and forced to publicly masturbate shocked the nation. That the report had been authored by a major general at the request of a senior military officer lent a credibility that burgeoning allegations by lawyers and human rights organizations had lacked. The report was later supplemented with reports issued by the Departments of Defense<sup>123</sup> and Justice<sup>124</sup> and the US Senate's Select Committee on Intelligence.<sup>125</sup> The United States could no longer deny that abuse had occurred.

Another powerful precipitator of reform came with the change in federal administrations in January 2009. President Obama announced just two days into his tenure that "the U.S. will not torture," signaling a renewed dedication to the rule of law, as well as to international and domestic norms that forbid abusive interrogations.

As for Supreme Court recognition, a series of cases—including *Boumediene v. Bush*,<sup>126</sup> which established the right of detainees to bring habeas claims in Article III courts—have potentially impacted post-9/11 interrogations almost as much as *Brown v. Mississippi* once did in a civilian context. At the very least, these cases have confirmed that the military, CIA, and FBI can no longer function as "total institutions" with respect to the war on terror, monopolizing the function of prosecutors, juries, and judges, just as police once did during the era of the third degree.

## Conclusion

Regardless of the specific paradigm in which it is enacted—police or intelligence—the logic of coercive interrogation is the same: the infliction of terror and pain to elicit compliance and extract admissions. As the United States' history with the third degree has demonstrated, abandoning abusive interrogation practices in favor of more professional approaches can strengthen institutional legitimacy, restore faith in systems of justice, improve morale, and result in more reliable intelligence.

Rejali has warned that "stopping torture requires a great deal more than

123. Office of the Inspector General of the Department of Defense, *Review of DOD-Directed Investigations of Detainee Abuse*, August 25, 2006; Department of Justice, *Review of the FBI's Involvement*.

124. Department of Justice, *Review of the FBI's Involvement*.

125. *Senate Intelligence Committee Report on Torture*.

126. 553 U.S. 723 (2008).

just monitoring. Among other things, it requires a public more literate in understanding what stealthy torture is, and state officials who recognize the wasteful, corrupting, misleading, and falsely consoling results that torture generates."<sup>127</sup> Remembering the United States' history with the third degree and transposing its lessons onto a modern, militarized context will help those charged with ensuring that the United States' post-9/11 interrogation program evolves into one that is more effective and more humane.

As the United States has discovered to its peril, organized torture "yields poor information, sweeps up many innocents, degrades organizational capabilities, and destroys interrogators."<sup>128</sup> Torture is also illegal, violates domestic and international norms, and, ultimately, does not work.<sup>129</sup> Change is needed. The United States' history with the third degree has confirmed that such change is possible and that the United States is capable of doing better.

127. Rejali, *Torture and Democracy*, 265.

128. *Ibid.*, 478.

129. Hajjar, "Does Torture Work?"; Bell, "Behind This Mortal Bone."

PART IV

The Ethics of Torture





# The Ticking Bomb Hypothetical

MARCIA BARON

## 1

Recent literature arguing for, or reaffirming, the impermissibility of torture has deplored the ticking bomb hypothetical and its frequent invocation. I have in mind in particular the work of David Luban and Henry Shue.<sup>1</sup> I share their views, by and large, but at the same time think that just what is so problematic about the hypothetical remains somewhat unclear.<sup>2</sup> This essay, while very much indebted to their work, aims to bring out more sharply how the focus on the ticking bomb hypothetical in the revived torture debates has led us astray.<sup>3</sup> I take issue not only with those who rely

1. David Luban, "Liberalism, Torture, and the Ticking Bomb," *Virginia Law Review* 91 (2005): 1425–61; David Luban, "Unthinking the Ticking Bomb," in *Global Basic Rights*, ed. Charles R. Beitz and Robert E. Goodin (New York: Oxford University Press, 2009), 181–206; Henry Shue, "Torture in Dreamland: Disposing of the Ticking Bomb," *Case Western Reserve Journal of International Law* 37 (2005): 231–39. See also Bob Brecher, *Torture and the Ticking Bomb* (Malden, MA: Blackwell, 2007); Claudia Card, "Ticking Bombs and Interrogations," *Criminal Law and Philosophy* 2 (2008): 1–15; Elaine Scarry, "Five Errors in the Reasoning of Alan Dershowitz," in *Torture: A Collection*, rev. ed., ed. Sanford Levinson (New York: Oxford University Press, 2005), 281–98; Kim Lane Scheppele, "Hypothetical Torture in the 'War on Terrorism,'" *Journal of National Security Law and Policy* 1 (2005): 285–340; Yuval Ginbar, *Why Not Torture Terrorists?* (Oxford: Oxford University Press, 2010).

2. This much, however, is very clear: employing the hypothetical to try to justify the use of torture by the United States during the administration of George W. Bush is deplorable. There torture was used (among other reasons, such as to humiliate, and to avenge killings) as a fishing expedition to uncover plots, *not* to prevent a ticking bomb from detonating. For more on the singular inappropriateness of trying to justify via the ticking bomb hypothetical the use of torture in the US "war on terror," see Scheppele, "Hypothetical Torture."

3. That there is some confusion about just what the point is in dismissing ticking bomb hypotheticals as "artificial" is evident from Oren Gross, "The Prohibition on Torture and the Limits of Law," in Levinson, *Torture*, 229–55 at 234.

on the hypothetical to defend the use of interrogational torture<sup>4</sup> but also with those who, while taking a much more nuanced view, insist on “the relevance and significance of the catastrophic case.”<sup>5</sup> Oren Gross writes that “there are two perspectives from which we ought to approach the question of the use of preventive interrogational torture, namely, the general policy perspective and the perspective of the catastrophic case. . . . We can only focus on one to the exclusion of the other at our peril.”<sup>6</sup> I see no peril in ceasing to take “the perspective of the catastrophic case.”

When I presented a version of this paper at a conference, some expressed perplexity at my attention to empirical facts. Perhaps the expectation, given my strong Kantian leanings, was that I would focus on moral principles and offer a Kantian argument against torture. But arguing against torture on Kantian grounds is unlikely to budge those who believe that moral opposition to torture needs to be tempered by (as they see it) realism. Indeed, one often comes across such phrases as “all but unabashed Kantians recognize” in discussions of torture, as in the following claim: “the fact that all but unabashed Kantians recognize the difficulties presented by extreme cases to any absolutist position is taken as further evidence that an absolutist position with respect to a ban on torture is untenable.”<sup>7</sup> To engage those who defend torture, or who believe that the ticking bomb hypothetical forces us to reconsider the ban on torture, it is crucial to meet them on their turf rather than invite them to consider the issue from a Kantian perspective.

4. My focus throughout this essay is on interrogational torture—that is, torture aimed at acquiring information crucial to preventing, or limiting the scope of, a catastrophe. I do not address instances of torture in direct self-defense or defense of others, where, say, someone is torturing my child and threatening to kill her, and for some reason the only way to get him to stop is to torture him (or his confederate . . . or his child). For discussion of such cases, see Sherry F. Colb, “Why Is Torture ‘Different’ and How ‘Different’ Is It?,” *Cardozo Law Review* 30 (2009): 1411–73. Nor do I consider torture for purposes of obtaining information that could then be used to convict (or defend) someone; I assume that readers of this volume would not regard that as worth considering. Even those who think that torture might very occasionally be permissible presumably would not want the criminal justice system to rely on information obtained by torture. More broadly, I assume that all readers of this volume, indeed all even moderately reasonable persons, agree that torture other than preventive interrogational torture or torture in direct self-defense—e.g., torture to extract confessions, exorcize demons, intimidate rebels, get revenge, or relieve boredom—is absolutely impermissible.

5. Gross, “Prohibition on Torture,” 239.

6. *Ibid.*, 239–40.

7. *Ibid.*, 231.

2

I begin by quoting two versions of the ticking bomb hypothetical, the first by an opponent of torture and the second by authors who defend it. Henry Shue presents it as follows in his classic 1978 article "Torture":

There is a standard philosopher's example which someone always invokes: suppose a fanatic, perfectly willing to die rather than collaborate in the thwarting of his own scheme, has set a hidden nuclear device to explode in the heart of Paris. There is no time to evacuate . . . the only hope of preventing tragedy is to torture the perpetrator, find the device, and deactivate it.<sup>8</sup>

Mirko Bagaric and Julie Clarke offer the following version:

A terrorist network has activated a large bomb on one of hundreds of commercial planes carrying more than three hundred passengers that are flying somewhere in the world at any point in time. The bomb is set to explode in thirty minutes. The leader of the terrorist organization announces this via a statement on the Internet. He states that the bomb was planted by one of his colleagues at one of the major airports in the world in the past few hours. No details are provided regarding the location of the plane where the bomb is located. Unbeknownst to him, he was under police surveillance and is immediately apprehended by police. The terrorist leader refuses to answer any police questions, declaring that the passengers must die and will shortly.<sup>9</sup>

The conclusion, as Bagaric and Clarke see it, is clear. "Who would deny that all possible means should be used to extract the details of the plane and the location of the bomb?"<sup>10</sup>

So, just what is problematic about the hypothetical? Doesn't it test our intuitions, getting us to question our commitment to a principle that torture is always wrong? The idea in putting forward the example, David Luban writes, is to "force the liberal prohibitionist to admit that yes, even . . . she would agree to torture in at least this one situation. Once [she] admits that, then she has conceded that her opposition to torture is not

8. Henry Shue, "Torture," *Philosophy and Public Affairs* 7 (1978): 124–43 at 141.

9. Mirko Bagaric and Julie Clarke, *Torture: When the Unthinkable Is Morally Permissible* (Albany: SUNY Press, 2007), 2.

10. *Ibid.*, 3.

based on principle. Now that [she] has admitted that her moral principles can be breached, all that is left is haggling about the price."<sup>11</sup> Luban goes on to say that the ticking bomb example "bewitches" us, and I think he is right, though just how it bewitches us is somewhat elusive. But I can also see that this would sound pretty lame to those who defend torture, as if when confronted by an example that clinches their case (as they see it), we protest that there is some unfairness, some trickery, that we are being bewitched. We seem to be dodging the problem. Shouldn't we have to answer their question and say whether or not we think that torture in such a situation is permissible?

I don't think we should have to. I also don't think that granting that torture might be permissible in extraordinary circumstances would weaken the prohibitionist's case in the way Luban's remarks suggest. But before we get to that, and before I explain in what ways the hypothetical has misled us, we need to be clear on what the problem isn't.

Those who take the ticking bomb hypothetical very seriously sometimes suppose that opposition to it is merely opposition to "artificial cases" or "fantastic examples" in general.<sup>12</sup> This is not entirely surprising. Although both Shue and Luban provide excellent reasons for seeing the ticking bomb hypothetical as problematic in a way that distinguishes it from most "fantastic examples," some of their remarks, at least if read out of context, may leave the impression that the ticking bomb example is of the same ilk as other "artificial cases." Luban remarks that "artificial cases" such as those of "fat men thrown in front of runaway trolleys, blown out of mineshafts with bazookas, or impaled on pitchforks as they fall from windows" are "deeply cartoonish."<sup>13</sup> Shue writes, "There is a saying in jurisprudence that hard cases make bad law, and there might well be one in philosophy that artificial cases make bad ethics."<sup>14</sup>

Artificial cases are not all of a kind. Some help us focus on key issues, while others distract us from the real issues or distort a reality they purport to depict (or both). The ticking bomb hypothetical is artificial and dangerously misleading in a way that the examples Luban refers to are not.<sup>15</sup>

11. Luban, "Liberalism," 1440.

12. See, e.g., Bagaric and Clarke, *Torture*, 3, where they write that "fantastic examples cannot be dismissed summarily merely because they are 'simply' hypothetical." I agree (but do not agree with the implication that opponents of torture dismiss the ticking bomb hypothetical solely on those grounds).

13. Luban, "Unthinking," 206.

14. Shue, "Torture," 141.

15. Clarification is in order concerning the content of the hypothetical. It is part of the content not only that a bomb will detonate soon unless we disable it and that we don't know

There may be reasons for objecting to them, but the problem I wish to bring out is not a problem they share.<sup>16</sup>

Just as it is not the sheer “cartoonishness” or “artificiality” of the examples that is the problem, the objection to the reliance on the hypothetical is not that ticking bomb scenarios are so rare that it is unwise to let them shape our general policy regarding the use of torture (though that is closer).

### 3

So what is the problem? Partly this: as Shue has explained, it is almost impossible to be in the position depicted in ticking bomb hypotheticals and also to know that one is in such a position. But once again it may sound as if the claim is only that the hypothetical is unrealistic, and why does that matter, when many hypotheticals are unrealistic? To understand why it matters in this case yet not in general and to see in what way this hypothetical is aptly said to “bewitch” us, we need to reflect on the role of hypotheticals in philosophical discussion and then examine how this hypothetical differs from others.

Normally when we are presented with a hypothetical, we accept it as a hypothetical and focus attention on whatever the person presenting the hypothetical asks us to consider. It is bad form to ask, “Does it really work that way?” We are expected to accept the hypothetical as such. But if we do so, granting it for the sake of discussion, we may be granting assumptions that are highly implausible. Often in philosophy it doesn’t matter that we are granting highly implausible assumptions for the sake of discussion; we

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where it is, but also that (a) we cannot find out in time except by torturing someone we have in captivity, (b) torturing him or her will indeed enable us to prevent the catastrophe, and (c) we know this. The clarification is needed because some respond to claims that the hypothetical is extremely implausible by saying there is no doubt that ticking bomb scenarios do occur, pointing in support of their claim to a case where a suicide bombing was averted but where (not only was the bomb not yet ticking, but more importantly) there is no indication that torture was used in the interrogation that led to the disclosure of the planned bombing, let alone that torture was needed (and, moreover, known to be needed). See, e.g., Stephen de Wize, review of *The Torture Debate in America*, ed. Karen Greenberg, *Democratiza* 7 (2006): 10–36, esp. 21.

16. Allen Wood has claimed in conversation that some of the problems I single out as problems with the ticking bomb hypotheticals also afflict trolley examples. I do not think that is the case with the original example by Foot and the ensuing discussions by J. J. Thomson, but it may be true of some of the more recent work on (and distortions of the original) trolley problem. For a critical discussion of trolley problems, see Allen W. Wood, “Humanity as End in Itself,” in *On What Matters*, by Derek Parfit, vol. 2 (New York: Oxford University Press, 2011), 58–82.

bracket one thing in order to focus on another. With many hypotheticals, it is fruitful to do so. There is something to be gained by thinking about the issue without worrying about the details that we are agreeing not to question. The fantastic examples may provide (as they do in Judith Jarvis Thomson's "A Defense of Abortion")<sup>17</sup> a way to disentangle the various arguments against a particular practice or policy or individual choice and examine them more clearheadedly. In the case of the ticking bomb hypothetical, however, it is hard to see why it would be helpful to set aside relevant facts about torture, when the matter under discussion is the moral permissibility of the practice of interrogational torture.

In many discussions involving an implausible hypothetical, the person proffering it is not claiming or assuming that this is in fact something that happens (or that we had better be prepared to see happen or, if it is something we might want to see happen, that we can bring about). With the ticking bomb hypothetical, things are different; yet we may, if we treat the hypothetical as one normally treats a hypothetical, fail to recognize this. We may, in effect, be tricked by the ticking bomb hypothetical into thinking that we are only accepting it as a hypothetical when in fact we are being led to view torture in a wholly inaccurate way.

It should now be somewhat clearer why the ticking bomb hypothetical is problematic in a way that other "artificial cases" are not, but more needs to be said to bring out how the former differs from the latter. Recall the runaway trolley, the fat man wedged in the mouth of a cave, the kidnapped violinist, and the people seeds that can drift into homes and take root in the upholstery. Or consider the cases involving killing someone—or, in another case, helping a starving person to die—so that his body can be used for medical research or for "spare parts" or for making a serum from his dead body that will save several lives. Imagine someone objecting to one of the medical examples by saying, "Wait a minute, is it really possible to make a serum from someone's dead body that would then save several lives?" We would reply, "Don't worry about that; it doesn't matter whether it is possible," and would explain (supposing that we are discussing Philippa Foot's "Abortion and the Doctrine of Double Effect")<sup>18</sup> that Foot's point was to contrast (a) our view that killing or allowing someone to die in order to save several people is clearly wrong, to (b) our reaction to a case where a decision is made to withhold a lifesaving drug that is in

17. Judith Jarvis Thomson, "A Defense of Abortion," *Philosophy and Public Affairs* 1 (1971): 47–66.

18. Philippa Foot, *Virtues and Vices* (Berkeley: University of California Press, 1978), chap. 2.

short supply from a patient who requires a massive dose and instead to give it to several people who also require the drug but for whom a much smaller dose will suffice. Note that her point in doing this was not to convince us of the wrongness or rightness of one medical policy or another. For this reason, her use of “fantastic examples” is strikingly different from the use to which the ticking bomb hypothetical is put. Her aim, rather, was to consider whether the Doctrine of Double Effect or a different principle better accounts for our judgments about such cases.

In the essays from which I have drawn these examples—Foot’s “Abortion and the Doctrine of Double Effect” and Thomson’s “A Defense of Abortion”—there is a distance between the example and the point in support of which the example is put forward, a distance that we do not have between the ticking bomb hypothetical and the claim it is intended to support. The relation in Foot’s and Thomson’s papers between the example and the intended point is such that it makes no difference at all that the example is artificial, or unrealistic. But because the ticking bomb hypothetical is intended to weaken our commitment to prohibitions on torture and lend support to a (possibly very limited) practice of torture, it does indeed matter whether the hypothetical is realistic. Yet, perhaps because normally we do not question the realism of a hypothetical, many people pay little attention to whether the ticking bomb hypothetical is at all plausible.

#### 4

Let’s look more closely at a couple of versions of the ticking bomb hypothetical—versions put forward by those who believe the hypothetical should be taken seriously—to see in what way it is unrealistic and in what way its being unrealistic leads us astray.

Recall the Bagaric and Clarke example. There we are asked to envision a situation where a leader of a terrorist organization has announced that a bomb has been placed on a passenger jet. The jet is now in flight, and the bomb is set to go off in thirty minutes. The terrorist leader was already under surveillance; we are asked to imagine that he is therefore apprehended quickly. We are to accept that he knows where the bomb is, that by torturing him (but by no other means<sup>19</sup>) we can extract the necessary

19. Bagaric and Clarke do not specify that no other means will be effective, though their claim that “the terrorist leader refuses to answer any police questions” (*Torture*, 2) seems intended to indicate this. It is possible that they think that we should use an assortment of techniques, torture included, with the idea that by using “all means” we increase our chances of extracting the information. But success is not increased by increasing the number of means used.



information, that the pilots can then be contacted, and that it will be possible either to quickly land and evacuate the plane or to locate the bomb on the plane and defuse it—all in less than thirty minutes. We are to accept, in short, that torture is the solution, and that the only thing standing in the way of saving the lives of over three hundred people is our moral scruples.

Or consider a version of the ticking bomb hypothetical put forward by Jean Bethke Elshtain. In her version, a bomb has been planted in one of several hundred elementary schools in a particular city. We don't know which school, but we are virtually certain that we have apprehended someone who not only is part of the plot but also knows in which school the bomb has been placed. The bomb is to go off within the hour. Officials know, Elshtain writes, that "they cannot evacuate all of the schools."<sup>20</sup> Curiously, it is considered a much surer thing to torture the suspect, extract the information, and then evacuate the school in question. If there is time to evacuate the school in question after the torture has extracted the information, why not skip the torture and immediately evacuate all the several hundred schools? That would be a much surer way to prevent loss of life.

These versions of the hypothetical stand in stark contrast to such cases as the runaway trolley and the drifting people seeds. To make sense of the hypothetical, we accept, perhaps without fully realizing we are doing so, that torture works, works very quickly, in some situations is the only thing that will work,<sup>21</sup> and, moreover, that we can know when we are in a situ-

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Using torture seriously undermines the effectiveness of Army Field Manual techniques, since these are based on establishing some rapport. See Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (New York: Doubleday, 2008); Darius Rejali, *Torture and Democracy* (Princeton, NJ: Princeton University Press, 2007); Sherwood Moran, "Suggestions for Japanese Interpreters Based on Work in the Field," excerpted in *The Phenomenon of Torture: Readings and Commentary*, ed. William F. Schulz (Philadelphia: University of Pennsylvania Press, 2007), 249–54. Someone might hold that torture can be justifiable other than as a last resort, but I do not think that view worth discussing and so do not take it up here. See also n. 21, below.

20. Jean Bethke Elshtain, "Reflection on the Problem of 'Dirty Hands,'" in Levinson, *Torture*, 77–89 at 78.

21. This assumes that we regard torture as something to be avoided if at all possible. Of course, if one thinks that terrorists deserve to be tortured, it may not seem necessary, to justify torture, that it be the only way to prevent a catastrophe; it will matter more that we not make mistakes and torture someone who, whether or not he or she has the information we need to prevent the catastrophe, is not a terrorist (or someone else they think deserves to be tortured). The current front-runner for the 2016 Republican nomination for the US presidency, Donald Trump, recently spoke to the issue. After declaring (in November 2015) that he would bring back waterboarding "in a heartbeat" because "it works," he added that if it doesn't work, "they deserve it anyway for what they do to us." In the February 6, 2016, Republican presidential debate, he added that he would "bring back a hell of a lot worse than waterboarding." See "Presidential Candidates Compete over Their Embrace of Torture," *Economist*, February 13, 2016.

ation where torture, and only torture, will prevent a disaster. If we do not accept these assumptions, we will find the hypothetical baffling; if we accept it as a hypothetical and do not question the assumptions, most of the important issues about the moral permissibility of the practice of torture have been taken off the table. The only thing that has not been taken off the table is moral principles condemning torture; concern about these, however, is dismissed as a sort of prissiness, or moral narcissism.<sup>22</sup>

The ticking bomb hypothetical asks us to forget about the fact that we do not know that our prisoner actually has the information we need and to ignore all the evidence that even if we do have the right person, torture is generally ineffective—certainly unreliable—as a way of obtaining the information we need.<sup>23</sup> It invites us to conceive of torture as in effect a truth serum. Indirectly, it also prods us to ignore the evidence that torture is very difficult to contain. I'll say more about this shortly.

## 5

The ticking bomb hypothetical is marred by the very feature that is supposed to make it so compelling: that there is no time to lose. Torture is particularly unlikely to work when the bomb will go off within thirty minutes, or even a couple of hours. A determined terrorist is likely to be able to withstand the torture until the bomb goes off, and even this isn't necessary,

22. Case in point: Elshtain ("Reflection," 80–81) asks us whom we would want in a position of judgment in her hypothetical. Would we prefer a "person of such stringent moral and legal rectitude that he or she would not consider torture because violating his or her own conscience is the most morally serious thing a person can do? Or a person, aware of the stakes and the possible deaths of hundreds of children, who acts in the light of harsh necessity and orders the prisoner tortured? This second leader," Elshtain adds, "does not rank his or her 'purity' above human lives."

23. See, among other sources, Rejali, *Torture and Democracy*, esp. chaps. 21–22; John W. Schiemann, *Does Torture Work?* (New York: Oxford University Press, 2016); the Senate testimony of former FBI agent Ali Soufan (who obtained extremely important information without using "enhanced" techniques and saw effective interrogations ruined when another agent insisted on torturing the detainee), Committee on the Judiciary, US Senate, May 13, 2009 (hereafter Soufan, "Testimony"), accessed November 27, 2012, [http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da14945e6&wit\\_id=e655f9e2809e5476862f735da14945e6-1-2](http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da14945e6&wit_id=e655f9e2809e5476862f735da14945e6-1-2) (this link is no longer available, but the following one is, as of June 26, 2017: [https://fas.org/irp/congress/2009\\_hr/051309soufan.pdf](https://fas.org/irp/congress/2009_hr/051309soufan.pdf)), and his 2009 *New York Times* op-eds, "My Tortured Decision," April 22, 2009, and "What Torture Never Told Us," September 5, 2009; Mayer, *Dark Side*; Jean Maria Arrigo, "A Utilitarian Argument against Torture Interrogation of Terrorists," *Science and Engineering Ethics* 10 (2004): 1–30; *Intelligence Interrogation*, Army Field Manual FM 34-52 (Washington, DC: Headquarters, Department of the Army, September 28, 1992).

since naming the wrong flight or school is as likely to end the torture as is naming the correct one.

A defender of torture might concede this and put forward a different hypothetical, where there is more time. But when there is time for torture to have a somewhat better chance of working,<sup>24</sup> there is also time to try to gain the captive's trust; when one does, one generally learns far more than when one tortures. Some defenders of torture, for example, Charles Krauthammer, find such suggestions preposterous; one would almost think from their scoffing that intelligence is generally obtained only via torture.<sup>25</sup>

Readers accustomed to, and perhaps influenced by, such scoffing might find it helpful to hear something about how interrogators can successfully interrogate without relying on violence, humiliation, degradation, and in general breaking the person down so fully that (if he survives intact enough to be able to remember the information and communicate it) he blurts out whatever the interrogator wants to hear (which defenders of torture assume will be something true). Given space limitations, a brief summary drawn from Ali Soufan's Senate testimony will have to do.<sup>26</sup> The

24. Only somewhat, however, and only at enormous cost. It has a better chance of working in part because time provides an opportunity to interrogate many other people and thereby confirm or disconfirm the information obtained. But once the notion that torture is the most effective way of obtaining information has taken hold, there is now an incentive for torturing an ever-increasing number of people, and over a long period of time. As torture becomes an ongoing activity, torturing those whom one has no good reason to think have valuable information becomes increasingly common. For a vivid picture, see the literature on the use of torture by the French in Algeria; e.g., Rejali, *Torture and Democracy*, chap. 22, part of which is published, with some modification, as "Does Torture Work?," in Schulz, *Phenomenon of Torture*, 256–65.

Worth noting, too, is that it is not as if detainees will have reason to figure that any misinformation they provide will be easily detected; some misinformation will be hard to detect, particularly by agents focused on torturing rather than on understanding the political situation. One tactic when pressed for names of those plotting terrorist attacks is to name members of a rival, more moderate group. The effect is that those who might have helped to develop a compromise and end the violence are themselves destroyed or radicalized by torture; support for the more extremist, more violent group thus increases. This strategy was employed by the Algerian FLN. As Rejali ("Does Torture Work?," 256) writes, the French soldiers, knowing little about the subtleties of Algerian nationalism, "helped the FLN liquidate the infrastructure of the more cooperative organization and tortured MNA members, driving them into extreme opposition."

The other reason that prolonged torture is more likely to work than is brief torture is that it is more likely to "break" the captive. Not to be forgotten, though, is that the captive may well not have the information sought and, if she does, may be so damaged by the torture as to be unable to recall or articulate the information. The particular horrors of prolonged torture need to be borne in mind here; they are hard to fathom, but we can get some sense of them from the film *Taxi to the Dark Side* (2007) and from memoirs of those who survived torture.

25. Charles Krauthammer, "Torture? No. Except . . .," op-ed, *Washington Post*, May 1, 2009.

26. Readers wanting more detail might read the full text of his statement in Soufan, "Testi-

"Informed Interrogation Approach," Soufan explains, is based on the following: the interrogator turns "the fear that the detainee feels as a result of his capture and isolation from his support base" and the fact that people "crave human contact" to his advantage, "becoming the one person the detainee can talk to and who listens to what he has to say, and uses this to encourage the detainee to open up." In addition, the kindness he shows the detainee takes the detainee by surprise, as the detainee is (typically) trained to resist torture but not trained to resist kindness. (Soufan's offer of sugar-free cookies to Abu Jandal, whom he knew to be diabetic, is but one example of the many ways he established the rapport that quickly led Jandal to share with him extensive information, just after the September 11, 2001 attacks, on both the hijackers and the structure of al-Qaeda.) The interrogator also takes into account "the need the detainee feels to sustain a position of respect and value to [the] interrogator." In addition, "there is the impression the detainee has of the evidence against him. The interrogator has to do his or her homework and become an expert in every detail known to the intelligence community about the detainee." This serves both "to impress upon the detainee that everything about him is known and that any lie will be easily caught" and to establish rapport.<sup>27</sup> Such expertise of course is also important in other ways: without it, the interrogator is less likely to ask the right questions and to pick up on details that otherwise might not seem significant.<sup>28</sup>

## 6

I mentioned that the ticking bomb hypothetical encourages us to view torture as something easily contained. It suggests that torture can happen just

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mony." See also Michael Isikoff, "We Could Have Done This the Right Way': How Ali Soufan, FBI Agent, Got Abu Zubaydah to Talk without Torture," *Newsweek*, April 25, 2009; the film *The Oath* (dir. Laura Poitras, 2010); Moran, "Suggestions for Japanese Interpreters," 249–54; Scott Pelley's interview with George Piro about his interrogations of Saddam Hussein, *60 Minutes*, January 27, 2008, accessed February 1, 2012, <http://www.cbsnews.com/video/watch/?id=4758713n&tag=mncol;lst;3>; Rejali, *Torture and Democracy*.

27. In his first interrogation of Zubaydah, Soufan ("Testimony") asked him his name; Zubaydah replied with his alias, and Soufan responded, "How about if I call you 'Hani'?" ("Hani" being the name Zubaydah's mother nicknamed him as a child). "He looked at me in shock, said 'ok,' and we started talking," Soufan recounts.

28. The need for interrogators to be very knowledgeable was put more starkly by an unnamed former CIA operative whom Mayer (*Dark Side*, 144) quotes. Lamenting the interrogations in Afghanistan by people with "no understanding of Al Qaeda or the Arab World," the operative emphasized that "the key to interrogation is knowledge, not techniques. We didn't know anything. And if you don't know anything, you can't get anything."

once, just for this particular emergency, without there being a practice of torture and without torture ever being used again. But it is seriously misleading to speak of a single instance of torture, necessary only for this one emergency.

There are two reasons for this. To have any prospect of even occasional success, interrogational torture requires, *inter alia*, training, manuals, equipment, practice at torturing, personnel to assist in torturing, and medical personnel to revive the detainee as needed and to advise on limits that need to be observed lest the torture result in death or another state that precludes extracting the needed information. So although it would be an exaggeration to say that torture is impossible except as part of a practice of torture, we have to assume that torture defended on the grounds that it may be necessary for obtaining information needed to prevent a ticking bomb from detonating will be not a "one-time" use of torture but part of a practice. Any attempt to justify interrogational torture for use only in rare circumstances will also either be, or require, a justification of torture as a practice.

The second reason why torture needs to be viewed as a practice concerns not what has to have preceded it if the contemplated torture is going to have any chance of being effective, but what follows in its train. As Rejali has meticulously documented and Shue, Luban, and others have elaborated, it is virtually impossible to limit torture to just one instance. Even when the plan is to allow it in only very rare instances, soon other situations arise where a catastrophe looms, even if not quite as huge a catastrophe, and torture is deemed necessary there, too; and then, as we saw in the conduct of the United States in recent years, it is pointed out that we cannot afford to wait until there is a ticking bomb and need to uncover terrorist plots before they are executed (a sound thought so far!), and to that end—given the seriousness of the calamity if we do not prevent it—we must employ "enhanced techniques" of interrogation as an ongoing part of our war on terror.

Torture spreads. Soldiers bring it home, where it is used in police interrogations and by prison guards.<sup>29</sup> Torture intended only for very limited use (e.g., in Guantanamo) soon shows up in US-run prisons in Iraq and Afghanistan.<sup>30</sup> It spreads not only geographically but also from one accepted

29. See Rejali, *Torture and Democracy*, 436, 178–80.

30. For details, see Scheppele, "Hypothetical Torture"; Mayer, *Dark Side*. See also Spencer Ackerman, "The Disappeared: Chicago Police Detain Americans at Abuse-Laden 'Black Site,'"

purpose to a purpose that initially was not seen as justifying it. As the torture equipment, training, and personnel expand and reports of the use of torture spread, torture becomes “normalized,” and the range of instances where torture is deemed necessary (or even just “worth a try”) expands. The more torture is viewed as the best way to get crucial intelligence, the more techniques that unlike torture are effective languish, and intelligence-gathering skills deteriorate. Torture is then relied on all the more.<sup>31</sup> In addition, torture initially justified only for intelligence gathering is soon used to express a sense of mastery, to humiliate, and to get the captive to say what one wants to hear (possibly to provide a pretext for some military action<sup>32</sup> or to justify action already taken).

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It might be objected that I have chosen to examine versions of the ticking bomb hypothetical that are stunningly stupid. It is true that they are—especially the one about the school. But that itself tells us something. It is very telling that those who take the hypothetical so seriously do not even notice that in the scenario they draw up, either the time frame is such that torture hardly stands a chance of working in time (as in the example of the bomb on the plane) or there is another, far better solution, not involving torture (as in the case of the schools, where immediate evacuation of all the schools would be a much surer way of saving lives than torturing first and then, relying on whatever one elicited from the captive, evacuating only the school in question). It is evidence of how mesmerized people are by the idea of a ticking bomb scenario that people with JDs or PhDs and a record of excellent scholarship can commit such a blunder. More specifically, it is evidence of the readiness on the part of many intelligent people to see

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*Guardian*, February 24, 2015, <http://www.theguardian.com/us-news/2015/feb/24/chicago-police-detain-americans-black-site>.

31. A further factor, difficult to assess, is that torture, according to some who have taken part in torturing or in torture “exercises,” is often quite intoxicating. See Jane Mayer, “The Experiment,” *New Yorker*, July 11, 2005; see also Rejali, *Torture and Democracy*, 457, 486–87.

32. See Mayer, *Dark Side*, chaps. 6–7, and in particular her discussion of the interrogation of Ibn al-Shaykh al-Libi, who was speaking freely with FBI agents interviewing him in the traditional “rapport-based” way, but then was forcibly removed by the CIA and taken to Egypt. There, under torture, he said what he gathered they wanted him to say and thus provided the “intelligence” CIA director George Tenet relied on when he told Secretary of State Colin Powell that al-Qaeda and Hussein’s secret police trained together in Baghdad, and that chemical and biological weapons were involved (137). See also the discussion of al-Libi in Rejali, *Torture and Democracy*, 504–5.

torture as the best solution (if moral issues are set to one side), the most effective way to deal with terrorism (at least when time is of the essence). The mindless way the topic of torture is discussed itself deserves our attention, and is part of the reason why Luban's hyperbolic claim that the ticking bomb hypothetical has bewitched us is apt.

Still, we might ask if these are just poor versions of the ticking bomb hypothetical. Will a better version avoid the problems I have noted? Interestingly enough, Shue's version fares somewhat better than those put forward by supporters of torture. In his version, it is an entire city that will be blown up, not just a school, so evacuation is not a very serious option (depending on the time frame, which is not indicated). Still, it is hard to imagine—even if we somehow know that we have the (or a) perpetrator and that the perpetrator knows where the bomb is—that we know with a reasonable degree of certainty that torture will extract the information and do so in time for the bomb to be located and deactivated. If the terrorist is determined that the bomb go off, he is more likely to hold out or lie or otherwise gain time than to tell the truth.<sup>33</sup> This and other points made above apply to thoughtfully crafted ticking bomb hypotheticals, not only to Elshtain's and to Bagaric and Clarke's.

It may be countered that torture has worked—that there have been real ticking bomb scenarios, where torture succeeded in extracting the necessary information in time, where the bomb really would have gone off had the information not been extracted, and where there is very good reason to believe that nothing else would have worked. Careful scrutiny of the cases calls this into question. In a case that defenders of torture often cite, that

33. And if he does cave in and release the information, chances are that it is no longer accurate, since when terrorists suspect that one of their cohort is in custody, they generally alter their plans and their own locations (Rejali, *Torture and Democracy*, 61). This is a consideration worth bearing in mind in assessing claims one often hears along the following lines (drawing here from Jeff McMahan's "Torture, Morality, and Law," *Case Western Reserve Journal of International Law* 37 [2006]: 241–48 at 244): in some instances in which Israeli security forces captured persons in the process of making or transporting bombs, those captured were then "tortured in order to force them to divulge information about other attacks . . . planned for the future." The information thereby obtained "then enabled the security forces to take preemptive action to thwart the planned attacks." This may be just what happened; it is hard to say because no specifics are provided. But given the standard practice of altering plans when one of their cohort cannot be reached and is presumed to be in custody, one wonders if what thwarted the planned attacks was perhaps simply the capture of someone involved in and informed about the plan, rather than the intelligence gleaned through the torture. Nothing in McMahan's description gives us reason to think that the attacks would have taken place had it not been for the torture. Perhaps, in keeping with what Rejali explains, the terrorists dropped their plan because they knew or suspected that some of their cohort had been captured.

of Abdul Hakim Murad, the torture—sixty-seven days of it!—may possibly have played a role in gleaning the information, though it seems unlikely. The information was provided not under torture but only afterward, when a new team of interrogators posed as Mossad agents and told Murad they were taking him to Israel.<sup>34</sup> But even supposing the torture was a significant contributing factor, it was completely unnecessary, because the information he provided was on his laptop, and the laptop was in the possession of the interrogators the entire time they were torturing him. Not only was it unnecessary to torture him—and let's bear in mind that this went on for sixty-seven days—but the information could have been obtained much more quickly had they not been intent on torturing and had instead employed proper procedures for gathering intelligence.<sup>35</sup> As Rejali observes, the interrogation of Murad is a textbook case of "how a police force is progressively deskilled by torture."<sup>36</sup> In another case often cited to show that torture does indeed work, Abu Zubaydah in fact revealed valuable information<sup>37</sup> *not* under torture but when a new interrogator discontinued the torture and persuaded Zubaydah that it was his religious duty to disclose the requested information.<sup>38</sup>

Rather than discuss further the question of whether there have been any authentic ticking bomb scenarios—where torture thwarted a major disaster that could not have been thwarted otherwise, and where those deciding to use torture believed on good evidence that torture and only torture would do the trick—I want to shift my focus and ask this question: suppose there really have been authentic ticking bomb scenarios. Or, even if there haven't been such cases, suppose there can be. What would that show?

I raise this question in part because I note in some of the literature with which I sympathize an eagerness to deny that a ticking bomb scenario could ever happen. The worry is that if we concede that it could, we'll be

34. Rejali, *Torture and Democracy*, 507.

35. Ibid.

36. Ibid. Another instructive example is that of an Algerian locksmith arrested by the French and tortured for three days. He had in his pocket "bomb blueprints with the address of an FLN bomb factory in Algiers." The "locksmith bought time, the bombers relocated, and the French raid three days later fell on open air." "Had the soldiers been able to read Arabic, they would have found the bomb factory days earlier," and had they not been focused on torturing, they could have sought help with the Arabic. Ibid., 486.

37. Such as it was; the value of the information Abu Zubaydah provided is a matter of dispute. See Luban, "Unthinking," 189–90.

38. Ibid., 189. For more on the interrogation of Zubaydah, see Schiemann, *Does Torture Work?*; Soufan, "My Tortured Decision." Soufan was one of Zubaydah's interrogators.



asked whether it is permissible to torture in such circumstances. And then, it is thought, we are in trouble. Luban writes (as noted above) that the idea in putting forward the ticking bomb hypothetical is to “force the liberal prohibitionist to admit that yes, even . . . she would agree to torture in at least this one situation. Once the prohibitionist admits that, then she has conceded that her opposition to torture is not based on principle. Now that [she] has admitted that her moral principles can be breached, all that is left is haggling about the price.”<sup>39</sup> In the article I am quoting, it is not entirely clear whether Luban is agreeing that the concession really is this significant or simply explaining a strategy. But in his “Unthinking the Ticking Bomb,” he makes it clear that he does think it quite significant: “After making the initial concession, any prohibition on torture faces significant dialectical pressure toward balancing tests and the unwelcome . . . conclusion that interrogational torture can be justified whenever the expected benefits outweigh the expected costs.”<sup>40</sup>

But the problem is not as serious as that suggests. Switch for a moment from torture to rape. Suppose that in some very bizarre scenario, perhaps involving a demented character like Jack D. Ripper from *Dr. Strangelove*, a horrible catastrophe—the detonation of nuclear bombs—could be prevented only by raping or abetting a rape. (If it helps, add to the example that one has to rape a child and has to do so in front of the child’s family and one’s own family.) We do not in any way deny that rape is impermissible—nor do we deny that our objection to it is based on principle—if we do not rule out the possibility that were this absolutely the only way to prevent a horrific catastrophe, and we knew it would prevent it, choosing to do so would not be wrong in those circumstances. The categories countenanced by Luban are too limited. It is not as if believing that X is wrong on principle—even horribly wrong—entails denying that there could be a scenario in which X would be a permissible choice. Allowing that there could be does not commit one to the view that X can be permitted anytime the benefits of permitting it outweigh the costs.<sup>41</sup>

39. Luban, “Liberalism,” 1440.

40. Luban, “Unthinking,” 198.

41. It is worth noting here that Kant, despite his position that suicide is impermissible, raised the following question, to which he did not offer an answer: “A man who had been bitten by a mad dog already felt hydrophobia coming on. He explained, in a letter he left, that, since as far as he knew the disease was incurable, he was taking his life lest he harm others as well in his madness (the onset of which he already felt). Did he do wrong?” Immanuel Kant, *The Metaphysics of Morals*, ed. and trans. Mary Gregor (New York: Cambridge University Press, 1996), 178 (AK 6:423–24).

We are expected to be prepared to answer questions about whether we would torture, or want others to torture, in a ticking bomb scenario, yet are not expected to answer questions about whether we would be willing to rape someone, or order or abet a rape, if that were necessary to prevent a catastrophe of massive proportions. Both scenarios are very unlikely, but torture is treated differently. I believe it is treated differently only because we are still bedeviled into thinking that torture is generally effective, and that therefore in a ticking bomb scenario, or perhaps even in a situation where we think there may be plans to bomb a city, torture is—from a strictly pragmatic standpoint—your best bet for obtaining the crucial information. We have not fully abandoned the idea that torture will work when nothing else will. Despite the fact that most of us really do know better, torture retains its status as the method of choice—as what you’ll do if you really want to get the job done.

8

I have tried to bring out what is so misleading about the ticking bomb hypothetical, in the context of a discussion of the practice of interrogational torture, and to show that it is problematic in a way that other hypotheticals—the runaway trolley, etc.—are not. The latter in no way rely for their effectiveness on the case being realistic, whereas the ticking bomb hypothetical does. Relatedly, the ticking bomb hypothetical takes off the table most of the objections to torture, in effect asking us to ignore such facts as that torture is (1) a very unreliable way to gather intelligence; (2) very difficult to contain; and (3) particularly unlikely to succeed if it is not part of an ongoing practice, involving assistants, equipment, and extensive training.<sup>42</sup> It is thus not well suited to a “one-time” or very occasional use envisioned by those who think it justifiable in ticking bomb scenarios.

I realize that some may find there to be something chilling about my attention to these pragmatic considerations, and in closing I want to emphasize that nothing I say should be construed as an indication that I think torture would be morally defensible if only it did work. As I noted at the outset, arguing against torture by focusing on its moral wrongness is very unlikely to budge those I hope to engage. Some defenders of torture believe

42. Reminder: I am speaking here only of torture as a way to gather intelligence. See n. 4, above.

that morality requires that we use torture in such a ticking bomb scenario; others do not, but hold that moral principles—or “scruples”—are a luxury that we cannot afford in an (extreme) emergency. What is needed to convince those inclined to either position is to show how very misleading the ticking bomb hypothetical is.<sup>43</sup>

43. I am grateful to Scott Anderson, Sandra Shapshay, and Allen Wood for helpful comments, and to discussants at conferences at the University of Chicago Law School (2008) and at Washington University (2008) for stimulating discussion of earlier drafts of this essay. Thanks are owed as well to Darius Rejali for helpful e-mail exchanges. Some of the work on this essay was done during my tenure as a National Endowment for the Humanities fellow; I gratefully acknowledge the support of NEH. This essay was completed in 2010; the editorial process was a slow one. In the interim, a slightly different version was published: “The Ticking Bomb Hypothetical,” in *Disputed Moral Issues*, 3rd and 4th eds., ed. Mark Timmons (Oxford: Oxford University Press, 2014/2017). In making final revisions in 2016 I have not been able to engage as fully as I would have liked with the many new books and articles that have been published since I completed my essay.

# Torture and Method in Moral Philosophy

JEFF MCMAHAN

Of the six philosophers who spoke at the conference at which a number of the essays in this book were presented, two devoted their talks to advancing objections to the hypothetical example known as the “ticking bomb case.”<sup>1</sup> In doing so, they joined a large chorus of distinguished contemporary moral and political philosophers who have criticized the use of that example.<sup>2</sup> The conference’s keynote speaker, Albie Sachs, went further by repeatedly criticizing all uses of hypothetical examples in philosophical discussions of torture. In the first part of this essay, I will offer some reflections on these protests against the use of the ticking bomb case and other hypothetical examples, or thought experiments, in debates about the morality of torture. In the second part, I will explore the ways in which certain distinctions in normative moral theory, the significance of which is usually demonstrated through the use of hypothetical examples, might be relevant to understanding the morality of torture.

## 1. Method in practical ethics

Many moral philosophers, particularly consequentialists but also others influenced by recent work in what is known as “experimental philosophy,”

1. The talks were by Marcia Baron (a revised version of which is published as chap. 8 of this volume) and by Claudia Card.

2. See, e.g., David Luban, “Liberalism, Torture, and the Ticking Bomb,” *Virginia Law Review* 91 (2005): 1425–61; Henry Shue, “Torture in Dreamland: Disposing of the Ticking Bomb,” *Case Western Reserve Journal of International Law* 37 (2006): 231–39; David Luban, “Unthinking the Ticking Bomb,” in *Global Basic Rights*, ed. Charles R. Beitz and Robert E. Goodin (New York: Oxford University Press, 2009), 181–206; Claudia Card, “Ticking Bombs and Interrogations,” *Criminal Law and Philosophy* 2 (2008): 1–15.

reject appeals to moral intuitions as a basis for moral theorizing and therefore tend to regard the use of hypothetical examples to elicit moral intuitions as an illegitimate method in moral theory. These philosophers argue that moral intuitions in general, whether about hypothetical cases or actual cases, are epistemically unreliable; they are the products of our evolutionary heritage, adapted to the primitive conditions in which our remote ancestors lived, and have also been shaped by cultural prejudice, self-interest, and a variety of other distorting factors.

Most of the prominent critics of the ticking bomb case and other hypothetical examples in the debate about torture are not, however, among the skeptics about moral intuition in general. They object, not to appeals to moral intuition, but only to the use of certain examples, such as the ticking bomb case, or to the use of hypothetical examples as opposed to actual, historical examples. For example, in his contribution to this volume, which is a revised version of his keynote address at the conference from which this book evolved, Albie Sachs repeatedly dismisses appeals to hypothetical examples and claims that in societies in which people still bear the memory of their own government's use of torture against them, there cannot be debates about the morality of torture in which the participants "convert what is a huge historical experience still haunting the soul of the nation into a set of imaginary situations to be dealt with at a purely instrumental level, weighing up profits and losses in an analytical bookkeeping manner."<sup>3</sup> Thus, as a citizen of such a society, he told the other conference participants who attended his keynote address that he could not attend their sessions, as it would be "horrific" to discuss torture by "concocting imaginary situations."

But Sachs is not opposed to reliance on the evocation of moral sentiment or intuition in general. On the contrary, his address, which appears in this volume, is essentially a sustained appeal to moral sentiment. It is just that the examples he describes, drawn largely from his own experience, are events that actually occurred. His restrained descriptions of actual instances of torture are moving and elicit powerful intuitions. Of his own treatment at the hands of South African "security" forces, for example, he says:

It was not a hypothetical situation of the kind that some academics conjure up when discussing the costs and benefits of the government using torture. And, as in 99.9 percent of cases where forms of torture are used, there was

3. Albie Sachs, "Tales of Terrorism and Torture," 32, in this volume.

no ticking bomb nearby when I collapsed on the floor, they poured water on me, and they lifted me up. I still remember those thick, heavy fingers prying my eyes open. I collapsed again, . . . [aware of their] triumph as they were now breaking through my resistance. (p. 25)

I think, however, that the emotional force of this passage derives not from its reference to an actual, rather than a hypothetical, example but from the fact that it describes the torture of an innocent and indeed unusually admirable man by agents of a cruel and unjust regime acting in the service of evil ends, such as, in Sachs's words, "hegemony, dominance, power, control, mastery," and "white supremacy" (p. 25). This and other similar passages could be equally effective if the scenes they describe were merely hypothetical, or fictional. *Waiting for the Barbarians*, a novel by the South African writer J. M. Coetzee, has passages describing the torture of the innocent that are even more harrowing and evocative, which is hardly surprising given Coetzee's brilliance as an imaginative writer.<sup>4</sup>

The effectiveness of Sachs's descriptions would be lost, not if they referred to hypothetical circumstances, but if the victim were clearly *not* innocent and the aims of the torturers were clearly *just*. What would one think if the words quoted above were not those of Albie Sachs reporting what had been done to him by the guardians of apartheid but were instead the recollections of a torturer and jailer employed by the apartheid regime who had been beaten and deprived of sleep to force him to reveal the location of the keys necessary to release ANC members from cells in which they were being confined and tortured? Would one then feel the same identification with and sympathy for the victim, or the same outrage or indignation against the perpetrators? My own intuitive reaction would be quite different in that case. One could still argue that beating the jailer would be wrong even in those circumstances, but one would have to give an argument rather than simply counting on the reader's emotional reaction to deliver the desired conclusion.

Hypothetical examples, even when used as a means of understanding the most serious of moral issues, have been deployed by philosophers at least since Plato, in his discussion of justice, appealed to the ring of Gyges, which makes its wearer invisible. What hypothetical examples can do that historical examples seldom can is to filter out irrelevant details that can distract or confuse our intuitions, thereby allowing us to focus on precisely those considerations that we wish to test for moral significance. Suppose

4. J. M. Coetzee, *Waiting for the Barbarians* (New York: Penguin, 1982).

that one is curious about whether a certain factor is morally significant in a certain specific way—for example, whether the intention with which a person acts can affect the permissibility of her action. It may happen that reflection on intention in the abstract proves inconclusive. One might then devise a pair of hypothetical examples in each of which an agent goes through the same series of physical movements and in which consequences of those movements are identical. The *only* difference is that in one case the consequences are intended as a means whereas in the other they are unintended but foreseen side effects. Suppose that a large majority of people from a variety of cultures judge that the agent who intends the bad consequences acts impermissibly while the agent who merely foresees them acts permissibly. That is at least *prima facie* evidence for the view that an agent's intentions can affect the permissibility of her action. Yet if one had sought to elicit people's intuitions about a pair of actual historical examples, it would have been inevitable that people would have been influenced by irrelevant historical associations, distracted by irrelevant details, or guided in their evaluations by morally relevant differences between the two cases having nothing to do with the agents' intentions. The value of hypothetical examples is that they can exclude all such features that are irrelevant to the purpose of the example.

When one understands what hypothetical examples are designed to do, one can see that the ticking bomb case is an entirely respectable philosophical tool. It is relevantly similar to thousands of other hypothetical examples that have appeared in the work of moral philosophers in recent decades and that most philosophers regard as legitimate components of philosophical arguments. It has no features that are not characteristic of the majority of hypothetical examples in moral philosophy. It is no different in relevant respects from the familiar trolley cases, transplant cases, examples comparing and contrasting terror bombers and tactical bombers, and so on. It is, if anything, more realistic than most.

An early instance of the ticking bomb case appeared in an article published more than forty years ago by Michael Walzer called "Political Action: The Problem of Dirty Hands." Walzer describes a political leader who "is asked to authorize the torture of a captured rebel leader who knows or probably knows the location of a number of bombs hidden in apartment buildings around the city, set to go off within the next twenty-four hours. He orders the man tortured, convinced that he must do so for the sake of the people who might otherwise die in the explosions—even though he believes that torture is wrong, indeed abominable, not just sometimes, but

always.”<sup>5</sup> Walzer uses the example not so much to defend the claim that torture can be permissible in extreme circumstances but to explore the way in which political necessity may require leaders to violate the constraints of ordinary individual morality.<sup>6</sup> The main reason I mention this use of the case is to call attention to its impeccable pedigree. Walzer is notoriously averse to the use of unrealistic hypothetical examples in philosophy. The subtitle of his classic work on just war theory is “A Moral Argument with Historical Illustrations.”

In Walzer’s presentation, from which I have quoted only the essential part, the example is quite detailed and realistic. It raises the question whether what the leader did in authorizing the torture was morally permissible. No one, so far as I am aware, objected to the case when it appeared in this well-known article. Subsequent writers have added certain stipulations that make the example less realistic but more serviceable for the purpose of moral reflection: for example, the bombs have become a nuclear bomb, the rebel has been relabeled a terrorist, it is known that the terrorist planted the bomb and thus knows where it is, torture offers the only hope, in the short time remaining before the bomb explodes, of inducing him to reveal its location, and so on. The example has received a lot of discussion for the simple reason that it *does* seem to most people that, in *these* conditions, it is morally permissible for the leader to have the rebel (or terrorist) tortured.

The central deficiency of the ticking bomb case is not that it involves uncertainties that would in practice be only probabilities, but that it often tempts people to accept a mistaken explanation of why it would be permissible to torture the terrorist in these conditions. It would be more illuminating if the harm to be prevented were not cataclysmic. Suppose that instead of having planted a nuclear bomb, the captured terrorist has ordered his subordinates in an unknown location to torture a single innocent person. The aim of torturing the terrorist is to force him to disclose that location so that the further torture of this innocent victim can be prevented.

5. Michael Walzer, “Political Action: The Problem of Dirty Hands,” *Philosophy and Public Affairs* 2 (1973): 160–80 at 167.

6. According to Christopher Finlay, Walzer has got it backward, at least from a Humean point of view. Finlay argues that a moral sentiment account of morality, such as that of Adam Smith or Hume, implies that because our sympathy would be with the potential victims of the explosions rather than with the rebel, morality actually requires the torture of the rebel while political principles—those necessary for regulating the social order—oppose it. See Christopher Finlay, “Dirty Hands and the Romance of the Ticking Bomb Terrorist: A Humean Account,” *Critical Review of International Social and Political Philosophy* 14 (2011): 421–42.



We might even stipulate that, in order to be effective, the torture inflicted on the terrorist has to be more severe than that which his subordinates will otherwise inflict on their victim. It could still, I think, be permissible to torture him. If it is, that suggests that the justification is not consequentialist. And it shows that the justification is also not a necessity or lesser-evil justification—that is, it is not that the harm done to the terrorist would be significantly less than the harm that would thereby be prevented. Rather, the justification in this case is *liability based*. It is that the terrorist's own moral responsibility for the fact that *someone* must suffer torture makes it the case that, as a matter of justice, *he* should be the one to suffer the harm that he has made unavoidable. This is a claim about justice in the *ex ante* distribution of harm, not a claim about greater and lesser harms.

It is important to stress this point, for the same considerations do the same normative work in the original ticking bomb case. The primary justification for torture in that case too is that the terrorist has, through his own culpable action, made himself morally liable to be tortured in defense of his innocent potential victims. But the stipulation that there are thousands of such potential victims misleads us into thinking that it is the comparative badness of the consequences of the two possible courses of action that is doing the work of justification. Sachs himself, who suggests that such examples call for assessing the “costs and benefits” (p. 25) and “weighing up profits and losses in an analytical bookkeeping manner” (p. 32), is among those who seem to have been misled in this way.

What the ticking bomb case shows is that, whatever we may want to say, most of us do not believe that there is an absolute moral prohibition of torture. This should not be surprising, for most of us are not absolutists about the moral prohibition of *any* general *type* of action, or act-type. Very few people, for example, are absolutists about the impermissibility of killing innocent human beings or even the *intentional* killing of innocent human beings. Most of us accept that at least one or two types of killing can be permissible in certain circumstances—for example, killing in self-defense, killing enemy combatants in a just war, capital punishment, abortion, suicide, or voluntary euthanasia. One challenge facing those who hold that torture is absolutely morally prohibited is to reconcile that view with the belief that killing can be permissible.<sup>7</sup>

7. Absolutists who believe that both torture and the intentional killing of innocent human beings are absolutely prohibited obviously have no problem of consistency here. But they face other problems, which I will briefly discuss later, that are even more serious and intractable. For various general objections to moral absolutism, see Jeff McMahan, “Torture in Principle and in Practice,” *Public Affairs Quarterly* 22 (2008): 111–28 at 111–14. On the comparison be-

It can, indeed, be illuminating to test proposed explanations of why torture is supposedly always morally wrong by considering whether they would be plausible when applied to killing. Consider, for example, what Sachs says would have happened to ANC members had they decided to torture their torturers: “[it] would have meant that we had become like them, that we had become gangsters and crooks and thugs—for a more noble cause to be sure, but in the end no different from them, only stronger. Our souls would be like their souls, and our inhumanity would be inseparable from their inhumanity” (p. 27). Many people have said the same about those who support or participate in one form of killing: namely, capital punishment. They claim that those who execute murderers thereby become murderers. But this is a paradigm instance of begging the question. No one other than the strictest pacifist believes that a police officer who kills a murderer when this is necessary to prevent him from killing an innocent victim thereby becomes a murderer or morally like a murderer.

Sachs also says that he and the other members of the ANC “were making unambiguous statements about the kind of people we were, what we were fighting for, and what our morality and core values were about. . . . They did not want to belong to an organization that used torture” (p. 31). It is tempting to echo this claim by affirming that we do not want to be members of an organization that kills people. But because it can sometimes be permissible, or even morally required, to kill people, there is nothing shameful, for example, in being a soldier in an army that intentionally kills people who are liable to be killed in the course of fighting a just, defensive war. It makes a substantial moral difference whether the people we kill have made themselves morally liable to be killed. Similarly, it makes a great difference whether a person we might torture is morally liable to be tortured.

Opponents of the ticking bomb example often object that this last claim presupposes that we can know when a person is liable to be tortured, whereas in practice we can never be certain of this. But if this is a serious objection to defensive torture, it must also be a serious objection to *all* forms of defensive harming, including defensive killing. This is because there is in practice always some uncertainty about whether the target of defensive harming is liable to be harmed. It is always possible, though perhaps highly unlikely, that he poses no threat at all or that he is not morally responsible for the threat he poses (which on my view, though not

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tween torture and killing, see F. M. Kamm, *Ethics for Enemies: Terror, Torture, and War* (Oxford: Oxford University Press, 2011), chap. 1.

on certain other views, would exempt him from liability) or that harming him is unnecessary or would be ineffective or disproportionate.<sup>8</sup> In all these cases, I believe, the target of our attempted defensive action might not be liable to be harmed. But this unavoidable uncertainty about liability does not entail that defensive harming can never be justified. It means only that defensive harming always involves a moral risk. This risk is generally much greater in the case of torture, though I and other revisionist just war theorists believe that uncertainty about liability to be killed in war is much greater than people have hitherto supposed.<sup>9</sup> In any case, this difference between torture and other forms of defensive harming is only a difference of degree, not a difference of kind.

Finally, consider Sachs's story of Sergeant Benzien, the torturer who was reduced to weeping when he was forced by the Truth and Reconciliation Commission to confront in a vivid way what he had done (p. 33). The conclusion of that narrative would be equally comprehensible if the protagonist had not been a torturer in the service of a repressive regime but had instead been a soldier who had killed enemy combatants in the course of a just war. Suppose that such a veteran were placed in a room with the parents, wife, and children of a man he had killed in hand-to-hand combat. Suppose he were then asked to demonstrate exactly how he had killed the enemy soldier—how, for example, he had thrust his bayonet into the young man's belly and watched him writhe in agony and die. He would probably weep as well. But that would not show that what he had done was wrong. (If this is too fanciful—too hypothetical—for one's taste, ask a veteran of a just war about the people he killed. Ask him, for example, what his feelings were when he searched the body of an enemy soldier he had killed for identification and found photographs of his victim's wife and children.)<sup>10</sup>

The main reason that killing can be morally justified far more often than torture is that killing is often necessary for self- or other-defense against a threat of wrongful harm, while torture is very seldom necessary for a defensive purpose. In part this is because in most cases a person cannot be tortured unless he has already been subdued or incapacitated and hence is incapable of posing a threat. But there are ways in which torture

8. I argue that moral responsibility is necessary for liability in *Killing in War* (Oxford: Clarendon Press, 2009), sec. 1.4. For a classic statement of the view that moral responsibility is not necessary for liability, see Judith Jarvis Thomson, "Self-Defense," *Philosophy and Public Affairs* 20 (1991): 283–310.

9. See, e.g., Seth Lazar, "Risky Killing and the Ethics of War," *Ethics* 126 (2015): 91–117.

10. For general discussion, see Lt. Col. Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society* (Boston: Little, Brown, 1995).

can be purely defensive. One way is illustrated in the ticking bomb case, in which torturing the terrorist can be a means of defending his potential victims from the effects of his previous, rather than present or future, action. But torture can also be defensive because pain can be a means of incapacitation.

Once it is conceded that torture, like killing, can be defensive, and that it can be less bad to be tortured than to be killed (though there are, of course, also forms of torture that are worse than being immediately killed), it becomes implausible to claim that a person can be liable to be killed for a purely defensive purpose but not to be tortured for a purely defensive purpose. At present, of course, it is rare that one can incapacitate a person for defensive reasons solely through the infliction of pain. This is because, again, a person must normally already be incapacitated for one to be able to cause him to suffer crippling pain in a way that does not otherwise disable him. But it is possible that a device could be developed that would act at a distance to inflict incapacitating pain on an individual without causing any bodily damage. Such a device might merely extend technologies that are already deployed in the manufacture of tasers.

Imagine that such a device exists. And suppose that an agent of a vicious, repressive regime has captured a member of the resistance, taken him to a tiny island one hundred yards offshore, and begun to use a device of this sort to compel him to reveal information about his confederates. Other rebels arrive at the mainland shore but realize that it will take them an hour to get a boat to take them to the island. They are armed not only with long-range rifles but also with a device identical to the one that the government agent is using. Like the guns, the device can be used with accuracy even at a distance of a hundred yards. They therefore have three options: they can allow their innocent comrade to be tortured for an hour, they can kill the torturer, or they can incapacitate him by torturing him with the device—that is, by intentionally causing him to suffer agony for an hour as a means of disabling him until they can reach the island.<sup>11</sup>

Assume that it would be permissible for them to kill the government agent if that were the only way to prevent him from continuing to torture their innocent comrade. This is a reasonable assumption; most of us accept that it would be permissible for a third party to kill a culpable person in defense of an innocent victim if that were the only way to prevent the victim from being wrongly tortured by him. Because he is culpably violat-

11. This example is based on a simpler one given in my "Torture in Principle and in Practice," 120.

ing his victim's fundamental moral rights, there is no basis on which he could claim to be morally immune from defensive action. Torturing him for an hour would be proportionate, since the harm done to him would be no worse than the harm that he would be prevented from inflicting on his innocent victim. Torturing him would also satisfy the necessity constraint while killing him would not. The necessity constraint forbids the use of a more harmful means of achieving an end if there is an alternative means that would be equally effective but less harmful. And it is uncontroversial that for a person who would otherwise have a long and happy life in prospect, it would be worse to be killed than to suffer agony for an hour, especially if the torture would not cause permanent physical damage. If killing the government agent would be permissible on grounds of liability if torturing him were not possible, then given that torturing him would be equally effective but substantially less harmful to him, it must be permissible to torture him. (Sachs himself endorses violence that is discriminate and proportionate: "The enemy was not a people, a population, but a system of injustice. When we used violence in our challenge to that system of injustice, it had always to be directed at the physical power and the structures of domination of that system, not at civilians" [p. 27].) Because killing the person would be more harmful to him than torturing him, killing him would be wrong. But it would also be wrong to do nothing, allowing him to continue to torture his innocent victim. In the circumstances, therefore, torturing him is not only permissible but morally *required*—that is, it would be impermissible *not* to torture him. I think this is not only true but *obviously* true.

Those who believe that torture is absolutely prohibited may claim that merely *incapacitating* the government agent with pain does not constitute torture. But no one would deny that what the agent is doing to his victim is torture; yet this is also what the rebels do to him. Both he and they intentionally inflict crippling pain as a means. He does so as a means of extracting information, while they do so as a means of preventing him from continuing. The only difference is that the government agent inflicts pain as a means of making a person *do* something, while the rebels inflict pain as a means of making a person *not* do something. He does so to manipulate a person's will, while they do so to disable a person's will. It would be hard to make the case that the former is subject to an absolute prohibition while the latter is not.<sup>12</sup> (The rebels might also use the infliction of agony to manipulate the agent's will by using the device on him for a while and

12. Those who are tempted to try to make that case might appeal to the analysis of the

then turning it off, threatening to turn it back on if he again attempts to harm his intended victim.)

This example, like the ticking bomb case, is hypothetical. But both these examples help us to understand why torture is objectionable. They help us, in particular, to see that torture cannot plausibly be thought to be absolutely morally prohibited. When its use is necessary to defend the innocent from the guilty, and would be proportionate, torture can be morally permissible. But it does not follow that it can be permissible as a matter of policy or that it should be legally permissible. As I noted, instances in which it can be used defensively are rare. It is difficult to find actual cases in which torture has been successfully used against a known wrongdoer to prevent a grave wrong for which the wrongdoer would have been responsible. Yet the use of torture has been pervasive throughout human history. But what this means is that it has almost always been used impermissibly. It has and continues to be used almost exclusively against people who are morally innocent in support of aims that are unjust. This is why, as I have argued elsewhere, torture must be absolutely prohibited in law.<sup>13</sup> It is far more important to deter the torture of the innocent than it is to provide a legal privilege for the use of torture in those very rare cases in which it might be morally justified.

This ground for prohibiting torture in law may seem merely pragmatic, or insufficiently “principled.” Sachs refers to the absolutist position that he and others take on torture as “principled.” Yet the reasons he cites usually turn out to be matters of expediency—for example: “if in the 1980s and earlier, we had not taken principled positions on questions of . . . what methods of struggle were legitimate, and how torture was to be prohibited, we would not have achieved what many today regard as the most progressive Constitution in the world” (p. 34). What, then, are the principles? Sachs makes a variety of claims:

[The delegates at the ANC conference] insisted that there be very clear standards and that absolutely no torture be used in any circumstances, whatever the euphemism used. . . . The young soldiers—and the not-so-young lawyers—were making unambiguous statements about the kind of people we were, what we were fighting for, and what our morality and core values were about. (p. 31)

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wrong involved in torture developed by David Sussman in “What’s Wrong with Torture?,” *Philosophy and Public Affairs* 33 (2005): 1–33.

13. Jeff McMahan, “Torture, Morality, and Law,” *Case Western Reserve Journal of International Law* 37 (2006): 241–48; McMahan, “Torture in Principle and in Practice.”

Whoever you are and whatever your motivation, whatever your cause, there are some things human beings just don't do to other human beings. (p. 33)

[W]hat is at stake is precisely the deep morality of the society and the role that respect for human dignity plays at its foundation, and that if respect for human dignity has a price beyond rubies, then the scales of any balancing process could never come down on the side of torture. (p. 22)

Apart from the vague notion of human dignity, which here as in most of its other uses is merely a rhetorical gesture, Sachs's statements are devoid of substantive content. Anyone, no matter what his or her substantive moral beliefs might be, could make claims of this sort with perfect sincerity in support of those beliefs. The white South African defenders of apartheid could echo Sachs's words by saying that "we are not the kind of people who can live on terms of equality with people lower than ourselves; rubbing shoulders with primitive, unwashed beings is not consistent with our morality. Legal and social equality between superior and inferior races is against the core values of our society." In opposing resistance to the Nazis by means of war, absolute pacifists could have said, with Sachs, that "there are some things, such as using explosives to rip their bodies apart, that human beings just don't do to other human beings." Those who oppose the legalization of voluntary euthanasia can say the same. Those who wish to impose an absolute prohibition of abortion sometimes appeal to "the deep morality of the society and the role that respect for human dignity plays at its foundation." But none of these assertions provides a *reason* for accepting the beliefs in support of which they are made.

The motivation of those philosophers who have exercised their ingenuity in producing objections to the ticking bomb case is understandable and admirable: they want to deny any support to those who defend the practice of torture as a matter of law or policy. In this they are right; it is our duty to oppose the legalization or institutionalization of torture. But that is not because torture is absolutely morally wrong. It is instead for the reason I gave: that it is morally far more important to prevent the torture of the innocent than it is to accord a legal privilege for torture in those exceedingly rare cases in which it would be morally permissible.

Even as a tactical matter it seems wiser to base one's opposition to the practice of torture on such grounds as this than to persist in claiming that morality rules out torture absolutely. For the continued assertion of that claim is likely to do little more than to convince the defenders of torture

that their opponents are obtuse or naïve. The ticking bomb case is, after all, highly effective in convincing people that torture is *not* absolutely wrong. Tactically, then, it is better simply to grant that and to focus one's efforts instead on explaining why the fact that torture *can* be morally permissible in certain rare circumstances is largely irrelevant to matters of law or policy in a world in which vicious rulers clutch at every possible rationale for the use of torture in the service of unjust ends. It is better, if I may put it this way, to base political opposition to torture on good arguments rather than on bad ones.

## 2. Normative theory

Having indicated why I think that appeals to hypothetical examples such as the ticking bomb case are legitimate and can lead to conclusions that are more principled than those derived from the kinds of considerations cited by Sachs and others who reject the use of such examples, I will in this section offer a few remarks about matters of normative theory that seem relevant to understanding the morality of torture. I begin with some further observations about moral absolutism.

As I have indicated, the ticking bomb case is an effective counter-example to moral absolutism about torture. But the intuitive implausibility of absolutism can be made vivid through the use of different examples as well. Consider first a hypothetical example and then a related but actual example. Suppose there is a machine that, by operating directly on the nociceptors in the brain, causes extreme agony but no somatic damage. It is, we may imagine, used by various dictatorial regimes to force "confessions" from those they want to execute, and it usually produces the desired result in less than half an hour. Suppose we agree that the use of this machine to inflict pain constitutes torture. But now suppose that a man wishes to prove his strength of will and his capacity for endurance. He pays the regime's torturers to use the machine on him for an hour and instructs them not to stop even if he pleads with them to do so. This man voluntarily subjects himself to protracted torture. There is a parallel here with the actual case of the journalist and writer Christopher Hitchens, who arranged to have himself waterboarded by professionals whose job it is to train American soldiers in techniques for resisting torture.<sup>14</sup>

14. Christopher Hitchens, "Believe Me, It's Torture," *Vanity Fair*, August 2008, reprinted in Hitchens, *Arguably* (New York: Twelve, 2011), 448–54.



If torture is absolutely prohibited, both the imaginary person who subjected himself to torture and the people who waterboarded Hitchens acted impermissibly. They violated an absolute prohibition. It is no use pointing out that the victims in these cases *consented* to be tortured, or that the intentions of those who tortured them were benign. Absolute is absolute: there are no exceptions for consent or good intentions. This is why the Catholic Church's absolute prohibition of the intentional killing of the innocent covers suicide and voluntary euthanasia as well as ordinary instances of murder. Yet it is very difficult to believe that any of these people, actual or hypothetical, is guilty of acting in a way that cannot possibly be justified, no matter what the consequences might be of not acting in that way. We might think that the self-torturer is foolish, and that Hitchens, though well motivated, acted counterproductively, but it seems absurd to suppose that any of these parties to wholly voluntary torture is guilty of grave wrongdoing. (I suggest that Hitchens's action may have been counterproductive because it seems unlikely that the best testimony to the awfulness of torture is to reveal that one regards torture as sufficiently tolerable to be endured in order to make a political point or to enable oneself to write a fascinating article.)

As I indicated, the rejection of absolutism in morality is compatible with the acceptance of absolutism in certain areas of the law. While it is objectionable for the law to criminalize action that is morally permissible (and even, in rare cases, morally required), the objection can be overridden by other considerations. Law is designed to serve certain purposes—usually morally important purposes—and the reasons for pursuing those purposes are sometimes strong enough to justify the legal prohibition of morally permissible action. There are many reasons why it may be necessary for the law to diverge from morality. Sometimes the law must permit what morality prohibits. This might be because the law simply cannot provide sufficiently precise guidance in determining what is prohibited, so that a legal prohibition would carry too great a risk of punishing the morally innocent. Or it might be because enforcement would be excessively invasive of people's privacy. Similarly, there are various possible reasons why the law must, in some cases, prohibit what morality permits. In the case of torture, the main reason, as I have suggested, is to deny potential torturers any legal pretext or rationale for action that would almost certainly be egregiously wrong. A similar claim might be advanced in favor of the legal proscription of other types of action that may on occasion be morally permissible but are much more likely in practice to be wrong, such as the intentional killing of civilians in war, punishment by execution, and preventive war.

It is worth pausing to explain the one exception that must be granted in law to avoid making the law ridiculous. This is for torture by freely given consent, as in the case of Hitchens, or soldiers who submit themselves to mild forms of torture by their own instructors to train them to withstand the more severe forms to which they may be subjected by their enemies. This is an exception that it would be difficult to exploit. The absolute legal prohibition, then, applies only to *involuntary* torture. I will take this as given in the remainder of this essay.

The implications of the claim that torture ought to be categorically prohibited in law may seem straightforward but they are not. Further elaboration is necessary. For example, even if there are no statutory exceptions to the legal prohibition of torture, should it be possible for certain defendants to be granted a defense of necessity at trial? If the torturer in the ticking bomb case had saved the city by discovering the location of the nuclear bomb through the use of torture, ought he to be judged to have had a justification of necessity and thus be acquitted?<sup>15</sup> I do not have a firm view about this, but I am inclined, for the reasons given, to think that it is more important to deprive potential wrongful torturers of the hope of a necessity defense than it is to have that option available in the rare conditions in which torture is morally justified. Perhaps the best that a justified torturer ought to be able to expect at trial is to be excused or to be treated leniently at sentencing.

Practical people, who pride themselves on living in the real world rather than in an ivory tower, may think that if we know that torture cannot be permitted in law and policy, we know all we need to know. There is nothing more to be said, and it is frivolous and repellent to conduct philosophical discussions of hypothetical cases to try to determine when torture might *in principle* be morally justified. But this suggestion, present in much of the discussion of torture, is itself irresponsible. It is not impossible that soldiers or antiterrorist agents could find themselves in a situation in which there seems to be a compelling moral case for the use of torture. In these situations, they may know that torture is prohibited by law and that they risk severe punishment if they engage in it, yet they may still be in need of moral guidance about whether to obey the law. For there can obviously be circumstances in which it is morally permissible, or even morally required, to break the law. Since we cannot rule out the possibility that there will in practice be cases in which torture is permissible or required, moral philos-

15. Thanks to Eric Posner for making me aware of this issue during the discussion at the conference.

ophers have a responsibility to try to provide criteria for identifying such cases and distinguishing them from others in which torture might seem to be permissible but is not. In the remainder of this essay, therefore, I will examine certain considerations that are relevant to determining when torture might be *morally* justified.

As I noted earlier, most of those who have discussed the ticking bomb case, both those who defend the practice of torture and those who oppose it, have thought that what it shows, or would show if it were successful, is that there can in principle be a *necessity* or *lesser-evil* justification for torture. That is, they have taken it to show that although there is a uniformly strong moral constraint against torture in all cases, this constraint can be overridden if the overall consequences of not torturing a person would be vastly worse, involving many more victims, than the torture itself. When philosophers and others criticize the ticking bomb case, they typically attempt to show that the conditions for a lesser-evil justification, including the *epistemic* conditions, never arise in practice, so that the constraint is never in fact overridden. This, however, cannot be shown to be true and is *prima facie* quite implausible.

It is essential to understand exactly what a lesser-evil justification is. Although it appeals to consequences, it is not a consequentialist justification. According to consequentialism, it is permissible to harm a person whenever doing so would have better consequences than any alternative course of action in the circumstances. A consequentialist could, for instance, endorse torturing an innocent person for 100 minutes if that is the only way to prevent someone else from torturing a different innocent victim for 101 minutes, assuming there would be no other relevant differences between the alternatives. A lesser-evil justification, by contrast, recognizes that there is a moral constraint against harming an innocent person that must be overridden before the harm can become permissible; therefore, it requires a substantial difference between the harm inflicted and that prevented—for example, one might claim that there is a lesser-evil justification for torturing an innocent person for 100 minutes only if that is necessary to prevent another innocent person from being subjected to an even worse form of torture for a significantly longer period of time or to prevent each of a greater number of innocent people from being tortured for 100 minutes.

I refer to the victims in all these cases as innocent people because lesser-evil justifications apply only to the infliction of certain harms on people who are not morally liable to those harms, who have a right not to be harmed that they have neither waived nor forfeited. To say that there is a lesser-evil justification for harming them is to say that their right not to be

harm remains in force but is *overridden*. By contrast, when a person has made himself liable to be harmed—that is, when through his action he has forfeited his right not to be harmed (usually by virtue of responsibility for a wrongful harm)—a lesser-evil justification for harming him may override the justification but is, in effect, superfluous. It would, indeed, be a mistake to appeal to such a justification. The harm inflicted on a person who is liable to be harmed may be fully justified even if it is not the lesser evil. It is often justifiable, for example, to inflict greater harm on a culpable aggressor if that is necessary to prevent him from inflicting a lesser harm on an innocent victim.

The strongest form of justification for harming another person appeals to the claim that through his own action a person has forfeited his right not to be harmed, at least in certain ways, by certain persons, and for certain reasons. One form that forfeiture might take is that a person may *deserve* to be harmed. The infliction of harm on the ground that it is deserved is called punishment. I find the view, presupposed by religious people who believe in traditional conceptions of hell, that people can deserve to be tortured deeply repellent. I will therefore set aside the idea that torture might be justified as a form of punishment. I will instead assume that the only purpose for which torture might be justified is the defense of the innocent. When harming another person is justified as a matter of defense, the justification usually appeals, again, to the claim that the target of the defensive action has forfeited his right not to be harmed. But here the form that forfeiture takes is not that the victim deserves to be harmed but that he is morally *liable* to be harmed. The main difference between desert and liability is that while the infliction of *deserved* harm may be an end in itself, the infliction of *defensive* harm must be either a means or an unavoidable side effect of averting a threat if it is to be justified as a matter of *liability* on the part of the victim. There can be no liability-based justification for harming a person unless harming that person is either instrumental or unavoidable in producing some good effect, which in cases of defense is the prevention of wrongful harm. Whereas the infliction of deserved harm is a matter of *retributive* justice and may be justified even when further harm is wholly avoidable, the infliction of defensive harm to which a person is liable is a matter of *preventive* justice and is concerned with *who* ought to suffer harm when harm is unavoidable, so that *someone must* suffer it. Preventive justice, in other words, is concerned with the *ex ante* distribution of harm when *some* harm is unavoidable.

There is a further form of justification for harming a person that combines both a liability-based justification and a necessity or lesser-evil

justification. Suppose that an event, E, that would cause great harm to many innocent people can, for some reason, be averted only if a hundred units of suffering are either inflicted on a single person or divided and inflicted on two or more people. Suppose that person P1 bears some degree of responsibility for the threat of E, but because the degree of his responsibility is slight, he is not liable to be caused a hundred units of suffering as a means of averting this threat. To inflict that much suffering on him would be disproportionate. Suppose, however, that *if* E could be averted by the infliction on P1 of only 80 units of suffering, he *would* be liable to that. As it turns out, E can in fact be averted by inflicting 80 units of suffering on P1 and 20 units on P2, who is not liable to be caused any degree of suffering. If preventing E were sufficiently important to justify inflicting 20 units on P2 on the ground that doing so would be the lesser evil in the circumstances, then the infliction of the remaining 80 units on P1 could be justified on grounds of liability. But if this is true, it seems that there could also be a liability justification for the infliction of 80 units on P1 and a lesser-evil justification for the infliction of the other 20 units on P1, who, like P2, would not be liable to suffer those 20 units. We can call this form of justification a “combined justification,” as the infliction of some of the suffering that is necessary and sufficient to avert E is justified on grounds of liability while the infliction of the rest is justified as the lesser evil.

As I indicated earlier, the ticking bomb case offers intuitive support for the claim that there can be a liability-based justification for defensive torture. The terrorist in that case has through his own wrongful action made it the case that either he must be tortured or a number of innocent people will be killed. His captors must choose between these harms: they can either allow the innocent people to become the victims of his action, or they can, in effect, substitute him as the victim, using his suffering as the means of saving his intended victims. In the conditions as stipulated, torturing him is not merely permissible but morally required as a matter of preventive justice. The same applies to an accomplice who did not plant the bomb but knows where it is hidden. By refusing to reveal its location, he too is responsible through wrongdoing for the necessity of choosing between torturing him and allowing innocent people to be killed.

And as I also noted earlier, critics of the example argue that in practice the stipulated certainties—that the terrorist planted the bomb and thus knows where it is and that he will divulge its location only under torture—never obtain. Yet some uncertainties are morally more important than others. Suppose both that antiterrorist agents are epistemically justified in be-

believing that a terrorist attack is imminent and that their belief is true. But they lack knowledge that would enable them to prevent it. They have captured a person who they have reason to believe is a member of the terrorist organization responsible for the threat and thus has vital information about it; yet there is uncertainty about whether he is in fact associated with this organization. This uncertainty is morally quite different from that in a case in which antiterrorist agents have good reason to believe, but are not certain, that a terrorist attack is imminent and have captured a person they *are* certain is a high-ranking member of the terrorist organization who, if there is such a threat, is certain to know about it. This person, furthermore, is *known* to have engaged in terrorist action in the past.

Suppose that in both cases the antiterrorist agents torture the person they have captured. In the first case, the person is not in fact a terrorist at all, while in the second there turns out to be no terrorist threat. The wrong done to the person tortured in the first case is far graver than that done to the terrorist in the second, despite the fact that in neither case was the person tortured liable to be tortured. Given the notion of liability as I have presented it, the terrorist in the second case cannot have been liable to be tortured, since torturing him could have been neither a means to nor a side effect of the prevention of a terrorist attack. Yet, although there is a sense in which he has been wronged, he may be in no position to complain. For the activities of the organization in which he was involved made it reasonable for the antiterrorist agents to believe that there was a serious risk of a terrorist attack; thus, he bears primary responsibility for the dilemma they faced—namely, the choice between torturing him, when doing so may be pointless, and not torturing him, when he had made it reasonable for them to believe that that was the only way to prevent innocent people from remaining at risk of being killed by him.

There are several ways in which the recognition that a liability-based justification for torture is possible may be important. One is that it seems, in relevant cases, to undermine the objection to torture that appeals to the helplessness or defenselessness of the victim.<sup>16</sup> Many people believe that the objection to harming the defenseless is more than that such harming is unchivalrous. It is often claimed that there is a constraint against harming those who cannot threaten us and that this constraint is at the core of commonsense beliefs about the ethics of violent conflict. It is, for example, a central element of the requirement of discrimination as it is understood

16. See, e.g., Henry Shue, "Torture," *Philosophy and Public Affairs* 7 (1978): 124–43.

in the traditional theory of the just war, which requires combatants to restrict their attacks to other combatants and never intentionally to attack noncombatants. Some philosophers have thought that the prohibition of torture can be grounded in this same constraint. They note that for a person to be tortured, he must first be incapacitated—that is, rendered defenseless. But once he is incapacitated, he can no longer be threatening; therefore, harming him can no longer be strictly defensive.

But, as the earlier example of a device that acts at a distance to cause incapacitating agony shows, torture can in principle be defensive in the purest sense—that is, it can be intended to stop an attack in progress by incapacitating the attacker with unbearable pain. And the ticking bomb case shows that action taken even against a person who is incapacitated and therefore defenseless can also be defensive, at least in the sense that it can prevent the incapacitated person's *past* action from harming its intended victims. In cases in which torturing a person is the only effective way of preventing him from wrongly harming innocent people, it may be justified on the ground that the victim has made himself liable to be tortured. In such a case, it is *good* if the victim is defenseless. He has no right of defense and it would be bad if he were able to defend himself by harming his torturers. In the ticking bomb case, for example, the terrorist can avoid being tortured simply by doing what he is in any case morally required to do, which is to reveal the location of the bomb. If instead he defends himself from torture by killing his captors, thereby ensuring that his bomb will not be found and will explode, he simply compounds his offense. He will then be guilty not only of murdering and maiming the victims of the bomb but also of murdering those who tried to stop him.

Those who think that the constraint against harming the defenseless is entailed by the broader constraint against harming those who pose no threat might distinguish between torturing the government agent in my earlier example and torturing the terrorist in the ticking bomb case by conceding that the government agent is liable to necessary and proportionate harm to stop him from torturing his own captive. And they might further concede that the use of the long-range torture device is proportionate. They could concede this and still deny that there is a liability-based justification for torture in the ticking bomb case. For all these claims are compatible with the traditional just war theory's insistence that the criterion of liability to defensive attack is *actively posing* a threat to others. The government agent is engaged in actively harming another, while the terrorist in the ticking bomb case cannot actively threaten anyone, since he has been incapacitated. Yet, as I have argued at length elsewhere, the traditional just

war theory's criterion of liability to defensive harm is mistaken.<sup>17</sup> It is mistaken not only because it holds people liable for posing a threat of harm that would not be wrongful but also because it holds people liable only for *posing* a threat of harm rather than for being *morally responsible* for a threat of harm. What matters for moral liability to defensive action is moral responsibility for a threat of wrongful harm, not a person's occupation of a certain position in a causal sequence leading to wrongful harm.

There is one possibly relevant difference between torturing the government agent with the long-range device and torturing the terrorist in the ticking bomb case that I have not yet mentioned. When the rebels use their long-range device against the government agent, they are merely eliminating the threat he poses, as they would do if they were to kill him instead. By contrast, the antiterrorist agents in the ticking bomb case torture the terrorist as a means of compelling him to act. They need him to be present so that they can use him as a means of locating the bomb. In the terms helpfully introduced by Warren Quinn, the rebels engage in harmful *eliminative* agency while the antiterrorist agents engage in harmful *opportunistic* agency.<sup>18</sup> As Quinn suggests, it is plausible to suppose that harmful opportunistic agency is in general harder to justify than harmful eliminative agency, other things being equal. (One might even argue that the *unintended* harming of an innocent person is harder to justify than the *intended* infliction of equivalent harm on an innocent person via eliminative agency. The evidence for this is that while most people accept that it can be permissible to kill a person who poses a lethal threat even when the person bears no responsibility for doing so, many people reject the permissibility of killing an innocent bystander as a foreseen side effect of action necessary to preserve one's own life.) Yet even if the constraint against opportunistically using a person is in all cases stronger than the corresponding constraint against inflicting comparable harm via eliminative agency, it seems clear that people can make themselves liable to be opportunistically used in harmful ways. If that were not the case, all that culpable attackers might need in order to secure immunity from defensive harm is the passage of time. The terrorist in the ticking bomb case might be liable to torture using the long-range device as a means of preventing him from planting the bomb but would no longer be liable to torture once he had successfully

17. McMahan, *Killing in War*, chap. 1.

18. Warren Quinn, "Actions, Intentions, and Consequences: The Doctrine of Double Effect," *Philosophy and Public Affairs* 18 (1989): 334–51 at 344. On the relevance of Quinn's distinction to the morality of self-defense, see McMahan, *Killing in War*, 170–72; Jonathan Quong, "Killing in Self-Defense," *Ethics* 119 (2009): 507–37.



hidden it—even if the torture would be equally effective in both cases and even if the severity of the torture required after he had hidden the bomb would be less. That seems untenable.

I will conclude by briefly considering whether certain widely recognized moral constraints on harming apply when the justification for harming is liability based—that is, when the victim of the harm is liable to suffer it. First consider the distinction between doing harm and allowing harm to occur. Most people find this distinction important in evaluating the action of someone who is causally implicated in the death of an innocent person. In most cases it is worse, other things being equal, to kill an innocent person than it is to allow an innocent person to die or be killed. It is, therefore, more difficult to provide a lesser-evil justification for killing an innocent person than for allowing that same person to die, if all other relevant considerations are equal. But is this true when the person who dies has made himself liable to lose his life? Suppose, for example, that a culpable attacker is rushing toward an innocent potential victim and will kill her unless he is killed first. The victim has two options. She can either kill the attacker by shooting him or she can refrain from alerting him to the presence of a land mine in his path, thereby allowing him to be killed. If the distinction between killing and letting die is significant in this context, she has a moral reason to allow him to tread on the mine rather than shoot him. Yet it seems to me that she has no such reason.

The same may be true in the case of torture. Assume that the terrorist in the ticking bomb case is liable to experience great suffering if that is necessary to prevent the bomb he has planted from killing innocent people. Then compare the standard version of the case in which antiterrorist agents cause him great suffering with an alternative version in which they have captured him but before they can torture him a stone drops from each of his kidneys into each ureter, causing him twice the agony that a person normally suffers from a kidney stone. Suppose this agony is as great as that caused by the agents in the standard case. The agents in the variant case have a potent new analgesic that will eliminate the terrorist's pain, but they refuse to administer it until he tells them where the bomb is located. This is a case of torture by intentionally allowing great suffering to continue. If the distinction between causing suffering and allowing suffering to occur has significance in this context, the action of the agents who allow the terrorist to suffer is easier to justify—for example, they could be justified in withholding the analgesic when the number of people they would save would be too few to justify the active torture of the terrorist. This may strike some people as plausible, but I find it hard to believe.

In both these versions of the ticking bomb case, the antiterrorist agents intend for the terrorist to suffer great agony as a means of coercing him to reveal the location of the bomb. It seems, indeed, to be a feature of the concept of torture that the infliction of suffering must be intended. Causing or allowing someone to suffer as an unintended side effect does not seem to count as torture. Yet there may be an exception. Frances Kamm distinguishes between acting *in order* to bring about an effect and acting *only because*, or only *on condition that*, one will bring about an effect.<sup>19</sup> The effect is intended in the first case but not necessarily in the second. If one acts in a certain way without intending to cause great suffering to someone but *only because* one will cause him great suffering, is this a case of torture? I will leave this question open.

Most people believe that it is morally more seriously objectionable to harm an innocent person intentionally than to inflict the same harm on the same person as a foreseen but unintended side effect. If this is right, it is generally more difficult to provide a lesser-evil justification for intentionally harming an innocent person than for inflicting the same harm unintentionally. But we can question whether this is true when the person harmed is morally liable to be harmed. Consider a further variant of the ticking bomb case. When the antiterrorist agents arrive at the terrorist's hideout, they discover that he has locked himself in a fortified chamber. It will take them some time to gain entry to be able to subject him to interrogational torture. They learn, however, that the location of the bomb has been written on a piece of paper that is highly likely to be in a doubly fortified safe in a room adjacent to the one in which he has barricaded himself. To cut through the metal safe, the agents must use an instrument that unavoidably produces sounds that will shatter the terrorist's eardrums, causing both excruciating pain that will persist for days and permanent loss of hearing. Suppose that this suffering and damage would actually be worse than the torture that would almost certainly be sufficient to compel the terrorist to reveal the location of the bomb. Each means of learning the location of the bomb would take roughly the same amount of time and have a roughly equal probability of success. Assuming that the terrorist is liable to be caused great suffering if that is necessary to prevent the bomb he has planted from killing innocent people, does it make a difference morally whether the suffering is inflicted intentionally as a means rather than unintentionally as a foreseen side effect? Given the assumption

19. Frances Kamm, *Intricate Ethics: Rights, Responsibilities, and Permissible Harm* (New York: Oxford University Press, 2007), chaps. 4–5.

of liability, I doubt that the intentional infliction of suffering is more seriously morally objectionable than the knowing infliction of an equal or even slightly greater degree of suffering as a side effect.

The infliction of the suffering as a side effect would not, it seems, count as torture. But what that suggests is that when someone is liable to suffer a great harm because that is unavoidable if his wrongful action is to be prevented from causing great harm to innocent people, it may be no worse to torture the person than to cause him equivalent or greater harm in a way that does not constitute torture.<sup>20</sup>

20. I am grateful to Scott Anderson for extremely helpful comments, both editorial and substantive, on an earlier version of this chapter.

## CHAPTER 10

# Torture, Self-Defense, and Fighting Dirty

DAVID SUSSMAN

It has been remarked that according to my view, shooting at someone establishes an I-thou relationship.

—Thomas Nagel<sup>1</sup>

This chapter does not consider whether we should recognize any absolute moral prohibition against torture, nor does it address the familiar “ticking bomb” hypothetical in any detail. I am generally skeptical of supposedly unqualified moral prohibitions against any general type of act, prohibitions that would hold regardless of specific circumstances. The thought that there might be such a prohibition against torture seems to assume that we might anticipate in advance all the ways in which different moral considerations relevant to a decision to torture might come into play in a particular situation. I have no confidence in anybody’s ability to do this, let alone mine. People who protest the use of the “ticking bomb” hypothetical often point out that, as a hypothetical, it is invariably underdescribed, always lacking the fullness of detail a real situation will present.<sup>2</sup> I think this is right, but also that the cases meant to motivate absolute prohibitions of torture will be afflicted by the same sort of underdescription as well. It if is always possible that actual situations will hold options that are morally preferable to torture, it is equally possible that some may not.

What I want to do here is to back up a little, put the question of absolute prohibitions on hold, and try to say a little more about what seems morally special about torture in general. In particular, I’d like to chase an

1. Thomas Nagel, “War and Massacre,” *Philosophy and Public Affairs* 1 (1972): 123–44.

2. See David Luban, “Liberalism, Torture, and the Ticking Bomb,” *Virginia Law Review* 91 (2005): 1425–61.

intuition a little bit, the intuition that torture is a paradigm instance of what Thomas Nagel called “dirty fighting” in his seminal article “War and Massacre” more than forty years ago. Nagel’s position is afflicted with obscurity, and this may explain why the paper seems to have receded from most ensuing discussions about morality and war. Nevertheless, I think Nagel was on the right track here, and that the idea of dirty fighting does a better job of illuminating what’s especially objectionable about torture than more familiar utilitarian, Kantian, or contractarian approaches do (despite the substantial affinities between the latter two and Nagel’s overall position).

### 1. Fighting dirty

According to Nagel, to fight dirty “is to direct one’s hostility or aggression not at its proper object, but at a peripheral target which may be more vulnerable, and through which the proper object can be attacked indirectly.”<sup>3</sup> Clean fighting, in contrast, is directed immediately against the activities of your enemy that are wrongfully directed against you. Nagel asks us to understand hostility as a fundamentally “personal relation” in which the way we fight needs to be guided by more than just a sense of effectiveness. In addition, proper fighting must also be shaped so as to remain consistent with an implicit expressive function. Combat must, *inter alia*, serve as a kind of *reply* to the wrongful intent or action of another, and not just a piece of physical opposition. As Nagel explains: “Whatever one does to another person intentionally must be aimed at him as a subject, with the intention that he receive it as a subject. It should manifest an attitude to *him* rather than just to the situation, and he should be able to recognize it and identify himself as its object.”<sup>4</sup> I realize that this may sound overly intellectualized or morally precious. Even so, I think there’s an insight worth tracking down here. Nagel’s thought seems to be that fighting someone, even to the death, is much closer to arguing with her than we would normally acknowledge. There is some sort of implicit norm of *address* that needs to be honored if fighting another person is going to be morally different from dealing with any other sort of physical threat.

Consider another example from Nagel: “In an altercation with a taxi driver over an excessive fare, it is inappropriate to taunt him about his accent, flatten one of his tires, or smear chewing gum on his windshield; and

3. Nagel, “War and Massacre,” 134.

4. *Ibid.*, 136.

it remains inappropriate even if he casts aspersions on your race, politics, or religion or dumps the contents of your suitcase into the street.”<sup>5</sup> For Nagel, to fight in a way that is properly guided by this idea of replying to and not just harming your opponent we must strive to direct our attacks against what is specifically tied up in the expression of a wrongful intent, rather than against something like the general features of human life and concern that bear no such special connection. First of all, I may fight only to disarm or disable. Of course, the only way to do this may be to kill, and in such cases Nagel thinks that killing can be appropriate.

What Nagel is ruling out is attacks aimed at the enemy’s general humanity in those cases where it becomes something that can be distinguished from his threatening activity and the powers immediately involved in engaging in it. Even when I might be permitted to kill an enemy, it may still be wrong to attack him through what he loves (his children, his church, his orchards), even though by doing so I might be able to more effectively distract or disable him. The use of chemical and biological warfare or attempts to starve an enemy into submission or keep him from medical care are supposed to be profoundly objectionable for parallel reasons, even when they are less injurious to their targets than permissible alternatives.

The distinction between replying to an attack and striking at the enemy’s underlying humanity is hard to make precise. Nagel himself claimed that the use of napalm is wrong because of the way it is directed against the sinner rather than the sin, but he allows the use of bullets and bombs, even though these weapons destroy the flesh of their victims in terrible ways. We might suspect that Nagel’s real objection to napalm is simply the special horror of being burned to death, something that may well be far worse than being shot or blown to bits. If so, then Nagel’s appeal to the distinction between countering an enemy’s act and striking at his person may be just a high-minded way to dress up a much simpler objection to the special cruelty of incendiary weapons. After all, the beating of my enemy’s heart can be simultaneously an integral part of his aggression against me and an element of his general life processes that has nothing to do with his attacks on me. Does this fact make it wrong for me to shoot him in the chest? It would seem that there will be many fundamentally indeterminate cases here, where the distinction between targeting the action and targeting the underlying person can find no clear purchase.

Yet this general problem of the indeterminacy of the distinction doesn’t seem to have much bearing on the case of torture, which would seem to

5. *Ibid.*, 135.

have to count as dirty fighting if anything is going to. In torture, we clearly attempt, not to directly block or frustrate the wrongful actions or intentions of our foe, but instead to exploit the perfectly general vulnerabilities and concerns that our enemy has as a human being, which we know how to exploit precisely because we share such vulnerabilities and concerns with him. The loves, fears, and vulnerabilities we take aim at would be what they are (and presumably, our torture would be equally effective) even if our enemy had never dreamt of attacking us in any way.

## 2. Attacking and addressing

The question for Nagel is why attacking someone through their feelings, emotions, and body this way fails to address them as an active subject in a way that could be properly received by him as such a subject. Nagel's own answer here is not particularly helpful. Supposedly, we see that we cannot be really addressing our foe as a subject when we realize how ludicrous it would be to justify our actions to him. He explains: "One could *even* say, as one bayonets an enemy soldier, 'It's either you or me.' But one cannot really say while torturing a prisoner, 'You understand, I have to pull out your fingernails because it is absolutely essential that we have the names of your confederates'; nor can one say to the victims of Hiroshima, 'You understand, we have to incinerate you to provide the Japanese government with an incentive to surrender.'"<sup>6</sup> The problem with this sort of reflective exercise is that it is likely to beg the question. It may well indeed sound ludicrous to address this sort of justification to the torture victim, but that may just be because we already implicitly accept that torture is uniquely and perhaps categorically wrong.

Moreover, there is of course something bizarre about imagining oneself as offering justification to people whom you are about to derange with pain or incinerate in a nuclear blast. How could anyone be expected to listen to such justifications or take them seriously, given what they are about to endure? In light of what these situations would normally have to be like, any such appeal (particularly if prefaced with the unavoidably condescending "*You understand*") would seem to be a mockery of one's victim and a travesty of the very activity of interpersonal justification and the sorts of human relations that depend on it. Yet none of this shows that these bizarre appeals could not in fact be advancing good justifications for this terrible treatment that a reasonable agent should accept. Instead, such

6. Ibid., 137.

appeals may seem ludicrous not because of any defect of their content but simply because, in any real instance of such a situation, it would be insane to ask one's victim to think about his predicament reasonably.

Of course, we could imagine addressing ourselves to our foe at some distance from any such altercation. We might see ourselves, as good contractualists, drawing up common principles for proper fighting in advance of any real conflict or under some sort of veil of ignorance or other deliberative mechanism meant to keep us from identifying exclusively with one party in these imagined scenarios. But now it is no longer so clear that we could never address a justification for torture in good faith to the one who might suffer it, once we step away from the exigency of a particular situation.

Admittedly, torture does target aspects of its victim that have nothing to do with his wrongful acts or intentions, and so resembles other cases of dirty fighting. The question, however, is whether we are permitted to fight dirty if this is the only way to effectively resist dirty fighting that is wrongfully directed against us. Terrorism, like torture, is presumptively dirty, aiming at the "soft targets" of an enemy's ordinary life, of his basic concerns and sensitivities as a human individual or member of a community. Surely this must make some difference as to what counts as a proper "reply" to his actions, to what counts as addressing him as a subject who could receive it as a subject. If the terrorist strikes at us through what we care most intimately about, and we strike at him through his most intimate concerns just as a way of frustrating that attempt, why isn't this the sort of reply we respect as giving someone "a taste of his own medicine"? How could the terrorist object to such treatment in both consistency and good faith?

### 3. Torture and self-defense

Here we might think that there is a general principle of reciprocity that governs self-defense. The thought here would be that for any kind of presumptively wrong act, I may commit that act against someone if this is the only effective way of frustrating his attempt to commit that very same sort of wrong against me (or those for whom I am responsible). Absent better, reasonably effective alternatives, I may kill the person trying to kill me, assault the person trying to beat me, or steal from someone if this is necessary to keep him from robbing me (I may exploit a moment of inattention and take my mugger's gun from him). Acts that seem categorically wrong, such as rape, may just be those where we cannot imagine an instance where performing such an act could in fact be a way of frustrating an attempt to



commit that act against us (how could raping someone be the only effective way of foiling that person's attempt to rape someone?).<sup>7</sup>

Our ordinary thinking about self-defense also seems to allow that, within a certain range, I may commit what would normally be a greater wrong against my assailant in order to frustrate a somewhat lesser wrong he is trying to commit against me. I may maim or kill a would-be rapist or do significant violence to someone who is trying to rob me. Approached in a contractualist way, the justification of this permission is easy to see. For an assailant to object to such forms of resistance, he would be asking others to care more about his rights and interests than they are allowed to care about their own, and certainly more than he cares about their rights and interests. And in any event, if the would-be assailant does not want to become exposed to such treatment from his intended victims, he only has to forgo attacking them, an attack he cannot advance any serious claim to be entitled to do to begin with.

The intended victim, in contrast, has no control over whether she will be put in this sort of situation. Given that she cannot avoid having to confront the attack in the simple way that the assailant can, it seems only fair that she have extra prerogatives to resist it should it be forced upon her. Since the assailant is in the special position of deciding whether or not the conflict begins at all, his victim is entitled to her own special powers of resistance to this decision, because it is not she who is actively creating or sustaining the conflict.

It might be thought that while this general principle of reciprocity does normally govern matters of self-defense, it cannot apply in the case of torture, because of the special asymmetry that torture involves. Someone might have to kill the person who is trying to kill him, or wound the person who is trying to maim him, but it might seem that no one could ever be in a position where she would have to torture the person who is trying to torture her as a way of frustrating that attempt. The objection, as Henry Shue argued almost forty years ago, is that you can torture a person only insofar as he is absolutely in your power and at your mercy.<sup>8</sup> However, it would seem that this relation is necessarily irreflexive: if someone is at my mercy, I cannot be at his. If I am in a position to torture my foe, then he

7. I'm confident that clever philosophers will be able to construct a case, no doubt involving a trolley or two and some fat people. However, I'm equally confident that any such cases would have to be so weird or byzantine as to make them useless as a way of eliciting any of our pretheoretical intuitions about the nature and limits of self-defense.

8. Henry Shue, "Torture," *Philosophy and Public Affairs* 7 (1978): 124-43.

must be helpless before me and so unable to threaten me in any way. If so, then it would seem that the issue of self-defense cannot arise.

I allow that it is especially hard to justify torture as a form of self-defense in cases that involve only two distinct agents, both of whom act without any dependents or confederates. However, we normally think that principles of self-defense apply not only to myself, considered as an individual, but also to those whom I have an obligation to protect. Suppose a terrorist group has captured and is torturing my wife, and I have just captured the leader of this group. May I torture this man if this is the only reasonably effective way of getting him to reveal where my wife is being held, so that I may stop the torture that is proceeding under his orders? Although my captive is in one way completely at my mercy, he still has power to act against something dear to me through his subordinates, who are acting under his command. My being in a position to torture him does not preclude his being in a position, through his subordinates, to torture me, through my spouse. Although he is completely in my power, I am also completely in his.

#### 4. Hill on self-defense

Recently, Daniel Hill has argued that in such cases, the captured terrorist cannot really be attacking me in a way that would allow self-defense justifications to apply.<sup>9</sup> That activity supposedly ended once the terrorist leader issued his orders or otherwise set some train of events into motion (say, by placing a bomb). If so, then torture cannot be justified as a way of frustrating a wrongful attack of his already under way: instead, it would at most be a way of forcing the terrorist to initiate a new action, one that would forestall the intended consequences of his earlier acts. Hill claims that self-defense can be invoked only to get someone to stop something he is already engaged in, not to force him to undertake new actions to defeat something he has already done.

I disagree with Hill about how to individuate temporally extended actions: I think that the terrorist is still engaging in his attack as he sits quietly in his cell, refusing to divulge any information.<sup>10</sup> The issue is a murky one in the philosophy of action, but fortunately it does not have to be resolved in order to see whether self-defense justifications might apply

9. Daniel Hill, "Ticking Bombs, Torture, and the Analogy with Self-Defense," *American Philosophical Quarterly* 44 (2007): 395–404.

10. Hill considers only temporally extended actions and not joint actions involving distinct agents.

in some cases of torture. Hill argues that we could be entitled to inflict pain on a terrorist in order to stop him from continuing to engage in some wrongful act that he is committing, because in so doing we would be making him comply with a negative duty that he has to us, a duty not to do something. On the other hand, requiring him to do something new in order to frustrate a plan he has already put into motion would be forcing him to fulfill a positive duty, a duty to perform some action. Hill takes this distinction to be of great moral significance.

Hill seems to think that, in general, negative duties are more stringent than otherwise similar positive ones, and that self-defense justifications are available only for the former and not the latter. Here he may be making the mistake of conflating negative duties with duties of justice, and positive duties with those of charity, which does seem to be a less pressing kind of concern. However, duties of justice can be positive (if you have borrowed money from me, justice demands that you repay me), and duties of charity can be negative (I shouldn't take the last seat on the subway when a very pregnant woman is standing).

More important, the positive/negative distinction does not seem to have very much to do with self-defense justifications at all. Suppose I have been poisoned by Wilt and am trying to administer the antidote to myself while I still can. If Wilt tries to wrest my vial of antidote from me, I am entitled, in self-defense, to twist his arm to get him to stop. So much even Hill will grant. But now suppose that Wilt has succeeded in taking the vial from me and placed it on a high shelf beyond my reach. Surely I may similarly twist his arm in order to get him to reach up and give the antidote back to me, and for the same reason. Self-defense applies in both cases, because although the first involves an omission and the second a new action, both are needed to frustrate Wilt's attempt to murder me.

### 5. Daschner's dilemma

Unfortunately, such situations are not merely hypothetical. Consider the case of Wolfgang Daschner, a deputy police chief in Frankfurt. In 2002 Magnus Gäfgen kidnapped eleven-year-old Jakob von Metzler, demanding a million euros for his safe return. Jakob's family paid the ransom, not knowing that Jakob had already been murdered by Gäfgen. Gäfgen was subsequently arrested (with the ransom money) but refused to divulge where Jakob was. Daschner, thinking the boy still alive, threatened Gäfgen with torture, and in response Gäfgen confessed to the crime and revealed

where Jakob's body had been left.<sup>11</sup> Gäfgen was convicted of murder and sentenced to life imprisonment. Daschner was subsequently tried and convicted for misuse of authority and coercion, receiving a moderate fine and probation.<sup>12</sup>

The Daschner case sparked considerable debate in Germany, and there may be good reason not to recognize any legal excuse or authorization to torture. My concern, however, is not with the place of torture in law but with the more basic dilemma Wolfgang Daschner faced as an individual with the reasonable belief that, somewhere, an innocent boy was essentially being murdered by the man he had in custody.<sup>13</sup> Here it seems that Daschner could in principle offer a justification for torture to Gäfgen that he could not reasonably reject, were Gäfgen or his proxy able to think about the situation rationally. So long as Daschner's threats were properly conditioned by this sort of reflection, such torture would be consistent with an address to Gäfgen as a fellow subject, despite the strong presumption of "dirtiness" that of course attaches to it. Even if Daschner was indeed properly held legally culpable, his threat was morally blameless. In fact, it may well have been morally obligatory (I suspect that the only cases in which torture could be permissible will be ones in which it has become obligatory, subject to a few minor qualifications. If so, then there still is something right about the intuition that torture cannot just be one option among others that are available in some emergency).<sup>14</sup>

Daschner's justification would then in principle seem to be available to those who torture those who are engaging in terrorist acts, if we see terrorism as involving something like the same class of wrong as torture. Such

11. See "Killer Convicted, Police under Fire for Torture," *Deutsche Welle*, July 29, 2003, accessed May 25, 2013, <http://www.dw-world.de/dw/article/0,,936126,00.html>.

12. "German Officer Guilty of Threats," *BBC News*, December 20, 2004, accessed May 25, 2013, <http://news.bbc.co.uk/2/hi/europe/4111483.stm>.

13. In response to his accuser, Daschner replied, "Not one single person has been able to tell me what I should have done." "Police Threat Fuels Debate on Torture," *Deutsche Welle*, February 24, 2003, <http://www.dw-world.de/dw/article/0,,785751,00.html>. While this does not answer important questions about general policies and proper institutional design, we should not lose sight of the fact that individuals have to decide and act, not just as occupants of institutional roles, but simply as human beings.

14. I have been assuming that when a person is at my mercy, a credible threat to torture him is itself an incipient form of torture or at least something in essentially the same moral category as torture. Torture is as much about fear and vulnerability as it is about physical pain (indeed, fear is probably the more essential element, since torture can proceed without any experience of physical pain at all, as with mock execution). In any event, I am willing to grant that had Gäfgen not acceded to the threat, Daschner would have been entitled to carry it out.

a defense would not cover everything that might be needed to prevent a terrorist act, even if directed only against the person responsible for that act. I have argued only that we may torture to frustrate an act of terrorism or torture already in progress, if this is done against those who have set this act in motion or are in the process of carrying it to completion, and if there are no other options that might be reasonably expected to succeed in place of such torture.<sup>15</sup>

## 6. Torture and reconciliation

So long as Nagel understands the norms of interpersonal address in a fundamentally contractualist way, it would seem that he must allow that torture could be justified as necessary self-defense against those who themselves are engaged in torture or something in the same moral ballpark, as may well be the case with most terrorism. However, I think there is more to the sort of address that Nagel is concerned with than is fully captured by this sort of contractualist dialogue. Ordinarily, the contractualist model of moral address assumes that those involved in it already see themselves as engaged in some common project of justifying themselves to one another or at least coming up with general principles by which such justification might proceed. This basic motivation establishes the relationship between the parties as one in which subjects address one another as subjects: the mutual commitment to norms of reciprocity is an ongoing expression of this stance.

However, when we are considering how to deal with people who are out to torture us or commit acts of terrorism against our loved ones, no such common project of mutual justification can be in the offing. Outside that context, the norms of reciprocity that support familiar principles of self-defense no longer find purchase. The basic problem is how to understand what would count as addressing another subject as a subject when his actions show that he is unwilling to recognize us as fellow subjects with the standing to demand justifications from him and to offer justifications to him. What is it to continue to address yourself *to* someone in the face of his refusal to acknowledge you as any sort of interlocutor in the first place?

15. Here it's important to note that I am not saying that we must have a high degree of confidence that such torture will succeed: it may well be that such confidence is never or only very rarely reasonable. I am only saying that, in such cases, we must have reasonable confidence that an act of torture will be more effective than any other options physically and morally open to us, even if nothing seems particularly promising. Despite torture's notorious unreliability as an intelligence tool, there may be emergencies in which it is nevertheless our best bet.

If the basic contractualist norms of discourse no longer apply in this context, is there any sort of fallback standard that might serve in their stead?

I suggest that in such extreme cases, all that remains of addressing a subject as a subject is a commitment that at least leaves open the possibility of entering into relations of mutuality and reciprocity with one's enemy, despite his current refusal to do so. Self-defense must be in some way qualified by an aspiration for a kind of moral reconciliation, should our enemy experience a change of heart (however unlikely this may be in actuality).<sup>16</sup>

What is special about torture, even with regard to self-defense, is the way in which it may preclude the possibility of any reconciliation, not just psychologically but morally. The problem is not just that torture makes it very difficult for its survivors ever to enter into relations of trust, respect, or genuine openness with their former tormentors or their compatriots. I have no doubt that this is true, although some remarkable individuals have managed to accomplish this feat. The deeper problem is that torture is the sort of thing that also may create moral impediments to such reconciliation, impediments that would remain in force regardless of how any individuals were psychologically capable of responding. Torture sets out to alienate the victim from his body and his affects. Pain and the fear of pain are effective means of coercion, but what they aim at in torture is an immediate experience of oneself as limitlessly vulnerable, completely dependent upon some particular other person or persons, and absolutely impotent, being unable to evade, shield oneself, or resist one's torment in any way. Characteristically, victims lose a sense of their wills and their world as something distinct from that of their torturers.<sup>17</sup>

Once a person has experienced himself in this kind of a relationship with another person, any form of subsequent trust, concern, respect, or openness must become morally suspect. What might seem to be forgiveness and reconciliation in another context might here be just a more subtle expression of the way that the torturer's will has insinuated itself in the victim's mind. Every move toward moral reconciliation may be simultaneously a further betrayal of oneself, a further reenactment of the

16. The idea is not unrelated to Kant's insistence that war be conducted with concern for *jus post bellum*—that is, in ways that would not preclude the possibility of securing a stable and just peace between the parties once the conflict is over. This would rule out using such weapons as land mines, depleted uranium, or chemical weapons, which continue to kill long after the cessation of hostilities. It would also rule out humiliating an enemy so as to make it impossible for him to act from the kind self-respect that just relations of peace require.

17. See Elaine Scarry, *The Body in Pain* (New York: Oxford University Press, 1985), 34–38.

experience of subjugation and dependence.<sup>18</sup> If so, then it might well be that victims of torture have something like a duty to themselves never to enter into something like a common project of mutual justification with their past tormentors, given that this might really be a kind of affirmation or endorsement of the relationship that the torturer forced on them.

If our enemy is subjecting us or our loved ones to torture or threatening us with immediate torture, then it would seem that he has already made full reconciliation morally impossible, no matter what we do. In this case, it would be wrong for us to enter into relationships of trust or openness with someone who has subjected us to this experience. Torture would then be justified at least in the very limited case where this is needed to resist acts of torture that are being committed against us or those we love. However, the right to torture in self-defense may be uniquely circumscribed. Although we are permitted to torture if this is necessary to frustrate a wrongful attempt to torture someone else, it may well be the case that we may not torture to frustrate other kinds of dirty fighting. Those other kinds of fighting, bad as they are, may not have the special features of torture that may morally block the possibility of reconciliation. If so, then the justifiable use of torture in self-defense may be far more limited than other uses of force, including killing in self-defense. The logic of self-defense allows us to kill not only to save someone's life but also to prevent other significant wrongs and harms that are clearly less grave than losing one's life. In contrast, defensive torture may be morally permissible only in those rare cases where it is the most effective way of frustrating some other act of torture and perhaps those most extreme forms of terrorism that count as essentially the same thing.

18. For further development of the centrality of self-betrayal in torture, see my "What's Wrong with Torture?," *Philosophy and Public Affairs* 33 (2005): 1–33.

## Torture as Unjust Means of War: To Squelch the Sirens' Singing

SCOTT A. ANDERSON

It is worth canvassing briefly the larger scope of the subject of torture, in order to understand the bounds of my present topic. Torture has had many uses in history, few of which have any defenders in civilized society today. It serves as a form of corporal punishment, either exacerbating a sentence of death or else serving on its own as a possible substitute for death. It also has been used as a technique in domestic police investigation and judicial forensic inquiry. For instance, as Richard Leo and Alexa Koenig have documented, torture (in the form of the "third degree") remained a widespread police technique in the United States as late as the 1940s.<sup>1</sup> Its barbarity as punishment and its relative ineffectiveness as a tool of investigation have largely diminished its appeal as a means of civilian control (though it remains popular with oppressive governments dealing with domestic political threats). In any case, philosophers and politicians in the Western developed world have come to have little sympathy for its use in domestic contexts or by individuals for their own purposes and roundly condemn its use for such purposes.

However, there remain live questions—or perhaps we should call them zombie questions, because they seemed to be dead not long ago but have recently been revived—about whether torture should be absolutely prohibited in circumstances of war. I wish to address here the question of whether torture might be a just means of war, which raises more challenging and

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1. See chap. 7, by Richard A. Leo and K. Alexa Koenig, in this volume.



poignant questions than many typical ethical “hard cases.” Torture often appears to provide a potentially efficacious means in pursuit of a just cause. As Sanford Levinson notes, it is implausible, and trivializes our difficulties, to suppose that torture never works. “If, after all, there were no genuine lure of the Sirens, Ulysses would scarcely have needed to tie himself to the mast. Most of us do not need to engage in such elaborate procedures in order to avoid walking into a pit of rattlesnakes. But the Sirens sang beautiful music, and it was perfectly understandable why someone might want to hear their songs more clearly.”<sup>2</sup>

In order to help us avoid the lure of this song of the Sirens, I will suggest that some of our long-standing principles here are to be vindicated after scrutiny. The interest of my remarks will not, therefore, be the novelty of the ethical conclusions reached but rather showing the strength of the ground for them that lies in international law and its basis in the just war tradition. Along the way, I’ll say a bit about the interest of this topic more generally and about the style of ethical argument I think most helpful here.

### 1. Prohibitions in ethics

One of the continual challenges in philosophical ethics is to make sense of and defend the possibility of absolute prohibitions or else to show that no such prohibitions bind in the tight corner. On the one hand, it seems nearly impossible to make a convincing argument for any absolute prohibitions on any kind of action: it doesn’t take much of a philosophical imagination to contrive circumstances that make virtually any prohibition seem foolish. On the other, there are numerous games (among other practices) featuring absolute prohibitions in which their existence is essential to the nature of the game—so, hardly foolish at all. Of course, it is usually of little consequence whether one follows the rules of a game strictly or not, whereas serious consequences can depend on whether one follows other sorts of prohibitions strictly or not. So it might seem that one can generate a defensible absolute prohibition only if one is talking about conventional actions (such as the sorts of actions defined in the context of a game) where it seems plausible that playing the game right might be more important than any extrinsic consequences attached to its outcome.

If there are any ordinary kinds of actions that might be reasonably, absolutely prohibited, torture would seem to be a good candidate for such a

2. Sanford Levinson, “‘Precommitment’ and ‘Postcommitment’: The Ban on Torture in the Wake of September 11,” *Texas Law Review* 81 (2002–3): 2013–53 at 2030–31.

kind of action. We might compare it to rape or murder, as kinds of actions that seem to be unjustifiable because they are simply bad in themselves, and similar to rape, it is hard (though not impossible) to devise a moderately realistic scenario in which tangible predicted benefits of torturing would outweigh the badness of the act itself. If torture is an intrinsically bad kind of act, we might find that an absolute prohibition on torture would be superior to any other possible rule regarding torture, and so impose it, and happily never come to regret it.<sup>3</sup> But again, it takes only a fertile imagination (or a fertilizer bomb) to show that such a rule is only a rule of thumb and liable to be problematic in the clutch.

But let's pursue, for the moment, the thought that torture is an intrinsically bad kind of act. If it's like murder and rape in this way, then an absolute prohibition on it might not be especially hard to defend. After all, like rape and murder, torture is a very bad kind of action, and the grounds to engage in torture are rarely ethically appealing—again, like rape and murder. But we might notice a further difficulty in thinking about prohibitions on bad kinds of actions, such as rape and murder (and, I will suggest, torture): it is tricky to define the activity at issue in a way that identifies exactly the wrongful action involved. Murder is more than killing a human, just as rape is more than sex with a human, where “killing” and “sex” are the most minimal ways of describing the basic action that is the fundamental element of the prohibition. To make sense of murder and rape *as bad kinds of actions*, such that they are rightly prohibited without exception, one will need to specify what we might call the circumstantial aspects of the actions that are necessary to account for their injustice. Murder, for instance, might be described as a private, intentional killing of a human with malice, except in self-defense. Rape might be described as sex with a person who one knows has not consented to such activity, with a possible subsidiary condition that the overriding of consent is accomplished through certain characteristic means (such as force, coercion, or incapacitation). The point is that for even these paradigmatically bad kinds of acts, there's more to the badness of them than the simple description of a kind of action in terms of the physical interaction between two agents.

I think a similar thing will prove to be true of torture: whatever the difficulties of defining the physical or psychological aspects of torture may be (and there are disagreements about these definitions), there will be further

3. This is the sort of conclusion that rule-utilitarian reasoning, such as that employed by Jeff McMahan in his contribution to this volume (chap. 9), can support, though it does not start from the notion of an intrinsically bad action.

difficulties in specifying the circumstantial aspects of the action that make it a possible candidate for being absolutely prohibited. I do not want to rule out the possibility of overcoming these difficulties, but merely to insist that it requires more than thinking just about how awful torture is for the person being tortured. I will return at the end of this chapter to this issue of the circumstantial aspects of torture and how specifying them properly is part of making a persuasive case for an absolute prohibition.

## 2. Torture, institutions, and war

There is another problem, however, for a defense of an absolute prohibition on torture, which stems from the recent circumstances in which the question has been raised: namely, the use of torture as a tool of war. Torture as a tool of war is at least potentially quite different from an activity conducted by individuals or private entities. Not only does the context of war make it at least plausible that there could be horrific consequences for taking or refraining from certain actions (say, torturing a captive), but the context of war brings with it a set of rules that are quite different from those that apply among citizens of a well-ordered state. Police are justifiably held to a much stricter standard in how they use force against civilian criminals than are soldiers in combat against foreign armed enemies. After all, in war, the enemy can be presumed not only to intend to kill at least one's own military personnel but also to be engaged in a campaign that is inimical to the vital interests of one's own state. And if one's own side refuses to fight except upon provocation by a just *casus belli*, then when one does in fact have such a cause, it is likely to give one's side very good reasons to regard its opponent as morally unconstrained and to do what is possible to prevail in the war. The necessity of defending one's own state against military defeat by foreigners licenses the use of greater degrees of violence as well as provides a blanket justification to use such violence against armed hostile forces (subject to certain limitations, as will be discussed momentarily). So killing the hostile forces is itself no crime, even if the particular individuals targeted are themselves unenthusiastic, innocent conscripts. From this, one may at least wonder why torturing them would be governed more restrictively, let alone forbidden altogether. One might make an argument that torturing someone is worse than killing him and hence must be treated differently for that reason.<sup>4</sup> But this at least seems

4. For an argument that could help support such a conclusion, see David Sussman, "What's Wrong with Torture?," *Philosophy and Public Affairs* 33 (2005): 1–33.

to be questionable, at least if the torture used is milder and of more limited duration than the more extreme cases. Failing an argument of this nature, it may seem a bit strange that although you can kill enemy soldiers for the sake of a nation's defense, you cannot torture (or even threaten to torture) them for the same cause.

Indeed, considerations like these have recently led some theorists as well as US leaders to reject the absolute prohibition on torture in war. The main question then would seem to be how far to limit its use and how to manage it appropriately in those exceptional cases where it is needed—say, by institutional dispensation in the form of “torture warrants”<sup>5</sup> or by defenses of necessity or other post facto exculpations when the inevitable breaches occur.<sup>6</sup> The idea that a potentially effective means of war might be ruled entirely out of bounds, in advance, seems to pay no heed to the facts that sometimes make self-defense a dire but inescapable reality.<sup>7</sup>

Viewed this way, the extraordinary nature of war seems to provide a conversation-stopping trump on behalf of keeping one's options open with respect to torture. Yet it has not seemed so to all policy makers. In fact, most current states have in fact bound themselves to absolute prohibitions on torture, in war as well as in peace, as part of international agreements.<sup>8</sup> When one invokes various elements of *international humanitarian law* (a designation that I will use to describe the negotiated laws of war and armed conflict), *customary international law*, or the just war tradition, one is liable to encounter objections that such practices are unhelpfully idealized and consequently not serious as grounds to restrain the conduct of states (or non-state belligerents) engaged in warfare against their enemies. It is of course possible that even overt agreements such as international humanitarian laws should be viewed cynically, as propaganda rather than actual law. But that seems to be at odds with how these agreements on

5. E.g., see Alan Dershowitz, *Why Terrorism Works* (New Haven, CT: Yale University Press, 2002), 141, 158–63.

6. For an argument of this sort, see Oren Gross, “Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience,” *University of Minnesota Law Review* 88 (2003–4): 1481–1555.

7. “After all, most of us believe that most, if not all, government agents, when faced with a genuinely catastrophic case, are likely to resort to whatever means they can wield—including preventive interrogational torture—to overcome the particular grave danger that is involved. And I believe that most of us hope they will do so” (ibid., 1554).

8. Negotiated international law bans torture in several distinct documents. Broad bans on the use of torture are found in the Convention against Torture (in force as of June 1987, with 147 states party to it) and the International Covenant on Civil and Political Rights (in force as of March 1976, with 167 states party to it). Torture is also banned for use in war in the Geneva Conventions (both the convention of 1949 and Protocol I of 1977).

the whole are actually treated by the states that made them; moreover, it fails to take into consideration the way these agreements usually gain their force through domestic legislation after their ratification.<sup>9</sup> These well-established agreements and customs clearly *have* placed bounds—even if imperfectly honored—on the conduct of many belligerent actors and offer useful guidance with respect to war-making conduct that serves the purpose of limiting its horrors.<sup>10</sup> Though continually changing circumstances present challenges with respect to many of the specific provisions of this law, the basic tenets of the law of war remain unimpeached as grounds for rejecting torture as a means of conducting war.

As one might guess, my interest in this subject is driven especially by the recent behavior of the United States in its so-called “war on terror.” The United States is, even in the wake of this conflict, hardly one of the world’s worst offenders with respect to its use of torture, and it seems to have largely altered its course and some of its stances since 2008’s election of Barack Obama as president. It is of interest to contemplate why torture draws so much attention relative to the many other horrors of recent wars, and why the use of it by the United States strikes us as particularly remarkable. In the case of attention to the United States, no doubt some of that is due to the extent to which the United States has proven itself to be quite cynical about honoring its commitment to refrain from torture. But its conduct here is all the more striking because of the many other respects in which as a matter of course it follows the dictates of international law of armed conflict. This is not to say that the United States is faithful to its international legal commitments in all areas other than torture—only that such commitments seem genuinely to guide and bind even the United States in its war fighting, and that at least with respect to *jus in bello* (if not *jus ad bellum*) its degree of adherence to international humanitarian law is much more notable than its deviations from it.

If we are correct to take international humanitarian law seriously, rather than as merely a cynical edifice, then there remain questions about whether a prohibition on torture is something that should in fact be part of such law, and if it is part of such law, whether it is a part that countries need to take seriously. One can imagine that countries might accept some but not all aspects of international law as being well grounded in consensus

9. For instance, the Convention against Torture requires parties to it to enact domestic legislation prohibiting all uses of torture, both domestically and against enemies in war, as well as preventing the state from engaging in inhuman or degrading treatment or punishment.

10. See Aldo Zammit Borda, “Introduction to International Humanitarian Law,” *Commonwealth Law Bulletin* 34 (2008): 739–48.

and important to uphold, and thus binding in ways that not all aspects of international law must be. We ordinarily accept such distinctions among different parts of domestic criminal and procedural law and conduct our behavior accordingly, without thereby denying that law has force in general. In the remainder of this chapter, I will argue for the importance and reasonableness of the ban on torture as a part of international humanitarian law, argue for the extension of that ban to cover fighters who do not conform to the dictates of international humanitarian law, and argue that this ban needs to be treated as a matter of primary importance rather than as a guideline that anticipates infringements in its very construction.

It may seem that my approach here gets things the wrong way around: I will be, in effect, arguing that what's wrong with torture as a means of war fighting depends in some way on its unlawfulness—that is, on the fact that a collection of states have mutually agreed to forbid it to themselves as a means of war. One might object that we must reason the other way: that its wrongfulness, because of its invasion of the rights of the tortured, is fundamental, and its unlawfulness follows from this and so can't and shouldn't be offered as grounds for its wrongfulness. But as I suggested earlier, this is a hard argument to make persuasively, especially in a context of war. By contrast, I will argue that states have reasonably agreed to ban the use of torture in international law because it is a barbaric act that is predictably counterproductive to the aims for which a war may be fought justly. Forswearing its use thus provides appreciable benefits to the citizens of the states who abide by the laws of war, at no significant cost to those states' defensive or war-fighting capacity. This ban is consistent with and even derivable from more general considerations of the lawful treatment of prisoners of war, who are now captive and "out of the fight." Hence, an absolute ban on the torture of enemy combatants is part and parcel of the broader rules governing a "combatant's privilege," which are themselves essential to the "principle of distinction." While this system of rules hardly makes war humane, it serves to check some of the worst horrors of war—even between parties that are otherwise fighting unlawfully—and also serves to limit the scope and duration of wars by facilitating the reconciliation needed to end hostilities. In this argument, I aim to build on thought from David Luban and Jeremy Waldron regarding the institutional considerations that weigh against the use of torture.<sup>11</sup> However, I aim to cast my net even wider than

11. See David Luban, "Liberalism, Torture, and the Ticking Bomb," *Virginia Law Review* 91 (2005): 1425–61; Jeremy Waldron, "Torture and Positive Law: Jurisprudence for the White House," *Columbia Law Review* 105 (2005): 1681–1750 (a condensed version of this essay is chap. 12 of this volume).

they have, in looking to the international law of war to serve as a ground for arguments to restrict the military use of torture.<sup>12</sup>

### 3. Torture and international humanitarian law

The law of warfare is rather more amorphous than the sort of law that is recognized as in force via legislative enactment in a country like the United States, in part because it consists in a number of overlapping covenants (each with different groups of signatories) as well as a body of customary law that largely lacks a systematic codification and a history of case law comparable to that of Anglo-American common law. Nonetheless, there is a body of widely accepted rules of conduct that establish norms of conduct in the course of battle and also for the treatment of enemy soldiers who have surrendered or been wounded in the course of fighting. These rules are most famously encoded in the various iterations of the Geneva Conventions, among other agreements, but also, subsequently, in the domestic laws of the signatories to these agreements. The correspondence between domestic and international law arises because these agreements require signatories to “enable” their effects by embedding their strictures on conduct into ordinary criminal and administrative domestic law, thus localizing the specific codes and methods of enforcement on a state-by-state basis. So, for instance, its executive having been a party to the negotiation of the Geneva Convention of 1949, the US Congress enacted 18 U.S.C. §2441 in 1996 to require that its military act in accordance with the Geneva Conventions and to punish grave breaches of the Conventions.<sup>13</sup> A similar process led to its signature of the UN Convention against Torture in 1988 and subsequent ratification and domestic enabling legislation (18 U.S.C. §2340A) in 1994, honoring the United States’ agreement as part of the convention.<sup>14</sup>

12. I am also here largely in concurrence with the view that the prohibition on torture in international law is more defensibly derived from the just war tradition’s concern with the morality of state conduct than it is from a concern with individual rights and individual moral conduct. For an elaboration of the underlying argument, see Janina Dill and Henry Shue, “Limiting the Killing in War: Military Necessity and the St. Petersburg Assumption,” *Ethics and International Affairs* 26 (2012): 311–33.

13. See generally Hamed Adibnatanzi, “The U.S. Codification of War Crimes: 18 USCA §2441,” *Annual Survey of International and Comparative Law* 14 (2008): 151–69.

14. However, it is of interest here that the US legislation enabling the Convention against Torture severely narrowed the definition of torture to exclude many forms of mental or psychological torture (e.g., techniques such as sleep deprivation or waterboarding, which causes suffocation rather than physical pain). Thus, it was possible for the Bush administration’s lawyers to argue that many forms of enhanced interrogation were not technically torture. See David Luban and Henry Shue, “Mental Torture: A Critique of Erasures in U.S. Law,” *Georgetown*

This process of international agreement leading to domestic legislation is of some interest in that it provides some sense of the grounds on which states expect to be able to rely on commitments from other states with respect to covenanted law of armed conflict. Of course, not all states can be described as governed by the rule of law; and domestic law is liable to come under significant strain when a country is engaged in war, so even normally lawful societies may be unreliable adherents to international law when pressed by war. Yet such law typically provides a set of overt boundaries for how a country will train its troops and establish military and judicial institutions (such as courts-martial) and public doctrines for domestic and foreign guidance. Such laws generally do not come with footnotes or sotto voce disclaimers to them indicating that they can be ignored or carry no weight in times of war or when expediency dictates otherwise. Rather, states have reason to expect that international conventions agreed upon and then enacted through domestic law will provide reasonable guarantees from other ratifying parties that they will conduct themselves according to their negotiated obligations, even in times of war. States are, of course, under considerable reputational pressure to sign on to such international agreements, but they are not generally forced to do so. Rather, they do so out of perceived self-interest, insofar as such agreements help offer protection to their own soldiers and civilians from other signatories, as well as encourage civilized behavior among their fellow states more generally. In these arrangements, one can see the standard structure of a contractual bargain among self-interested parties, who as a result of such bargains incur fiduciary duties to keep the covenants they have made.

International humanitarian law is not, however, merely an agreement for the sake of convenience or mutual benefit, which the states would then be free to abrogate with notice when it suits their purposes. Rather, we can regard these contracted obligations as an implementation of a scheme of justice for extreme conditions, where individual states, in order to secure humane treatment for their own citizens, undertake commitments to treat other states and their citizens humanely or better, by following certain agreed-upon protocols for the conduct of war. Mutual implementation of this scheme is no doubt in the interests of states, in the way just relations between parties are usually to their mutual benefit (at least antecedent to any particular tight corner they might find themselves in). But the point of the laws of war in general is to forestall war in favor of peaceful means of



conflict resolution; to foster the safety and security of noncombatants on both sides; and to provide for the restoration of peace and reconciliation after the conflict. It is, in other words, a mutual obligation to avoid and constrain the “incommunities of war” as much as is possible, even when a state finds itself involved in a war that cannot be avoided or a war it is at risk of losing. It is thus both prudent and a matter of justice that states attempt to secure such commitments from other states, exchanging their own if need be, and then that states uphold their commitments so long as such agreements taken together provide a framework for limiting the disasters of war.

This picture of international humanitarian law reflects a reading of it through the lens of the just war tradition, which is itself subject to considerable disagreement and debate. This tradition holds that there are indeed ethics that govern the conduct of war, permitting some techniques, and war for some causes, while prohibiting all others. A number of aspects of this tradition could be usefully discussed here, but the one that I will focus on is the principle of distinction (or discrimination), which determines who is potentially a target of military action. One statement of this principle holds that “just warriors may intentionally target personnel directly participating in the enemy nation’s wrongdoing, but should not directly target other enemy nationals. . . . [E]nemy nationals not engaged in the war or contributing to waging it are committing no wrong against the victim nation, and so the victim nation has no just cause to target such nationals.”<sup>15</sup> The principle then gives rise to procedures related to the appropriate treatment of captives, including those who were appropriate targets to be killed while they were engaged in military actions. Once such agents are captured and disarmed, rendering them harmless, the principle of discrimination holds that they must not be subject to further harm: “When enemy military personnel surrender, however, they are no longer participating in the enemy’s wrongdoing, nor do they have any potential to do so once they are disarmed and imprisoned. Accordingly, the law of nations and international conventions requires that belligerents not kill non-resisting prisoners of war, and that belligerents treat prisoners of war humanely.”<sup>16</sup> This protection for captives, which is the primary component of the “combatant’s privilege,” is not an obvious rule of justice: one might, for instance, be tempted to regard such individuals as conspirators to murder, insofar as

15. Richard Regan, *Just War: Principles and Cases* (Washington, DC: Catholic University of America Press, 1996), 87.

16. *Ibid.*, 88.

they were (before being captured) attempting and often succeeding at killing one's compatriots. Of course, insofar as they were members of a military, they were doing so at the behest of a foreign state rather than of their own initiative; many may in fact be conscripts who fight only because their state has compelled them to do so, though it is probably likely that most sympathize to some extent with their state's side. In any case, if they are part of a foreign enemy's military at war, then they are directly engaged in activities that are hostile to the safety and security of one's own state and its citizens. Moreover, the cause for which they were fighting may have been no more just than that of a criminal enterprise. Yet the combatant's privilege holds regardless of whether the state they fight for qualifies as meeting the *jus ad bellum* standard.<sup>17</sup>

Given that the combatant's privilege protects those fighting with indifference to whether the cause they are fighting for is just, it is not obvious that this privilege can be derived simply from considerations of what justice demands for the treatment of captives. However, I think it is not an arbitrary principle, nor one arising simply from coordinated self-interest. Instead, it reflects the importance of a basic distinction that differentiates war from peace: individuals who have surrendered and are disarmed are no longer a threat to a state, and so they become, like civilians, out of bounds for military attacks or reprisals. This arrangement has several advantages with respect to curtailing the horrors of war, which is clearly a moral imperative. First, and most obviously, it protects the lives of those soldiers who become captives of a hostile power. Second, it also reduces the incentive of active soldiers to fight on at all costs and thus can shorten wars by reducing the cost to the losers of losing. Last, I would argue that it aids in reconciliation in the wake of a war: since war has the potential to place a large number of captives at the mercy of their nation's enemy, if that enemy nation shows a willingness to abide by laws of humane treatment of those captives, it can make it easier for both nations to see the people of the other as trustworthy and humane after the threat of hostilities has ended.

The difference between being a threat and not being a threat is a fundamental difference that conditions the possibilities for peaceful coexistence

17. This is disputed; while the traditional view is that the dictates of *jus in bello* are independent of *jus ad bellum*, some have recently argued that the "independence thesis" should be rejected. See, e.g., Jeff McMahan, "The Ethics of Killing in War," *Ethics* 114 (2004): 693–733; David Rodin, "The Moral Inequality of Soldiers: Why *Jus in Bello* Asymmetry Is Half Right," in *Just and Unjust Warriors*, ed. David Rodin and Henry Shue (New York: Oxford University Press, 2008), 44–68. For a view that supports the independence thesis, see Christopher Kutz, "Fearful Symmetry," in Rodin and Shue, *Just and Unjust Warriors*, 69–86.

and cooperation among peoples and among states. Hence, there is good reason, based in the principles of just war, to use international humanitarian law to restrict the targeting of military force to only those persons who constitute an active threat: that is, the soldiers under arms or otherwise engaged in military activity. Of course, this distinction is itself a bit of artifice: as is sometimes argued, there would seem to be good military reasons to attack a wider range of targets than merely those that constitute an enemy's military. But drawing a sharp line between legitimate and illegitimate targets allows states to protect many more people and resources than they could without such boundaries. Knowing with specificity who is and isn't liable to attack can help all parties choose their activities and whereabouts with a view to shielding the lives of those who are immune to targeting. And in fact there is a real difference between using the tools of armed combat to attack another state (the sort of thing combatants do) and using other, nonviolent means to oppose or harass a people or a state.<sup>18</sup> Thus, the principle of distinction is fundamental to the rationale behind the restrictions of just war thinking: to restrain the barbarities of war, to minimize the legitimate causes for war, and to facilitate the restoration of a just peace at the end of war.<sup>19</sup>

The ban on the torture of enemy combatants is reasonably regarded as an appropriate extension of the principle of distinction. It is essential to torture-as-we-know-it that the torturer possesses complete corporal control over the tortured, and hence that the target of torture will necessarily be *hors de combat* in the technical sense that triggers a combatant's privilege. In this state, just as it is illegal to kill prisoners of war or conscript them for the other side (despite their potential utility to a state's war effort), it is illegal to torture them for the sake of intelligence gathering. The reasons for prohibiting the former sorts of treatment, if indeed they can be

18. There are of course exceptions: if one state is landlocked by another, being territorially encompassed by it, then it is possible to see how this sort of stranglehold might suffice to starve the vulnerable state. Similarly, if one state depends on water that originates in another state, this too could present a choke point. But the ability of any one state to exercise this sort of non-military power over others is relatively uncommon and depends on specific local geographical factors, whereas the ability of states to attack each other militarily is now nearly ubiquitous and so merits the special body of law that regulates it.

19. I should emphasize here that these advantages of the principle of discrimination do not by themselves imply that states must accept and respect the principle. They simply show that the acceptance and codification of such a principle are not arbitrary or to be taken lightly. What gives legal and moral force to the principle is that states do in fact, in international agreements, commit to accept and respect it, in exchange for like commitments from other states.

justified, would equally provide a justification for banning the torture of such parties.

There has been a fair amount of dispute concerning whether those the United States fought and is fighting in its war on terror are entitled to the protection of the combatant's privilege upon capture. This privilege extends only to lawful combatants—a category that excludes at least fighting civilians, spies, and those engaged in terrorism or other violations of the laws of armed combat. The Bush administration argued vehemently that many of the combatants it captured in Iraq and Afghanistan failed to meet the standards for receiving the combatant's privilege under the Geneva Conventions, since they did not fight in uniform (to distinguish themselves from civilians), did not carry arms openly, and in a variety of cases may have engaged in or been part of plans to conduct unlawful fighting, such as terrorist attacks on civilians. They also in many cases would have been fighting on behalf of parties that were not themselves signatories of international treaties on war (such as al-Qaeda) and thus not themselves overtly committed to upholding the same laws of war that the United States and its allies had committed to. On this basis, the Bush administration designated such fighters as “unlawful combatants,” which it argued exempted them from the protections due under the Geneva Conventions, as well as from protections due to civilians, thus leaving them in a legal shadow.

Part of the ongoing controversy here concerns whether the term “unlawful combatant” picks out a distinct category of person in international humanitarian law.<sup>20</sup> More generally, there is need to develop additional international agreements to explicate the rights and obligations of non-state belligerent parties in a way that accords with the fact that such entities are increasingly involved in global conflicts and that the domestic laws of the states where such groups are domiciled are frequently inadequate to curb their uses of unlawful means of war. The problem of belligerents who ignore the rules of *jus in bello* should not be dismissed casually, since international law is not merely a statement of aspirations for human conduct but rather aims to incentivize conflicting parties to conduct themselves in accord with its dictates by making its benefits and disadvantages

20. A summary of some of these conflicting views is found in Noam Lubell, *Extraterritorial Use of Force against Non-state Actors* (New York: Oxford University Press, 2010), 143–46. The alternative to the tripartite categorization is to regard such fighters simply as civilians acting contrary to ordinary domestic law and thus subject to being treated as common criminals (and thus, for instance, to be tried and punished if convicted for crimes such as murder). I'm indebted to Cindy Holder for helpful guidance on these issues.

conditional. So extending protections to those who flout its demands runs counter to the logic of the law, on the account I've offered.

Nonetheless, even if so-called "unlawful combatants" are not owed the combatant's privilege, it does not mean that it is open season on them or that no rules apply to their treatment. They are rightly treated as civilian criminals or as war criminals, depending on how one answers the prior question of whether they properly belong to a military organization. Even if they have violated the laws of war themselves, states have also mutually agreed to outlaw the use of torture against humanity in general, as part of international humanitarian law. International norms, agreed to by the vast majority of countries, require that those engaged in crime be tried and punished by authorized tribunals and also prohibit the use of torture for any purpose, including the investigation of crimes or the punishment of criminals. The fact that someone has forfeited the combatant's privilege by activities contrary to the rules of *jus in bello* does not imply that the principle of distinction no longer applies to them, since once they are captured and off the battlefield, they cease to be an immediate threat.

Some argue, however, that a captured combatant (whether fighting lawfully or unlawfully) might still be, in some sense, actively engaged in hostilities if, for instance, they are in possession of information that would be of instrumental value for preventing future unlawful, egregious harms. This is the situation depicted in the numerous rudimentary ticking bomb examples that haunt this topic. One might say of such people that, insofar as they possess information about future war crimes that they are withholding, they are not *hors de combat* and so have no privilege from attack. One might press the point further by suggesting that such individuals have it fully at their disposal to avoid being tortured: if they choose to cooperate and reveal the information they know, and thereby thwart an illegal act, they would be spared the ordeal of being tortured. By refusing to divulge their knowledge, they are complicit in the illegal act and thereby earn the harm that befalls them.

It is worth a brief detour to consider how these sorts of thought experiments have deformed the public and even theoretical understanding of torture. A number of philosophers have pointed out the unreality of such cases and questioned whether any such circumstances might in fact arise that would justify torture once all relevant considerations and uncertainties are factored in.<sup>21</sup> Experts in interrogation have also attested that other,

21. See Luban, "Liberalism"; Henry Shue, "Torture in Dreamland: Disposing of the Ticking Bomb," *Case Western Reserve Journal of International Law* 37 (2005–6): 231–39; Marcia Baron's

nonbrutal methods of interrogation have a better track record of acquiring valuable, accurate information from captives and so should be preferred to torture on instrumental grounds.<sup>22</sup> Yet there remains some doubt about our reasons for abjuring torture on principle, and so we are forced to consider specifically whether a necessity or a “lesser of two evils” exception might keep us from shutting the lid on Pandora’s box entirely.<sup>23</sup>

To push back against this objection, it is worth noting a bit more generally the circumstances that have actually led democracies in the last couple hundred or so years to employ torture against enemies, either foreign or domestic. I can’t offer genuine data here, but my sense from reading around on this topic is that states like the United States have resorted to torture principally when fighting or policing people who are regarded as quite distinct from the dominant ethnic/racial/religious groups doing the torturing.<sup>24</sup> It is perhaps unsurprising that it is much easier to torture people who seem both radically other and inferior to oneself, but the pattern to the choice of targets for torture ought to give one pause. It is also true that the two wars in which the United States employed torture prior to the war on terror were also both counterinsurgency conflicts (the Philippine War at the turn of the twentieth century and the Vietnam War). So the perceived legitimacy of those combatants would have been questionable to the US soldiers. But the tendency to reserve torture for those regarded as other and inferior goes back as far as ancient Rome and is also evident in the use of domestic torture by police in the United States.<sup>25</sup> And it goes without saying that essentially none of the targets of such torture were tortured for the sake of preventing a particular, imminent disaster from taking place.

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and David Sussman’s contributions to this volume, chaps. 8 and 10, respectively. However, for a rebuttal to such arguments, see Jeff McMahan’s chap. 9 in this volume.

22. For a review of relevant data and sources, reaching the conclusion that torture does not work, see Lisa Hajjar, “Does Torture Work? A Sociolegal Assessment of the Practice in Historical and Global Perspective,” *Annual Review of Law and Social Science* 5 (2009): 311–45. Also see Intelligence Science Board, ed., *Educating Information: Interrogation—Science and Art* (Washington, DC: National Defense Intelligence College, 2006), esp. the essays by Robert Coulam and Randy Borum.

23. “Against [the background of terrorist acts against civilians], the evil of torture, however defined, must remain illegal, but it should not be utterly precluded as a method of combatting the evil of terrorism—although its use must be rare.” John T. Parry, “What Is Torture, Are We Doing It, and What If We Are?,” *University of Pittsburgh Law Review* 64 (2002–3): 237–62.

24. This view is bolstered by Christopher J. Einolf in chap. 6 of this volume. See also Christopher J. Einolf, “The Fall and Rise of Torture,” *Sociological Theory* 25 (2007): 101–21.

25. These points are argued in this volume by Kathleen M. Coleman (chap. 5) and Richard A. Leo and K. Alexa Koenig (chap. 7).

President Bush declared a few days after 9/11, "We will rid the world of the evildoers" and shortly thereafter identified Iraq, Iran, and North Korea as the "axis of evil"—three countries that at the time had no apparent common interests or collaborative ties. Attributing the problem faced by the United States to the evil of its enemies was even then unmistakably shallow and reactionary. But what it underscores is that the US leadership at the time lacked any sense that its enemies were whole people too, with goals and grievances, families and friends, and (probably) some sense of justice, albeit perhaps different from that which the United States favors.<sup>26</sup>

Part of what makes the ticking bomb scenario so distorting for thinking about a just response to terrorism is that it abstracts away from the context in which actual terrorism occurs. We are asked to imagine a group that has the power and intention to commit a mass atrocity against civilians, but we are given no description of what their end is in doing so or what has occurred prior to such an attempt. All that is typically specified is that they intend to kill large numbers of innocent civilians. Of course, this is something that terrorists do on occasion, and something that they attempt to do more often than they actually accomplish, so the scenario is not completely disjoint from reality. And such conduct is clearly immoral and illegal, and so ought to be stopped if that is possible. Alex J. Bellamy has suggested that it is the willingness to use terrorism by the current adversaries of the United States that has made torture seem more acceptable to some.<sup>27</sup> Hence, it seems to require extraordinary restraint in the face of egregiously malicious conduct to resist the lure of using torture against such enemies. "If they show no respect for the lives of noncombatants, why should we?" is a more-than-understandable response.

However, terrorism is frequently an upshot of larger social understandings in which a group's own perceived oppression at the hands of those it targets motivates those who commit such acts. Whether or not one accepts the terrorists' viewpoint as legitimate, there is good reason to think that by exhibiting a willingness to torture those who target noncombatants, one is liable to increase social support for terrorism by one's enemies and to justify it in the minds of those who might otherwise oppose its use.<sup>28</sup> Abstracting away from any sense of why a group might engage in such acts,

26. This process is helpfully and more thoroughly elaborated in chap. 2, by William Gorman and Sandra G. Zakowski, in this volume.

27. Alex J. Bellamy, "Torture, Terrorism, and the Moral Prohibition on Killing Non-combatants," in *Terrorism and Torture: An Interdisciplinary Perspective*, ed. Werner G. K. Stritzke et al. (New York: Cambridge University Press, 2009), 18–43.

28. In this context, see Fathali Moghaddam, "From the Terrorists' Point of View: Toward

we are left with no understanding of such people except a blunt depiction of them as "evil." The picture of the terrorist as a powerful evil genius is so empty of any other human characteristics or interests that it is then unsurprising that one might conclude that torture and corporal punishment are the only sorts of incentives that might weigh with such people. In short, the ticking bomb argument attempts to justify barbaric conduct by depicting an enemy who lacks the human qualities that might make alternatives to torture considerably more plausible. When combined with a sense of one's own inherent righteousness and deep grievances against one's enemies, torture can seem entirely justified. Background beliefs such as these are liable to lead, and have led, to serious moral error by countries such as the United States.<sup>29</sup>

That said, we may ask why we shouldn't see a captive combatant whom we know to be withholding the location of a bomb that will soon kill civilians as continuing to engage in hostile activity and, as such, liable to attack.<sup>30</sup> In some respects, this description is entirely apt. However, there is perhaps a better reason to hold that captives are ipso facto out of the fight and hence protected from attack. This is in part due to the lack of any other good place to draw a line between belligerent and nonbelligerent. Possessing information that is valuable to one's enemy while refusing to disclose it does not make one a combatant, even if one was earlier a combatant and actively engaged in hostilities. There are no doubt many civilians among the population of the enemy state who similarly possess information that could be valuable for preventing attacks, mitigating damage, or otherwise

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a Better Understanding of the Staircase to Terrorism," in Stritzke et al., *Terrorism and Torture*, 106–24.

29. Again, see Luban, "Liberalism," on this point.

30. Some suggest that captured terrorists or combatants who refuse to divulge knowledge that is of value to their captors are "guilty" of continuing to participate in combat and so render themselves appropriate targets for harm—that is, torture. (See, e.g., McMahan, chap. 9, this volume.) Such a claim does not, however, cohere with our current norms of "crime," "guilt," or "conspiracy," nor does it license the use of torture as a punishment. The Geneva Conventions, widely accepted as international law, explicitly reject treating prisoners of war as criminals, subject to the sort of interrogation suspected criminals may be liable to: "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. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind." *Convention Relative to the Treatment of Prisoners of War* (1949), art. 17. While other sorts of combatants do not merit protection as "prisoners of war" under the Geneva Conventions and may not be entitled to this particular guarantee of safety, they should be treated according to the domestic law with respect to their criminal conduct. And no domestic law could justifiably determine their guilt prior to a trial allowing them means to defend themselves in an adversarial proceeding.



weakening one's enemy. But kidnapping such individuals and treating them as combatants or criminals unless they betray their country is beyond what we consider prudent or decent means of fighting wars. It is only a small step from there to licensing the targeting of anyone who in any way contributes to the war-fighting capacity of the enemy, thus throwing open the gates to total warfare against the population of the enemy. So if we are to be able to draw a line distinguishing legitimate from illegitimate targets for attack, the only reasonably robust place to draw that line is between those who constitute an active threat as part of the military in the field, on the one hand, and everyone else, "out of the fight," on the other. You can't very realistically torture someone you haven't captured and taken "out of the fight," so torture comes into the picture as possible only for those who no longer constitute an active threat. Because the principle of distinction is central to the workability of the just war tradition, it provides a reason to treat all captives as having the status of nonthreats.

This reasoning helps rebut the natural challenge at this point: namely, that consequential considerations still offer a reason to keep our options open, since no one knows what harm might come from foreclosing them altogether. In response, we may insist that we also take into account the costs of keeping our options open. As I noted above, even basically decent states have resorted to torture for reasons much less significant than to avoid humanitarian catastrophes, while the value of torture for preventing humanitarian catastrophes is dubious at best. So one will have to weigh an awful lot of instances of unjustifiable, gruesome torture against very few catastrophes prevented, if any.<sup>31</sup> But besides this slippery-slope-style consequentialist argument, there is a different sort of cost to keeping one's options open here: that such states fail to help solidify and reinforce the principle of distinction. Insisting on the right to use torture, even if one never exercises the right, shows that one regards one's enemies as implacably evil or unworthy of protection, or both, even if not engaged in hostilities. But this is the opposite of the stance needed in order to provide a basis for mutual trust and negotiation of a settlement to issues in conflict. Fifteen-plus years into the war on terror, the United States has suffered a considerable loss of international goodwill and trust by Muslims and countries in the Middle East and North Africa. While only some of this can be attributed to its choice to engage in torture, its continuing reluctance to

31. See Darius Rejali, *Torture and Democracy* (Princeton, NJ: Princeton University Press, 2007), chap. 21, esp. 469–79.

constrain its conduct in accordance with the recognized law of war is frequently cited as a ground for the hardening of attitudes toward it.<sup>32</sup>

Now, forswearing the use of torture will not force politicians and pundits to rethink their conceptions of their enemies and to adopt a less cartoonish understanding. It is also unlikely, I suppose, in the short run to alter the tactics or aims of those enemies, to bring them closer into line with the norms of international humanitarian law. But surely, resorting to torture on the ground that one's enemies will respond to nothing less does not foster trust or cooperation nor therefore make conflicts more tractable without resort to war. On the other hand, consistency in treating others humanely by, among other things, refusing to torture them when held captive may reasonably be expected to influence perceptions of what kind of people we are and demonstrate our willingness to adhere to just and hu-

32. Steven Kull, director of the Program on International Policy Attitudes, argues that international polling data show the following:

There is substantial evidence that the values and ideas for world order that the U.S. promoted have become widely accepted. . . .

The problem is that of late there has been a growing perception that the U.S. is not living up to its principles. . . .

What the world is looking for is assurance that the U.S. is constrained by the rules that the U.S. has promoted; that it is still committed to the rule of international law, to limits on the use of military force, to respect for human rights, and to fairness in the world economic system.

See testimony by Steven Kull, *Global Polling Data of Opinion of American Policies, Values, and People: Hearing before the Subcommittee on International Organizations, Human Rights, and Oversight of the Committee on Foreign Affairs, House of Representatives, 110th Cong., 1st Sess.* (March 6, 2007), 14–15. For further discussion of the impact of such attitudes for US strategic interests, see further testimony by Steven Kull, *Declining Approval for American Foreign Policy in Muslim Countries: Does It Make It More Difficult to Fight Al-Qaeda? Hearing before the Subcommittee on International Organizations, Human Rights, and Oversight of the Committee on Foreign Affairs, House of Representatives, 110th Cong., 1st Sess.* (May 17, 2007). The hearings at which Kull testified were summarized by the subcommittee, which reached, *inter alia*, the following conclusions:

2. It's the policies: Opposition to specific U.S. policies, rather than to American values or people, has driven this decline. The key policies are: The invasion and occupation of Iraq; support for repressive governments worldwide; a perceived lack of evenhandedness in the Israeli-Palestinian dispute; and torture and abuse of prisoners in violation of treaty obligations.

3. It's the perception of hypocrisy: Disappointment and bitterness arise from the perception that the proclaimed American values of democracy, human rights, tolerance, and the rule of law have been selectively ignored by successive administrations when American security or economic considerations are in play.

See *The Decline in America's Reputation: Why? Report of the Subcommittee on International Organizations, Human Rights, and Oversight of the House Committee on Foreign Affairs, 110th Cong., 2nd Sess.* (June 11, 2008), 6. See further Bellamy, "Torture, Terrorism."

mane principles.<sup>33</sup> So in the longer run, there seems reason to hope that adhering to the norms of international law, and in particular to prohibitions on acts such as torture, will further the ends that underwrite the just war tradition.

Tickling bomb cases present torture as an exceptional but justified investigative technique in certain cases of exigent necessity. I have pointed out that such exigencies are exceedingly rare, and that torture is almost always useless for and frequently counterproductive to its supposed purposes, and I have argued that the underlying outlook that keeps hoisting such exigencies as an objection to prohibiting torture reflects a deeply problematic misconception of both our own motivations and those of enemies liable to suffer it. Nonetheless, despite these objections, it may seem that the goal of promoting international humanitarian law, and in particular the principle of distinction, is simply too abstract and ephemeral a concern to carry much weight against the chance, however remote, that torture might sometime save many innocent lives. But the benefits of international humanitarian law and human rights law more generally are not nearly so intangible nor unrealizable as one might suppose. International humanitarian law does not function seamlessly, but it has worked to reduce some of the horrors of war. In a study of the effects of international humanitarian law during the twentieth century, James Morrow writes:

The laws of war limit the destruction of war because they clarify expectations for how the sides will fight and support the parties in their efforts to

33. See here the testimonies cited in n. 322. Additionally, Robert Pape has studied the underlying causes of suicide terrorism as part of an ongoing research project. Writing in review of the US Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, December 2012, Pape argues:

If American action appears to confirm the worst accusations of American arrogance, the United States will help extremists recruit a new generation of willing terrorists, one that will be far larger than the last. Leaders of anti-American terrorist groups already base their recruitment appeals on claims of oppression, injustice, and humiliation. A program subjecting dozens, much less hundreds to thousands, to torture is likely to become powerful evidence that the terrorist leaders' claims are valid, widening the appeal of these anti-American groups beyond what would otherwise occur. . . .

. . . In sum, there is evidence that U.S. torture: 1) created a pervasive culture of abuse, the condition of possibility for scandals like Abu Ghraib; 2) contributed to Al Qaida propaganda and recruitment, and contributed to further attacks; and 3) weakened American support for the war on terror, particularly the Iraq war.

See Robert A. Pape, contribution to H-Diplo, "Forum on the Senate Select Committee on Intelligence (SSCI) Report and the United States' Post-9/11 Policy on Torture," *International Security Studies Forum*, 2015, <https://issforum.org/forums/ssci-report-torture>.

comply and enforce those obligations. States have created this law, revised it, and publicly accepted it because they seek to limit the destruction of war to the degree that it can be limited. The record of these legal limits has been mixed, which reflects the practical difficulties of limiting violence. The successes are not just the result of the parties' intents to comply no matter what; the law aids them in creating the limited battlefield. The body of the law has expanded and deepened over time as those parties that favor restraint revised treaty law in light of their experiences of applying it during wars. Through this evolutionary process, the laws of war have improved and now limit the battlefield more than in their early days.<sup>34</sup>

So there is reason to think that practices that uphold the principle of distinction are important to maintaining the power of international humanitarian law to constrain the evils of war.

With regard to the laws governing torture in particular, Darius Rejali argues that in the wake of the passage of humanitarian laws starting in the mid-twentieth century, many states modified their uses of torture owing to the desire at least not to appear to engage in torture. Before and during the first half of the twentieth century, many nondemocratic states had been accustomed to using techniques that left plenty of residual evidence of torture, such as the scarring of the victim's body. But as international conventions promoting human rights and banning torture took shape, and states were subsequently condemned publicly for engaging in torture when evidence of their doing so surfaced, nondemocratic states switched to what Rejali calls "clean" methods of torture. These were methods that left little evidence of having been used and that required little in the way of specialized or telltale tools or equipment. Such techniques included sleep deprivation, electroshocks, positional tortures, and waterboarding.<sup>35</sup> (Democratic states had long before adopted principally clean torture methods.) Of course, this indicates that states did not actually stop torturing people in the wake of these prohibitions but merely changed tactics. However, because states did respond to law and public pressure against torture, at least taking pains to achieve some plausible deniability, there is reason to hope that if states are subjected to better monitoring and to publicity spotlighting their uses of torture, further changes in behavior may occur.

The last issue I will address in this defense of an absolute prohibition

34. James D. Morrow, *Order within Anarchy: The Laws of War as an International Institution* (New York: Cambridge University Press, 2014), 329.

35. Rejali, *Torture and Democracy*, chap. 20.

is whether states, having agreed to prohibit torture, ought to take such a prohibition seriously. It might be suggested that instead, like a speed limit or parking laws, the law against torture is intended to hold only for the most part—although it is unconditional and absolute in form, it is widely expected to be broken when it is expedient to do so. Laws against speeding and parking regulations are expressed as absolute prohibitions on certain kinds of actions, but the practices for monitoring and enforcing these laws show that the function of such laws is principally to regulate conduct in these areas rather than to prohibit absolutely transgressive actions. Should a ban on torture as an instrument of war be understood more like a biblical commandment or, rather, like a suggestion with a modest price attached for failing to follow it?

Unlike parking your car in a certain location or driving at a certain speed, which are morally benign acts considered in isolation, it is fair to regard torturing someone as seriously harmful to its target—necessarily so—and therefore in need of specific justification. I have resisted the view that torture is so manifestly bad that we need not worry about possible countervailing justification—this because, given the context of war, it seems *a priori* that a possible justification might well be found. But I don't think that there is any way for the ban on torture to achieve its full purpose within the canon of the laws of war unless that ban is understood to be absolute in practice, not just in form. Unlike speeding, which is typically harmless and need show no disrespect to other individuals using the roads, torture is necessarily harmful and unavoidably disrespectful to the humanity of the party tortured as well as to the people on whose behalf he or she is fighting. While there are no doubt moral advantages to torturing less rather than more, and so an imperfect ban that is largely effective is better than none at all, the sort of mutual respect that could reduce the barbarity and duration of modern war (and perhaps also its frequency) entails that there should be clear assurances given and maintained against the use of torture. Such respect does not seem to me to be compatible with, at the same time, states retaining the liberty to use torture when it appears expedient to do so.

#### 4. The style of this argument

I began this chapter by offering a simplistic recitation of the difficulties inherent in defending any absolute moral prohibitions. I then proceeded to offer a defense of one such prohibition, on torture as a means of war, and suggested that the absoluteness of this prohibition depends in part

on the fact that the law of war asserts the principle of distinction, which can be seen to entail protection from torture for captured combatants. This suggests that were there no widely agreed-upon law of war, or if the law of war lacked broad agreement about the principle of distinction, then the prohibition on torture as a means of war would need some other sort of argument in its favor, or else be unsupportable. The harmfulness and disrespect inherent in torture does not, I think, in and of itself generate the basis for an absolute prohibition. This view seems likely to me to rankle some, so I'll conclude by offering some explanation for what might seem to be a curious style of argument for the prohibition of torture.

The objection to my approach might be offered as follows: given that torture constitutes a grievous harm to its target, and that this harm is why we care about torture, surely the principal party to have grounds to object to it is the torture victim herself. But on the analysis offered here, the party who is aggrieved by the torture of a captured combatant is the law or humanity itself or perhaps the community of other states who are responsible for having established the law, and in particular the state to which the captured combatant owes allegiance. If the torture victim has a cause of complaint, it is by virtue of the fact that this law promises her, as a member of the international community subject to the law of war, a privilege against attack, which the enemy has violated. In the absence of its prohibition by the law of war, the torture itself and its effect on her are not sufficient to generate a claim that she has been wronged.

While I imagine that some will find this objection to be compelling, I think it is an upshot of the need to regard ethical prohibitions as parts of a larger system of ethics, in which social coordination of efforts and the social provision of protections of rights must all be accounted for as a part of determining what rights individuals have. While torturing someone is obviously an ethically loaded activity, so is participating in war or killing someone who is participating in war. Insofar as we can distinguish between, say, murder and self-defense, even when the party against whom one defends oneself is a conscripted and otherwise unenthusiastic soldier, we can see the need to look to a wider context to determine whether torture itself might be permissible in the course of fighting a war against a deadly enemy. If I'm right in my arguments above, then the fact that a broad prohibition on torture is justified is due both to the peculiarities of torture and to the fact that there is a larger agreement at stake in which potentially warring parties (mainly states) have elected to forswear torture for the sake of promoting peace overall. The existence of this broad convention, whether or not one is a signatory to it, and whether or not it is upheld

without exception, adds meaning and import to a decision to use or refrain from torture. The existence and operation of such conventions constitute a fair portion of the circumstantial aspects required to determine whether the physical or psychological tormenting of a captive combatant is compatible with justice.

The conventional prohibition of torture is systematic in that it connects the evaluation of each particular act of torturing in war to the larger structure of obligations in war, which govern other acts of torturing, killing, targeting, surrendering, and so forth. The fact that a very, very high bar is set against torture is due to several factors: how bad it is to those who suffer from torture, the general pointlessness of torturing, and the general harm that the resort to torture does to maintaining peaceful, cooperative relationships among conflicting parties. Assuming that such rules are broadly accepted across states, it then becomes possible to think of them as part of a practice, in the sense Rawls identifies in his "Two Concepts of Rules," and thus to see them as something more than "rules of thumb" that give advice about how to produce maximum utility.<sup>36</sup> Because they are part of a practice, it makes sense to think of them as governing the practice absolutely, in the same way the rules of chess define what it is to play chess. Although a state or other hostile party might choose to opt out of the conventions associated with just war, there remain reasons for their opponents to continue to insist on such rules and to govern themselves by them, in order to encourage the future adherence to the practice of just war. It is in these circumstances—which are notably also the current circumstances—that a prohibition on torture as a means of war can be absolute, apply generally, and yet not depend on holding that torture is uniquely evil or claiming that no circumstances whatever could justify engaging in it.

36. John Rawls, "Two Concepts of Rules," *Philosophical Review* 64 (1955): 3–32.

PART V

Torture in US Law and Policy





## Torture and Positive Law: Jurisprudence for the White House

JEREMY WALDRON

My starting point is the dishonor that descended upon the United States early in 2004 as a result of revelations about what was happening under American control in Abu Ghraib prison in Iraq. That dishonor involved more than the Abu Ghraib nightmare itself—the photographs of sexual humiliation, the dogs, the hoods, the wires, the beatings.<sup>1</sup> It became apparent that what took place there was not just a result of the depravity of a few poorly trained reservists but the upshot of a policy determination by intelligence officials to have military police at the prison “set favorable conditions” (that was the euphemism) for the interrogation of detainees.<sup>2</sup>

The concern and the dishonor intensified when it was revealed that abuses were not isolated in this one prison but that brutal interrogations were also being conducted by American officials elsewhere. We know now that a number of captured officers in Iraq and Afghanistan, including general officers, were severely beaten during interrogation by their American captors and in one case killed by suffocation.<sup>3</sup> We know too that terrorist

1. James Risen, “G.I.’s Are Accused of Abusing Iraqi Captives,” *New York Times*, April 29, 2004, A15.

2. Peter Hermann, “Army Sets First Court-Martial in Abuses,” *Baltimore Sun*, May 10, 2004, 1A: “A report by Maj. Gen. Antonio M. Taguba notes . . . that soldiers said they were told to ‘set favorable conditions’ for interviews with inmates, which the soldiers have described in e-mail, letters and a diary as orders to rough up the detainees to elicit their cooperation.” See also Patrick J. McDonnell et al., “Report on Iraqi Prison Found ‘Systemic and Illegal Abuse,’” *Los Angeles Times*, May 3, 2004, A1: “Taguba found that military intelligence interrogators . . . ‘actively requested that . . . guards set physical and mental conditions for the favorable interrogation of witnesses.’ . . . One sergeant told investigators that military intelligence interrogators urged guards to ‘loosen this guy up for us’ and ‘make sure he has a bad night.’” See generally Seymour M. Hersh, *Chain of Command: The Road from 9/11 to Abu Ghraib* (New York: HarperCollins, 2004), 1–72.

3. See Miles Moffeit, “Brutal Interrogation in Iraq: Five Detainees’ Deaths Probed,” *Denver*

suspects, enemy combatants, and others associated with the Taliban and al-Qaeda held by the United States in the camps at Guantanamo Bay were being interrogated using physical and psychological techniques<sup>4</sup> that had been outlawed by the European Court of Human Rights after their use by British forces against terrorist suspects in Northern Ireland in the early 1970s<sup>5</sup> and outlawed by the Israeli Supreme Court after their use by security forces in Israel against terrorist suspects in the 1990s.<sup>6</sup>

Above all, my starting point is the realization that these abuses took place not just in the fog of war but against a legal and political background set by discussions among lawyers and other officials in the White House, the Department of Justice, and the Department of Defense about how to narrow the meaning and application of domestic and international legal prohibitions relating to torture.

I want to place particular emphasis on the fact that these efforts to modify the prohibition on torture were undertaken by *lawyers*.<sup>7</sup> Sure, our primary objection to torture ought to be out of consideration for the potential victims of the treatment that lawyer-proponents of some uses of torture, such as Alan Dershowitz, Jay Bybee, and John Yoo, appear to condone.<sup>8</sup>

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*Post*, May 19, 2004, A1: "Brutal interrogation techniques by U.S. military personnel are being investigated in connection with the deaths of at least five Iraqi prisoners. . . . The deaths include the killing in November of a high-level Iraqi general who was shoved into a sleeping bag and suffocated, according to the Pentagon report."

4. Raymond Bonner et al., "Threats and Responses: Interrogations; Questioning Terror Suspects in a Dark and Surreal World," *New York Times*, March 9, 2003, 1. See also Josh White and John Mintz, "Red Cross Cites 'Inhumane' Treatment at Guantanamo," *Washington Post*, December 1, 2004, A10.

5. *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (Ser. A), at 41, 94 (1978).

6. H.C.J. 5100/94 Public Committee Against Torture in Israel v. The State of Israel, *IsrSC* 53(4) 817 (1999).

7. Other authors have expressed this concern. See Richard H. Weisberg, "Loose Professionalism, or Why Lawyers Take the Lead on Torture," in *Torture: A Collection*, ed. Sanford Levinson (New York: Oxford University Press, 2004), 299, 300–304; David Luban, "Liberalism, Torture, and the Ticking Bomb," *Virginia Law Review* 91 (2005): 1425–61; Andrew Rosenthal, "Legal Breach: The Government's Attorneys and Abu Ghraib," *New York Times*, December 30, 2004, A22.

8. Professor John Yoo now teaches law at the University of California at Berkeley. While he was a deputy assistant attorney general in the Justice Department, Yoo was the lead author of a January 2002 memorandum persuading the Bush administration to withdraw its recognition of the rules imposed by the Geneva Conventions so far as the treatment of prisoners belonging to al-Qaeda and the Taliban was concerned. See "Memorandum from John Yoo, Deputy Assistant Att'y Gen., & Robert J. Delahunty, Special Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Def. 1," January 9, 2002. Alan Dershowitz is a professor at Harvard Law School who asked his readers to consider whether torture might be a morally and constitutionally acceptable method for US officials to use to extract information from terrorists when the information might lead to the immediate saving of lives. See Alan Dershowitz, *Shouting*

But the defense of torture was also shocking as a jurisprudential matter. That views and proposals like these should be voiced by scholars who have devoted their lives to the law, to the study of the rule of law, and to the education of future generations of lawyers is a matter of dishonor for our profession. Reading the memoranda of Judge Bybee and Professor Yoo and the mooted proposal of Professor Dershowitz shook my faith in the integrity of the community of American jurists. At the very least, it indicated the necessity of our thinking more deeply about the nature of the rule against torture and specifically about its place in our legal system.

In what follows I want to do several things. In section 1, I shall explore the idea that there is something wrong with trying to pin down the prohibition on torture with a precise legal definition. Insisting on exact definitions may sound very lawyerly, but there is something disturbing about it when the quest for precision is put to work in the service of a mentality that says, "Give us a definition so we have something to work around, something to game, a determinate envelope to push."

In section 3, I explore the idea that narrowing or otherwise undermining the definition of torture might deal a body blow to the *corpus juris* that would go beyond the immediate effects on the mentality of torturers and the terror and suffering of their victims. I precede that discussion with some meditation, in section 2, on legal and moral absolutes. In both these sections, I defend the proposition that torture is repugnant to the spirit of our law, and I consider the jurisprudence that might be necessary to make sense of that proposition. I argue that the rule against torture operates in our law as an archetype—that is, as a rule that has significance not just in and of itself but also as the embodiment of a pervasive principle. As the notion of a legal archetype is new and unfamiliar, I shall spend some time outlining and illustrating the jurisprudence that is necessary to make sense of this idea.

Finally, in section 4, I extend the analysis to consider the relation between prohibitions on torture and the idea of the rule of law, specifically the idea of subjecting the modern state to legal control. And I consider

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*Fire: Civil Liberties in a Turbulent Age* (Boston: Little, Brown, 2002), 470–77; Alan Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven, CT: Yale University Press, 2002), 132–63. Jay Bybee is a judge on the Ninth Circuit Court of Appeals; between 2001 and 2003 he was head of the Office of Legal Counsel in the Department of Justice, and in that capacity he put his name on a memorandum sent to the White House that narrowed the administration's definition of "torture" so that it did not cover most cases of the deliberate infliction of pain in the course of an interrogation. See "Memorandum from Office of the Assistant Att'y Gen. to Alberto R. Gonzales, Counsel to the President," August 1, 2002. I shall refer to this as the Bybee Memorandum.

also the application of the argument in section 3 to the role played by the prohibition on torture in international law, in particular the international law of human rights.

## 1. Definitions

### *A. The texts and the prohibitions*

The law relating to torture comprises a variety of national, regional, and international norms. The basic provision of human rights law with respect to torture is found in the International Covenant on Civil and Political Rights (which I shall refer to as the Covenant):

Article 7. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 4 of the Covenant provides that “[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation,” but article 4 also insists that no derogation from article 7 may be made under that provision. The United States ratified the Covenant in 1994—though with the following reservation:

[T]he United States considers itself bound by article 7 to the extent that “cruel, inhuman or degrading treatment or punishment” means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.<sup>9</sup>

The more specific international Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment (which I shall call the Convention) requires each state to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”<sup>10</sup> and to “ensure that all acts of torture are offences under its criminal law.”<sup>11</sup> Again there is a nonderogation provision (implying, in ef-

9. S. Exec. Rep. No. 102-23, at 22 (1992).

10. The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment, art. 2(1).

11. *Ibid.*, art. 4(1). The Convention also imposes requirements of non-refoulement of

fect, that states must establish an absolute, rather than a conditional, ban on torture),<sup>12</sup> and again there is a similar reservation (relating not to torture but to cruel, inhuman, and degrading treatment) in the US ratification of the Convention.<sup>13</sup> The Convention does what the Covenant does not do (and also what other regional human rights instruments such as the European Convention on Human Rights do not do);<sup>14</sup> namely, it attempts a definition of torture:

For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>15</sup>

This definition, particularly in its reference to the *intentional* infliction of *severe* pain, was the starting point of the recent American discussion by Jay Bybee and others.

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refugees likely to face torture (art. 3), requirements to ensure that officials are prohibited from using torture and that the prohibition is included in their training (art. 10), and requirements promptly to investigate allegations of torture (art. 12), to protect complainants against further ill-treatment or retaliation (art. 13), and to secure a right to redress and compensation for victims of torture (art. 14). There is also a prohibition on the use in legal proceedings or proceedings before any official tribunal of "any statement which is established to have been made as a result of torture . . . except against a person accused of torture as evidence that the statement was made" (art. 15).

12. *Ibid.*, art. 2(2): "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."

13. See S. Exec. Rep. No. 101-30, at 29-31 (1990).

14. The relevant provisions of the European Convention on Human Rights are as follows. Art. 3: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." Art. 15: "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation. . . . No derogation from . . . Article 3 . . . shall be made under this provision."

15. Convention against Torture, art. 1(1); however, art. 1(2) says that this is "without prejudice to any international instrument or national legislation which does or may contain provisions of wider application."

In pursuance of its obligations under the Convention, the United States has enacted legislation forbidding torture outside the United States by persons subject to US jurisdiction.<sup>16</sup> The antitorture statute<sup>17</sup> makes it an offense punishable by up to twenty years imprisonment to commit or to conspire or attempt to commit torture (adding that this is punishable by death or life imprisonment if the victim of torture dies as a result). The statute defines torture as follows:

As used in this chapter, . . . “torture” means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.<sup>18</sup>

There is an additional definition of “severe mental pain and suffering” in terms of “prolonged mental harm” resulting from the threat of death or physical torture or the use of mind-altering substances on oneself or others.<sup>19</sup>

Finally, there are the Geneva Conventions, which deal with the treatment of various categories of vulnerable individuals in circumstances of armed conflict. The best-known provision is article 17 of the Third Geneva Convention, which provides that “[n]o 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.” In addition, the four Geneva Conventions share a common article—article 3—which provides, among other things, that

[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms[,], shall in all circumstances be treated humanely. . . .

. . . [T]he following acts are . . . and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; . . .

(c) outrages upon personal dignity, in particular humiliating and degrading treatment. . . .

16. It is assumed that ordinary provisions of criminal and constitutional law sufficiently prohibit torture within the United States.

17. 18 U.S.C. 2340A (2000).

18. 18 U.S.C. 2340(1) (2000).

19. *Ibid.*, (2).

Common article 3 applies to all the persons whom the Geneva Conventions protect: that is, not just prisoners of war but wounded soldiers, shipwrecked sailors, detained members of irregular forces, and so on.

These provisions, together with the protections that law routinely provides against serious assault and abuse, add up to an interlocking set of prohibitions on torture. They are what I have in mind when I refer, in what follows, to “the prohibition on torture” (or “the rule against torture”), though sometimes one element in this interlocking set, sometimes another, will be most prominent.

### *B. The interest in clear definitions*

The response to the Abu Ghraib scandal indicated that there is far from a consensus on what exactly constitutes torture. Muslim prisoners were humiliated by being made to simulate sexual activity with one another; they were beaten and their fingers and toes were stomped on; they were put in stress postures, hooded and wired, in fear of death if they so much as moved; they were set upon or put in fear of attack by dogs. Was this torture? Many commentators thought it was, but one or two American newspapers resisted the characterization, preferring the word “abuse.”<sup>20</sup> Some conservative commentators suggested that what happened was no worse than hazing.<sup>21</sup> The impetus for this distinction seemed to be that if we use the word “torture” to characterize what Americans did in Abu Ghraib prison, we might be depriving ourselves of the language we need to condemn much more vicious activities.<sup>22</sup>

20. Geoffrey Nunberg, “Don’t Torture English to Soft-Pedal Abuse,” *Newsday*, May 20, 2004, A50: “Torture is torture is torture,” Secretary of State Colin Powell said this week in an interview. . . . That depends on what papers you read. The media in France, Italy and Germany have been routinely using the word ‘torture’ in the headings of their stories on the abuses in the Abu Ghraib prison. . . . But the American press has been more circumspect, sticking with vaguer terms such as ‘abuse’ and ‘mistreatment.’ [T]hey may have been taking a cue from Defense Secretary Donald Rumsfeld. Asked about torture in the prison, he said, ‘What has been charged so far is abuse, which is different from torture. I’m not going to address the ‘torture’ word.”

21. Frank Rich, “The War’s Lost Weekend,” *New York Times*, May 9, 2004, sec. 2, 1: “[A] former Army interrogation instructor, Tony Robinson, showed up on another Fox show . . . to assert that the prison photos did not show torture. ‘Frat hazing is worse than this,’ the self-styled expert said.” This characterization—that the abuse at Abu Ghraib was more like hazing than like torture—was seconded also by Rush Limbaugh. See “Limbaugh on Torture of Iraqis: U.S. Guards Were ‘Having a Good Time,’ ‘Blow[ing] Some Steam Off,’” *Media Matters for America*, May 5, 2004, <http://mediamatters.org/research/200405050003>.

22. Similarly, Sir Gerald Fitzmaurice had asked this in his dissent in *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. 1 (Ser. A) (1977), para. 35: if the techniques that the British had



Both the Convention and the antitorture statute refer to the intentional infliction of *severe* pain or suffering. Since pain can be more or less severe, evidently the word “severe” is going to be a site for contestation between those who think of torture in very broad terms and those who think of it in very narrow terms. The word seems to be supposed to restrict the application of the word “torture.” But as with a requirement to take “reasonable care” or a constitutional prohibition on “excessive” bail, we are not told what exactly the restriction is; that is, we are not told where exactly severity is on the spectrum of pain and, thus, where the prohibition on torture is supposed to kick in.

We might ask: What is the point of this restriction? Why narrow the definition of torture so that it covers only *severe* pain? Most modern discussions work from the assumption that there is something seriously wrong with torture—even if it is not absolutely forbidden—and they approach the issue of definition on that basis. Marcy Strauss, for example, complains that “Amnesty International and others speak of torture when describing sexual abuse of women prisoners, police abuse of suspects by physical brutality, overcrowded cells, the use of implements such as stun guns, and the application of the death penalty.”<sup>23</sup> And she worries about the consequences of this casual expansion of the term: “[I]f virtually anything can constitute torture, the concept loses some of its ability to shock and disgust. . . . [U]niversal condemnation may evaporate when the definition is so all encompassing.”<sup>24</sup> She implies that we have a certain normative investment in the term—we use it to mark a serious moral judgment—and we ought to adjust our definition so as to protect that investment.

What do those who are dissatisfied with the vagueness of the phrase “severe pain or suffering” have in mind? What would be a more determinate definition? I think the argument in favor of precision goes like this. If the terms of a legal prohibition are indeterminate, the person to whom the prohibition is addressed may not know exactly what is required of him, and he may be left unsure as to how the enforcement powers of the state will be used against him. The effect will be to chill that person’s exercise of his liberty as he tries to avoid being taken by surprise by enforcement decisions.

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used in Northern Ireland in the early 1970s—sleep deprivation, hooding, white noise, stress postures, and severe limitations on food and water—were “to be regarded as involving torture, how does one characterize e.g. having one’s finger-nails torn out, being slowly impaled on a stake through the rectum, or roasted over an electric grid?”

23. Marcy Strauss, “Torture,” *New York Law School Review* 48 (2003–4): 201–74 at 203.

24. *Ibid.*, 215.

Is this a compelling argument? We should begin by recalling that the prohibitions on torture contained in the Geneva Conventions and in the Convention against Torture apply in the first instance to the state and state policy. Is the state in the same position as the ordinary individual in having a liberty-interest in bright lines and an interest in not having its freedom of action chilled?<sup>25</sup> I don't think so: we set up the state to preserve and enlarge *our* liberty; the state itself is not understood as a beneficiary of our libertarian concern. Even the basic logic of liberty seems inapplicable. In the case of individuals, we say that everything that is not expressly forbidden is permitted. But it is far from clear that this should be a principle applying to the state.<sup>26</sup> Indeed, constitutional doctrine often works the other way round: in the United States, everything that is not explicitly entrusted to the federal government is forbidden to it; it does not have plenary power.<sup>27</sup>

However, although the prohibition on torture is intended mainly as a constraint on state policy, soldiers and other officials do also have an interest as individuals in anticipating war crimes or other prosecutions. The antitorture statute purports to fulfill the United States' obligations under the Convention against Torture by defining torture as an individual criminal offense. Many would say that inasmuch as that statute threatens serious punishment, there is an obligation to provide a tight definition. If that obligation is not fulfilled, they will say, then lenity requires that the defendant be given the benefit of whatever ambiguity we find in the statute. The doctrine of lenity, then, is the basis of the demand for precision.<sup>28</sup>

Against all this, we need to remember that the charge of torture is un-

25. There is an English doctrine that the state or its officials should be treated just like any other individual. See A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (1915; repr., Indianapolis: Liberty/Classics, 1982), 114–15. But see Carol Harlow and Richard Rawlings, *Law and Administration* (Cambridge: Cambridge University Press, 1984), 38–47, who suggest that this doctrine is generally in disrepute; see also Jeremy Waldron, *The Law* (New York: Routledge, 1990), 39–42.

26. Cf. Bruce Harris, "The 'Third Source' of Authority for Government Action," *Law Quarterly Review* 108 (1992): 626–50.

27. Is the state entitled, as we sometimes think individuals are entitled (see F. A. Hayek, *The Constitution of Liberty* [Chicago: University of Chicago Press, 1960], 139–40, 156–57), to a legally predictable environment in which it can exercise whatever liberty it has? I was intrigued by a suggestion to this effect by Justice Scalia in his dissent in *Rasul v. Bush*, 124 S. Ct. 2686 (2004) at 2706: "Normally, we consider the interests of those who have relied on our decisions. Today, the Court springs a trap on the Executive, subjecting Guantanamo Bay to the oversight of the federal courts even though it has never before been thought to be within their jurisdiction—and thus making it a foolish place to have housed alien wartime detainees."

28. Cf. *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994): lenity requires that "ambiguous criminal statute[s] . . . be construed in favor of the accused."

likely to be surprising or unanticipated by someone already engaged in the deliberate infliction of pain on prisoners: "I am shocked—*shocked!*—to find that 'waterboarding' or squeezing prisoners' genitals or setting dogs on them is regarded as torture." Remember we are talking about precision or imprecision in regard to a particular element in the definition of torture: the severity element. The potential defendant we have to consider is one who already knows that he is inflicting considerable pain; that is his intention. The question he faces is whether the pain is severe enough to constitute torture. It seems to me that the working definition of torture in the antitorture statute already gives him all the warning he needs that he is taking a huge risk in relying upon casuistry about "severity" as a defense against allegations of torture.<sup>29</sup>

I turn now to the more general question of precision in law. One way of thinking about the need for precise definition involves asking whether the person constrained by the norm in question—state or individual—has a legitimate interest in pressing up as close as possible to the norm and, thus, a legitimate interest in having a bright-line rule stipulating exactly what is permitted and exactly what is forbidden by the norm. The idea is that the offense may be understood as a threshold on a continuum of some sort; the subject knows that he is on the continuum and that there is a point at which his conduct might be stigmatized as criminal; and the question is whether he has a legitimate interest in being able to move as close to that point as possible. If he *does* have such an interest, then he has an interest in having the precise location of the crucial point on the continuum settled clearly in advance.<sup>30</sup> If he does not, then the demand for precision may be treated less sympathetically.

An example of someone who has such a legitimate interest might be a taxpayer who says, "I have an interest in arranging my affairs to lower my tax liability as much as possible, so I need to know exactly how much I can deduct for entertainment expenses." Another example is the driver who says, "I have an interest in knowing how fast I can go without breaking the speed limit." For those cases, there does seem to be a legitimate interest in having clear definitions. Compare them, however, to some other cases: the

29. However, Gerald Neuman has argued forcefully (in a private communication to the author) that the concern for the individual is surely heightened in the military context when the individual is acting under orders and needs to know whether to take the risk of disobeying the orders that are given to him.

30. Some material in this part of this section is adapted from Jeremy Waldron, "Vagueness in Law and Language—Some Philosophical Perspectives," *California Law Review* 82 (1994): 509–40.

husband who says, "I have an interest in pushing my wife around a bit, and I need to know exactly how far I can go before it counts as domestic violence"; or the professor who says, "I have an interest in flirting with my students, and I need to know exactly how far I can go without falling foul of the sexual harassment rules." *There are some scales one really should not be on* and with respect to which one really does not have a legitimate interest in knowing precisely how far along the scale one is permitted to go.

In regard to torture, is there an interest in being able to press up against clear and bright-line rules, analogous to the taxpayer's interest in pushing his entertainment deductions to the limit or the driver's interest in going at exactly 65 mph? The most common argument goes like this. Interrogators have an interest in being as coercive as possible and in being able to inflict as much pain as possible short of violating the prohibition on torture. After all, the point of interrogation is to get people to do what they do not want to do, and for that reason pressure of some sort is necessary, to elicit information that the subject would rather not reveal. Since interrogation *as such* is not out of bounds, it may be thought that interrogators obviously do have a legitimate interest in being on a continuum of pressure, and it is just a question of how far along that continuum we ought to allow them to go. If we fail to specify that point, we might chill *any* use of pressure in interrogation, even what might turn out to be legitimate pressure.<sup>31</sup>

What is wrong with this argument? Well, it is true that all interrogation *puts pressure* on people to reveal what they would rather not reveal. But there are ways in which the law can pressure people while still respecting them as persons and without using any form of brutality. And it is quite wrong to suggest that these forms of respectful pressure are marked on the scale of brutality, just further down the line from torture. So, for example: a hostile witness under *subpoena* on the witness stand (in a case where there is no issue of self-incrimination) is *pressured* to answer questions truthfully and give information that he would rather not give. The examination or cross-examination may be grueling, and there are penalties of contempt for refusing to answer and perjury for answering falsely. These are forms of pressure, but they are not on a continuum of brutality with torture. Certainly the penalties for contempt and perjury are coercive: they impose unwelcome costs on certain options otherwise available to the witness.<sup>32</sup> Even

31. See Bradley Graham, "Abuse Probes' Impact Concerns the Military; Chilling Effect on Operations Is Cited," *Washington Post*, August 29, 2004, A20.

32. For a more complete account of coercion, see Robert Nozick, "Coercion," in *Philosophy, Science, and Method: Essays in Honor of Ernest Nagel*, ed. Sidney Morgenbesser, Patrick Suppes, and Morton White (New York: St. Martin's Press, 1969), 440–72.

so, there is a difference of quality, not just a difference of degree, between the coercion posed by legally established penalties for noncompliance and the sort of force that involves using pain to break the will of the person being interrogated.

Some have argued that there might be a continuum of discomfort associated with interrogation, and we are entitled to ask how far along *that* continuum we are permitted to be. After all, we are not required to provide comfortable furniture for the subject of interrogation to sit in. So, one might ask, "Are we required to ensure that the back of the chair that the subject sits in does not hurt his back or that the seat is not too hard?" If the answer is "No," then surely that means we *are* on a continuum with some of the techniques of interrogation that are arguably torture, like the Israeli technique of shackling a subject in a stress position in a low tilted chair.<sup>33</sup>

To answer this, it is important to understand that torture is a crime of specific intent: it involves the use of pain deliberately and specifically to *break the will* of the subject. Failing to provide a comfortable armchair for the interrogation room may or may not be permissible; but it is in a different category from specifically choosing or designing furniture in a way calculated to break the will of the subject by the excruciating pain of having to sit in it. That latter choice *is* on a continuum with torture—and I want to question whether that is a continuum an official has a legitimate reason for being on. The former choice—failing to provide an armchair or a cushion—is not.

## 2. Absolutes: Is nothing sacred?

I now want to step back from all this and ask: What was it about these definitional shenanigans that seemed so disturbing? After all, we know there is an element of contingency and manipulation in the definition of any legal rule. As circumstances change, amendments in the law or changes of interpretation seem appropriate.<sup>34</sup> Legal prohibitions are not set in stone. Changing the definitions of offenses or reinterpreting open-ended phrases is part of the normal life of any body of positive law. Why should the law relating to torture be any different?

Well, for one thing, we seemed to be dealing in this case with not just fine-tuning but a wholesale attempt to gut our commitment to a certain

33. See Public Committee against Torture in Israel, "Torture in Israel," in *Israel/Palestine: The Black Book*, ed. Reporters without Borders (London: Pluto Press, 2003), 113–30 at 125.

34. See also the discussion in Jeremy Waldron, "Security and Liberty: The Image of Balance," *Journal of Political Philosophy* 11 (2003): 191–210.

basic norm. The Bybee Memorandum maintained that *none* of the legislation enacted pursuant to the Convention against Torture could be construed as applying to interrogations authorized under the president's commander-in-chief powers.<sup>35</sup> It does not matter what the legislative definition of torture is, and those who act under presidential authority in time of war cannot be construed as covered by it; any attempt to extend prohibitions on torture to modes of interrogation authorized by the president would be unconstitutional.<sup>36</sup> This was not just tinkering with the details of positive law; it amounted to a comprehensive assault on our traditional understanding of the whole legal regime relating to torture. Even so, we still have to acknowledge that the life of the law is sometimes to change or reinterpret whole paradigms (particularly in constitutional law, where we suddenly decide that a whole area of lawmaking thought out-of-bounds is in-bounds or vice versa).<sup>37</sup> Why was it so shocking in this instance?

The question can be generalized. Law in all its features and all the detail of its terms and application is contingent on politics and circumstances—that is the lesson of legal positivism. Nothing is beyond revision or repudiation. Why then should we have had this sense that something *sacred* was being violated in the Bybee Memorandum? Can a provision of positive law *be* sacred, in anything approaching a literal sense, so that it is wrong to even touch it or approach its formulation with a view to reinterpreting it? Is there a literal meaning of “sacred” in this secular age?

Some among the drafters of the European Convention on Human Rights seemed to think so. I am not usually one for citing legislative history, but in this case it is instructive. The following motion was proposed in the *travaux préparatoires* for the European Convention in 1949 by a United Kingdom delegate, a Mr. F. S. Cocks:

[T]he Consultative Assembly takes this opportunity of declaring that all forms of physical torture . . . are inconsistent with civilized society, are

35. Bybee Memorandum, 2: “Section 2340A may be unconstitutional if applied to interrogations undertaken of enemy combatants pursuant to the President’s Commander-in-Chief powers. We find that in the circumstances of the current war against al Qaeda and its allies, prosecution under Section 2340A may be barred because enforcement of the statute would represent an unconstitutional infringement of the President’s authority to conduct war.”

36. Bybee Memorandum, 39: “Congress may no more regulate the President’s ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield.”

37. See, for example, the discussion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) at 861–64 of cases like *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), which overruled whole swathes of existing constitutional doctrine.

offences against heaven and humanity, and must be prohibited. It declares that this prohibition must be absolute, and that torture cannot be permitted for any purpose whatsoever, neither for extracting evidence, for saving life nor even for the safety of the State. It believes that it would be better even for society to perish than for it to permit this relic of barbarism to remain.<sup>38</sup>

Lamenting the rise of torture in the twentieth century, Mr. Cocks added this in his speech moving this proposal:

I feel that this is the occasion when this Assembly should condemn in the most forthright and absolute fashion this retrogression into barbarism. I say that to take the straight beautiful bodies of men and women and to maim and mutilate them by torture is a crime against high heaven and the holy spirit of man. I say that it is a sin against the Holy Ghost for which there is no forgiveness.<sup>39</sup>

Mr. Cocks's fellow delegates applauded his sentiments—nobody disagreed with his fierce absolutism on this issue—but they thought this was inappropriate to include in their report. And you can see their point. It is all very well to talk about “a sin against the Holy Ghost”<sup>40</sup> and crimes against “high heaven” and humanity, but these are not exactly legal ideas, and it's unlikely that they resonate even with my good-hearted readers, let alone steely-eyed lawyers in the Justice Department.

So: can we make sense—without resorting to religious ideas—of the idea of a noncontingent prohibition, a prohibition so deeply embedded that it cannot be modified or truncated in this way?

Attempting to answer such a question affirmatively entails no small risk. In these troubled times, it is not hard to make the idea of an absolute prohibition on torture, or any absolute prohibition, look silly as a matter of moral philosophy. I do not mean that everyone is a consequentialist. There are good deontological accounts of the rule against torture, but most of them stop short of absolutism:<sup>41</sup> the principle defended by deontologists

38. Council of Europe, *Collected Edition of the “Travaux Préparatoires” of the European Convention on Human Rights*, vol. 2 (August–November 1949) (The Hague: Martinus Nijhoff, 1975), 36–38.

39. *Ibid.*, 40. I would like to acknowledge Edward Peters, *Torture*, exp. ed. (Philadelphia: University of Pennsylvania Press, 1996), 145–46, for this reference.

40. The reference is to Mark 3:29 and Luke 12:10; but those passages seem to indicate that the sin against the Holy Ghost is a form of blasphemy or denial.

41. See, e.g., Thomas Nagel, “Autonomy and Deontology,” in *Consequentialism and Its Critics*, ed. Samuel Scheffler (New York: Oxford University Press, 1988), 142–72 at 156–67, who

almost always turns out to be wobbly when sufficient pressure is applied. Even among those who are not already Bentham-style consequentialists, most are moderates in their deontology: they are willing to abandon even cherished absolutes in the face of what Robert Nozick once called “catastrophic moral horror.”<sup>42</sup> For a culture supposedly committed to human rights, we have amazing difficulty in even conceiving of—without some sort of squirm—the idea of genuine moral absolutes. Academics in particular are so frightened of being branded “unrealistic” that we will fall over ourselves at the slightest provocation to opine that *of course* moral restraints must be abandoned when the stakes are high enough. Extreme circumstances can make moral absolutes look ridiculous; and men in our position cannot afford to be made to look ridiculous.

### 3. Archetypes

#### A. *Repugnance to law*

Why does the prospect of judicially authorizing torture (whether it is called “torture” or not) shock the conscience of a scrupulous lawyer? Is it simply that the unthinkable has become thinkable? Or is it something about the specific effect *on law*—perhaps a more systemic corrupting effect—of this abomination’s becoming one of the normal items on the menu of practical consideration?

A case can be made that torture is now to be regarded as alien to *any* system of law. It may *once* have been intimately bound up with the civilian law of proofs,<sup>43</sup> but as Edward Peters observes, “[a]fter the end of the eigh-

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argues that the human tendency to intuitively recoil from anything like the deliberate infliction of torture cannot be explained simply by the amount of pain that would be involved and is based instead on concerns about our agency; and David Sussman, “What’s Wrong with Torture?,” *Philosophy and Public Affairs* 33 (2005): 2–3, who points out that there’s a logical step between showing inherent wrongness of torture and showing that what is inherently wrong may never in any circumstances be done.

42. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 30n: “The question of whether these side constraints are absolute, or whether they may be violated in order to avoid catastrophic moral horror, and if the latter, what the resulting structure might look like, is one I hope largely to avoid.” See also Sanford H. Kadish, “Torture, the State and the Individual,” *Israel Law Review* 23 (1989): 345–56 at 346: “The use of torture is so profound a violation of a human right that *almost* nothing can redeem it—*almost*, because one cannot rule out a case in which the lives of many innocent persons will surely be saved by its use against a single person” (emphasis added).

43. See John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Régime* (Chicago: University of Chicago Press, 1977).



teenth century, torture . . . came to be considered . . . the supreme enemy of humanitarian jurisprudence . . . and the greatest threat to law and reason that the nineteenth century could imagine."<sup>44</sup> Be that as it may, torture is certainly seen by most jurists—or has been seen by most jurists until very recently—as inherently alien to *our* legal heritage.

Thus, American judges have always been anxious to distance themselves from what Justice Stevens has referred to as "the kind of custodial interrogation that was once employed by the Star Chamber [and] by the Germans of the 1930's and early 1940's."<sup>45</sup> "There have been, and are now, certain foreign nations with governments . . . which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government."<sup>46</sup> Justice Black saw torture as characteristic of tyrannical, not free, governments:

Tyrannical governments had immemorially utilized dictatorial criminal procedure and punishment to make scapegoats of the weak, or of helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny. . . .

. . . The rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross questioning, and other ingenious forms of entrapment of the helpless or unpopular had left their wake of mutilated bodies and shattered minds along the way to the cross, the guillotine, the stake and the hangman's noose.<sup>47</sup>

Torture may be something that happens elsewhere in the world, but not in a free country, or not in (what used to be referred to as) a Christian country,<sup>48</sup> or at any rate, not under the law of a country like ours. Our con-

44. Peters, *Torture*, 75. See also *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980): "[T]he torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind."

45. *Chavez v. Martinez*, 538 U.S. 760, 788 (2003) (Stevens, J., dissenting in part).

46. *Ashcraft v. State of Tennessee*, 322 U.S. 143, 155 (1944).

47. *Chambers v. Florida*, 309 U.S. 227, 236–38 (1940).

48. The availability of torture under Muslim governments used to be cited as a ground for the practice of allowing consular officers to deal with American sailors or merchants charged or embroiled in disputes while in foreign ports. See *In re Ross*, 140 U.S. 453, 462–63 (1891).

stitutional arrangements are spurred precisely by the desire to set the face of our law against such "ancient evils."<sup>49</sup>

### B. A legal archetype

I believe it is helpful to introduce some technical terminology to capture the importance for a legal system of a provision like the prohibition on torture. I am going to describe that prohibition as a "legal archetype." I shall use that term to refer to a particular provision in a system of norms that has a significance going beyond its immediate normative content, a significance stemming from the fact that it sums up or makes vivid to us the point, purpose, principle, or policy of a whole area of law. Like a Dworkinian principle, an archetype performs a background function in a given legal system.<sup>50</sup> But archetypes differ from Dworkinian principles and policies in that they *also* operate as foreground provisions. They work in the foreground as rules or precedents; but in doing so, they sum up the spirit of a whole body of law that goes beyond what they might be thought to require on their own terms. The idea of an archetype, then, is the idea of a rule or positive law provision that operates not just on its own account, and does not just stand simply in a cumulative relation to other provisions, but operates also in a way that expresses or epitomizes the spirit of a whole structured area of doctrine, and does so vividly, effectively, publicly, establishing the significance of that area for the entire legal enterprise.

Before discussing the way the rule against torture operates as an archetype in our law, it may help us get our bearings at this stage if I mention some *other* examples of legal archetypes: that is, provisions or precedents that do this double duty of operating as rules or requirements and as emblems or icons of whole areas of legal principle or policy.

The best example, I think, is given by the habeas corpus statutes. The importance of "the Great Writ" is not exhausted by what it does in itself, overwhelmingly important though that is. Habeas corpus is also archetypal of our legal tradition's emphasis on liberty and freedom from physical confinement.<sup>51</sup> It is also archetypal of the law's opposition to arbitrariness

49. *Chambers v. Florida*, 236.

50. Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), 22–31.

51. George Anastaplo, "Constitutionalism, the Rule of Rules: Explorations," *Brandeis Law Journal* 39 (2000–2001): 17–217 at 95. "That a considerable liberty is taken for granted by the Constitution may be seen in its assurances with respect to habeas corpus, to bills of attainder,

in regard to actions that have an impact on that right. This is an aspect of habeas corpus that has received much comment; it is referred to as “the bulwark of liberty”<sup>52</sup> and “the crystalization [sic] of the freedom of the individual,”<sup>53</sup> and its constant use is seen as a way of “slowly educating the bench, the bar, police, prosecutors, and the mass of citizens to the highest traditions of Anglo-American law.”<sup>54</sup> To say that habeas corpus is archetypal is not to say that it is absolute or comprehensive in its coverage. The Great Writ, as we all know, is subject to suspension and may be limited in its application. Calling it an archetype is without prejudice to all of that: archetypes stand for general principles or policies in the law, and principles or policies may differ in their weight.<sup>55</sup> What is necessary for an archetype is that a foreground provision of the law do this sort of double duty, with regard to its own immediate normative effect and with regard to a broader principle—of whatever strength and extent—that it seems to epitomize.

Precedents are sometimes archetypes. In this category, the best example is the most obvious. In itself *Brown v. Board of Education*<sup>56</sup> is authority for a fairly narrow proposition about segregation in schools, and its immediate effect in desegregation was notoriously slow and limited.<sup>57</sup> But its archetypal power is staggering, and in the years since 1954 it has become an icon of the law’s commitment to demolish the structures of *de jure* (and perhaps also *de facto*) segregation and to pursue and discredit forms of discrimination and badges of racial inferiority wherever they crop up in American law or public administration.<sup>58</sup> A court decision may become an archetype because it was seen at the time as a test case or it was widely

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to the crime of treason, to religious tests, and to ‘Indictment, Trial, Judgment and Punishment, according to Law.’ It may be seen as well in the spirit of liberty which pervades the system, making much of a people’s freely choosing what they will have done for them, by whom, and upon what terms.”

52. S.G.F. [Sydney G. Fisher], “The Suspension of Habeas Corpus during the War of the Rebellion,” *Political Science Quarterly* 3 (1888): 454–88 at 454.

53. W. W. Grant, “Suspension of the Habeas Corpus in Strikes,” *Virginia Law Review* 3 (1916): 249–74 at 249.

54. Louis H. Pollak, “Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ,” *Yale Law Journal* 66 (1956): 50–66 at 66.

55. Cf. Dworkin, *Taking Rights Seriously*, 26.

56. 349 U.S. 294 (1954).

57. See James T. Patterson, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy* (New York: Oxford University Press, 2002), 78–85.

58. See, e.g., Jordan Steiker, “American Icon: Does It Matter What the Court Said in *Brown*?” *Texas Law Review* 81 (2002): 305–43. See also Jack M. Balkin, “*Brown* as Icon,” in *What Brown v. Board of Education Should Have Said: The Nation’s Top Legal Experts Rewrite America’s Landmark Civil Rights Decision*, ed. Jack M. Balkin (New York: New York University Press, 2001), 3, 3–4.

regarded as a striking victory or because it seemed to epitomize more clearly than subsequent or earlier cases what was at stake in this area of the law: *Brown* has all these features and it is, so to speak, the archetype of archetypes, so far as case law is concerned.

### C. *What is the rule against torture archetypal of?*

The rule against torture is archetypal of a certain policy having to do with the relation between law and force. The prohibition is expressive of an important underlying policy of the law, which we might try to capture in the following way: Law is not brutal in its operation. It is not savage. Law does not rule through abject fear and terror or by breaking the will of those whom it confronts. If law is forceful or coercive, it gets its way by nonbrutal methods that respect rather than mutilate the dignity and agency of those who are its subjects. The idea is that even where law has to operate forcefully, there will not be the connection that has existed in other times or places between law and *brutality*. People may fear and be deterred by legal sanctions; they may dread lawsuits; they may be forced by legal means or legally empowered officials to do things or go places against their will. But even when this happens, they will not be herded like cattle or broken like horses; they will not be beaten like dumb animals or treated as bodies to be manipulated. Instead, there will be an enduring connection between the spirit of law and respect for human dignity—respect for human dignity even in extremis, where law is at its most forceful and its subjects at their most vulnerable. I think the rule against torture functions as an archetype of this very general policy. It is vividly emblematic of our determination to sever the link between law and brutality, between law and terror, and between law and the enterprise of breaking a person's will.

When I say that the prohibition on torture is an archetype of our determination to draw a line between law and savagery or between law and brutality, I am not looking piously to some sort of paradise of force-free law. I am looking rather to the well-understood idea that law can be forceful without compromising the dignity of those whom it constrains and punishes. No one denies that law has to be forceful and final. The finality of law makes it important for law to prevail in the last analysis, and as Max Weber puts it, "the threat of force, and in the case of need its actual use[,] . . . is always the last resort when others have failed."<sup>59</sup> But

59. Max Weber, *Economy and Society*, ed. Guenther Roth and Claus Wittich (Berkeley: University of California Press, 1978), 54.

forcefulness can take many forms, and—as I have already mentioned in my discussion of compelled testimony<sup>60</sup>—not all of it involves the sort of savage breaking of the will that is the aim of torture and the aim, too, of many of the cruel, inhuman, and degrading methods that the Bush administration tried to distinguish from torture for the purpose of paying lip service to the prohibitions.<sup>61</sup> Neither ordinary legal sanctions nor physical control and confinement work like that. For example, when a defendant charged with a serious offense is brought into a courtroom, he is brought in whether he likes it or not, and when he is punished, he is subject to penalties that are definitely unwelcome and that he would avoid if he could; in these instances there is no doubt that he is subject to force, that he is coerced. But in these cases force and coercion do not work by reducing him to a quivering mass of “bestial, desperate terror,”<sup>62</sup> the aim of every torturer (and of every interrogator who would inflict cruel, degrading, and inhuman treatment while calling it not quite torture).<sup>63</sup>

#### *D. The operation of this archetype in American law*

There are a number of areas of American law where, it seems to me, the prohibition on torture has been cited as epitomizing a more pervasive policy of nonbrutality.

*Eighth Amendment cases*—It has been said of the constitutional prohibition on cruel and unusual punishment that the original impetus for the Eighth Amendment came from the Framers’ repugnance toward the use of torture, which was regarded as incompatible with the liberties of En-

60. See above, nn. 32–33 and accompanying text.

61. Nor does all legal forcefulness involve the torturer’s enterprise (and the enterprise of those who use the cruel, inhuman, and degrading methods that the administration would like to distinguish from torture) of inducing a regression of the subject into an infantile state, where the elementary demands of the body supplant almost all adult thought.

62. Hannah Arendt, *The Origins of Totalitarianism*, new ed. (New York: Harcourt Brace Jovanovich, 1973), 441.

63. Austin Sarat and Thomas Kearns, “A Journey through Forgetting: Toward a Jurisprudence of Violence,” in *The Fate of Law*, ed. Austin Sarat and Thomas Kearns (Ann Arbor: University of Michigan Press, 1993), claim that “force is disdainful of reason” and that it “tends to short-circuit the pathways of rational agency.” But this is too quick. Sometimes coercion works by constraining choices rather than eliminating agency. For a discussion, see Jeremy Waldron, “Terrorism and the Uses of Terror,” *Journal of Ethics* 8 (2004): 5–35 at 10–16.

Those—like Sarat and Kearns—who maintain dogmatically that law is always violent and that the most important feature about it is that it works its will, in Robert Cover’s phrase, “in a field of pain and death,” will be unimpressed by the distinctions I am making. For them, law’s complicity with torture in the cases I have discussed is just business as usual. See Robert Cover, “Violence and the Word,” *Yale Law Journal* 95 (1986): 1601–29 at 1601.

glishmen.<sup>64</sup> The drafters' primary goal was to proscribe "'torture[s]' and other 'barbar[ous]' methods of punishment."<sup>65</sup> Even for those sentenced to death, the Court has held for more than a century that "punishments of torture[,] . . . and all others in the same line of unnecessary cruelty, are forbidden."<sup>66</sup> "Wanton infliction of physical pain" is a formula that is sometimes used,<sup>67</sup> often in a way that indicates reference to a continuum on which torture is conceived as the most vivid and alarming point.<sup>68</sup> We see this, for example, in what has been said in our courts about prison rape,<sup>69</sup> about the withholding of medical treatment from prisoners,<sup>70</sup> and about the use of flogging, hitching posts, and other forms of corporal punishment in our prisons.<sup>71</sup> In a similar way, judicial resistance in recent years

64. *Ingraham v. Wright*, 430 U.S. 651 (1977) at 665 (Powell, J., for the Court): "The Americans who adopted the language of this part of the English Bill of Rights in framing their own State and Federal Constitutions 100 years later feared the imposition of torture and other cruel punishments not only by judges acting beyond their lawful authority, but also by legislatures engaged in making the laws by which judicial authority would be measured."

65. *Estelle v. Gamble*, 429 U.S. 97 (1976) at 102, quoting Anthony Granucci, "Nor Cruel and Unusual Punishment Inflicted: The Original Meaning," *California Law Review* 57 (1969): 839-65 at 842. See also *In re Kemmler*, 136 U.S. 436, 447 (1890): "Punishments are cruel when they involve torture or a lingering death."

66. *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879).

67. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 173 (1976); *Furman v. Georgia*, 408 U.S. 238, 392; *Kent v. Johnson*, 821 F.2d 1220, 1229 (6th Cir. 1987).

68. See, e.g., *Holt v. Sarver*, 309 F. Supp. 362, 380 (E.D. Ark. 1970), which discusses the meaning of "cruel and unusual punishment": "The term cannot be defined with specificity. It is flexible and tends to broaden as society tends to pay more regard to human decency and dignity and becomes, or likes to think that it becomes, more humane. Generally speaking, a punishment that amounts to torture, or that is grossly excessive in proportion to the offense for which it is imposed, or that is inherently unfair, or that is unnecessarily degrading, or that is shocking or disgusting to people of reasonable sensitivity is a 'cruel and unusual' punishment."

69. *U.S. v. Bailey*, 444 U.S. 394 (1980) at 423-24 (Blackmun, J., dissenting): "[F]ailure to use reasonable measures to protect an inmate from violence inflicted by other inmates also constitutes cruel and unusual punishment. Homosexual rape or other violence serves no penological purpose. Such brutality is the equivalent of torture, and is offensive to any modern standard of human dignity. Prisoners must depend, and rightly so, upon the prison administrators for protection from abuse of this kind."

70. *Estelle v. Gamble*, 103: "An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical 'torture or a lingering death,' [citation omitted] the evils of most immediate concern to the drafters of the Amendment. In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose."

71. In a recent decision, the Supreme Court has condemned the practice of handcuffing prisoners to hitching posts as a form of punishment, formal or informal, for disciplinary infractions, citing a Fifth Circuit observation that "[w]e have no difficulty in reaching the conclusion that these forms of corporal punishment run afoul of the Eighth Amendment, offend contemporary concepts of decency, human dignity, and precepts of civilization which we profess

to the use of corporal punishment in prisons has used the idea of torture as a reference point, even though corporal punishment itself is not necessarily identified as torture.<sup>72</sup>

*Procedural due process*—Consider also the role of the prohibition on torture in epitomizing the constitutional requirements of procedural due process. Reference to torture is common in the jurisprudence of due process and self-incrimination. Principles of procedural due process are expressed in sayings such as “[t]he rack and torture chamber may not be substituted for the witness stand,”<sup>73</sup> and the privilege against self-incrimination we are told “was designed primarily to prevent ‘a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality.’”<sup>74</sup> Here—as with Eighth Amendment jurisprudence—the point is to remind us, not that torture is prohibited, but to use our clear grip on that well-known prohibition to illuminate and motivate other prohibitions that are perhaps less extreme but more pervasive and important in the ordinary life of the law.<sup>75</sup>

The connection between this use of the torture archetype and the non-brutality principle is particularly clear in the opinion of Justice Frankfurter in *Rochin v. California*.<sup>76</sup> In that case, narcotics detectives directed a doctor to force an emetic solution through a tube into the stomach of a suspect against his will. The suspect’s vomiting brought up two morphine capsules he had swallowed when he first saw the detectives. The morphine was introduced into evidence, and the suspect was convicted of unlawful posses-

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to possess.” *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974), 1306, cited in *Hope v. Pelzer*, 536 U.S. 730 (2002) at 737.

72. See *Jackson v. Bishop*, 404 F.2d 571, 577–79 (8th Cir. 1968), holding that prison use of a strap for whipping is unconstitutional. See also the excellent discussion in Edward Rubin and Malcolm Feeley, “Judicial Policy Making and Litigation against the Government,” *University of Pennsylvania Journal of Constitutional Law* 5 (2003): 617–64 at 647–59.

73. *Brown v. Mississippi*, 297 U.S. 278, 285–86 (1936).

74. *Pennsylvania v. Muniz*, 496 U.S. 582, 596 (1990), citing *Ullmann v. United States*, 350 U.S. 422 (1956). Consider also this from *U.S. v. Balsys*, 524 U.S. 666, 701–2 (1998), Justice Ginsburg, dissenting: “The privilege against self-incrimination, ‘closely linked historically with the abolition of torture,’ is properly regarded as a ‘landmar[k] in man’s struggle to make himself civilized’” (citing Erwin Nathaniel Griswold, *The Fifth Amendment Today* [Cambridge, MA: Harvard University Press, 1955], 7).

75. See also *United States v. White*, 322 U.S. 694, 697–98 (1944): “[T]he constitutional privilege against self-incrimination . . . grows out of the high . . . regard of our jurisprudence for conducting criminal trials and investigatory proceedings upon a plane of dignity, humanity and impartiality. It is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him. . . . Physical torture and other less violent but equally reprehensible modes of compelling the production of incriminating evidence are thereby avoided.”

76. 342 U.S. 165 (1952).

sion. The Supreme Court reversed the conviction, holding that “[f]orce so brutal and so offensive to human dignity”<sup>77</sup> was constitutionally prohibited and that there was little difference between forcing a confession from a suspect’s lips and forcing a substance from his body. Justice Frankfurter said famously of Mr. Rochin’s treatment, “These . . . are methods too close to the rack and the screw.”<sup>78</sup> Referring to some earlier decisions about the use of coerced confessions, he went on to talk in general terms about the principle at stake in the condemnation of the coercion in this case:

These decisions are not arbitrary exceptions to the comprehensive right of States to fashion their own rules of evidence for criminal trials. They are not sports in our constitutional law but applications of a general principle. They are only instances of the general requirement that States in their prosecutions respect certain decencies of civilized conduct. . . . To attempt in this case to distinguish what lawyers call “real evidence” from verbal evidence is to ignore the reasons for excluding coerced confessions. . . . Coerced confessions offend the community’s sense of fair play and decency. So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society.<sup>79</sup>

Once again, we do not need to define Mr. Rochin’s treatment as torture in order to see how the prohibition on torture is crucial to the Supreme Court’s invocation of a more general nonbrutality principle in condemning this apparently novel form of coercion. In recent years, the Court has repeated this approach, holding that “[d]etermining what constitutes unconstitutional compulsion involves a question of judgment: Courts must decide whether the consequences of an inmate’s choice to remain silent are closer to the physical torture against which the Constitution clearly protects or the de minimis harms against which it does not.”<sup>80</sup> My guess is that if

77. *Ibid.*, 174.

78. The whole passage reads: “[T]he proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach’s contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation” (*ibid.*, 172).

79. *Ibid.*, 173–74.

80. *McKune v. Lile*, 536 U.S. 24, 26 (2002).



the prohibition on torture itself becomes shaky or uncertain as a legal standard, we will have to find new points of orientation to help us in our application of whatever is left of the nonbrutality principle articulated in *Rochin*.

*Substantive due process*—The importance of the prohibition on torture for the jurisprudence of *substantive* due process is a little less clear. In a rather confusing set of opinions in *Chavez v. Martinez*,<sup>81</sup> a plurality on the Supreme Court rejected the position that torture to obtain relevant information is a constitutionally acceptable law enforcement technique if the information is not introduced at trial. There was considerable disagreement about the facts in *Chavez*, but there seemed to be a consensus that the Court's reliance in other abuse cases on the Fifth Amendment's Self-Incrimination Clause "do[es] not mean that police torture or other abuse that results in a confession is constitutionally permissible so long as the statements are not used at trial."<sup>82</sup> As Justice Kennedy put it, "[a] constitutional right is traduced the moment torture or its close equivalents are brought to bear. Constitutional protection for a tortured suspect is not held in abeyance until some later criminal proceeding takes place."<sup>83</sup> So I think one can say at least that if there is anything to the idea of substantive due process, the claim that torture for any purpose is unconstitutional comes close to capturing the minimum.

Seth Kreimer has taken all this a little further with the suggestion that the prohibition on torture should be understood as connected with the constitutional protection of bodily integrity and autonomy interests.<sup>84</sup> One of the reasons physical torture is constitutionally out of the question, Kreimer says, is that the Constitution protects bodily integrity against invasion,<sup>85</sup> and physical torture always involves such an invasion. Now the immediate point of Kreimer's discussion is to refute Alan Dershowitz's suggestion that any constitutional prohibition on torture is actually quite limited in its operation and that Dershowitz's mooted proposal for judicial

81. 538 U.S. 760, 773 (2003).

82. *Ibid.* Also, Justice Stevens said, in a partial dissent, the type of brutal police conduct involved "constitutes an immediate deprivation of the prisoner's constitutionally protected interest in liberty" (*ibid.*, 784).

83. *Ibid.*, 789–90.

84. Seth F. Kreimer, "Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror," *University of Pennsylvania Journal of Constitutional Law* 6 (2003): 278–325 at 294–95.

85. See *ibid.*, 295–96. See also, e.g., *Cruzan v. Director of Minnesota Department of Health*, 497 U.S. 261, 287 (1990) (O'Connor, J., concurring): "Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause."

torture warrants may not pose any great constitutional difficulty.<sup>86</sup> Kreimer's purpose is to highlight the resources available in our constitutional tradition for attacking the use of torture that Dershowitz is contemplating. But it is worth also considering how the argument might be pushed in the opposite direction: and that is what I am doing here. The constitutional resources that might be used by Kreimer to oppose torture might also be understood as constitutional resources whose security depends upon the integrity of the prohibition on torture. Undermine that integrity, and our conception of the constitutional scheme as something that *as a whole* protects dignity, autonomy, and bodily liberty begins to unravel.

*Law enforcement procedure*—It is not only in the decisions of the courts that we find an array of doctrines and principles epitomized by the prohibition on torture. We find it also in regard to the general culture of law enforcement. "The third degree" used to be a pervasive feature of the culture of policing. The fact that it has now largely disappeared from the culture of policing represents an enormous change in that culture.<sup>87</sup> It is not just a matter of changes in positive law or in the regulations with which police behavior is disciplined. To eliminate this sort of violence (once it is established), you need to change the entire basis on which police officers are trained to respond (and hold themselves and each other ready to respond) in dangerous or threatening situations. It is a matter of changing a whole ethos: patterns of training, supervision, camaraderie, peer support, conceptions of good and bad policing as shared among low-ranking officers, and the expectations of the public. Moreover, it cannot be done piecemeal: it requires a broad-fronted transformation of attitude, impulse, and expectation. You can't just have a bit of restraint here and a bit of abuse there; the prohibition needs to be incorporated into the whole training, peer relations, supervisory, and disciplinary regimen.<sup>88</sup>

### *E. Undermining an archetype*

I have said that the prohibition on torture is a legal archetype, which means that, in some sense, *other law* depends on its integrity. But *in what*

86. Cf. Dershowitz, *Why Terrorism Works*, 135.

87. President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (Washington, DC: US Government Printing Office, 1967), 93: "[T]oday the third degree is almost nonexistent." On the huge cultural changes that were necessary to eliminate coercion in police station houses, see James Fyfe and Jerome Skolnick, *Above the Law: Police and the Excessive Use of Force* (New York: Free Press, 1993).

88. For a summary of the history of the use of torture by US police in the twentieth century, see Richard A. Leo and K. Alexa Koenig's contribution (chap. 7) to this volume.

sense does other law depend on the integrity of this prohibition? What sort of hypothesis am I propounding when I talk about the impact on the rest of our law of undermining current restrictions on the deliberate infliction of pain as an aid to interrogation?

It sounds like some sort of "slippery-slope" argument, and you may think it needs to be treated with all the caution that slippery-slope arguments deserve.<sup>89</sup> But the archetype idea is the reverse of a slippery-slope argument. It is sometimes argued that if we relax some lesser constitutional inhibition, we will be on the downward slide toward an abomination like torture. But I am arguing in the other direction: starting at the bottom of the so-called slippery slope, I am arguing that if we mess with the prohibition on torture, we may find it harder to defend some arguably less important requirements that—in the conventional mode of argument—are perched above torture on the slippery slope. The idea is that our confidence that what lies at the bottom of the slope (torture) is wrong informs and supports our confidence that the lesser evils that lie above torture are wrong too. Our beliefs that flogging in prisons is wrong, that coerced confessions are wrong, that pumping a person's stomach for narcotics evidence is wrong, that police brutality is wrong—these beliefs may each of them be uncertain and a little shaky, but the confidence we have in them depends partly on analogies we have constructed between them and torture or on a sense that what is wrong with torture gives us some insight into what is wrong with these other evils. If we undermine the sense that torture is absolutely out of the question, then we lose a crucial point of reference for sustaining these other, less confident beliefs.

The case I am making is in part an empirical one, and it is open in principle to empirical refutation. Presented with solid evidence that a legal system that permitted torture was nevertheless able to maintain the rest of the adjacent law about nonbrutality intact over the long or medium term, I would have to abandon my concern about the systemic effects of messing with these provisions. Of course, the empirical argument in either direction is complicated. It is complicated, first, by the fact that we cannot assume stability or any particular trajectory for the rest of our law absent any assault on the prohibition on torture; we may be at a loss to say what

89. See, e.g., Frederick Schauer, "Slippery Slopes," *Harvard Law Review* 99 (1985): 361–83. For full discussion of the form of argument, see Eugene Volokh, "The Mechanisms of the Slippery Slope," *Harvard Law Review* 116 (2003): 1026–1134; Mario J. Rizzo and Douglas Glen Whitman, "The Camel's Nose Is in the Tent: Rules, Theories, and Slippery Slopes," *UCLA Law Review* 51 (2003): 539–92; Eric Lode, "Slippery Slope Arguments and Legal Reasoning," *California Law Review* 87 (1999): 1469–1543.

would have happened had the torture prohibition not been undermined and thus at a loss to determine how far the assault on the prohibition has caused us to deviate from that baseline. Second, it is possible that the very factors that led us to undermine the prohibition on torture may also have led us to undermine the adjacent law, in which case it will be hard to show that it was the undermining of the prohibition as such that had the deleterious effect. Actual causation, baselines, and null hypotheses in this area are notoriously difficult to establish.

The difficulties are compounded by the fact that the specific mechanism suggested here has to do with the role of argument. My claim assumes that the life of the law depends, in large part, on argumentation. It assumes that argument is not (as some Legal Realists suggested) just decoration in the law but a medium through which legal positions are sustained, modified, and elaborated.<sup>90</sup> Above all, it assumes that whether a given argument works or has a chance of success in sustaining a legal position depends on what decisions have already been made in the law. That last point is very important. In law, we do not just argue pragmatically for what we think is the best result; we argue by analogy with results already established, or we argue for general propositions on the basis of existing decisions that already appear to embody them. Philosophical defenses of this mode of argumentation can be given—as they have been in Dworkin's work on integrity, for example.<sup>91</sup> But whether one finds this jurisprudence convincing or not, there is no doubt as a matter of fact that this is how legal argumentation does take place and how arguments achieve their effect in preventing or promoting legal change.

One other point needs to be mentioned. Critics of "slippery slopes" and other similar models of argumentation sometimes say that the slide from one position to another can always be prevented provided the person evaluating the arguments can tell a good argument from a bad one and distinguish between positions that are superficially similar. That may be true of some philosophically sophisticated individuals. But in legal systems, we evaluate arguments together, and we have to concern ourselves with the prospects for *socially accepted* arguments and *socially convincing* distinctions.<sup>92</sup> In general, law makes available an institutional matrix for the

90. See, e.g., Jerome Frank, *Law and the Modern Mind* (New York: Brentano's, 1930), 111.

91. Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), chaps. 5–6.

92. Cf. Rizzo and Whitman, "Camel's Nose," 570–71: "The process by which arguments are accepted and decisions made is a social one that derives from the decisions of many individuals. No single decision maker can control the evolution of the discussion. The person who

presentation and evaluation of arguments, a social way of presenting and evaluating arguments that is supposed to affect what actually happens at the level of the whole society. We are not dealing, then, with any simple empirical prediction; any estimation of likelihoods must take all this complexity into account.

In any case, the claim of this essay goes beyond a purely empirical projection of the likelihood that one type of legal change will lead to another. There is also a more qualitative concern about the corruption of our legal system that results from undermining the prohibition on torture. Consider analogous concerns about the corruption of an individual. Suppose an individual, previously honest, is offered a bribe. Friends may warn him against the first act of dishonesty, not just for itself, but because of what it is likely to do to his character. Part of this concern is about how this change in his character will affect his future decisions. But corruption is more than just an enhanced probability of future dishonest acts. It involves a present inherent loss: now the man no longer has the sort of character that is set against dishonesty; he no longer has the standing to condemn and oppose dishonesty that an honest man would have.

Or suppose—a worse case, but one more analogous to the torture possibility—that someone has decided that in office he will accept bribes but that in other areas of his personal and professional life he will maintain honesty and not steal or cheat on his taxes, and so on. He may think that he can maintain this firewall between one sort of dishonesty and other sorts, but the cost to him is that he has to maintain it artificially. He no longer refrains from stealing for the reasons that are common to the condemnation of stealing and bribery; he refrains from stealing because even though it is like the acts he is willing to commit, he has simply determined that his dishonesty will go thus far and no further. That is a moral loss attendant on his corruption: an inability now to follow the force of a certain sort of reason, an attenuation of moral insight so far as bribery, stealing, and other forms of dishonesty are concerned.

The damage done to our system of law by undermining the prohibition on torture is, I think, just like this. If we were to permit the torture of al-Qaeda and Taliban detainees, or if we were to define what most of us regard as torture as not really “torture” at all to enable our officials to inflict pain on them during questioning, or if we were to set up a Dershowitz

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makes [a slippery-slope argument] does not necessarily claim that the listener himself will be the perpetrator of the future bad decision. Rather, he draws attention to the structure of the discussion that will shape the decisions of many decision makers involved in a social process.”

regime of judicial torture warrants, maybe only a few score detainees would be affected in the first instance. But the character of our legal system would be corrupted. We would be moving from a situation in which our law had a certain character—a general virtue of nonbrutality—to a situation in which that character would be compromised or corrupted by the permitting of this most brutal of practices. We would have given up the lynchpin of the modern doctrine that law will not operate savagely or countenance brutality. We would no longer be able to state that doctrine in any categorical form. Instead, we would have to say, more cautiously and with greater reservation: “In *most* cases the law will not permit or countenance brutality, but since torture is now permitted in a (hopefully) small and carefully cabined class of cases, we cannot rule out the possibility that in other cases the use of brutal tactics will also be permitted to agents of the law.” In other words, the repudiation of brutality would become a *technical* matter—“sometimes it is repudiated, sometimes not”—rather than a shining issue of principle.

Of course, the present character (or the pre-9/11 character) of our legal system is imperfect, just as the honesty of any given individual is imperfect. There were already pockets of brutality in our law—capital punishment, on some accounts; residual police brutality of the Rodney King variety; and the regular “leverage” of prison rape and other unlawful phenomena by prosecutors in the course of plea bargaining—and we see from Dershowitz’s example that their existence is already exploitable for an argument by analogy in favor of torture.<sup>93</sup> Our general commitment to the nonbrutality principle is not so secure that we can assume it will remain intact if we add one more set of deviations. In any case, it is not just one more set of deviations. The *archetypal* character of the prohibition on torture means that it plays a crucial and highly visible role in regard to the principle.

As we have seen, the prohibition on torture is a point of reference to which we return over and over again in articulating legally what is wrong with cruel punishment or distinguishing a punishment that is cruel from one that is not: we do not equate cruelty with torture, but we use torture to illuminate our rejection of cruelty. And the same is true of procedural due process constraints, certain liberty-based constraints of substantive due process, and our general repudiation of brutality in law enforcement. So, in order to see what might go wrong as a result of undermining the prohibition on torture, we have to imagine Eighth Amendment jurisprudence without this point of reference, arguing about cruelty without the assump-

93. Dershowitz, *Why Terrorism Works*, 147–49.

tion that torture, at any rate, is wholly out of the question. Or we have to imagine Fifth Amendment jurisprudence without this point of reference, where arguments about coerced confessions and self-incrimination must be made against the background of an assumption that torture is sometimes legally permissible. The halting and hesitant character of such argumentation would itself be a blight on our law in addition to the actual abuses that would result. Or, rather, the two would not be separated: because law is an argumentative practice, the empirical consequences for our law would be bound up with the corruption of our ability to make arguments of a certain kind or to assert principles that put torture unequivocally beyond the pale and use that to provide a vivid and convincing basis for the elaboration of a general principle of nonbrutality.

#### 4. The state

##### A. "*Engine of state*" and the rule of law

I have been arguing that the prohibition on torture is a legal archetype emblematic of our determination to break the connection between law and brutality and to reinforce its commitment to human dignity even when law is at its most forceful and its subjects are at their most vulnerable. But in its modern revival, torture does not present itself as an aspect of *legal* practice. It presents instead as an aspect of *state* practice, by which I mean it involves agents of the state seeking to acquire information needed for security or military or counterinsurgency purposes rather than (say) police, prosecutors, or agents of a court seeking to obtain information that can then be put to some forensic use.

So what is the relevance of my argument about *legal* archetypes to a practice that no one proposes to connect specifically with law? Why be so preoccupied with the trauma to *law* of what is essentially a matter of *power*?

One point is that "*engines of state*" and "*engines of law*" are not so widely separated as the Blackstone observation might lead us to believe. Even if one were to take the view that what is done by American officials in holding cells in Iraq, Afghanistan, or Guantanamo Bay is done in relation to the waging of war in a state of emergency rather than as part of a legally constituted practice, still the thought that torture (or something very like torture) is permitted would be a legally disturbing thought. For we know that, in general, there is a danger that abuses undertaken in extraordinary circumstances (extraordinary relative to the administration of law and order at home) can come back to haunt or infect the practices

of the domestic legal system. This concern was voiced by Edmund Burke in his apprehensions about the effect on England of the unchecked abuses of Warren Hastings in India,<sup>94</sup> and it is also voiced by Hannah Arendt, who offers the tradition of racist and oppressive administration in the African colonies as part of her explanation of the easy acceptance of the most atrocious modes of oppression in mid-twentieth-century Europe.<sup>95</sup> The warning has been sounded often enough: "Do not imagine that you can maintain a firewall between what is done by your soldiers and spies abroad to those they demonize as terrorists or insurgents and what will be done at home to those who can be designated as enemies of society."<sup>96</sup> You may say that there is a distinction between what we do when we are at war and what we do in peacetime, and we should not be too paranoid that the first will infect the second. Saying that may offer some reassurance about the prospect of insulating the engines of law from the exigencies of *some* wars. But is it really a basis for confidence in regard to the sort of war in which we are said to be currently involved—a war against terror as such, a war without end and with no boundaries, a war fought in the American homeland as well as in the cities, plains, and mountains of Afghanistan and Iraq?

A second point is that although we are dealing with torture as "an engine of state," still the issue of legality has been made central. Maybe there are hard men in our intelligence agencies who are prepared to say (whenever they can get away with it), "Just torture them, get the information, and we'll sort out the legal niceties later." But even if this is happening, a remarkable feature of the modern debate is that an effort has been made to see whether something like torture can be accommodated *within the very legal framework that purports to prohibit it*. The American executive has seemed to be interested in the prospects for a regime of cruel and painful interrogation that is legally authorized or at least not categorically and unconditionally prohibited.<sup>97</sup> An effort has been made to see whether the law

94. See Edmund Burke, "Speech in General Reply" [on the impeachment of Warren Hastings, Esq.] (May 28, 1794), in *The Works of the Right Honorable Edmund Burke*, vol. 11 (Boston: Little, Brown, 1867), 201: "[T]he House of Commons has already well considered what may be our future moral and political condition, when the persons who come from that school of pride, insolence, corruption, and tyranny are more intimately mixed up with us of purer morals. Nothing but contamination can be the result."

95. Arendt, *Origins of Totalitarianism*, 185–86, 215–16, 221.

96. Bear in mind also that some of the reservists involved in the abuse at Abu Ghraib were prison guards in civilian life. It is of course disturbing to think that that explains their abusive behavior in Iraq; it is also disturbing to think about causation back in the opposite direction.

97. Should we be pleased that the Bush administration cared enough about legality to embark on this debate? Or should we be appalled? Is it a tribute to law? Or is it an affront (like trying to get an honorable father's favor for a thoroughly disreputable friend)?



can be stretched or deformed to actually authorize this sort of thing. The administration did not just take the prisoners to the waterboards; it has dragged the law—our law—along with them. The effect on law, in other words, is unavoidable.

A third point addresses the issue of *the rule of law*—the enterprise of subjecting what Blackstone called “the engines of state” to legal regulation and restraint. We hold ourselves committed to a general and quite aggressive principle of legality, which means that law does not just have a little sphere of its own in which to operate but expands to govern and regulate every aspect of official practice. I think the central claim of this essay applies to that aspiration as well: that is, I think we should be concerned about the effect not just on American law but *on the rule of law* of a weakening or an undermining of the legal prohibition on torture. We have seen how the prohibition on torture operates as an archetype of various parts of American constitutional law and of law enforcement culture generally. I believe it also operates as an archetype of the ideal we call the rule of law. That agents of the state are not permitted to torture those who fall into their hands seems an elementary incident of the rule of law as it is understood in the modern world. If this protection is not assured, then the prospects for the rule of law generally look bleak indeed.

I think a case can be made that it is the prohibition on torture, not the existence of a system for the legal authorization of torture, that is really archetypal of the rule of law. Although in 1911 the author of the article “Torture” in the *Encyclopaedia Britannica* could write that “[t]he whole subject is now one of only historical interest as far as Europe is concerned,”<sup>98</sup> political theorist Judith Shklar has noted that torture began to flourish again in the twentieth century, and that “acute fear” is once again becoming “the most common form of social control.”<sup>99</sup> Modern states suffer from a standing temptation to try to get their way by terrorizing the populations under their authority with the immense security apparatus they control and the dreadful prospects of torture, disappearance, and other violence that they can deploy against their internal enemies. Much more than mere arbitrariness and lack of regulation, this is the apprehension that most of us have about the modern state. The rule of law offers a way of responding to that apprehension for, as we have seen, law (at least in the heritage of our jurisprudence) has set its face against brutality and has found ways

98. *Encyclopaedia Britannica*, 11th ed. (1911), s.v. “torture.”

99. Judith Shklar, “The Liberalism of Fear,” in *Liberalism and the Moral Life*, ed. Nancy Rosenblum (Cambridge, MA: Harvard University Press, 1989), 21–38 at 27.

of remaining forceful and final in human affairs without savaging or terrorizing its subjects. The promise of the rule of law, then, is the promise that this sort of ethos can increasingly inform the practices of the state and not just the practices of courts, police, jailers, prosecutors, and so on. In this way, *a state subject to law* becomes not just a state whose excesses are predictable or a state whose actions are subject to forms, procedures, and warrants; it becomes a state whose exercise of power is imbued with this broader spirit of the repudiation of brutality. That is the hope, and I think the prohibition on torture is an archetype of that hope: it is archetypal of what law can offer, and in its application to the state, it is archetypal of the project of bringing power under this sort of control.

This point can also be stated the other way around: to be willing to abandon the prohibition on torture or to define it out of existence is to be willing—among other things—to sit back and watch how much of that enterprise unravels. It is to contemplate with equanimity the prospect that the ideal of the rule of law will no longer hold out the clear promise of nonbrutality: that the state that it aims to control will be permitted in some areas and to at least a certain extent to operate toward individuals who are wholly within its power with methods of brutality that law itself recoils from.

### *B. An archetype of international law*

I have said that the prohibition on torture is archetypal of our particular legal heritage, as well as a certain sort of commitment to the rule of law. Beyond that, we may ask about its archetypal status in international law, particularly international humanitarian law and the law of human rights.

I think a case can be made, similar to the case made in section 3, that the prohibition on torture also operates as an archetype in these areas. Consider, for example, its prominence in the law relating to the treatment of prisoners in wartime. The rule against the torture of prisoners may not be the best known of the Geneva Convention provisions. (That honor probably belongs to the image of a prisoner's having an obligation to disclose only his "name, rank, and number.") But if it is less prominent in the public imagination, it is only because it is more taken for granted. We implicitly understand that while prisoner-of-war camps are uncomfortable and the circumstances of the prisoners often straitened, there is something inherently unlawful about the torture of prisoners.<sup>100</sup> And this is not just

100. When captured British airmen appeared on Iraqi television during the first Gulf War

because of the stringency of the provision itself. Torture of prisoners threatens to undermine the integrity of the surrender/incarceration regime: if we can torture prisoners, then we can do anything to them, and if we can do anything to them, then the willingness of defeated soldiers to surrender will be quite limited.<sup>101</sup> The whole enterprise of attempting to mitigate the horrors of war by making a provision for an *hors de combat* status for individual soldiers in the face of certain defeat depends on their confidence, underwritten by law, that surrender and incarceration is better than death in combat. But torture (or interrogation practices that come close to torture) threatens that confidence and thus the whole basis of the regime.

What about human rights law? Certainly torture is widely understood as the paradigmatic human rights abuse. It is the sort of evil that arouses human rights passions and drives human rights campaigns. The idea of a human rights code that lacks a prohibition on torture is barely intelligible to us. Now it is true that even human rights advocates accept the idea that rights are subject to interpretation as well as to limitations to meet "the just requirements of morality, public order and the general welfare in a democratic society."<sup>102</sup> And few are so immoderate in their human rights advocacy that they do not accept that "[i]n time of public emergency which threatens the life of the nation" the human rights obligations of the

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showing clear evidence of having been beaten, allied outrage was immediate. See Maureen Dowd, "War in the Gulf: The Oval Office; Bush Calls Iraqis 'Brutal' to Pilots," *New York Times*, January 22, 1991, A10: "President Bush vowed today to hold President Saddam Hussein accountable for what he called 'the brutal parading of allied pilots,' an act that he denounced as a 'direct violation of every convention that protects prisoners.' Iraq released videotapes on Sunday in which seven men identified as allied pilots gave robotic answers to Iraqi questions. . . . Several of the pilots' faces appeared bruised in the tapes, which were broadcast today in the United States. The appearance of the men, along with the wooden delivery of their responses, led military analysts to believe that the pilots were coerced." See also John Bulloch et al., "Crisis in the Gulf," *Independent* (London), January 27, 1991, 13: "[B]y parading US and British pilots on Baghdad television, the argument for war crimes trials moves on to the agenda again, bringing with it the possibility of pursuing the war into Iraq after a withdrawal from Kuwait."

101. W. Hays Parks, "Teaching the Law of War," *Army Lawyer*, Department of the Army Pamphlet 27-50-174, June 1987, 4–10 at 6: "[T]actical rationale is being used to support legal principles; our service men and women are taught that these principles are absolute and may not be waived when convenient. . . . [A] lack of humane treatment may induce an enemy to fight to the death rather than surrender, thereby leading to increased friendly casualties. The instruction is candid, however, in admitting that humane treatment of enemy prisoners of war will not guarantee equal treatment for our captured servicemen, as we learned in World War II, Korea, and Vietnam; but it is emphasized that inhumane treatment will most assuredly lead to equivalent actions by the enemy."

102. Universal Declaration of Human Rights, art. 29(2).

state may be limited.<sup>103</sup> People are willing to accept that the human rights regime does not unravel altogether when detention without trial is permitted or when habeas corpus is suspended or when free speech or freedom of assembly is limited in times of grave emergency. But were we to put up for acceptance as an integral part of the main body of human rights law the proposition that people may be *tortured* in times of emergency, I think people would sense that the whole game was being given away and that human rights law itself was entering a crisis.

But what if we were proposing to violate not the rule against torture but only the international norm relating to cruel, inhuman, or degrading treatment? Maybe that could be abandoned without wider damage to the human rights regime? I have serious doubts about this. For one thing, the Bush administration also toyed with redescribing a considerable amount of what was previously regarded as torture as merely—merely!—"cruel, inhuman, and degrading treatment." The human rights community is not easily fooled, and it would be an archetypal blow to its endeavor if the rule that in fact prohibits torture were to unravel under this sort of definitional pressure. For another thing, we must not become so jaded that the phrase "cruel, inhuman, and degrading treatment" simply trips off the tongue as something much less taboo than torture. It may be vague, but it is not a technical term. And it is not just a pious aspiration: the word "inhuman" means much more than merely "inhumane." "Inhuman treatment" means what it says, and its antonymic connection with the phrase "human rights" is not just happenstance. To treat a person inhumanly is to treat him in the way that no human should ever be treated. On this basis it would not be hard to argue that the prohibitions on inhuman treatment (e.g., in the Universal Declaration of Human Rights, the Covenant, and the European Convention on Human Rights) are as much a paradigm of the international human rights movement as the absolute prohibition on torture.

I said in section 3C that dire predictions about the effect of undermining an archetype are partly empirical, but they also have partly to do with the sense of corruption and demoralization that the collapse of an archetype would induce. Archetypes make law visible, they dramatize its more abstract principles, and they serve as icons or symbols of its deepest commitments. By the same token, the demise of an archetype sends a powerful message about a change in the character of the relevant law. As Sanford Kadish has observed:

103. International Covenant on Civil and Political Rights, art. 4(1).

The deliberate infliction of pain and suffering upon a person by agents of the state is an abominable practice. Since World War II, progress has been made internationally to mark the perpetrators of such practices as outlaws. This progress has been made by proclamations and conventions which have condemned these practices without qualification. . . . Any claim by a state that it is free to inflict pain and suffering upon a person when it finds the circumstances sufficiently exigent threatens to undermine that painfully won and still fragile consensus. . . . If any state is free of the restraint whenever it is satisfied that the stakes are high enough to justify it, then the ground gained since WWII threatens to be lost. . . . Lost would be the opportunity immediately to condemn as outlaw any state engaging in these practices. Judgment would be a far more complicated process of assessing the proffered justification and delving into all the circumstances.<sup>104</sup>

If in this way the rule against torture were to change from a matter of shining principle in the “Global Bill of Rights” to become a technical matter—a matter of counterintuitive lawyers’ definitions and a maze of exceptions and provisions for derogation—then we would lose our sense of international law’s ability to confront the horrors of our time clearly and decisively. Law’s mission in these areas is much more vulnerable to demoralization than it is in domestic law, where people have learned to live with a gap between legal technicality on the one hand and the clear demands of morality on the other.

So far in this section I have considered the rule against torture as an archetype of the substantive law of human rights and the treatment of prisoners. We may want to consider it also as an archetype of international law *as such*, as an archetype of the way in which international law operates. We know that the rule against torture functions as one of the most vivid modern exemplars of *ius cogens* in international law—that is, of the idea that some norms have a status that transcends the ordinary requirement of subscription to treaty as the basis of the bindingness of international law.<sup>105</sup> However, it is not the only exemplar. Traditionally, the paradigms of an offense prohibited by *ius cogens* were piracy and the slave trade; even if the rule against torture ceased to be regarded as *ius cogens*, these other rules would continue to afford clear examples of peremptory norms subject to universal jurisdiction.

104. Kadish, “Torture,” 352.

105. Ruth Wedgwood, “International Criminal Law and Augusto Pinochet,” *Virginia Journal of International Law* 40 (2000): 829–47 at 836. See also M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* (Dordrecht: M. Nijhoff, 1992), 489.

## Conclusion

The most important issue about torture remains the moral issue of the deliberate infliction of pain, the suffering that results, the insult to dignity, and the demoralization and depravity that is almost always associated with this enterprise whether it is legalized or not. The issue of the relation between the prohibition on torture and the rest of the law, the issue of archetypes, is a *second-tier issue*. By that I mean it does not confront the primary wrongness of torture; it is a second-tier issue like the issue of our proven inability to keep torture under control, or the fatuousness of the suggestion made by Dershowitz and others that we can confine its application to exactly the cases in which it might be thought justified. Given that we are sometimes tongue-tied about what is really wrong with an evil like torture, work at this second tier is surely worth doing. Or it is surely worth doing anyway, as part of the general division of labor, even if others are managing to produce a first-tier account of the evil.<sup>106</sup>

I have found this second-tier thinking about archetypes helpful in my general thinking about law. I have found it helpful as a way of thinking about what it is for law to structure itself and present itself in a certain light. I have found it helpful to think about archetypes as a general topic in legal philosophy, as a corrective to some of the simplicities of legal positivism, and as an interesting elaboration of Dworkin's jurisprudence. Most of all, I have found this exploration helpful in understanding what the prohibition on torture symbolizes. By thinking about the prohibition as an archetype, I have been able to reach a clearer and more substantive sense of what we aspire to in our jurisprudence: a body of law and a rule of law that renounce savagery and a state that pursues its purposes (even its most urgent purposes) and secures its citizens (even its most endangered citizens) honorably and without recourse to brutality and terror.

106. See, e.g., Sussman, "What's Wrong with Torture?"

## In Defense of Lawfare: The Value of Litigation in Challenging Torture

LISA HAJJAR

"Lawfare," a neologism of law and warfare, is a concept with multiple and disputed meanings.<sup>1</sup> There is, however, a minimum consensus that it refers to the uses (some argue, misuses) of law in the context of war and armed conflict. Yet even the meaning of "context" is debatable: is lawfare invoked in a narrowly tailored way to address combat operations and the treatment of enemy prisoners, or is it more broadly understood to target domestic security measures instituted by the state in wartime?<sup>2</sup> The dominant theme in the lawfare debates—or at least the most contentious one—turns on the contested legitimacy of bringing cases to court to challenge the legality of a state's war-waging policies and practices or to sue or otherwise penalize individual state agents (and government-funded contractors and corporations) who are alleged to have engaged in or abetted serious violations of the law in the conduct—or the time—of war.

In this chapter, I tackle the conundrum posed by this suggestively polemical term. I begin by tracing the contours in contemporary debates about the purpose and role of law in relation to war. The fluidity and evolution of the concept's meaning are related to the ways in which law has been used in recent years and to political perceptions of those uses. Those

1. See Leila N. Sadat and Jing Geng, "On Legal Subterfuge and the So-Called 'Lawfare Debate,'" *Case Western Reserve Journal of International Law* 43 (2011): 153–61. This paper was presented at the conference "Lawfare! Are America's Enemies Using the Law against Us as a Weapon of War?," where much of the discussion was devoted to debating the meaning and utility of the concept; article versions of the papers are available at [http://www.case.edu/orgs/jil/issues\\_lawfare.html](http://www.case.edu/orgs/jil/issues_lawfare.html) (accessed February 10, 2012), and the webcast can be accessed at <http://law.case.edu/Lectures.aspx?dt=20100910> (accessed February 10, 2012).

2. See Mary Dudziak, "Law, War and the History of Time," *California Law Review* 98 (2010): 1669–1712. See also Joseph Margulies and Hope Metcalf, "Terrorizing Academia," *Journal of Legal Education* 60 (2011): 433–71.

perceptions do not divide neatly into two camps, “pro” and “anti” lawfare (i.e., there are multiple and shifting variations of pro and anti positions). But like the minimum consensus about the meaning of lawfare, people holding differing views tend to concur that lawyers function as or could be analogized to warriors; David Luban has coined the term “lawriors.”<sup>3</sup>

The main focus of this chapter is litigation that was mounted in response to the US government’s interrogation and detention policies in the “war on terror,” along with the debates that this litigation has generated. These policies included the official authorization of torture, protracted incommunicado detention, kidnapping, and extraordinary rendition. I map the politico-ideological and legal-intellectual variations manifested in pro- and antilitigation arguments. One element of these arguments is the fact that lawfare was the means—the only means that materialized, for reasons I explain—to challenge these practices. Even some people who have been involved in lawfare as lawriors or endorsed the legitimacy of litigation have become skeptical about the utility of going to court because the record of judicial outcomes vis-à-vis the litigants’ goals has been largely disappointing. That particular brand of litigious skepticism, as discussed in a later section, is a manifestation of “thinking like a lawyer.” I conclude by offering a sociolegal comparative and historical perspective in order to analyze lawfare by *not* thinking like a lawyer.

### 1. A debatable concept

The relationship between law and war has been a subject of contention for millennia, evidenced by the durability of Roman orator and politician Cicero’s aphorism “inter arma enim silent leges” (in time of war the law falls silent). The cornerstone of the contemporary lawfare debate was laid in the last decade of the twentieth century in response to the creation of new international law enforcement institutions (i.e., United Nations ad hoc tribunals for the former Yugoslavia and Rwanda and the establishment of an International Criminal Court) and innovative uses of the international criminal law doctrine of universal jurisdiction to prosecute perpetrators of torture and other gross crimes in foreign national court systems (e.g., the Pinochet precedent).<sup>4</sup> Today, invocations of lawfare tend to reference

3. David Luban, “Carl Schmitt and the Critique of Lawfare,” *Case Western Journal of International Law* 43 (2011): 457–71.

4. See Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, NJ: Princeton University Press, 2001); John Bolton, “Is There Really ‘Law’ in International Affairs?,” *Transnational Law and Contemporary Problems* 10 (2000): 1–48; Curtis A. Bradley and



twenty-first century conflicts, mainly the US global war on terror as well as the conflict in Israel/Palestine, which the Israeli state has characterized as its own "war on terror."<sup>5</sup>

At the dawn of the twenty-first century, the concept and the terms of the debate were defined in a very military-centric way because of the influence of an oft-cited 2001 essay by Colonel Charles J. Dunlap Jr., in which he described lawfare as "the use of law as a weapon of war" and "a method of warfare where law is used as a means of realizing a military objective."<sup>6</sup> As an Air Force officer and staff judge advocate, Dunlap was concerned about the influence of international law and the role of lawyers in connection to military operations; he used as examples the 1991 Gulf War and the NATO air campaigns in Kosovo and Serbia to argue that "hyperlegalism" coupled with advanced media technologies that convey the consequences of combat in almost real time and the efficacy of humanitarian-minded nongovernmental organizations could have a constraining effect on the US military by undermining public support for warfare. Dunlap writes: "Evidence shows this technique can work. The Vietnam War—where US forces never suffered a true *military* defeat—is the model that today's adversaries repeatedly try to replicate."<sup>7</sup>

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Jack L. Goldsmith, "The Current Illegitimacy of International Human Rights Litigation," *Fordham Law Review* 66 (1997): 319–69; Lisa Hajjar, "Chaos as Utopia: International Criminal Prosecutions as a Challenge to State Power," *Studies in Law, Politics and Society* 31 (2003): 3–23; Christopher Hitchens, *The Trial of Henry Kissinger* (New York: Verso, 2001); Paul Kahn, "American Hegemony and International Law: Speaking Law to Power; Popular Sovereignty, Human Rights, and the New International Order," *Chicago Journal of International Law* 1 (2000): 1–18; Harold Hongju Koh, "Why Do Nations Obey International Law?," *Yale Law Journal* 106 (1997): 2599–2659; Stephen Macedo, ed., *The Princeton Principles on Universal Jurisdiction* (Princeton, NJ: Princeton University Program in Law and Public Affairs, 2001); Aryeh Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* (New York: Times Books, Random House, 1998); Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice* (New York: New Press, 1998); Naomi Roht-Arriaza, "The Pinochet Precedent and Universal Jurisdiction," *New England Law Review* 35 (2001): 311–19.

5. See Noura Erakat, "Israel versus Universal Jurisdiction: A Battle for International Human Rights Law," *Jadaliyya*, November 4, 2010, accessed April 26, 2011, [http://www.jadaliyya.com/pages/index/288/israel-versus-universal-jurisdiction\\_a-battle-for-](http://www.jadaliyya.com/pages/index/288/israel-versus-universal-jurisdiction_a-battle-for-); Lisa Hajjar, "International Humanitarian Law and 'Wars on Terror': A Comparative Analysis of Israeli and American Doctrines and Policies," *Journal of Palestine Studies* 36 (2006): 21–42; Eyal Weizman, "Lawfare in Gaza: Legislative Attack," *Open Democracy*, March 1, 2009, accessed April 26, 2011, <http://www.opendemocracy.net/article/legislative-attack>.

6. Col. Charles J. Dunlap Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts*, Harvard University Carr Center for Human Rights, November 21, 2001, 5, 11, accessed April 13, 2011, <http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf>.

7. *Ibid.*, 11 (emphasis in original).

This military-centric understanding featured at a March 18, 2003, National Security Roundtable convened at the Council on Foreign Relations (CFR) to discuss “the increased use of legal tools to combat American military might.”<sup>8</sup> The roundtable, titled “Lawfare, the Latest in Asymmetries,” coincided with the start of the US-led war against Iraq, but the discussion, as described in the summary posted on CFR’s website, was principally concerned with the new International Criminal Court and the “widening gap between the legal culture in the United States and Europe.” The roundtable’s definitions of lawfare bore the military-centrism featured in Dunlap’s 2001 essay. One example discussed at the roundtable was the filing of human rights suits by Colombian peasants against military figures, which was compared to a “decapitation strike” because it might remove a military commander from active duty by forcing him to defend himself in court. Another example was the way enemies might manipulate American “respect for the laws of armed combat” by deliberately placing combatants among civilians “to goad American forces into violations . . . , which are then used against the United States in the court of world opinion.”<sup>9</sup>

While Dunlap’s own understanding of the concept changed in response to developments in the uses of law since 2001, his original military-centric, us-versus-adversaries, antilawfare arguments continue to loom large in the discourse. For example, Luban, who is not prone to military-centrism in his analysis of war on terror litigation,<sup>10</sup> nevertheless subscribes to the Dunlapian definition of lawfare as “the use of law as a weapon of war *against* a *military* adversary.”<sup>11</sup> The problem with this military-centric understanding is that it elides or ignores legal activities that focus on noncombat issues, which actually dominate the debate about lawfare.

Variations on the antilawfare position have maintained the notion that adversaries are those who use or misuse the law but extend beyond the military to include other sectors of government, encompassing all sorts of legal strategies against state institutions and agents. The excoriating and expansive interpretation of lawfare was epitomized in the 2005 National

8. Council on Foreign Relations, “Lawfare, the Latest in Asymmetries,” March 18, 2003, accessed April 13, 2011, <http://www.cfr.org/publication.html?id=5772>.

9. Ibid.

10. See David Luban, “Lawfare and Legal Ethics in Guantanamo,” *Stanford Law Review* 60 (2008): 1981–2026; David Luban, “Liberalism, Torture and the Ticking Bomb,” *Virginia Law Review* 91 (2005): 1425–61.

11. Luban, “Carl Schmitt,” 1 (emphasis added). In the same vein, he writes: “If strategic, goal-oriented planning behind legal arguments is the hallmark of lawfare, all litigation is like lawfare. The only difference is the specific military nature of the goal, that is, that legal success will constrain a state’s military forces by declaring some of their tactics legally off-limits” (5).

Security Strategy of the United States, which includes the following assertion: "Our strength as a nation-state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes and terrorism."<sup>12</sup> This conflation of international fora and judicial processes with terrorism has been controversial, to say the least. But it appeals to those who wish to denigrate lawyers and organizations like the ACLU and the Center for Constitutional Rights whose post-9/11 litigation challenged the government's wartime behavior on a range of issues. Daniel Popeo provides an example of this antilawfare attitude: "Over the past nine years, these ideologues have, with the help of the courts, secured criminal defendant rights for enemy combatants; invalidated parts of the USA Patriot Act; and forestalled invaluable surveillance activities. Rather than spending time deterring the next terrorist attack, government officials have had to defend detainment decisions, fight the disclosure of highly sensitive national security information, and judicially justify the transfer of terror suspects to other nations."<sup>13</sup>

Some people embrace the term "lawfare" as a positive and apt description for law-enforcing and rights-protecting litigation. Those who would self-identify as "prolawfare," including lawriors who initiated civil lawsuits against law-violating government officials or contractors, or who zealously defended their imprisoned clients,<sup>14</sup> maintain that their objective was to attack, not the military or the state per se, but violations and violators of law. If one looks to the actual uses and users of law (i.e., if one analyzes lawfare as *practice*), American lawyers—including military lawyers—deployed the tools of their trade in a legal landscape that was made muddy on purpose by secret policy decisions to disregard legal norms and rules to wage the global war on terror. Lawriors have used the courts—indeed, *had to use the courts* for a lack of alternatives—not only to contest the dubious legality or flagrant illegality of certain wartime policies and practices but also to shed light on the ways in which power has been exercised on and off the battlefield.

Those who are ambivalent about government-challenging litigation but

12. National Security Strategy of the United States, Pentagon, March 2005, 5, accessed July 9, 2011, <http://www.defense.gov/news/Mar2005/d20050318nds2.pdf>.

13. Daniel Popeo, "The ACLU Is Courting Terrorism and Disaster," *Washington Examiner*, November 16, 2010.

14. See David Frakt, "Confessions of a Terrorist Sympathizer," *Salon*, March 9, 2010, accessed April 13, 2011, [http://www.salon.com/news/feature/2010/03/09/confessions\\_terrorist\\_sympathizer](http://www.salon.com/news/feature/2010/03/09/confessions_terrorist_sympathizer); Nancy Hollander, "A Terrorist Lawyer and Proud of It," *New York Times*, March 26, 2010. (Both titles are ironic.)

nevertheless interested in the practices that constitute lawfare have a resource in the *Lawfare Blog*, cofounded by Benjamin Wittes, Jack Goldsmith, and Robert Chesney in September 2010. In the inaugural post, Wittes writes: "The name Lawfare refers both to the use of law as a weapon of conflict and, perhaps more importantly, to the depressing reality that America remains at war with itself over the law governing its warfare with others. . . . It is our hope to provide an ongoing commentary on America's lawfare, even as we participate in many of its skirmishes."<sup>15</sup> An example of their skirmish participation includes advocating that the government abandon the idea of prosecuting Guantanamo detainees in favor of indefinite (permanent) detention.<sup>16</sup>

## 2. The political meanings of lawfare

The lawfare debate operates on several political registers. The right-wing neorealist or hypersovereigntist antilawfare position asserts the illegitimacy or irrelevance of international human rights and humanitarian law writ large. The genealogy of this position runs through the American "old right" opposition to the post-World War II revolution in international law, but it got a "new right" makeover in the post-Cold War 1990s with the demi-revolution in enforceability. In December 2000 David Rivkin and Lee Casey published an article in the *National Interest* that presaged the position that they and other hypersovereigntists would carry into the new century; they wrote: "Since the Cold War's end, a number of international organizations, human rights activists and states have worked to transform the traditional law of nations governing the relationship between states into something akin to an international regulatory code. This 'new' international law . . . constitutes a real and immediate threat to US national interests."<sup>17</sup> This brand of right-wing reasoning blends proclamations that international law enforcement is un- or postdemocratic because the international order does not represent "democratic sovereign America"<sup>18</sup> and denunciations of legal

15. Benjamin Wittes, "Welcome to Lawfare," *Lawfare*, September 1, 2010, accessed July 9, 2011, <http://www.lawfareblog.com/2010/09/welcome-to-lawfare-2/>.

16. See Benjamin Wittes and Jack Goldsmith, "Ghailani Verdict Makes Stronger Case for Military Detentions," *Washington Post*, November 19, 2010. See also Daphne Eviatar, "Indefinite Detention Would Harm, Not Help National Security," *Human Rights First*, November 19, 2010, accessed April 14, 2011, <http://www.humanrightsfirst.org/2010/11/19/indefinite-detention-would-harm-not-help-national-security/>.

17. David B. Rivkin and Lee A. Casey, "The Rocky Shoals of International Law," *National Interest*, Winter 2000, 35.

18. See John Fonte, "Democracy's Trojan Horse," *National Interest*, Summer 2004, 117–29.

constraints on the state's armed and covert pursuit of national security. At the inaugural conference of the Lawfare Project on March 11, 2010,<sup>19</sup> former UN ambassador John Bolton voiced his long-held hypersovereigntist position: "It is a big mistake for us to grant any validity to international law even when it may seem in our short-term interest to do so—because over the long term . . . those who think that international law really means anything are those who want to constrict the United States."<sup>20</sup>

A different antilawfare position is the state-centric view that international law means what powerful states say it means,<sup>21</sup> that prevailing interpretations of what is legal in war should emanate from the executive branch, and that courts have no (legitimate) role to play in this field. This state-centric view, which is attentive to international law but not international opinion, was epitomized by the "new paradigm" devised by Bush administration officials under the intellectual authorship of Vice President Dick Cheney and his counsel, David Addington,<sup>22</sup> and varnished with legal opinions from the Justice Department's Office of Legal Counsel (OLC), most prominently by John Yoo, a Berkeley law professor who served as deputy assistant attorney general from 2001 to 2003. Their goal was to insulate the "unitary executive" from the power-checking prerogatives of US courts and Congress in the context of this war. To these ends, Yoo and his OLC colleagues produced memos opining that the president, as commander in chief, should have unfettered powers to wage war and that any efforts to subject executive discretion (e.g., vis-à-vis interrogation and detention of enemy prisoners, domestic surveillance without warrants, military operations in countries not at war with the United States) to judicial scrutiny for compliance with federal or treaty laws would be constitutionally dubious.<sup>23</sup>

As distinct from the Boltonesque denunciation of international law, those who devised the new paradigm engaged in radical reinterpretation: for example, asserting that the black-letter prohibition of torture and cruel,

19. A video of the Lawfare Project conference proceedings is available on YouTube, accessed April 13, 2011, <http://www.youtube.com/user/TheLawfareProject>.

20. Quoted in Scott Horton, "Lawfare Redux," *Harper's Magazine*, March 12, 2010, accessed April 13, 2011, <http://harpers.org/archive/2010/03/hbc-90006694>.

21. See Kenneth Anderson, "Who Owns the Rules of War?," *New York Times Magazine*, April 13, 2003, 38–43.

22. Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (New York: Doubleday, 2007).

23. See the OLC memo titled "Application of Treaties and Laws to al Qaeda and Taliban Detainees," January 9, 2002, reprinted in Karen Greenberg and Joshua Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005), 38–79 at 47.

inhuman, and degrading treatment, which is enshrined in the Geneva Conventions of 1949 and the UN Convention against Torture, to which the United States is a signatory, and criminalized through federal legislation, is unenforceable outside the jurisdiction of the United States (i.e., no crime without law<sup>24</sup>) and that terror suspects imprisoned in offshore facilities could be held incommunicado indefinitely by decree of the president without any right to contest the basis of their detention.<sup>25</sup> Because of the institutional role of the OLC as the government's lawyer, these opinions have the status of controlling legal authority and were relied upon by the administration to authorize "coercive" but putatively not "torturous" interrogation tactics, including waterboarding, bashing into walls ("walling"), protracted sensory manipulation, sleep deprivation, stress positions, and sexual and religious humiliations.<sup>26</sup>

The intellectual authors of the new paradigm reasoned that the president *could* authorize such practices without legal consequence as a prerogative of his commander-in-chief power. But that he *should* do so was based on the ideologically driven presumptions that every prisoner in US custody was an "unlawful enemy combatant" (i.e., that capture and custody were tantamount to guilt, as evidenced by the refusal to provide any manner of impartial status review) and that violence and degradation would be effective in obtaining actionable intelligence and validly incriminating statements. Consequently, US military interrogators, CIA agents, and government-hired contractors were, in effect, licensed to treat prisoners in a manner that was no longer regulated by domestic US or international law.

For the first few years of the war on terror, the government's interrogation and detention policies and the radical legal premises on which they were based were largely secret.<sup>27</sup> That changed starting in late April 2004 with a quick succession of events: the publication of the Abu Ghraib photos, the declassification and release of several key "torture memos," and the Supreme Court's decision in *Rasul v. Bush*. That case, initially filed in February 2002 to pursue the habeas corpus rights of people detained

24. See Anthony Lewis, "Making Torture Legal," *New York Review of Books*, July 15, 2004.

25. See the OLC memo titled "Military Interrogation of Alien Unlawful Combatants Held Outside the United States," March 14, 2003, [http://www.thetorturedatabase.org/document/olc-memo-military-interrogation-alien-unlawful-combatants-held-outside-united-states?search\\_url=search/apachesolr\\_search&search\\_args=page=5%26authoring\\_agencies=57,33%26advsearch=1](http://www.thetorturedatabase.org/document/olc-memo-military-interrogation-alien-unlawful-combatants-held-outside-united-states?search_url=search/apachesolr_search&search_args=page=5%26authoring_agencies=57,33%26advsearch=1).

26. See David Cole, *Torture Memos: Rationalizing the Unthinkable* (New York: New Press, 2009); Jameel Jaffer and Amrit Singh, *The Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond* (New York: Columbia University Press, 2007).

27. Louis Fisher, "Why Classify Legal Memos?," *National Law Journal* 30 (July 14, 2008).

at Guantanamo, lost at every level until the Supreme Court. In June 2004 a slim majority overturned lower-court rulings and held that the habeas corpus rights of people detained at Guantanamo could not be denied indefinitely.

The Supreme Court's ruling in *Rasul* opened the prison camp door to lawyers, and hundreds from all sectors of the profession signed on to what came to be referred to as the "GITMO bar." These lawyers' actual access to clients, however, was subject to onerous and dilatory security clearances, speech-stifling protective orders, surveillance, and other forms of harassment.<sup>28</sup> Meanwhile, despite the continuous accretion of information and evidence about serious, systematic prisoner abuses,<sup>29</sup> President Bush and other top officials denied that what *we* (i.e., the United States) do is "torture" while stressing the efficacy of "enhanced interrogations," as the practices came to be euphemized.<sup>30</sup>

### 3. The war in court

A significant portion of litigation that would fall under the rubric of lawfare has been related to the treatment of prisoners,<sup>31</sup> including efforts to pursue war on terror detainees' habeas rights in theory and practice (e.g., *Hamdi v. Rumsfeld*, *Boumediene v. Bush*); to access relevant data about custodial treatment, medical conditions, and circumstances of capture (e.g., *OK [Omar Khadr] v. Bush*); to challenge the legality of the military commissions (i.e., *Hamdan v. Rumsfeld*), as well as to provide legal defense for the few who have been charged or referred for prosecution in this system; and to seek redress for people who were tortured and abused by or at the behest of the US government (e.g., *El Masri v. Tenet*, *Arar v. Ashcroft*, *Mohamed v. Jeppesen Dataplan*). The Bush administration denounced such litigation and sought—usually successfully—to persuade judges that claims relating to the treatment of prisoners (as well as domestic spying and assassination

28. See Mark P. Denbeaux and Jonathan Hafetz, eds., *The Guantánamo Lawyers: Inside a Prison outside the Law* (New York: New York University Press, 2009).

29. Since 2003, the ACLU has spearheaded Freedom of Information Act litigation for the release of records relating to the torture and abuse of prisoners in US detention overseas. See "Accountability for Torture: Documents Released under FOIA," accessed April 25, 2011, <http://www.aclu.org/accountability/released.html>.

30. For analysis of the manufacturing of official denial, see Stanley Cohen, *States of Denial: Knowing about Atrocities and Suffering* (New York: Polity, 2001).

31. See Judith Resnick, "Detention, the War on Terror, and the Federal Courts," *Columbia Law Review* 110 (2010): 579–686.

operations abroad) are nonjusticiable by invoking the “states’ secrets” privilege.<sup>32</sup>

The importance of the courts as sites of contention was elevated in large part by the lack of alternatives. Congressional representatives in both houses and from both parties, with a few exceptions—including *Senator Barack Obama*—demonstrated a bipartisan unwillingness to condemn the executive excesses of the new paradigm. Congress passed jurisdiction-stripping legislation in an attempt to impede detainees’ access to federal courts for habeas or torture claims (i.e., the Detainee Treatment Act of 2005, the Military Commissions Act [MCA] of 2006)<sup>33</sup> and opposed even nonjudicial methods of investigation and accountability as a recipe for a “partisan witch hunt” and the “criminalization of policy differences.”

The two-party dichotomy of Republican versus Democrat, which otherwise provides the touchstone of political discourse and alliances in the United States, found no meaningful reflection in Congress vis-à-vis pro- and antilawfare positions; the legislative branch functioned as an antilawfare partisan. Conversely, those who have engaged in or supported lawfare (mainly legal and intellectual elites) include people affiliated with both parties, thus contradicting the antilawfare claims of Cheney and others that they represented only the left wing of the Democratic Party. The common denominator for supporters of lawfare has been a condemnation of torture, a desire to restore the rule of law that had been upended by Bush administration policies, and an endorsement of the use of courts for those purposes.

During the 2008 presidential campaign, candidate Obama promised to “set an example for the world that the law is not subject to the whims of stubborn rulers, and that justice is not arbitrary.”<sup>34</sup> He pledged that, if elected, his administration would end torture and “extreme rendition,” restore habeas corpus, and restrict use of the states’ secrets privilege. On his second day in office, President Obama signed executive orders to suspend the military commissions, to shutter the CIA’s “black sites,” and to require the agency to adhere to the 2006-revised Army Field Manual

32. See Louis Fisher, “The State Secrets Privilege: Relying on *Reynolds*,” *Political Science Quarterly* 122 (2007): 385–408; statement by Louis Fisher, appearing before the Senate Committee on the Judiciary, “Examining the State Secrets Privilege: Protecting National Security while Preserving Accountability,” February 13, 2008, accessed April 19, 2011, [http://www.loc.gov/law/help/usconlaw/pdf/ssp\\_senatejudiciary.pdf](http://www.loc.gov/law/help/usconlaw/pdf/ssp_senatejudiciary.pdf).

33. See David Luban and Henry Shue, “Mental Torture: A Critique of Erasures in US Law,” *Georgetown Law Journal* 100 (2012): 823–63.

34. Barack Obama, “The War We Need to Win,” Obama ’08, accessed April 25, 2011, [http://obama.3cdn.net/417b7e6036dd852384\\_luzxmv109.pdf](http://obama.3cdn.net/417b7e6036dd852384_luzxmv109.pdf).



for interrogations, and he pledged to close Guantanamo within one year. However, by the end of his first year, the military commissions had been resurrected and a handful of prisoners had been recharged (including Canadian “child soldier” Omar Khadr), the promise to close Guantanamo had been derailed, and indefinite detention without trial had been authorized for dozens of prisoners.<sup>35</sup>

The Obama administration stepped into the defendant or respondent role in ongoing domestic lawsuits brought by victims of US torture and extraordinary rendition and replicated the stance of its predecessor by invoking states’ secrets to shut them down. Habeas cases won by Guantanamo detainees were routinely appealed by the government, and dozens of prisoners who had been cleared for release remained imprisoned, including five (of an original seventeen) Chinese Uighurs whom the White House asserted had no enforceable right to a remedy despite the recognition that they had never posed a threat to US national security (*Kiyemba v. Obama*).<sup>36</sup>

Obama adopted the position of the Bush administration by asserting that people arrested elsewhere and rendered to the Bagram prison in Afghanistan have no habeas corpus rights to challenge their detention in federal courts (*Maqaleh v. Gates*). The government contended that *Boumediene*, a 2008 Supreme Court decision which holds that Guantanamo detainees have a constitutional right to habeas, does not apply to “enemy aliens in the active war zone,” and it relied on the jurisdiction-stripping language of the 2006 MCA (which Senator Obama had voted against and condemned). In effect, Bagram succeeded Guantanamo as the “legal black hole” to which people could be transferred and held incommunicado and rightless for years.<sup>37</sup>

Obama neither fulfilled his campaign promises of greater governmental transparency nor pressed for compliance with his own presidential order to expedite declassifications (EO 13526). On the contrary, his administration’s reliance on secrecy and classification came to exceed that of any previous administration. In addition to the glacial process of Freedom of Information Act litigation, an alternative route to making information public was provided by WikiLeaks, an antisecrecy/protransparency organization,

35. See Peter Finn and Anne Kornblut, “Guantanamo Bay: Why Obama Hasn’t Fulfilled His Promise to Close the Facility,” *Washington Post*, April 23, 2011; Jane Mayer, “The Trial: Eric Holder and the Battle over Khalid Sheikh Mohammed,” *New Yorker*, February 15, 2010.

36. See Sabin Willett, “Requiem for a Remedy,” *Lawfare*, April 2011, accessed May 17, 2011, <http://www.lawfareblog.com/2011/04/sabin-willett-on-the-kiyemba-cert-denial/>.

37. See Lisa Hajjar, “Bagram, Obama’s Other GTMO,” *Middle East Report* 260 (Fall 2011).

which began releasing classified materials in 2010 that included diplomatic cables, Iraq and Afghanistan war reports and videos, and assessment reports on Guantanamo detainees. The source of this huge leak was a US soldier, Bradley Manning (now Chelsea Manning), who served as an army analyst. According to media reports and Manning's own statement during the court-martial, when he encountered documentation about serious violations of international law, he copied and leaked them because he felt that the public has a right to know. After he was arrested, he was subjected to cruel and inhumane treatment, including protracted isolation and forced nudity, during his detention and interrogation at the Marine Corps facility Quantico, where he was held between May 2010 and April 2011, when he was moved to Fort Leavenworth. He was court-martialed for violations of army regulations and the draconian Espionage Act of 1917. One illustration of the Obama administration's secrecy regime was the prohibition on lawyers representing Guantanamo detainees from publicly discussing the information in the leaked detainee reports about their own clients.<sup>38</sup>

#### 4. Anti- and anti-antilawfare

Condemnations of lawfare, which have escalated since 2009, should be understood as part of a larger political effort to deny and obscure official wrongdoing and to maintain the status quo of unaccountability. Former officials and pundits like Cheney, Yoo, Rivkin, and Casey have portrayed US prisoner policies as legal, necessary, and effective and have berated government-challenging litigation as a form of aid and comfort to the enemy. Scott Horton, who characterizes such critics as "lawfare theorists," contends that their (Carl) Schmittian friend/enemy distinction<sup>39</sup> represents an all-out assault on the rule of law unprecedented in American history. "In the strange reasoning of the lawfare theorists, lawyers who defend their clients, or who present their claims to domestic or international courts, might as well be terrorists themselves."<sup>40</sup> Keep America Safe, an organization established in 2010 by Liz Cheney, Bill Kristol, and Debra Burlingame, mounted a protest campaign against the "al-Qaeda seven," lawyers who

38. See Joseph Margulies, "What We See in the GITMO Papers," *New Republic*, April 28, 2011; Scott Shane, "Guantanamo Detainee's Lawyer Seeks a Voice on WikiLeaks Documents," *New York Times*, April 28, 2011.

39. Carl Schmitt, *The Concept of the Political*, trans. George Schwab (Chicago: University of Chicago Press, 1996).

40. Scott Horton, "State of Exception: Bush's War on the Rule of Law," *Harper's Magazine*, July 2007.

represented Guantanamo detainees and subsequently joined the Obama administration.<sup>41</sup>

These right-wing lawfare theorists articulate an illiberal insistence on legally unfettered executive discretion in wartime and contend that any opposition to the government's policies is "anti-American." Their friend/enemy distinction, as narrated through us/them polemics, makes, literally, no sense because the enemy "them" reflects no unified groups of people unless one subscribes to the empirically baseless contention that American lawriors have allied with or functioned as the useful idiots of al-Qaeda. On the other hand, their "us" conflates individual officials with the nation at large to argue that any quest for legal accountability is *nationally* illegitimate and dangerous. Yoo, who authored some of the most egregious torture memos,<sup>42</sup> has claimed that the civil suit brought against him by José Padilla and his mother menaces not just Yoo personally but all Americans.<sup>43</sup> In the first of his Padilla-suit op-eds, titled "Terrorist Suspects Are Waging Lawfare on U.S.,"<sup>44</sup> Yoo writes, "The 9/11 attacks on our nation's capital and financial center, and the loss of 3,000 American lives, placed the United States at war with al-Qaeda, a fact that Padilla's lawyers do not accept." In subsequent op-eds and public talks, Yoo denounced lawfare as undemocratic because it ignores the will of the people who gave Bush a second term. These majoritarian electoral outcomes, in Yoo's view, immunize him, a political appointee elected by no one, from any culpability for helping to "legalize" interrogation tactics and detention conditions that experts characterized as "tantamount to torture." Yoo touted the fact that the Obama administration maintained and replicated many of the policies of the Bush administration that he had helped to craft as further proof of their legitimacy and efficacy.<sup>45</sup>

The overly generalizing polemics of the lawfare theorists inspired anti-antilawfare critiques, including from the ubiquitous Dunlap. In November 2007 he delivered a speech at an American Bar Association conference

41. See Dahlia Lithwick, "More than Words," *Slate*, March 5, 2010, accessed April 13, 2011, <http://www.slate.com/id/2246903/>; Ben Smith, "Cheney Group Questions Loyalty of Justice Lawyers," *Politico*, March 2, 2010, accessed April 14, 2011, [http://www.politico.com/blogs/bensmith/0310/Cheney\\_group\\_questions\\_loyalty\\_of\\_Justice\\_lawyers.html](http://www.politico.com/blogs/bensmith/0310/Cheney_group_questions_loyalty_of_Justice_lawyers.html).

42. David Cole, "The Sacrificial Yoo: Accounting for Torture in the OPR Report," *Journal of National Security Law and Policy* 4 (2010): 455–64.

43. See Adam Liptak, "Padilla Sues Former U.S. Lawyer over Detention," *New York Times*, January 5, 2008 (the electronic version of the article has a link to the complaint).

44. John Yoo, "Terrorist Suspects Are Waging Lawfare on U.S.," *Philadelphia Inquirer*, January 16, 2008.

45. John Yoo, "My Gift to the Obama Presidency," *Wall Street Journal*, February 24, 2010, A17.

titled "Lawfare Today," in which he criticized the ways in which the concept had been employed to condemn uniformed and retired members of the military.<sup>46</sup> Dunlap directed his harshest comments to Yoo, who coauthored a *UCLA Law Review* article<sup>47</sup> in which military lawyers in the Judge Advocate General's Corp (JAG) were blamed for a "breakdown" in civil-military relations. Dunlap retorted, "I beg to differ. JAG opposition to harsh physical interrogation techniques was a reflection of an analysis of the fundamental principles of human decency that underpin law in this country, not to mention around the globe." While Dunlap maintained his military-centered perspective, he embraced a more flexible view of the issue, arguing that "concern by publics, NGOs, academics, legislatures, and the courts about the behavior of militaries is more than a mere public relations problem; it is a legitimate and serious activity totally consistent with adherence to the rule of law, democratic values, and—for that matter—lawfare. . . . [T]he use of the courts is something I advocate as a vitally important lawfare measure."<sup>48</sup> Phillip Carter, a lawyer and Iraq War veteran, concurred with Dunlap that lawfare is a legitimate option for conscientious soldiers.<sup>49</sup> In a 2005 entry on his *Intel-Dump* blog, he writes:

The retired generals and admirals who filed a brief in *Hamdan v. Rumsfeld* did not do so because they wanted to aid and abet America's enemies. . . . Quite the contrary—they filed their brief because they wanted to help America retain the moral, political and legal high ground in the war on terrorism, because they recognize that doing so is essential for strategic victory. . . . We are not engaged in this fight because we hate America, or want to help America's enemies prevail. We are engaging this issue in the courts because we care deeply about America, and because we want this country to live up to its highest ideals, even (or especially) when at war.<sup>50</sup>

Major David Frakt, a military lawyer who represented two Guantanamo detainees (Muhammad Jawad and Ali al-Bahlul), coined the term "lawfear"

46. Maj. Gen. Charles J. Dunlap Jr., "Lawfare Today: A Perspective," *Yale Journal of International Affairs* 3 (2008): 146–54 at 148. See also Charles J. Dunlap, "Does Lawfare Need an Apologia?," *Case Western Reserve Journal of International Law* 43 (2011): 121–43.

47. Glenn Sulmasy and John Yoo, "Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror," *UCLA Law Review* 54 (2007): 1815–46.

48. Dunlap, "Lawfare Today."

49. See Phillip Carter, "Legal Combat: Are Enemies Waging War in Our Courts?," *Slate.com*, April 4, 2005.

50. Phillip Carter, "Bring 'Em On," *Intel-Dump*, May 24, 2005, archived at <http://powerblogs.com/pipermail/inteldump/2005-May/000412.html>.

to describe and explain the political motivations of the antilawfare critique (which he terms “counterlawfare”). Frakt writes:

Under the *lawfear* theory, the Bush Administration’s efforts to avoid the legal review and scrutiny of their actions that detainee and other war-related litigation would engender was not based on a belief that such lawsuits would be frivolous, abusive, distracting, and a waste of time, but rather the opposite. They feared discovery by zealous defense counsel and review by independent judges because they knew that their actions would not survive a searching and unbiased legal review. They did not want to expose the flimsy legal justifications and paltry intelligence that supported their actions. They feared that if lawyers (other than trusted ideologically-compatible insiders) and courts became involved in reviewing the Administration’s actions in the War on Terror, they might be precluded from carrying out programs which the administration considered essential as part of their national security strategy, for they knew that such programs were legally dubious at best. They feared that domestic support for the war would wane if the American public knew what was really going on. They even feared criminal prosecution for extralegal acts that they were authorizing.<sup>51</sup>

## 5. Litigious skepticism

A different strain of opposition to lawfare emanates from the non-war-specific skepticism about Americans’ litigious propensity. Over the second half of the twentieth century, litigation became an ever more common means of trying to redress the suffering or disadvantage of individuals and groups affected by the exercise of discriminatory and abusive power and to transform the status quo in some goal-oriented fashion. A voluminous scholarly literature engages with the benefits and liabilities of turning to courts, the consequent privileging of “cause lawyers” as the key interlocutors and agenda shapers for social movements that pursue a litigation strategy, and the “tunnel vision” that results when important and complex issues are framed as legal problems.<sup>52</sup> The use of litigation to advance civil

51. David Frakt, “Lawfare and Counterlawfare: The Demonization of the GITMO Bar and Other Legal Strategies in the War on Terror,” *Case Western Journal of International Law* 43 (2011): 335–56 at 356.

52. See Ellen Ann Anderson, *Out of the Closets and into the Courts: Legal Opportunity Structure and Gay Rights Litigation* (Ann Arbor: University of Michigan Press, 2005); Kimberlé Crenshaw, “Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law,” *Harvard Law Review* 101 (1988): 1331–87; Charles Epp, *The Rights Revolution: Lawyers,*

rights, social equality, and other progressive causes has a mixed record of success for the intended beneficiaries in terms of judicial outcomes and a disputed record in terms of broader social change over time.<sup>53</sup> However, it has acquired an oversized reputation among conservatives inclined to decry that “judicial activism” threatens majoritarian democracy<sup>54</sup> and that rights-asserting lawsuits are evidence of a “litigation crisis”<sup>55</sup> and the “judicialization of politics.”<sup>56</sup>

Some liberal and progressive scholars also take a critical view of litigation. Stuart Scheingold, in his seminal book *The Politics of Rights*, characterizes the investment of time and hope in litigation as “the myth of rights”: “The *myth of rights* is . . . premised on a direct linking of litigation, rights and remedies with social change.”<sup>57</sup> He offers a populist critique that litigation lacks legitimacy unless the goals and outcomes command at least some degree of popular support. “Conventional legal tactics based on the

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*Activists and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998); Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991); Joel Handler, *Social Movements and the Legal System* (New York: Academic, 1978); Alan Hunt, “Rights and Social Movements: Counter-Hegemonic Strategies,” *Journal of Law and Society* 17 (1990): 309–28; Michael McCann, “Law and Social Movements: Contemporary Perspectives,” *Annual Review of Law and Social Science* 2 (2006): 17–38; Gerald Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?*, 2nd ed. (Chicago: University of Chicago Press, 2008); Austin Sarat and Stuart Scheingold, eds., *Cause Lawyering and Social Movements* (Stanford, CA: Stanford University Press, 2006).

53. See John Brigham, *The Constitution of Interests: Beyond the Politics of Rights* (New York: New York University Press, 1996); Kristin Bumiller, *The Civil Rights Society: The Social Construction of Victims* (Baltimore: Johns Hopkins University Press, 1988); Marc Galanter, “Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change,” *Law and Society Review* 9 (1974): 95–160; Herbert Kritzer and Susan Silbey, eds., *In Litigation: Do the “Haves” Still Come Out Ahead?* (Stanford, CA: Stanford University Press, 2003); Michael McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago: University of Chicago Press, 1994).

54. See Richard Abel, “Questioning the Counter-Majoritarian Thesis: The Case of Torts,” *DePaul Law Review* 49 (1999): 533–58; William Haltom and Michael McCann, *Distorting the Law: Politics, Media, and the Litigation Crisis* (Chicago: University of Chicago Press, 2004); Stephen Powers and Stanley Rothman, *The Least Dangerous Branch? Consequences of Judicial Activism* (New York: Praeger, 2002); Thomas Sowell, *The Quest for Cosmic Justice* (New York: Free Press, 1999).

55. For example, Congress passed the Prison Litigation Reform Act of 1995, which instituted limits on postconviction prison litigation about conditions of detention, abuses, and other allegations of extreme treatment.

56. Haltom and McCann, *Distorting the Law*; Robert Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge, MA: Harvard University Press, 2001); Philip Howard, *Life without Lawyers: Liberating Americans from Too Much Law* (New York: W. W. Norton, 2009).

57. Stuart A. Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change*, 2nd ed. (Ann Arbor: University of Michigan Press, 2004), 5. (The original version was published by Yale University Press in 1975.)

myth of rights tend to be naïve *in extremis*. Power cannot be purged from politics by a legalization of political processes.”<sup>58</sup> Mark Tushnet and Larry Kramer have staked even bolder populist antilitigation stances.<sup>59</sup> Tushnet has advocated an end to judicial review, arguing that constitutional decision-making should be returned to “the people acting politically” through elected representatives in the legislative branch.<sup>60</sup> Kramer has argued that the people should interpret the Constitution for themselves and resist judicial interpretations that they dislike.<sup>61</sup>

Tushnet pursued his litigious skepticism in the post-9/11 era in relation to emergency powers, contrasting the “legal constitution,” which derives from judicial decisions, with the “political constitution,” which refers to the ways in which the political branches interpret and make laws to determine what is constitutional. He contends that the latter empowers the will of the people—through their elected representatives—to override courts. He uses the Supreme Court’s *Hamdan* decision and the subsequent passage of the 2006 MCA (which negated key elements of that ruling) as an example of how “the political constitution replaced the legalized one.”<sup>62</sup> Tushnet concludes, “Many of those who thought the President’s military commissions were unconstitutional have similar qualms about the Military Commissions Act. But, if *Hamdan* is a triumph of the Rule of Law, so must be the Military Commissions Act.”<sup>63</sup>

In his enthusiasm for the will of the people, Tushnet conflates—and thus confuses—the rule of law with the rule of the legislature: Congress passed the MCA one month after President Bush acknowledged the CIA’s black sites and extraordinary rendition program and his authorization of waterboarding and other enhanced (i.e., torture) tactics. The MCA included a clause to grant ex post facto immunity for violations of the War Crimes Act dating back to 1997 because *Hamdan* held that Common Article 3 of the Geneva Conventions applies to the treatment of prisoners in US custody and that serious violations are criminal offenses. That leg-

58. *Ibid.*, 214.

59. Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton, NJ: Princeton University Press, 1999); Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford: Oxford University Press, 2004). See also Emily Zackin, “Popular Constitutionalism’s Hard When You’re Not Very Popular: Why the ACLU Turned to the Courts,” *Law and Society Review* 42 (2008): 370–71.

60. Tushnet, *Taking the Constitution Away from the Courts*, 154.

61. Kramer, *The People Themselves*, 249.

62. Mark Tushnet, “The Political Constitution of Emergency Powers: Some Lessons from *Hamdan*,” *Minnesota Law Review* 91 (2007): 1451–72 at 1457.

63. *Ibid.*, 1472.

islative measure flagrantly contravenes the *actual* rule of law: the Geneva Conventions form part of customary international law, and therefore, grave breaches cannot be immunized. According to Scott Horton, the 2006 MCA is “a piece of legislation that will stand in history alongside the Alien and Sedition Acts and the Fugitive Slave Act as a reminder of the kind of constitutional vandalism that Congress is capable of when it really tries.”<sup>64</sup> Although the MCA was revised in 2009 to reform the military commissions, the new version did not touch the war crimes immunity provided in the 2006 act, which, thus, remains law in the books and an ignoble feature of the “political constitution.”

## 6. The myth of social responsibility

Notwithstanding some small-scale antitorture demonstrations and online petition drives,<sup>65</sup> the vast majority of Americans have been, at best, indifferent to the systematic abusive, violent, and degrading treatment of prisoners captured in the war on terror, neither mobilizing any meaningful opposition nor exacting any political price. Public indifference may be explained in part by the fact that those subjected to some combination of torture; cruel, inhumane, and degrading treatment; extraordinary rendition; and incommunicado detention have been foreign Muslims held abroad—with a few exceptions at home (including Padilla and Manning). No domestic constituency has been directly affected or perceived itself as imperiled by government authorization of brutal and illegal interrogation practices. But equally important is the fact that the general public is too uninformed about the legal issues and unaware of the facts about the adverse consequences of the state’s war on terror prisoner policies to formulate intelligent, critical opinions,<sup>66</sup> and their indifference has been nourished by coverage in the mainstream media of specious arguments propounded by Bush, Cheney, and other politicians and pundits that coercive interrogation, when done by us, is not “torture” and that it actually “worked.”<sup>67</sup>

64. Horton, “State of Exception,” n. 1.

65. The organizations that sponsor antitorture demonstrations and other types of initiatives include Witness against Torture, Act against Torture, Catholic Worker, Code Pink, and Cageprisoners Ltd. The ACLU, Amnesty International, the Center for Constitutional Rights, and others, as part of their public education and outreach, generate petitions and statements to be signed and sent to relevant government officials. The ecumenical National Religious Campaign against Torture is sponsoring a drive to collect signatures and support for a statement of conscience opposing torture.

66. See Margulies and Metcalf, “Terrorizing Academia,” 457–68.

67. See Lisa Hajjar, “Does Torture Work? A Socio-legal Assessment of the Practice in His-



Obama's election compounded the populist deficit by quieting criticisms of Bush era policies among liberal supporters and Democratic partisans who became silent or supportive when he retained or even expanded some of them.<sup>68</sup> Former critics of these policies started defending them as expedient concessions that reflected Obama's aspirational "postpartisan-ship," contending that the political capital cost to press for the fulfillment of his 2008 rule-of-law restoration promises would have compromised the administration's ability to pursue other goals and priorities (like health care reform). Moreover, Obama's commitment to "looking forward, not backward" drained whatever meager political support might have existed to press for legal accountability for the authors of the torture policy.<sup>69</sup>

Two prominent lawriors, Joseph Margulies and Hope Metcalf,<sup>70</sup> proffer a bleak assessment of the achievements of the first decade of war on terror prisoner litigation. With few exceptions, the courts have failed to enforce US treaty and statutory obligations, and judicial decisions that have been favorable to prisoners were unenforced or appealed by the government. Margulies and Metcalf also engage introspectively with their own involvement in lawfare in light of this record, criticizing themselves for having subscribed to the myth of rights belief that the courts could and would provide relief or remedy for prisoners who were subjected to torture and abuse or indefinitely detained. They contend that "a strategy for post-9/11 justice that focuses exclusively on the law (and especially courts) misses the mark by failing to confront the political and societal conditions that foster the creation of abusive policies." They describe these conditions as "the decidedly illiberal, authoritarian tendency in American thought to demonize communal 'others' during moments of perceived threat."<sup>71</sup> Their essay closes on a personal note: speaking of himself in the third person,

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torical and Global Perspective," *Annual Review of Law and Social Science* 5 (2009): 311–45. The "torture works" mythology got a new lease on life following the operation that killed Osama bin Laden in May 2011 when some politicians and pundits claimed (baselessly) that waterboarding was the means of locating his hideout; see, for example, the panel hosted at the American Enterprise Institute titled "CIA Interrogations and the Bin Laden Operation," accessed May 17, 2011, <http://bcove.me/fm0tz0eh>.

68. See Jeremy Scahill, "The CIA's Secret Sites in Somalia," *Nation*, August 1–8, 2011.

69. See Human Rights Watch, *Getting Away with Torture*, July 12, 2011, accessed July 12, 2011, <http://www.hrw.org/en/reports/2011/07/12/getting-away-torture>.

70. Margulies was the counsel of record for *Rasul* and has represented several Guantánamo detainees, including Abu Zubaydah, the first "high-value detainee" captured and for whom the original CIA "torture memos" were written. Metcalf is a cocounsel in *Padilla v. Rumsfeld*, *Padilla v. Yoo*, *Mohamed v. Jeppesen*, and *Maqaleh v. Obama*.

71. Margulies and Metcalf, "Terrorizing Academia," 436.

Margulies writes that he “now looks back on *Rasul* as a failure. But in 2002, there was no other choice. The Bush Administration had created a prison beyond the law, Congress was a stony monolith, and the parents and family of lost prisoners pleaded that their loved ones not be abandoned. At that moment, there was no choice but to litigate. He would do it again tomorrow, were the circumstances the same. His mistake, for which he takes sole responsibility, was to believe that law, in an intensely legalistic society, was enough.”<sup>72</sup> Margulies and Metcalf’s disenchantment with society distinguishes their position from populist analyses (like Scheingold’s) that emphasize the importance of seeking public support for the goals of litigation or (like Tushnet’s) that vaunt the people acting politically and from right-wing arguments (like Yoo’s) that majoritarian democracy militates against the legitimacy of legal activism targeting government policies or officials. But by different routes they all arrive at the same conclusion: litigation is a dubious strategy. Margulies and Metcalf’s brand of litigious skepticism is shared by some other lawriors,<sup>73</sup> and for similar reasons: their measurement of success or failure is the judicial and real-life outcome for litigants (i.e., their clients and client communities). Many lawyers *understandably* tend to evaluate the benefits and liabilities of litigation in terms of winning and losing cases; it is a manifestation of thinking like a lawyer.

What is paradoxical about Margulies and Metcalf’s position is the suggestion that the focus on the courts was compounded by the failure to “confront the political and societal conditions that foster the creation of abusive policies.” If, as they (correctly) argue, Americans have been historically and consistently disinterested in or hostile to the rights of “despised minorities,” what is this mysterious road not taken, marked by their use of the phrase “failure to confront”? The hope that mainstream American society would support the goals of litigation on behalf of war on terror prisoners is an example of what I would call the “myth of social responsibility.” Only a mythic American society would have had the intellectual wherewithal and political motivation to oppose the government’s authorization of torture, extraordinary rendition, and incommunicado detention against people publicly branded as “the worst of the worst” or acted responsibly to demand legal accountability for their own leaders who authorized policies that criminally breached federal laws and the Geneva Conventions.

72. *Ibid.*, 471.

73. See Muneer I. Ahmad, “Resisting Guantanamo: Rights at the Brink of Dehumanization,” *Northwestern University Law Review* 103 (2009): 1683–1763.

## 7. In support of lawfare

In the real world of post-9/11 America, litigation was neither a failure nor a naïve choice. Rather, it has been a necessary and valuable enterprise, despite the record of losses. The necessity of litigation was driven by the fact that the Bush administration “legalized” flagrantly unlawful practices and operationalized those practices on a global scale. The only kinds of people who *could* meaningfully contest the radical reinterpretations of law and their effects on prisoners were the ones who *did*: lawyers and intellectual elites with an esoteric (not popular or popularizable) specialization in the legalities of warfare, interrogation, detention, jurisdiction, and the like. Those challenges took the form of litigation, and but for that there would have been nothing.

Litigation and associated practices, like filing amicus briefs and legal blogging, produced a meta-counternarrative to the illiberal new paradigm that would deny and defile universal norms such as the right to habeas corpus and the prohibition of torture. The production of that meta-counternarrative involved interpreting and invoking the relevant domestic and international laws and operationalizing it through litigation to expose and challenge governmental violations vis-à-vis the treatment of prisoners, as well as basic constitutional principles such as the separation of powers and habeas corpus.

Viewed broadly, lawfare has been a collective intellectual project to dismantle the post-9/11 arguments for the radical exceptionalist view that no law—international or federal—could constrain the president in his capacity as commander in chief. Karen Greenberg writes, “Arguably, this legal back-and-forth has brought to the fore a nation at its best, reasoning and debating, trying to make sense of a world increasingly difficult to fathom, searching its fundamental philosophical treatises and its knowledge of its own past for usable precedents and explanatory principles, in an effort to find a guide to going forward.”<sup>74</sup> The result of these efforts, according to Joshua Dratel, “ushered in a resurgence of attention and fidelity to international law principles and normative concepts of universal human rights—two legal systems that had been roundly dismissed as irrelevant to US jurisprudence during the past two decades. . . . [This] has had the unintended consequence of forcing the courts to address broader, traditional

74. Karen Greenberg, “Caught in the War on Terror: Redefining Prisoners in the Post-9/11 Era,” in *The Enemy Combatant Papers: American Justice, the Courts, and the War on Terror*, ed. Karen Greenberg and Joshua L. Dratel (New York: Cambridge University Press, 2008), xii.

protections that have global applications."<sup>75</sup> Greenberg and Dratel both understand the *necessity* of fidelity to the law for a functioning democracy and advocate for lawfare as a means to pursue such fidelity.

When it comes to appraising the value of lawfare, there is an analytical route that involves *not* thinking like a lawyer. Margulies and Metcalf identify this when they commend "socio-legal studies, history and political science" for being "ahead of the legal academy" (and, implicitly, legal practitioners) and argue that "we must translate the lessons of the social sciences into the language of the law, which likely requires that we knock law from its lofty perch."<sup>76</sup> This translation involves situating our analysis of lawfare in the broader sociopolitical context and adopting a comparative and *longue durée* perspective.

Lawfare has operated in the context and under conditions that were created by the frantic and furious quest for human intelligence about al-Qaeda in the wake of 9/11. During this period, the US government engaged in a globalized effort to arrest, interrogate, and detain individuals of interest who were presumed to be guilty of or were suspected to be implicated in terrorism. This lawlessness was compounded by decisions to treat people accused of being terrorists as rightless and to refuse to grant them any form of status review. There is now abundant evidence that a *majority* of those caught up in these rendition, detention, and interrogation operations were not captured on any battlefield and did not meet the Pentagon's own criteria for transfer to Guantanamo or extraordinary rendition; such criteria would be membership in al-Qaeda, top leadership in the Taliban, the possession of actionable intelligence that would aid the war on terror, and being prosecutable for criminal offenses.<sup>77</sup> There is still much to learn about the full extent of the failings and errors of the government's prisoner policies. However, authoritative sources, including the US Senate Armed Services Committee,<sup>78</sup> the bipartisan report on detainee treatment

75. Joshua Dratel, "Repeating History: Rights and Security in the War on Terror," in *ibid.*, xiv.

76. Margulies and Metcalf, "Terrorizing Academia," 468, 471.

77. See Mark Denbeaux and Joshua Denbeaux, "Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data," Seton Hall Law School, February 8, 2006, accessed February 12, 2012, [http://law.shu.edu/publications/guantanamoReports/guantanamo\\_report\\_final\\_2\\_08\\_06.pdf](http://law.shu.edu/publications/guantanamoReports/guantanamo_report_final_2_08_06.pdf); Mark Denbeaux and Joshua Denbeaux, "Second Report on the Guantanamo Detainees: Inter- and Intra-departmental Disagreements about Who Is Our Enemy," Seton Hall Law School, March 20, 2006, accessed February 2, 2012, [http://law.shu.edu/publications/guantanamoReports/second\\_report\\_guantanamo\\_detainees\\_3\\_20\\_final.pdf](http://law.shu.edu/publications/guantanamoReports/second_report_guantanamo_detainees_3_20_final.pdf).

78. Senate Committee on Armed Services, "Report on Inquiry into the Treatment of Detainees in US Custody," November 20, 2008, accessed June 21, 2011, [http://armed-services.senate.gov/Publications/Detainee%20Report%20Final\\_April%2022%202009.pdf](http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf).

by the Constitution Project,<sup>79</sup> and the Senate Select Committee on Intelligence report about the CIA interrogation and detention program<sup>80</sup> have criticized them.

The efforts of lawyers and the practice of litigation were critical to penetrating the clandestine detention facilities and bringing to light facts about what the government was doing. The work of lawyers also made a difference in the dehumanized conditions and lives of their clients, including getting people released from custody, providing emotional support to detainees who had seen no one but hostile interrogators and guards for years, and serving as a source of information about clients' families. These developments, while certainly no panacea for the overarching ills and errors, were meaningful and positive interventions.<sup>81</sup> A poignant and illuminating example is the case of Muhammad Jawad, an Afghan juvenile at the time of his capture and transfer to Guantanamo in 2002. Jawad, who was accused of throwing a grenade at a passing convoy that wounded two US soldiers and their translator, was one of the first prisoners to face prosecution in the military commission. Jawad's military lawyer, David Frakt, moved to have the charges dismissed on the grounds of torture and outrageous government conduct, and the prosecutor assigned to the case, Lieutenant Colonel Darrel Vandeveld, resigned in protest. Frakt and Vandeveld cooperated to expose the extent of the "frequent flier program" (i.e., protracted sleep deprivation) at the Guantanamo detention facility. Although the military judge refused to dismiss Jawad's charges on those grounds, paradoxically he did recommend that soldiers directly involved in Jawad's abuse be disciplined. In 2009 the federal judge who heard Jawad's habeas motion ruled that he was a noncombatant. Finally, a military judge dismissed the charges because the only government evidence to support the allegation that Jawad threw the grenade was statements he had made under torture to interrogators at Bagram. When he was repatriated to Afghanistan in August 2009, he would have been transferred to Afghan custody in Pul-e-Charkhi prison, but one of his other military lawyers flew there before his arrival

79. "The Report of the Constitution Project's Task Force on Detainee Treatment," 2013, <http://detainee-taskforce.org/>.

80. Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, December 12, 2014. (Only a heavily redacted version of the executive summary has been released at the present time.)

81. See Moazzam Begg, with Victoria Brittain, *Enemy Combatant: My Imprisonment at Guantanamo, Bagram, and Kandahar* (New York: New Press, 2006); Murat Kurnaz, *Five Years of My Life: An Innocent Man in Guantanamo* (New York: Palgrave Macmillan, 2009); *Outside the Law: Stories from Guantanamo*, dir. Polly Nash and Andy Worthington (London: Spectacle Production, 2009), DVD.

and intervened with the Karzai government to prevent that. But for lawfare, Jawad, like many others, would not have been freed.

Lawfare was also the means to pursue justice for those who were tortured and accountability for those who perpetrated grave breaches of law.<sup>82</sup> The pursuit of justice and accountability, regardless of the outcome, demonstrates respect and acknowledgment of the rules and norms that were violated. Litigation was the means to address past bad acts and had the derivative effect of making public the injustices to which victims were subjected. Although the courts were not adequately responsive to the victims of US torture (e.g., conceding to spurious and overly broad states' secrets arguments as grounds for dismissing every single civil suit against officials), those lawsuits have become part of the historical record of the war on terror. Had lawyers not gone to court on behalf of those whose most basic rights had been violated, the national history of this era would have been defined by a mass concession to torture and other state crimes. Instead, lawriors recognized the grievousness of torture and incommunicado detention both for those subjected to these practices and for the legal values of the nation and took confrontational action.

The legacy of lawfare has had a subtle but important impact on the nation's ideologico-political spectrum. Through the antitorture alliances and networks that formed among those involved in or supportive of litigation, old and stubborn divides were bridged to compose a campaign that brought together members of the military, the human rights community, corporate lawyers taking cases pro bono, civil libertarians, national security and military law experts, and sociolegal scholars.<sup>83</sup> These alliances have had knowledge-producing effects on individuals' own understandings of the law as they cultivated forms of expertise that they did not previously possess. For example, electronic listservs have provided a forum and form of cyberschooling where people taught and learned from each other about international humanitarian law and domestic national security and military law. The antitorture legal campaign has by no means generated a seamless consensus about the parameters or the goals of litigation; on the contrary, through my research on those engaged in lawfare, I have found a divide exists between "legal nationalists," who seek and propose answers to questions about "what is legal" in terms defined by US precedent and

82. See Lisa Hajjar, "Rights at Risk: Why the Right Not to Be Tortured Is Important to You," *Studies in Law, Politics and Society* 48 (2009): 93–120.

83. See Lisa Hajjar, "The Legal Campaign against American Torture," *Jadaliyya*, July 1, 2011, accessed July 19, 2011, <http://www.jadaliyya.com/pages/index/2053/the-legal-campaign-against-american-torture>.

legislative history, and “legal transnationalists,” for whom those answers are derived from a more international perspective on rights, justice, and accountability. The debates about these issues have enriched legal discourse and practice and are leaving a transformative imprint on scholarship and teaching (including law schools and other institutions of higher education) in this country.

Finally, the value and significance of lawfare are clearly evident if one adopts the lens of comparative and *longue durée* perspectives. Had there been no litigious resistance to the official authorization of torture by the world’s lone superpower, the impact on legal norms globally would have been far more deleterious than it has been. Instead, the evidence of official criminality pried out via the Freedom of Information Act and other forms of litigation resonated abroad with publics in some foreign allied nations whose security services had colluded with the US government in its torture and extraordinary rendition policy. In some countries, people protested the roles played by their own officials and made forceful political demands for accountability and redress for victims (notably Canada and the United Kingdom). Moreover, mounting evidence of US torture stimulated or heightened antitorture sentiments abroad, especially in Europe. Transnational collaborations between some American lawriors and their European counterparts are ongoing in the quest for criminal indictments for US officials under the doctrine of universal jurisdiction (notably Spain, as well as Germany), and Italy prosecuted and convicted twenty-three CIA agents, albeit in absentia, who were involved in kidnapping and extraordinary rendition to torture from Italian soil. These law enforcement efforts and norm-reinforcing alliances in the present will, arguably, have a deterring (future) effect on officials of governments that self-identify as committed to the rule of law because they will be loath to replicate a wartime prisoner policy that is widely regarded, at least beyond the shores of the United States, as a disgrace and a mistake.

Continuing efforts in the United States and abroad to pursue legal accountability for violators and abettors of the prohibition against torture may pay off in the future because there is no immunity for this gross crime. Recent developments in Latin America are suggestive of this possibility. Many of the region’s military regimes that had perpetrated rampant state terror during their reigns, including mass torture (as well as extrajudicial executions), granted themselves immunity as they vacated power. But the passage of time and changing political environments brought forth a legal reckoning as some of those aging torturers were put on trial and convicted.

Kathryn Sikkink has described this trend as “the justice cascade.”<sup>84</sup> However belated, prosecutions have served to penalize, punish, disempower, and delegitimize the perpetrators, thereby transforming the conditions in which impunity previously had thrived and adding new and redeeming chapters to those nations’ histories.<sup>85</sup> The record of authoritarian era struggles by lawyers and human rights activists that bore little fruit at the time became a critical factor in recent quests for justice and accountability.

## Conclusion

Ultimately, lawfare has aimed to close the gap between “law in the books” and “law in action” by pressing for law enforcement through litigation. Lawsuits addressed the criminality of torture and the absolute and universal right not to be tortured. Were it not for the work of lawyers and their allies, the torture policy would not have been challenged at all. The very act of going to court served at least two important functions: it demonstrated a commitment to the norms and laws making torture always and everywhere illegal, and it created a record of struggle to defend human rights and enforce international law. Those who have been engaged in lawfare were willing to devote themselves to difficult work, sometimes—because of the lack of political support and governmental animus toward this litigation—at the risk of their reputations and careers.

Any good student of law in action knows that the impact of legal initiatives cannot be assessed definitively by immediate outcomes of court cases. Antitorture lawfare will be important in the future, perhaps even more than at present, as a record of resistance to inhumanity and dehumanization. In the long struggles against slavery and de jure racism, those who fought are remembered today for being on the right side of history, and those fights eventually paid off.

84. Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing the World* (New York: W. W. Norton, 2011).

85. See Ellen L. Lutz and Caitlin Reiger, eds., *Prosecuting Heads of State* (Cambridge: Cambridge University Press, 2009); Sikkink, *The Justice Cascade*.



## Tortured Prosecutions: Holding Private Military Contractors Accountable

GARRETT ORDOWER

In late April 2004, *60 Minutes II* broadcast the first images of the abuse at Abu Ghraib prison. At the time of the broadcast, six soldiers involved in the abuse there were already facing courts-martial proceedings.<sup>1</sup> The cries for greater accountability started immediately, as the shocking scenes of abuse flooded television screens around the world. One week after the scandal erupted, six military supervisors' careers effectively ended when they were reprimanded for failing to recognize and correct the abuses.<sup>2</sup> The next day, President Bush appeared on al-Arabiya television to attempt to assuage the outrage expressed throughout the Arab world. "Our citizens in America are appalled by what they saw, just like people in the Middle East are appalled," Bush told the network. "[W]e will find the truth, we will fully investigate. The world will see the investigations and justice will be served."<sup>3</sup>

Bush expressed a sentiment well understood in the international community—that each nation has a responsibility to control and discipline its subjects, especially when they risk or cause harm to foreigners.<sup>4</sup> As Hugo

1. James Risen, "G.I.'s Are Accused of Abusing Iraqi Captives," *New York Times*, April 29, 2004, A15.

2. Thom Shanker and Dexter Filkins, "Army Punishes 7 with Reprimands for Prison Abuse," *New York Times*, May 4, 2004, A1.

3. Richard W. Stevenson, "Bush, on Arab TV, Denounces Abuse of Iraqi Captives," *New York Times*, May 6, 2004, A1.

4. This is also known as command responsibility, which is "[t]he requirement to ensure Soldiers act pursuant to the lawful orders of an equally responsible chain of command [and] is built into the definition of lawful combatants, who, according to the Prisoner of War Convention, must be 'commanded by a person responsible for his subordinates,' who are all charged with 'conducting their operations in accordance with the laws and customs of war.'" Dick Jackson, "Reporting and Investigation of Possible, Suspected, or Alleged Violations of the Law of War," *Army Lawyer*, June 2010, 95.

Grotius explained, "it is presumed that every sovereign is able to control and punish his own subjects, unless there be some defect in his authority: and a lapse of time, beyond what is usually taken for the punishment of civil offenses in every country, may be construed into willful neglect. And such neglect amounts to a sanction of the offense."<sup>5</sup>

Between September and December 2003, US military police, military intelligence, and military contractors abused scores of prisoners at Abu Ghraib prison on the outskirts of Baghdad.<sup>6</sup> Detainees were hooded, stripped naked, threatened and bitten by attack dogs, and subjected to sexual humiliation, including forced masturbation, simulated sex with other inmates, and sodomy. Photographs taken of the abuse brought Abu Ghraib to the world's attention. In one photograph, a young female army private holds a leash attached to the neck of a naked detainee lying on the prison's floor. In another, that same private and another military policeman stand smiling, giving a thumbs-up sign, in front of a pile of naked prisoners forced to kneel one atop the other. Dozens of similar photographs prompted President Bush's call for accountability and his assurance to the world that the United States would not carry on the same types of abuses as the regime of the man it had just ousted, Saddam Hussein, had perpetrated.

While eleven US soldiers were convicted for their roles at Abu Ghraib, the military contractors who worked alongside them and were also deemed responsible for the abuses committed at Abu Ghraib were not prosecuted.<sup>7</sup> An investigation conducted by Major General Antonio Taguba determined that of the four key individuals involved, two were not military employees at all but rather civilian contractors employed by CACI International,

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Barack Obama has, unsurprisingly, echoed the same sentiments. See President Obama's Nobel Lecture, December 10, 2009: "Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct. And even as we confront a vicious adversary that abides by no rules, I believe the United States of America must remain a standard bearer in the conduct of war. That is what makes us different from those whom we fight. That is a source of our strength. That is why I prohibited torture. That is why I ordered the prison at Guantanamo Bay closed. And that is why I have reaffirmed America's commitment to abide by the Geneva Conventions." See [https://www.nobelprize.org/nobel\\_prizes/peace/laureates/2009/obama-lecture\\_en.html](https://www.nobelprize.org/nobel_prizes/peace/laureates/2009/obama-lecture_en.html).

5. Hugo Grotius, *The Rights of War and Peace*, trans. A. C. Campbell (New York: M. Walter Dunne, 1901), 394.

6. Maj. Gen. George R. Fay, *AR-15 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade*, August 24, 2004, 96–108.

7. Noah Bierman, "Few Have Faced Consequences for Abuses at Abu Ghraib Prison," *Los Angeles Times*, March 17, 2015.

based in Arlington, Virginia.<sup>8</sup> Taguba found that the two contractors were “either directly or indirectly responsible for the abuses at Abu Ghraib.”<sup>9</sup> Nonetheless, the CEO of CACI, J. P. London, noted that his company did not hear from the military, “no charges, no communications, no citations, no calls to appear at the Pentagon.”<sup>10</sup> Despite a staggering list of alleged crimes committed by military contractors in Iraq,<sup>11</sup> there has been a near-complete absence of any accountability for those crimes.<sup>12</sup>

The United States’ use of military contractors skyrocketed in the wake of the War on Terror. Though contractors have been a staple of modern warfare, the ratio of troops to contractors previously reached a peak of ten-to-one during the first Gulf War. There was a one-to-one ratio during much of the second Gulf War. In fact, civilian contractors at times outnumbered US soldiers: in Afghanistan, there were more than 90,000 civilian contractors and 100,000 soldiers as of March 2011, and 64,000 civilian contractors to 46,000 soldiers in Iraq.<sup>13</sup> Despite their increasing prevalence, the legal regime governing contractors has not kept pace. In response to calls for accountability, American prosecutors have shoehorned prosecutions into laws of questionable and disputed applicability. The US Congress passed some stopgap measures, but these have fallen short of an adequate solution. Seeing no accountability, victims of contractor abuses have pursued civil actions, only to see those too struggle against a confused and incomplete jurisprudence.

8. James Risen, “Common Errors Aided Iraq Abuse, Army Has Found,” *New York Times*, May 3, 2004, A1.

9. Maj. Gen. Antonio M. Taguba, *Article 15-6 Investigation of the 800th Military Police Brigade*, May 2004, 48.

10. Joel Brinkley and James Glanz, “Contract Workers Implicated in February Army Report on Prison Abuse Remain on the Job,” *New York Times*, May 4, 2004, A6.

11. The recent release of confidential documents on the Iraq War by WikiLeaks revealed yet another round of details concerning contractor abuses in Iraq. “The documents sketch, in vivid detail, a critical change in the way America wages war: the early days of the Iraq war, with all its Wild West chaos, ushered in the era of the private contractor, wearing no uniform but fighting and dying in battle, gathering and disseminating intelligence and killing presumed insurgents. There have been many abuses, including civilian deaths.” James Glanz and Andrew W. Lehren, “Use of Contractors Added to War’s Chaos in Iraq,” *New York Times*, October 23, 2010.

12. James Risen, “Efforts to Prosecute Blackwater Are Collapsing,” *New York Times*, October 20, 2010.

13. Moshe Schwartz and Joyprada Swain, “Department of Defense Contractors in Iraq and Afghanistan: Background and Analysis,” Congressional Research Service Report for Congress, May 13, 2011, 6. In June 2009 contractors in Iraq numbered about 120,000, and troops numbered 135,000, while in Afghanistan there were 74,000 contractors and 55,000 troops. Moshe Schwartz, “Department of Defense Contractors in Iraq and Afghanistan: Background and Analysis,” Congressional Research Service Report for Congress, September 21, 2009, 5.

A civil lawsuit, *Saleh v. Titan*, brought by Abu Ghraib victims is particularly instructive. In late December 2009, the D.C. Circuit Court dismissed the lawsuit against the contract employees and their corporate employers, relying heavily on the seeming Catch-22 that the plaintiffs could not proceed civilly because the government had opted not to proceed criminally.

The court noted that the military “acted swiftly” against military personnel in connection with Abu Ghraib but chose not to pursue “analogous disciplinary, criminal, or contract proceedings . . . against the defendants. This fact alone indicates the government’s perception of the contract employees’ role in the Abu Ghraib scandal.”<sup>14</sup>

Judge Merrick Garland chided the majority for reading too much into the government’s lack of action on the contract employees:

My colleagues are . . . convinced that the failure to institute criminal proceedings against the contractors “indicates the government’s perception of the contract employees’ role in the Abu Ghraib scandal.” No such inference from prosecutorial silence is warranted. The government may well believe that it faces a jurisdictional barrier to prosecution; it may lack the evidence that these plaintiffs have; it may feel that its evidence is insufficient to satisfy the higher burden of proof applicable to a criminal prosecution; or it may simply prefer to rely on the tort system.<sup>15</sup>

All these reasons—often in combination—have stifled prosecutions of private military contractors working on behalf of the United States in Iraq, Afghanistan, and elsewhere. Despite the one-to-one contractor-to-soldier ratio throughout the wars in Iraq and Afghanistan, the total number of prosecutions against civilian contractors is barely in the double digits. These prosecutions are the subject of constitutional impediments, evidentiary hurdles, political roadblocks, and statutory gaps. The problems stem from an inability or unwillingness to acknowledge the rapid changes in the makeup of the US fighting force and from laws tethered to antiquated notions of territoriality and extraterritorial jurisdiction. The accountability promised by President Bush, and by President Obama since, has been realized in some areas, but in the domain of policing military contractors the promise remains unfulfilled. This chapter examines a number of prosecutions that have been attempted, illuminates a number of legal gaps

14. *Saleh v. Titan*, 580 F.3d 1 (D.C. Cir. 2009), *cert. denied*, S. Ct., 2011 WL 2518834 (June 27, 2011).

15. *Ibid.*

and obstacles to prosecuting contractors, and argues that the United States needs a clearer, stronger legal framework to govern the conduct of its military contractors. It then sketches out a legal regime that would improve the feasibility of holding military contractors accountable for crimes such as torture.

### 1. Legacy legal grounds for holding US military contractors accountable for crimes

The most significant impediment to prosecutions of military contractors is that, at the outset of a given incident, it is unclear what law should apply. A patchwork of civil, criminal, military, contract, and international law governs private military contractors, but no law covers every offense in a given area. Coverage depends on a number of factors ranging from geography of the occurrence to the employer of the contractor to the nationality of the victim.

The structure of these laws stems in large part from accepted but somewhat rigid international law notions of extraterritorial jurisdiction. In the nineteenth century, the notion of “territoriality” sharply constrained the reach of laws outside a nation’s sovereign territory. As Justice Story explained, “it would be wholly incompatible with equality and exclusiveness of the sovereignty of all nations, that any one nation should be at liberty to regulate either persons or things not within its own territory.”<sup>16</sup> But as globalization and attention to human rights issues have increased, the strictness of territoriality has waned. In 1927 the International Court of Justice held that Turkey could prosecute a French officer responsible for colliding with a Turkish ship in international waters, causing several Turkish passengers to drown, because its effects were felt in Turkish territory. In 1932 the Draft Convention on Jurisdiction with Respect to Crime set out the bases for extraterritorial jurisdiction that are generally accepted today.<sup>17</sup>

International law recognizes five bases for extraterritorial jurisdiction: nationality, territorial effects, protective, universality, and passive personality. The least controversial is the nationality principle, which recognizes the right of a state to regulate the conduct of its nationals.<sup>18</sup> The territorial

16. Joseph Story, *Commentaries on the Conflicts of Laws* (Boston: Hillard, Gray, 1834), 21.

17. “Draft Convention on Jurisdiction with Respect to Crime,” *American Journal of International Law* 29 supplement (1935): 439–42.

18. Restatement (Third) of Foreign Relations Law §402(2), comment e. A recent extension of this principle is the criminalization of US nationals engaging in sex acts with minors abroad. See *United States v. Clark*, 435 F.3d 1100, 1106 (9th Cir. 2006).

effects principle—the one recognized by the International Court of Justice in the Turkish case—extends to “activity outside the state, but having or intended to have substantial effect within the state’s territory.”<sup>19</sup> The protective principle “recognized the right of a state to punish . . . offenses directed against the security of the state or other offenses threatening the integrity of governmental functions.”<sup>20</sup> The universality principle allows all nations to prosecute “for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism.”<sup>21</sup> Finally, the passive personality principle allows for jurisdiction where the victim of an act is a national of the state asserting jurisdiction.<sup>22</sup>

Regulating the “extraterritorial” conduct of a nation’s armed forces is, of course, the responsibility of a sovereign state. But military contractors operating overseas can fall into several gray areas, raising jurisdictional problems. The development of laws governing military contractors has been shaped by two conflicting considerations: the responsibility of a state to control those that it employs and arms to fight on its behalf, and limitations on its jurisdiction to police acts occurring outside its territory. In addition, the reach of US law remains circumscribed by due process requirements and limited legislative mandates. The remainder of this section examines the legacy legal situation applicable to US military contractors and notes the difficulties involved in holding them accountable for criminal acts such as torture.

### *A. Federal criminal laws*

The most straightforward approach to holding private contractors accountable would be to apply to them the existing criminal laws that apply to other civilians. Despite the large gaps in one Abu Ghraib contractor’s knowledge regarding the chain of command and the rules of engagement,

19. Restatement (Third) of Foreign Relations Law §402(1)(c), comment c. Judge Learned Hand enshrined the effects test in US law with his opinion in *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 443–44 (2d Cir. 1945): “[I]t is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize.”

20. Restatement (Third) of Foreign Relations Law §402(3), comment f.

21. *Ibid.*, §404.

22. *Ibid.*, comment g, noting that this principle “has not been generally accepted for ordinary torts or crimes, but it is increasingly accepted as applied to terrorist and other organized attacks on a state’s nationals by reason of their nationality.”

when interrogated by General Taguba he responded clearly that “[c]ivilians are punishable, from my understanding, under the federal court system.”<sup>23</sup>

In some sense this is correct, and arguably the Abu Ghraib contractors could have been prosecuted under a number of statutes that were in place at the time of the Abu Ghraib scandal. The four main avenues for prosecuting civilian contractors in the federal civilian court system are the Military Extraterritorial Jurisdiction Act of 2000 (MEJA), the Special Maritime and Territorial Jurisdiction (SMTJ) as amended by the USA Patriot Act, the War Crimes Act of 1996, and the Anti-torture Statute.

#### (1) Military Extraterritorial Jurisdiction Act

The MEJA has the broadest reach of any criminal scheme applicable to the conduct of private military contractors abroad. It allows for the prosecution of those “employed by or accompanying the Armed Forces outside the United States” if the offense would be punishable by more than one year in prison.<sup>24</sup> Such an exercise of jurisdiction falls squarely within the nationality principle. The Abu Ghraib contractors, however, would not have been covered by the MEJA because at the time it applied only to Department of Defense contractors or subcontractors,<sup>25</sup> while the Abu Ghraib contractors were under contract with the Department of the Interior.

In 2005 the definition was expanded to include “a contractor (including a subcontractor of any tier) or any other Federal agency . . . to the extent that such employment related to supporting the mission of the Department of Defense overseas.”<sup>26</sup> Notably, this still leaves a loophole for contractors not specifically connected to the wars in Iraq and Afghanistan. The term “the mission” is undefined, and although the statute could be construed broadly to apply the MEJA to contractors supporting all operations worldwide aimed at protecting the United States’ national security, it could also be construed so narrowly that only those contractors working in support of specifically authorized military operations, such as specific Department of Defense offensives in Iraq and Afghanistan, would be under its purview.<sup>27</sup> Then senator Barack Obama introduced a bill in 2007 that would

23. Taguba, *Article 15-6 Investigation of the 800th Military Police Brigade*, annex 90, 7.

24. 18 U.S.C. §3261.

25. *Federal Register* 69 (February 2004), 4891.

26. *Federal Register* 70 (December 2005), 76000.

27. This provision has been tested only a single time. A federal district judge concluded that a DynCorp contractor charged with possession of child pornography while working at an Afghan police training facility in Afghanistan was working in support of the Department of Defense mission, though employed by the Department of State. “I must assume that the training of the Afghan civilian police was in support of the Department of Defense’s efforts against

have expanded the definition further to cover any “contingency operation,” sweeping in virtually all potential military engagements worldwide.<sup>28</sup>

Even if this proposed change had passed, the MEJA would still be less than comprehensive. In particular, because it is debatable whether diplomatic protection and other quasi-military operations are “contingency operations,” this expanded definition still may not cover employees of private military contractors working for government agencies other than the Department of Defense,<sup>29</sup> including employees such as those of Blackwater, Triple Canopy, and DynCorp, each of which has received large State Department contracts to protect diplomats overseas.<sup>30</sup> Less serious assaults that might result in only a six-month jail sentence are also not covered.<sup>31</sup>

The MEJA has been used sparsely to prosecute contractors serving at the “tip of the spear,” to use P. W. Singer’s terminology.<sup>32</sup> The two earliest prosecutions under the MEJA were for downloading child pornography and for a KBR employee who stabbed a fellow employee in the throat.<sup>33</sup> In 2008, in one of the first potential tests of the MEJA’s constitutionality, a former soldier was prosecuted for the rape of a fourteen-year-old Iraqi girl and the murder of her family (the MEJA provides a basis for prosecution of soldiers after discharge from the military).<sup>34</sup>

The MEJA was subsequently used to prosecute Blackwater employees for a bloody confrontation that took place in Nisour Square in 2007, leaving seventeen unarmed civilians dead, including a nine-year-old boy.<sup>35</sup> Nisour

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the Taliban since October 2001. A civilian police force would be needed to take the place of the overthrown regime.” *United States v. Gleason*, 2009 WL 799645, at \*5 (D. Or. Mar. 24, 2009).

28. *Security Contractor Accountability Act of 2007*, S. 2147. The House version is the *MEJA Expansion and Enforcement Act of 2007*, H.R. 2740.

29. “MEJA leaves significant gaps in our enforcement capability. . . . For example, a civilian Government contractor whose employment is unrelated to the mission of the Department of Defense—but is related to the mission of another U.S. Government agency—cannot currently be prosecuted under MEJA, even if he or she clearly committed a crime.” *Statement by Assistant Attorney General Lanny A. Breuer of the Criminal Division Before the Senate Judiciary Committee*, May 25, 2011, 1.

30. Karen DeYoung, “IG Faults Oversight of Security Contractors,” *Washington Post*, January 10, 2009.

31. Anthony E. Giardino, “Using Extraterritorial Jurisdiction to Prosecute Violations of the Law of War: Looking beyond the War Crimes Act,” *Boston College Law Review* 48 (2007): 699–738 at 733.

32. P. W. Singer, *Corporate Warriors* (Ithaca, NY: Cornell University Press, 2003), 91–95.

33. “Standardsville, Va. Man Convicted of Child Pornography, Obscenity Charges,” *U.S. Federal News*, January 26, 2007; “US Contractor Jailed for Iraq Stabbing,” *Times of Oman*, March 31, 2009.

34. *United States v. Green*, 2008 WL 4000868 (W.D. Ky. 2008).

35. Ginger Thompson and James Risen, “Plea by Blackwater Guard Helps U.S. Indict Five



Square sparked outrage across the world and confusion in the United States. While the Department of Justice was determining who should handle the investigation, Blackwater acted. The company repaired the vehicles involved (at the behest of the State Department, it claimed), destroying forensic evidence.<sup>36</sup> State Department officials allegedly interfered in the inquiry as well, with one State Department employee telling prosecutors "that some of his colleagues were handling evidence in a way they hoped would help the Blackwater guards avoid punishment for a crime that drew headlines and raised tensions between American and Iraqi officials."<sup>37</sup> Blackwater (which was later sold and renamed Academi) may even have tried to stop calls for its expulsion from the country by bribing Iraqi officials.<sup>38</sup> At the same time, Secretary of State Condoleezza Rice suggested that a "hole" in US law might have left the Blackwater contractors outside the scope of US prosecutors.<sup>39</sup>

The Justice Department, meanwhile, scrambled to investigate a crime scene that was long gone by the time its officials arrived. The initial plans for the investigation, unbelievably, called for Blackwater itself to guard the investigators. Despite these issues, the Justice Department eventually brought a prosecution under the MEJA. However, on December 31, 2009, the US district court judge Ricardo Urbina dismissed the indictment, finding that the prosecution relied heavily on compelled statements given to the State Department under threat of termination in the immediate aftermath of Nisour Square.<sup>40</sup> Because the Fifth Amendment to the US Constitution prohibits the government from compelling self-incriminating testimony, in any situation where it does compel such testimony, immunity must be granted that puts the witness in "substantially the same position as if [he] had claimed his [Fifth Amendment] privilege."<sup>41</sup> Judge Urbina concluded that the government failed to effect the required immunity, or

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Others," *New York Times*, December 9, 2008, A12. For a more descriptive account of the incident, see Jeremy Scahill, "Blackwater's Youngest Victim," *Nation*, January 28, 2010.

36. "Vehicle Repairs Complicate Blackwater Shooting Inquiry," *Associated Press*, January 13, 2008.

37. James Risen, "Interference Seen in Blackwater Inquiry," *New York Times*, March 3, 2010, A12.

38. Mark Mazzetti and James Risen, "U.S. Examines Whether Blackwater Tried Bribery," *New York Times*, January 31, 2010.

39. John M. Broad, "Rice Says 'Hole' in U.S. Law Shields Contractors in Iraq," *New York Times*, October 26, 2007.

40. *United States v. Slough*, 677 F. Supp. 2d 112, 116 (D.D.C. Dec. 31, 2009).

41. *Kastigar v. United States*, 406 U.S. 441, 458–59 (1972).

at least to prove that it had done so. “[T]he government has utterly failed to prove that it made no impermissible use of the defendants’ statements or that such use was harmless beyond a reasonable doubt.”<sup>42</sup> That decision was vacated because, the D.C. Circuit Court concluded, Judge Urbina failed to parse the evidence of taint from the impermissible statements line by line and witness by witness.<sup>43</sup> Following that decision, the government re-investigated the case—years after it occurred—with a “clean slate.”<sup>44</sup> In the end, the court declined to dismiss the new indictment after finding that the later investigation and indictment did not make improper use of the defendants’ immunized statements.<sup>45</sup> The court noted, however, that it was “disturbing that it has taken seven years of hard-fought litigation to finally reach the . . . trial date set in this case,” and that had the State Department “deliberately tried to sabotage this prosecution, [it] could hardly have done a better job.”<sup>46</sup>

In late 2014 four of the Blackwater guards were convicted for their actions at Nisour Square and each received a lengthy prison sentence.<sup>47</sup> Nearly a decade after the incident, their convictions have been appealed and remain uncertain. If Justice Department officials had reacted quickly, they would not have had to rely on the problematic State Department interviews. Instead they could have conducted their own canvass of the crime scene, interviews with victims and witnesses, and unimmunized interviews with suspects (or sent federal investigators to do so). The logistical obstacles to doing so underscore the practical difficulties in bringing criminal prosecutions for events that take place abroad.<sup>48</sup> As Attorney General Michael Mukasey told the Senate Judiciary Committee in July 2008, “It is enormously difficult, particularly when we rely on initial investigations by

42. *Slough*, 677 F. Supp. 2d at 116.

43. *United States v. Slough*, 641 F.3d 544 (D.C. Cir. 2011).

44. *United States v. Slough*, 36 F. Supp. 3d 37, 42 (D.D.C. 2014).

45. *Ibid.*, 57–58.

46. *Ibid.*, 58.

47. Matt Apuzzo, “Ex-Blackwater Guards Given Long Terms for Killing Iraqis,” *New York Times*, April 13, 2015.

48. The first two Blackwater contractors to be convicted of criminal charges stemming from incidents abroad received thirty- and thirty-seven-month sentences for killing two Afghan civilians. The contractors shot thirty rounds at a vehicle as it left the scene of a traffic accident with a Blackwater convoy. The first jury to hear the case could not reach a verdict, and the second convicted the men of involuntary manslaughter rather than murder. In sentencing one of the men, the judge remarked, “They tried to paint their victims as aggressors, and they weren’t aggressors. They were just victims.” Bill Sizemore, “2nd Ex-Blackwater Contractor Gets 30 Months for Manslaughter,” *Virginian-Pilot*, June 28, 2011.

the Department of State and by the Department of Defense and we have FBI agents trying to conduct investigations in a war zone, to bring criminal prosecutions that pass the test of an American court."<sup>49</sup>

It remains an open question, even after the convictions, whether the case will survive challenges to the MEJA jurisdiction.<sup>50</sup> The defendants had argued that since Blackwater was working under a State Department contract at the time, the indictment "does not allege a single fact showing that Defendants' contract employment 'relate[d] to supporting the mission of the Department of Defense.'"<sup>51</sup> The government countered that "the overarching mission of the United States in Iraq was to win the war against opposition forces and bring stability to that country, a goal the Executive assigned to the Department of Defense . . . to lead. . . . [I]n Iraq both . . . [the State and Defense Departments] fulfill mutually supporting responsibilities and work hand-in-hand to achieve that single, common objective."<sup>52</sup>

The obstacles, therefore, to this most wide-reaching and comprehensive of the avenues that might be used to prosecute crimes committed by contractors abroad were enough to seriously frustrate prosecution of one of the most high-profile and public incidents of the Iraq War. But there do exist other mechanisms that can be used in certain circumstances.

## (2) Special Maritime and Territorial Jurisdiction

The SMTJ provides a very powerful tool for prosecuting civilian contractors. It allows for application of many federal criminal laws to conduct outside the United States—but with one major caveat: the activity at issue must have occurred on "the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant

49. Attorney General Michael Mukasey, speaking to the Senate Judiciary Committee, on July 9, 2008, 110th Cong., 2d Sess.

50. Judge Urbina did deny an early motion requesting dismissal for lack of jurisdiction, but did so without reaching the jurisdictional question. Instead, he concluded that the issue of whether the contractors were working in support of the Department of Defense's mission was one of the substantive elements of the crime, and therefore, either the jury must decide whether the contractors were in fact working in support of "the mission," or the trial judge could do so at the close of the prosecution's case. *United States v. Slough*, No. 08-CR-00360-RMU, Dkt. 127, at \*46–47 (D.D.C. Feb. 17, 2009).

51. "Memorandum of Points and Authorities in Support of the Defendants' Motion to Dismiss the Indictment for Failure to State an Offense Under the Military Extraterritorial Jurisdiction Act," *U.S. v. Slough*, No. 08-CR-36—RMU (D.D.C. filed Oct. 16, 2009).

52. Government's Opposition to Defendant's Motion to Dismiss for Lack of Jurisdiction, *U.S. v. Slough*, No. 08-360 (D.D.C. filed Jan. 27, 2009) (available on Westlaw at 2009 WL 5453718).

and ancillary thereto or used for purposes of those missions or entities."<sup>53</sup> It essentially asserts not extraterritorial jurisdiction but rather traditional territorial jurisdiction.

The first prosecution of a civilian contractor for a crime committed against a foreign national during the War on Terror was brought under the SMTJ. The incident took place in the remote military outpost of Asadabad, Afghanistan, where the United States controlled a primitive twenty-five-acre base surrounded by a ten-foot-high, two-foot-thick mud wall.<sup>54</sup> David Passaro, a former US Army Special Forces member, spent two days "interrogating" a detainee named Abdul Wali at the base in June 2003, while working as a civilian contractor for the Central Intelligence Agency. "This 'interrogation' . . . included repeatedly throwing Wali to the ground, striking him open handed, hitting him on the arms and legs with a heavy Maglite-type flashlight measuring over a foot long, and, while wearing combat boots, kicking Wali in the groin with enough force to lift him off the ground."<sup>55</sup> Wali became delirious, collapsed, and died.

Passaro was eventually tried by US government prosecutors in a federal district court for felony assault resulting in serious bodily injury and three counts of misdemeanor simple assault, was found guilty by a jury on all counts, and was sentenced to one hundred months. The judge remarked that, were it not for the evidentiary difficulties encountered in prosecuting the case, Passaro may well have faced murder or manslaughter charges rather than felony assault.<sup>56</sup>

The SMTJ jurisdiction proved robust, despite attempts to defeat it on appeal. While the Asadabad base was primitive, the court found that "it possesses all the qualities of a permanent U.S. military base abroad, albeit on a smaller scale . . . [and that] the United States had retained control for nearly a year and a half over this significant, discrete tract of land."<sup>57</sup> The court explained that the SMTJ jurisdiction is limited: "[f]or example, we agree with Passaro that [the SMTJ] would not reach any piece of Afghan soil on which a soldier 'pitches his pup tent.'"<sup>58</sup>

Though robust in a limited sphere, the SMTJ does nothing to remove the practical impediments of a Justice Department based in the United

53. 18 U.S.C. §7(9)(A).

54. *United States v. Passaro*, 577 F.3d 207, 214 (4th Cir. 2009).

55. *Ibid.*, 211.

56. "Contractor Sentenced for Beating Detainee," *Chicago Tribune*, February 14, 2007.

57. *United States v. Passaro*, 577 F.3d at 214.

58. *Ibid.*

States prosecuting crimes in a war zone and leaves any activity outside a permanent installation uncovered.

### (3) War Crimes Act of 1996 and the Anti-torture Statute

Though in theory the War Crimes Act might be a powerful tool to prosecute those who commit war crimes, it has never been used in a prosecution, and it is doubtful that charging someone associated with the US military with a war crime would be politically palatable.

The act allows for the prosecution of crimes, including torture, murder, mutilation, rape, or hostage taking, provided that the offender or the victim is a US national or a member of the military.<sup>59</sup> The act thus draws upon the nationality, passive personality, and universality principles of jurisdiction, although there is some dispute as to whether all the enumerated crimes would be covered under the universality principle. The definition of torture under the act was narrowed by the Military Commissions Act of 2006 to remove those offenses defined under common article 3 of the Geneva Conventions and now excludes "outrages upon personal dignity."<sup>60</sup>

The Anti-torture Statute has been utilized only once in the sixteen years of the statute's existence (which is once more than the War Crimes Act). Chuckie Taylor, the son of Liberia's former dictator, was prosecuted under the act and sentenced to ninety-seven years in prison for torturing his father's political opponents in Liberia.<sup>61</sup> Taylor was subject to the law because he was born in the United States and the act reaches US nationals or those who are at any point present in the United States.

The torture statute had been discussed as the basis for potential prosecutions of Bush administration officials who authorized torture (none were prosecuted).<sup>62</sup> It could be utilized to prosecute private contractors who are US nationals but would not reach third-party nationals working for the United States unless they physically enter the United States. In addition, for the Justice Department to charge someone working on behalf of the United States with torture would be to admit that the United States has engaged in such actions and would submit those policies to further

59. Pub L. No. 104-192, §2(a), 110 Stat. 2104.

60. Military Commissions Act of 2006, §6(b). For further discussion of how the statute is more limited than the Geneva Conventions with respect to mental torture, see David Luban and Henry Shue, "Mental Torture: A Critique of Erasures in U.S. Law," *Georgetown Law Journal* 100 (2012): 823–63.

61. Curt Anderson, "Judge in Liberia Torture Case Awards Millions to Victims," Associated Press, February 6, 2010.

62. Greg Miller and Josh Meyer, "Investigation of CIA's Harsh Tactics Is Likely," *Los Angeles Times*, August 9, 2009.

scrutiny, including potential claims from any defendant charged under the statute that they were merely executing official policy.<sup>63</sup>

### *B. Military justice system*

Had the Abu Ghraib contractors and the Blackwater contractors at Nisour Square been subject to the Uniform Code of Military Justice (UCMJ) it is virtually indisputable that their cases would not have been subject to the evidentiary and legal uncertainties that have plagued their prosecutions. Prosecutions through the military justice system are very common, and statistically somewhere around 1 percent of those in the active-duty military will be subject to a court-martial proceeding in a given year, a far cry from the handful of contractors that have been prosecuted in any form since the beginning of the War on Terror.<sup>64</sup> Such an exercise of jurisdiction would be supported under both the nationality principle and the general norms of command responsibility.

Perhaps the strongest argument for UCMJ jurisdiction is that it is intuitively incongruous to subject two people working alongside each other—like the military intelligence interrogators and contractors at Abu Ghraib—to two completely different sets of laws. As one law professor put it, “[I]t is perhaps the first axiom of the law that like cases be treated alike. Soldiers and civilians accused of like misconduct in a like wartime setting should not answer to different courts, different procedures and different law.”<sup>65</sup>

The UCMJ has long extended coverage to “all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States,” but that provision has proven constitutionally problematic.<sup>66</sup> The military justice system, for example, does not provide

63. Indeed, the US government recently decided to close inquiries into the treatment of nearly one hundred detainees, while ordering an investigation into the deaths of two terrorism suspects. Eric Lichtblau and Eric Schmitt, “U.S. Will Widen 2 C.I.A. Inquiries into Jail Deaths,” *New York Times*, July 1, 2011.

64. In the US Navy and US Marine Corps alone there were 2,541 court-martial proceedings between October 2009 and September 2010 for a force of 202,729, and these numbers have been relatively steady for the past decade. Vice Adm. James W. Houck, *Annual Report of the Judge Advocate General of the Navy for FY 2010*, 27, accessed February 21, 2012, <http://www.armfor.uscourts.gov/newcaaf/annual/FY10AnnualReport.pdf>. The contracting force, which at its height has included close to 200,000 people, has seen only a handful of prosecutions.

65. William C. Peters, “On Law, War and Mercenaries: The Case for Courts-Martial Jurisdiction over Civilian Contractor Misconduct in Iraq,” *Brigham Young University Law Review* 2006 (2006): 367–414 at 412.

66. *Reid v. Covert*, 354 U.S. 1, 4 (1957).

for a grand jury indictment, which the Fifth Amendment requires for “a capital or otherwise infamous crime.”<sup>67</sup> Neither does it provide for a jury made up of civilians, as is required by Article III of the Constitution and its Sixth Amendment.<sup>68</sup> Numerous procedural aspects of the civilian justice system, many of them with a constitutional basis, are also lacking in the military justice system. In short, the US Supreme Court has explained, military trials for civilians are not permissible because “[t]rial by jury in a court of law and in accordance with traditional modes of procedure after an indictment by grand jury has served and remains one of our most vital barriers to governmental arbitrariness.”<sup>69</sup>

Senator Lindsey Graham, formerly an Air Force Judge Advocate General’s Corp lawyer, has advocated for bringing contractors under the UCMJ and spearheaded an amendment to the UCMJ that extends its coverage “in time of declared war or a contingency operation [to] persons serving with or accompanying an armed force in the field.”<sup>70</sup> The provision, he said, would “give military commanders a more fair and efficient means of discipline on the battlefield.”<sup>71</sup>

In one major test, a court upheld the extension of the UCMJ to contractors. Alaa Mohammed Ali, a dual Canadian and Iraqi citizen working on contract as an interpreter in Iraq, was successfully prosecuted under the UCMJ for charges related to an altercation with another interpreter.<sup>72</sup> The court concluded that under the specific circumstances of Ali’s prosecution—as a “noncitizen who is neither present within the sovereign territory of the United States nor has established any substantial connections to the United States”—the UCMJ prosecution was constitutional.<sup>73</sup> Also key to the court’s decision were Ali’s reporting directly to the military commander for “operational purposes,” his serving in Iraq in a declared “contingency operation,” and his presence in an area of “actual fighting.”<sup>74</sup>

Under the specific facts present in the *Ali* case, the UCMJ appears to be a viable route to prosecution (indeed, the Supreme Court declined to review his conviction). Nevertheless, its application is uncertain and highly fact specific, and in other instances the military has been reluctant to pur-

67. *Ibid.*, 6.

68. *Ibid.*

69. *Ibid.*

70. 10 U.S.C. §802(a)(10).

71. William Matthews, “Some UCMJ Rules Now Cover U.S. Contractors,” *Marine Corps Times*, January 10, 2007.

72. *United States v. Ali*, 71 M.J. 256, 258–59 (C.A.A.F. 2012).

73. *Ibid.*, 268.

74. *Ibid.*, 261–64.

sue prosecutions of contractors under the UCMJ. In early 2009, after three months in captivity, the Defense Department released a twenty-four-year-old former Air Force staff sergeant working on contract in Iraq and accused of setting fire to a Predator drone.<sup>75</sup> He was released just days after filing a habeas corpus petition alleging that it would be unconstitutional to try him under the UCMJ.<sup>76</sup>

### C. Civilian tort lawsuits

For many years, it appeared that the Alien Tort Statute (ATS) provided a potential method of accountability for military contractors. In 2013, however, the US Supreme Court frustrated that possibility in its *Kiobel* decision, concluding that the US Congress had not clearly indicated that the law applied to extraterritorial conduct.<sup>77</sup>

The Alien Tort Statute dates nearly to the founding of the United States and provides that “[t]he district 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.”<sup>78</sup> Prior to the 2013 *Kiobel* decision, courts had struggled with what causes of action could be recognized under the ATS and whether, for example, corporations could face ATS liability. The Supreme Court had previously addressed the ATS in 2004, holding that the statute was meant to apply only to piracy, infringement of the rights of ambassadors, and violations of safe conduct, but had left the door open for other offenses consistent with the universality principle, which allows causes of action for war crimes and other universally accepted criminal activity. “[C]ourts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”<sup>79</sup>

An ATS suit against Blackwater for the Nisour Square shootings had been dismissed prior to the Supreme Court’s *Kiobel* decision, with the door left open for refiling (all but one plaintiff settled soon after the dismissal<sup>80</sup>).

75. Keith Rogers, “No Court-Martial for Man Suspected in Spy Plane Fire,” *Las Vegas Review-Journal*, January 23, 2009, B1.

76. Petitioner’s Petition for a Writ of Habeas Corpus, *Price v. Gates*, 09-CV-00106, \*2, 4–5 (D.D.C. filed Jan. 16, 2009).

77. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

78. 28 U.S.C. §1350.

79. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

80. Jeremy Scahill, “Blackwater Settles Massacre Lawsuit,” *Nation*, January 6, 2010. The suit



The court's ruling did, however, look favorably on the idea that a private corporation could be held liable under the ATS for activity not committed "in furtherance of a military objective" but instead performed for ideological or economic reasons.<sup>81</sup> *Sosa* explicitly acknowledges the existence of a developing consensus that non-state actors may violate certain norms as defined by the law of nations. . . . Nothing in the ATS or *Sosa* may plausibly be read to distinguish between private individuals and corporations."<sup>82</sup> However, the Second Circuit subsequently held in 2010 that a corporation could not be subject to suit under the ATS. "[C]ustomary international law has steadfastly rejected the notion of corporate liability for international crimes, and no international tribunal has ever held a corporation liable for a violation of the law of nations."<sup>83</sup> Judge Richard Posner, of the Seventh Circuit, rebuked this reasoning and its factual premise in a subsequent opinion. Noting that corporate tort liability is "common across the world" and that, in fact, "a corporation complicit in Nazi war crimes . . . [had been] punished criminally for violating customary international law," he concluded that "the corporation can be civilly liable" for the same acts.<sup>84</sup> Posner chastised the Second Circuit's search for precedent in international tribunals: "If a plaintiff had to show that civil liability for such violations was itself a norm of international law, no claims under the Alien Tort Statute could ever be successful, even claims against individuals; only the United States, as far as we know, has a statute that provides a civil remedy for violations of customary international law."<sup>85</sup> The D.C. Circuit, also writing subsequent to the Second Circuit's decision disclaiming corporate liability under the ATS, took a similar tack to that of Judge Posner. The "norms of international law" referred to in *Sosa*, the court reasoned, "provide . . . rules for determining whether international disapprobation attaches to certain types of conduct, such as torture, extrajudicial killing, [and] prolonged arbitrary detention," but it is US law that determines whether a corporation can be held liable for the actions of its subordinates.<sup>86</sup> And in US law, the

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brought by the estate of nine-year-old Ali Kinani continued. Fred Clasen-Kelly, "Judge: Black-water Suit Can Proceed," *Charlotte Observer*, January 27, 2011.

81. *In re Xe Services Alien Tort Litigation*, 665 F. Supp. 2d 569, 584 (E.D. Va. 2009).

82. *Ibid.*, 585, 588.

83. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 120 (2d Cir. 2010), *affirmed*, 133 S. Ct. 1659, 1669 (2013).

84. *Flomo v. Firestone National Rubber Co.*, F.3d, 2011 WL 2675924, at \*5 (7th Cir. July 11, 2011).

85. *Ibid.*

86. *Doe v. Exxon Mobil Corp.*, F.3d, 2011 WL 2652384, at \*23 (D.C. Cir. July 8, 2011).

court concluded, corporate liability was well established by 1789, when Congress passed the ATS.<sup>87</sup>

The *Kiobel* decision sidestepped the issues of whether corporate liability might exist under the ATS and determined instead that where “relevant conduct took place outside the United States,” the ATS did not apply.<sup>88</sup> The Court concluded that “even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial applications. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required.”<sup>89</sup>

In the wake of *Kiobel*, some lower courts have taken a fairly expansive view of the “touch and concern” test, finding, for example, that the ATS could reach “allege[d] acts of torture committed by United States citizens who were employed by an American corporation . . . [that] occurred at a military facility operated by United States government personnel.”<sup>90</sup> But there remains much uncertainty concerning the reach of the ATS, and it provides little real deterrent or accountability for private military contractors.

State tort lawsuits alleging wrongful death or other common-law torts have also been pursued in a few instances, but there are many roadblocks that could thwart maintenance of such an action, such as certain exceptions to the Federal Tort Claims Act and the application of *forum non conveniens* that could bar suits brought by foreigners.<sup>91</sup>

#### D. Foreign and international law

Holding private military contractors to account by subjecting them to the criminal laws of the states in which they operate would seem to eliminate many of the jurisdictional and practical difficulties that arise in these prosecutions.<sup>92</sup> (Indeed, the territoriality principle gives these states a solid

87. *Ibid.*, \*28.

88. *Kiobel*, 133 S. Ct. at 1669.

89. *Ibid.*

90. *Al Shimari v. CACI Premier Technology, Inc.*, 758 F.3d 516, 528 (4th Cir. 2014). See also *Salim v. Mitchell*, 2016 WL 1717185 (E.D. Wash. Apr. 28, 2016).

91. See generally Congressional Research Service, “Tort Suits against Federal Contractors: An Overview of the Legal Issues,” April 7, 2011; John R. Wilson, “Coming to America to File Suit: Foreign Plaintiffs and the *Forum Non Conveniens* Barrier in Transnational Litigation,” *Ohio State Law Journal* 660 (2004): 659–95.

92. In fact, it is a tenet of international law that a state in many cases can assert extraterritorial jurisdiction only when the state where the conduct occurred has chosen not to pursue its

basis for launching such prosecutions.) The reality, however, is that the areas in which private military contractors operate typically lack functioning justice systems, hence the need for the contractors. In addition, contractors are often immunized from local prosecution as a condition of their deployments. In Bosnia, for example, DynCorp contractors accused of running a child sex slave ring were immune from prosecution because of a Status of Forces Agreement.<sup>93</sup> In Iraq, contractors were immune from local prosecution under Coalition Provisional Authority Order 17, which provides that "Contractors shall be immune from the Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto."<sup>94</sup>

Some foreign governments unrelated to the conduct at issue might prosecute acts of torture by private military contractors because torture is a universal jurisdiction offense. This has most prominently been used to bring charges against Donald Rumsfeld and other high-ranking Bush administration officials for the Abu Ghraib abuses.<sup>95</sup> The limitation is that the individual prosecuted must be physically present in the charging state or in a state that has an extradition agreement with the charging state.

The International Criminal Court does not provide much of a remedy, as of 2011. US nationals cannot be prosecuted because the United States is not presently a party, and additionally, the offenses must have been "committed as part of a plan or policy or as part of a large-scale commission of such crimes."<sup>96</sup>

### *E. Market and contractual constraints*

In theory, contractors should shy away from bad conduct for fear that the market would respond and they would lose revenue. But hidden costs and market power mean that the market responds less than one might expect.

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own prosecution. See Draft Convention on Jurisdiction with Respect to Crime, art. 10, §a. The Third Restatement of Foreign Relations has adopted a multifactor balancing test for determining whether the assertion of extraterritorial jurisdiction is warranted when more than one state has an interest in a prosecution.

93. Robert Capps, "Crime without Punishment," *Salon*, June 27, 2002, accessed February 21, 2012, [http://www.salon.com/2002/06/27/military\\_10/](http://www.salon.com/2002/06/27/military_10/).

94. Coalition Provisional Authority, Order 17, §4, at 3.

95. Adam Zagorin, "Charges Sought against Rumsfeld over Prison Abuse," *Time*, November 10, 2006.

96. Phillip Carter, "Keeping the ICC out of Abu Ghraib," *Slate*, May 7, 2004, accessed February 21, 2012, [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2004/05/do\\_the\\_right\\_thing.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2004/05/do_the_right_thing.html).

As one attorney explained after military contractor ArmourGroup ran into trouble in Afghanistan, "It's expensive for the State Department to withdraw a contract from one company, rebid the project and award it to a new one. So businesses know that once they get a contract, State may ding them around a little bit, but it's not going to fire them."<sup>97</sup>

Another limitation is that the market may actually reward collateral damage and other types of abuses that the criminal justice system would normally tend to punish. As one congressman put it while defending Blackwater during a testy congressional hearing, "Zero individuals that Blackwater [has] protected have been killed. . . . That is, I think, the operable number here. Your client is the State Department. The State Department has a contract with you to provide protective service for their visitors; for instance, [congressional delegations], ambassadors, and it runs the gamut. And you've had zero individuals under your care and protection killed."<sup>98</sup> To some, collateral damage is part of the calculus.

The fact is that when more than half of its forces in Afghanistan and Iraq have consisted of private contractors, the US government had little choice but to continue contracting even with the worst offenders. As neo-conservative commentator Max Boot has explained, "All these problems are undeniable, but what is the alternative? It is rare to hear the voices that castigate Blackwater, KBR, DynCorp and their ilk call for a massive increase in the size of the active-duty military. Yet that is what it would take to decrease our reliance on contractors while maintaining existing military commitments."<sup>99</sup>

## 2. Possible improvements in the legal basis for holding US military contractors accountable

Together the US civilian criminal justice system, military law, civil tort lawsuits, foreign and international law, and market and contractual constraints provide at best an inconsistent, uncertain, and noncomprehensive scheme to hold private military contractors accountable for torture and other crimes committed while they are operating abroad. The obstacles

97. Ginger Thompson and Mark Landler, "Company Kept Kabul Contract despite Record," *New York Times*, September 12, 2009, A1.

98. House Committee on Oversight and Government Reform, "Blackwater USA," October 2, 2007, 56, <https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/20071127131151.pdf>.

99. Max Boot, "The Mercenary Debate: Three Views," *American Interest*, May/June 2009, 40.

take numerous forms, many of which are themselves difficult to anticipate, account for, or rectify. The question, then, is what can be done?

Legislative efforts have not yet picked up steam. In July 2011 Representative Jan Schakowsky reintroduced the Stop Outsourcing Security Act, which would require the United States to end its use of private military contractors for diplomatic missions in Iraq and Afghanistan within 180 days of its passage, a gradual phaseout of all contractors for "mission critical or emergency essential functions," and increased transparency for security contracts.<sup>100</sup> Her previous version of the bill garnered only thirty cosponsors before the expiration of the 111th Congress, and the Senate version garnered only one official supporter, its sponsor, Vermont senator Bernie Sanders.<sup>101</sup>

The reality is that the US military in the early twenty-first century could not fight wars like those in Afghanistan and Iraq without the significant use of private military contractors. This fact, then, would seem to necessitate rethinking how it should hold such contractors accountable. The most comprehensive scheme would be to bring private military contractors under the UCMJ. Further test cases could determine whether this would withstand constitutional scrutiny or whether tweaks to the process might do so. Such an extension of the UCMJ would be well within the acceptable extraterritorial jurisdiction of the United States so long as it applied only to US nationals or residents. The application to foreign employees of either the US military or US corporations would be more controversial. The United States Foreign Corrupt Practices Act, which bans bribing foreign officials, for example, does apply to foreign agents of US businesses, but it has come under some criticism for its expansive reach.<sup>102</sup> (Limiting US corporations involved in military contracting to employing US nationals or residents could solve this, and many other issues, but would significantly reduce potential profits for contracting companies, who pay foreigners at a fraction of the rate they pay US citizens, and therefore would make such a regulation practically infeasible.) Forcing foreigners into the US military justice system, especially those not considered combatants, would also create a difficult precedent for the US government, which regularly criticizes foreign governments that lack transparent justice systems, and which would not want to raise the possibility of US civilians being subject to military justice abroad.

100. *Stop Outsourcing Security Act*, H.R. 2665, 112th Cong., 1st Sess.

101. *Stop Outsourcing Security Act*, H.R. 4650, 111th Cong., 2d Sess.

102. Philip M. Nichols, "Regulating Transnational Bribery in Times of Globalization and Fragmentation," *Yale Journal of International Law* 24 (1999): 257–303 at 291.

Legislation proposed in the last several congressional sessions, the Civilian Extraterritorial Jurisdiction Act (CEJA), outlines a quite sweeping scheme for criminal enforcement against private contractors in the US civilian court system for acts committed abroad. The bill mimics the MEJA and applies to anyone “employed by or accompanying any department or agency of the United States” outside the United States. The bill also provides for the establishment of “investigative task forces” to enforce the law and for the deployment of law enforcement agents overseas, but it does not provide any additional funding to do so—the funding would instead come from the Department of Justice’s budget. Some have also questioned whether the CEJA would withstand constitutional scrutiny.<sup>103</sup> The CEJA would be palatable from an international law perspective, as it contains an exhaustion requirement that prohibits prosecution if a foreign government is prosecuting that individual, unless the attorney general or deputy attorney general personally approves such a move. It is a tenet of international law that in general a state may assert extraterritorial jurisdiction only when the state where the conduct occurred has chosen not to pursue its own prosecution.<sup>104</sup> The Third Restatement of Foreign Relations has adopted a multifactor balancing test for determining whether the assertion of extraterritorial jurisdiction is warranted when there is a traditional basis for extraterritorial jurisdiction but more than one state has an interest in a prosecution.<sup>105</sup>

The next-best scenario would be to enact a statutory scheme that provides a civil and criminal cause of action against individual private military contractors, regardless of their nationalities, and, through *respondeat superior*, the corporations that employ them—so long as the contractor or his activities have a connection to the United States. Such a connection could stem either from the nationality of the contractor himself, from the nationality of the military contracting the corporation’s principals, the contracting corporation’s receipt of funds from the United States, the

103. DonnaMarie McKinnon, “Current Development, 2010–2011: Federal Civilian Criminal Prosecutions of Private Military Contractors; Inherent Legal Ethics Issues,” *Georgetown Journal of Legal Ethics* 24 (2011): 695–712 at 709–12.

104. See Draft Convention on Jurisdiction with Respect to Crime, art. 10, §a: “A State has jurisdiction with respect to any crime committed outside its territory by an alien . . . when committed in a place not subject to its authority but subject to the authority of another State, if the act or omission which constitutes the crime is also an offense by the law of the place where it was committed, if surrender of the alien for prosecution has been offered to such other State or States and the offer remains unaccepted.”

105. Restatement (Third) of Foreign Relations Law, §403(3).

contractor's benefiting from US military training or funds, or the contracting activities affecting the United States.

There are numerous examples of schemes that provide for civil and criminal enforcement of extraterritorial actions in US courts. The Torture Victim Protection Act (TVPA), for example, provides a civil cause of action for victims of torture or the families of those subjected to extrajudicial killing, provided the perpetrator acted under the actual or apparent color of law.<sup>106</sup> The act requires that a claimant first exhaust any remedies available in the state where the conduct occurred, consistent with the international law tenets governing situations in which more than one state has an interest in prosecution. The Anti-torture Statute, discussed above, provides a similar criminal scheme. These, of course, find grounding in the universality principle.

The more comprehensive scheme outlined above would draw on a variety of jurisdictional bases. The conduct intended to be reached would first need to be spelled out explicitly by Congress—similar to the MEJA's reaching conduct punishable by more than one year in prison. Such a scheme could go farther, even allowing prosecutions or civil claims for assault and battery, crimes, though minor, that are covered under the UCMJ.<sup>107</sup>

The application of such a scheme to US nationals or residents would be an uncontroversial use of the nationality principle, provided an exhaustion/subordination requirement similar to that in the TVPA and that proposed in the CEJA is included. Similarly, both civil and criminal prosecutions could uncontroversially be extended to US corporations.<sup>108</sup>

The extension of the statute to war crimes and torture—whether committed by US nationals or aliens—would be firmly supported under the universality principle.

The more difficult questions would arise where US nationals or military veterans move abroad or establish contracting corporations based abroad, or in bringing prosecutions for crimes committed by aliens working in support of United States-based or affiliated private military contractors that do not rise to the level of war crimes. Such an extension of jurisdiction is

106. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73.

107. UCMJ, art. 128.

108. See, e.g., 18B Am. Jur. 2d Corporations §1841: "As in the case of torts, the general rule prevails that a corporation is liable for criminal acts of its employees and agents done within the scope of their employment with the intent to benefit the corporation." Drawing on the citizenship test set out by the Restatement (Third) of Foreign Relations Law, §213, comment d, it would cover anyone working on contract for a corporation owned or managed by US nationals, having a principal place of business in the United States, or on contract for the US government or another US corporation.

necessary, for example, because of situations like Blackwater founder Erik Prince's reported relocation to Abu Dhabi in the wake of legal trouble in the United States.<sup>109</sup> Similarly, a Blackwater affiliate, Greystone, is based in Barbados. In these cases, jurisdiction not supported under the nationality or universality principles might be justified under either the territorial effects principle or the protective principle, though such an assertion of jurisdiction is not a straightforward application. The territorial effects principle allows for jurisdiction when extraterritorial activity has an effect within a state's territory. Certainly in the case of a contractor that does business with the US military, conduct it engages in, even on a separate contract, could in many cases have at the very least a financial effect within the United States. To the extent a foreign-flagged contractor recruits from the United States or makes use of US armaments or expertise, it would seem the effects principle should apply. The protective principle traditionally applies in the case of activities that threaten either the security of the state or the integrity of its governmental functions. Though not a traditional understanding of a security threat, it has been well recognized that rogue contractors do threaten the security of the state and that might militate for extraterritorial jurisdiction.<sup>110</sup> The governmental functions usually involved in an assertion of the protective principle include espionage, counterfeiting, falsification of documents, and similar activities. Military contractors acting with the actual or apparent sanction of the US government but in violation of its laws similarly threaten the integrity of the government.

The use of private military contractors ballooned during the War on Terror, and there is no reason to think that this trend is likely to reverse itself. In addition to providing diplomatic security and military support, private contractors are increasingly being used for intelligence gathering and other highly sensitive tasks. Blackwater executives floated the idea of a brigade-for-hire ready for deployment in Darfur or other troubled regions as a

109. James Risen, "Blackwater Founder Moves to Abu Dhabi, Records Say," *New York Times*, August 18, 2010, A10.

110. See, e.g., Remarks by President Obama at Strasbourg, France, Town Hall, April 3, 2009: "In dealing with terrorism, we can't lose sight of our values and who we are. That's why I closed Guantanamo. That's why I made very clear that we will not engage in certain interrogation practices. I don't believe that there is a contradiction between our security and our values. And when you start sacrificing your values, when you lose yourself, then over the long term that will make you less secure. When we saw what happened in Abu Ghraib, that wasn't good for our security—that was a recruitment tool for terrorism. Humiliating people is never a good strategy to battle terrorism." The speech can be found at <http://www.cnn.com/TRANSCRIPTS/0904/03/cnr.01.html>; it is also in *Public Papers of the Presidents of the United States: Barack Obama*, 2009, bk. 1 (Washington, DC: Government Printing Office, 2011), 413–23 at 422.



peacekeeping force.<sup>111</sup> Since the US military has provided the funds, training, expertise, and personnel that have enabled the rapid growth of this industry, the United States has a unique responsibility to ensure that the gaps in enforcement and accountability are closed, before the next Abu Ghraib or Nisour Square. International law allows such an assertion of jurisdiction in nearly all the cases encountered thus far in the War on Terror, and in the small fraction of cases where jurisdiction would be questionable under the nationality or universality principles, alternative bases arguably would support a comprehensive scheme designed to ensure accountability and control in this new era of warfare. Such a scheme is more a requirement than an option. As Grotius explained nearly four hundred years ago, "For a morbid body is still a body, and a state, though dreadfully diseased, is still a political being, as long as its laws and tribunals and other necessary parts of its constitution remain, to administer justice and give redress to foreigners, no less than to private subjects in their actions against each other."<sup>112</sup>

111. Kelly Kennedy, "Private Firm Pitches Army-for-Hire Plan," *Air Force Times*, April 10, 2006.

112. Grotius, *Rights of War and Peace*, 315–16.

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## INDEX

- 18 U.S.C. §2340A, 238, 262, 269n35  
 18 U.S.C. §2441, 238  
 24 (television series), 90
- absolutism, 5, 13–15, 178–79, 192–93,  
 200, 204–9, 219, 232–34, 251–54, 259,  
 268–71
- Abu Ghraib prison (Iraq), 11, 51, 66,  
 90, 92–94, 139–41, 144, 169,  
 173, 257, 263, 301, 320–23, 325–26,  
 338
- Academi. *See* Blackwater
- ACLU, 298
- act kinds, 233
- Addington, David, 2, 300
- Afghanistan. *See* “axis of evil”; war on  
 terror.”\$
- al-Bahlul, Ali, 307
- Ali, Alaa Mohammed, 334
- Alien and Sedition Acts, 311
- Alien Tort Statute (ATS), 335–37; applica-  
 bility to torture, 337
- al-Libi, Ibn al-Shaykh, 169
- al-Qaeda, 141, 243, 258, 315
- “al-Qaeda seven” (lawyers), 305–6
- al-Qahtani, Mohammed, 91, 99–100, 168
- American Nursing Association, 66
- American Psychiatric Association, 66
- American Psychological Association, 66–  
 69, 168
- ANC (African National Congress), 23, 27–  
 31, 201, 205; code of conduct of, 30–31;  
 constitution of, 29; and nonviolence,  
 27; and terrorism, 27–28; torture by,  
 29–30
- Anderson, Scott A., 16
- Antitorture Statute, 262, 264–65, 326, 332
- apatheia*, 72
- Apuleius, 109–10
- Arar v. Ashcroft*, 302
- archetypes, legal, 17, 259, 270, 273–86,  
 288–93
- Arendt, Hannah, 53, 287
- Aristotle, 72
- ArmourGroup, 339
- Army Field Manual for Interrogations, 123,  
 170–71, 303–4
- Augustus, 12
- Aulis Gellius, 73–74
- “axis of evil,” 246
- Bagaric, Mirko, 179, 183–84, 190
- Bagram Air Base prison facility (Afghani-  
 stan), 66, 83, 304, 316
- Bandura, Albert, 55
- Baron, Marcia, 14–15, 195n1
- Bar-Tal, Daniel, 136
- Basson, Wouter, 36–37
- beatings. *See* punishment: corporal
- Beccaria, Cesare, 1
- Becker, David, 99–100
- Bellamy, Alex J., 246
- Benzien, Jeffery T., 33, 202
- Black, Donald, 136
- Black, Hugo, 272
- “black sites” prisons, 4, 188n30, 303, 310

- Blackstone, William, 288  
 Blackwater, 327–29, 333, 335–36, 339, 343  
 Bolton, John, 300  
 Bonanno, George, 63  
 Boot, Max, 339  
 Bosnia, 338  
*Boumediene v. Bush*, 39, 173, 302, 304  
 Bronfenbrenner, Urie, 50  
*Brown v. Board of Education*, 274–75  
*Brown v. Mississippi*, 157, 170, 172–73  
 Burger, Jerry, 55  
 Burke, Edmund, 287  
 Burlingame, Debra, 305  
 Bush, George W. 13, 246, 302, 306, 310–11, 320–21, 323; administration, 2–3, 13, 17, 56, 67–68, 89–90, 98, 138–42, 144, 148, 161–65, 168, 243, 257–58, 276, 287–88, 299–302, 303, 308, 312, 314, 332, 338; responsibility for torture, 139–42  
 Bybee, Jay, 2, 258, 261  
 Bybee memorandum, 269
- CACI International, 321–22  
 Calvisianus, 116–17  
 Canada, 318  
 Caracalla, 112  
 Card, Claudia, 195n1  
 Carter, Phillip, 307, 338n96  
 Casey, Lee, 299, 305  
 Catiline, 108  
 “cause lawyers,” 308  
 Center for Constitutional Rights, 298  
 Chafee, Zechariah, 156  
*Chavez v. Martinez*, 280  
 Cheney, Liz, 305  
 Cheney, Richard (Dick), 2, 161, 300, 303, 305, 311  
 Chesney, Robert, 299  
 Christopher Commission, 90, 98–99  
 CIA, 4, 10, 67, 69, 124, 134, 139–41, 147, 163, 170, 172–73, 303, 310, 316, 331  
 Cicero, 78, 80, 107–8, 114, 117, 295  
 Civil War (US), 123, 126, 128–32, 134–35, 143  
 Citadel, 96  
 Civilian Extraterritorial Jurisdiction Act (CEJA), 341–42
- Clarke, Julie, 179, 183–84, 190  
 Cleomenes, 107  
 Clinton, Hillary, 4  
 Coalition Provisional Authority, 338  
 Cocks, F. S., 269  
 coerced confessions, 150, 153–54, 156, 163, 165–71, 279; wrongfulness of, 282, 286  
 coercion, 140, 159, 227; for intelligence gathering, 53; lawful coercion not brutal, 275–76; pain and fear as means of, 229; and psychologists, 63, 67; and self-control, 86; as torture, 122, 261–62; and virtue, 79, 82; in war on terror, 140, 161  
 coercive interrogation, 53, 217, 267–68; in ancient Rome, 105–6, 112, 115–16, 118; distinguished from torture, 301, 311; by police, 13, 147–56, 159, 163–74; and psychologists, 9, 63, 67; ‘in war on terror, 163–74, 301, 311  
 Coetzee, J. M., 70, 85, 197  
 Coleman, Kathleen, 12  
 combat, as “clean” fighting, 220  
 combatants: injured, 263; insurgents, 121, 124–25, 130, 135, 140–43; lawful and unlawful, 12, 129, 140, 142–43, 237, 243–44, 301, 320n4; torture of unlawful, 140–41  
 combatant’s privilege, 240–43. *See also* distinction, principle of  
 commander-in-chief power, 269, 301, 314  
 Conroy, John, 58, 167  
 consequentialism, 210, 270–71  
 Constitution Project, 316  
 contractualism, 223–24, 228–29  
 Convention against Torture, UN, 1, 21–22, 59, 68, 122, 140–41, 162–63, 235–36, 238, 260–62, 265, 269, 301  
 conventions, 232, 253–54  
 Council on Foreign Relations, 297  
 counterinsurgency conflicts, 12, 21, 128–40; minimizing civilian casualties in, 129; soldiers’ perceptions of, 121, 134–36, 139, 144; tactics of, 120, 128–29, 131–33; use of torture in, 129, 132–41. *See also* delegitimization  
 counterinsurgency war, 12

- counterlawfare, 307–8  
 Crawford, Susan, 168  
 customary law, 125–27, 238. *See also* international law
- Dalinyebo, King Sabata, 28  
 Darby, Joseph, 94  
 Daschner, Wolfgang, 226–28  
 degrading treatment, 262–63; American indifference to, 311; “merely,” 140, 276, 291; sexual abuse as, 88, 96; status and, 118. *See also* Convention against Torture, UN; Geneva Conventions; South Africa: Constitutional Court of;  
 dehumanization, 246–47, 275–76;  
 lawfare as remedy to, 319; and racism, 12, 25; torture and, 31, 53, 55; in war, 139  
 delegitimization, 13, 136–37, 145; and morality, 136–37; and racism, 137; and torture, 121, 139, 141  
 deontology, 271. *See also* absolutism  
 Dershowitz, Alan, 258–59, 280–81, 285, 293  
 Detainee Treatment Act of 2005, 303  
 Dilowar, 160  
 Diocletian, 116  
 dirty fighting, 16, 220–23, 228–30  
 “Dirty Wars” (Latin America), 51  
 discrimination, principle of. *See* distinction, principle of  
 dissociation, 80–82, 84–86; caused by PTSD, 47  
 distinction, principle of, 16, 213–14, 237, 240–44, 247–48, 253–54, 262, 290  
 doctrine of lenity, 265  
 doing/allowing distinction (act/omission distinction), 216, 226. *See also* intention  
 Draft Convention on Jurisdiction with Respect to Crime, 324  
 Dratel, Joshua L., 314–15  
 Dunlap, Charles J., Jr., 296–97, 306–7  
 Dworkin, Ronald, 273, 283, 293  
 Dworkinian principle, 273  
 DynCorp, 327, 338–39
- Einolf, Christopher J., 12  
*El Masri v. Tenet*, 302  
 Elshtain, Jean Bethke, 184, 190
- Encyclopaedia Britannica*, 288  
 engines of state, 286–88  
 England, Lynndie, 92, 101  
 enhanced interrogation, 56, 66; techniques of, 3, 301–2, 310  
 Epictetus, 10, 72, 74, 80, 85–86  
 Esfandiari, Haleh, 83  
 ethics, 177–254; combined justification, 212; empirical methods in, 178; hypothetical cases in, 179, 181–94; and intuitions, 196–97; and law, 208; methodology in ethics, 195–218, 252–54; positive and negative duties, 226. *See also* absolutism; consequentialism; contractualism; deontology; doing/allowing distinction (act/omission distinction); intention; Kantian ethics  
*eudaimonia*, 72  
 Euplius, 116–17  
 European Convention on Human Rights, 291, 261, 269  
 European Court of Human Rights, 258  
 Everson, Mary Lynn, 43  
 Evin prison (Iran), 83  
 extraordinary rendition, 147, 163, 167, 295, 303–4, 315, 318; and unlawful combatants, 167
- Fabri, Mary, 43  
 false confessions, 165–66  
 Faludi, Susan, 99  
 FBI, 156–57, 170, 172–73  
 feminist fundamentalism, 101–2  
 “field fucking,” 94  
 fighting dirty. *See* dirty fighting  
 First, Ruth, 32  
 Foot, Philippa, 182–83  
 Foreign Corrupt Practices Act, 340  
 Frakt, David, 307, 316  
 Frankfurter, Felix, 279  
 Frankl, Victor, 63  
 Freud, Sigmund, 80  
 Fugitive Slave Act, 311  
 Furius, 107
- Gäfgen, Magnus, 226–27  
 Gaius, 113  
 Garland, Merrick, 323

- Geneva Conventions, 1, 37, 93, 124–25, 127, 130, 140–43, 148, 163, 235, 238, 243, 262–63, 265, 289, 301, 310, 313, 332; requirement of humane treatment, 142; US failure to ratify Protocol I, 125
- Gilligan, Michael, 59
- Gitmo bar (group), 302, 308
- Global Bill of Rights, 292
- Goldsmith, Jack, 299
- good emotions (*eupatheiai*), 77
- Gorman, William, 9
- Graham, Lindsey, 334
- Graner, Charles, 95, 101
- Greenberg, Karen, 314–15
- Gregory of Nyssa, 119
- Gross, Oren, 178
- Grotius, Hugo, 320, 344
- Guantanamo Bay (US military prison), 3, 39, 66, 83–84, 97, 99, 139–41, 160, 166, 168–69, 286, 299, 302, 304–6, 315–16
- Gulf War (US, 1990–91), 123, 126–27, 137, 296, 322
- habeas corpus, 24, 171, 173, 273, 301–4, 314
- Habibullah, Mullah, 160
- Hadrian, 112–13
- Hague Convention of 1907, 127, 130
- Hajjar, Lisa, 17–18
- Hamdan v. Rumsfeld*, 302, 307, 310
- Hamdi v. Rumsfeld*, 302
- Harrington, Penny, 99
- Harvey, Mary, 50
- Hastings, Warren, 287
- hazing, 11, 88–94, 263
- Heartland Alliance Marjorie Kovler Center, 9, 43–44, 60
- Herman, Judith, 63–64, 77
- Hersh, Seymour, 100
- Hill, Daniel, 225–26
- Hillman, Elizabeth, 94
- Hitchens, Christopher, 207–9
- Hoffman, David, 68
- Hoover, J. Edgar, 156
- Hopkins, Ernest Jerome, 149, 153–56, 162
- Horton, Scott, 90, 305, 310
- Huggins, Martha, 137
- human dignity, 6, 22, 31, 34, 206, 293; and legal archetypes, 275, 279, 286. *See also* Geneva Conventions
- humane treatment, 239, 241, 249; US treatment of POWs, 128, 145
- human rights: lawfare and 314, 317, 319; and psychological practice, 67; in South Africa, 38; US as promoter of, 163; vs. territoriality, 324. *See also* human rights law; human rights norms; Universal Declaration of Human Rights, UN
- human rights law, 250, 289–92; and international law, 260–61; and lawfare, 297, 299; vs. cruel, inhuman, degrading treatment, 291–92. *See also* human rights; human rights norms; Universal Declaration of Human Rights, UN
- human rights norms, 163, 251. *See also* human rights; human rights law
- humiliation. *See* degrading treatment
- Hussein, Saddam, 321
- hypothetical examples, 14–15, 25, 31, 53, 195–218, 209, 244–48; in Plato, 197; vs. historical examples, 198. *See also* ticking bomb case
- intention, 164, 198, 216, 220, 261. *See also* doing/allowing distinction (act/omission distinction)
- International Court of Justice, 324–25
- International Covenant on Civil and Political Rights, 235, 260–61, 291
- International Criminal Court (ICC), 57, 295–96, 338
- international humanitarian law. *See* international law
- International Human Rights Law Institute, 57–58
- international law, 142–43, 260, 289, 314; and CEJA, 341; and contractor accountability, 324, 336; and the death penalty, 38; difficulty of enforcement, 125–42; and enabling domestic legislation, 237–38, 260, 262; and extraterritorial jurisdiction, 324–25, 337–38, 344; *ius cogens* in, 292; and jurisdiction, 36–37; and lawfare, 292, 295–96, 299–301, 319; and principle of distinction, 16;

- prohibition of torture, 5; protections for combatants, 121–23, 125; soldiers' respect for, 13; and torture, 31–32, 232, 235–44, 249–51; US obligation to uphold, 300–301, 312; US ratification of, 260–61. *See also* Convention against Torture, UN; customary law; distinction, principle of; Geneva Conventions; law of war; Universal Declaration of Human Rights, UN
- International Rehabilitation Council for Torture Victims, 43–44
- interrogation, 65–66, 187, 245, 267; efficacy of, 88–89, 97–98; and Geneva Conventions, 93; and norms of masculinity, 97–98
- intersectionality, 101–2
- Iraq. *See* “axis of evil”; Gulf War (US, 1990–91); war on terror
- Israel/Palestine conflict, 296
- Jandal, Abu, 187
- Jawad, Muhammad, 307
- Jessen, John Bruce, 69
- Judge Advocate General (JAG) corps, 307
- judicial review, 310
- jus ad bellum*, 236, 241
- jus in bello*, 236, 243–44
- Justinian, 106
- just war theory, 200–202, 214, 232, 234–35, 240–42, 249–51, 253
- Kabwe (Zambia), 28
- Kadish, Sanford, 291–92
- Kamm, Francis Myrna, 217
- Kantian ethics, 178
- Karzai, Hamid: government of, 317
- KBR, 327, 339
- Keep America Safe organization, 305–6
- Kennedy, Anthony, 280
- Kennedy, John F., 24
- killing in war, 200
- King, Rodney, 90
- Kiobel v. Royal Dutch Petroleum Co.*, 335–37
- Kiyemba v. Obama*, 304
- Koenig, K. Alexa, 13, 51, 231
- Korean War, 10, 123, 126–27, 137; North Korea in, 127
- Kosovo, 296
- Kramer, Larry, 310
- Kreimer, Seth, 280–81
- Kristol, Bill, 305
- Lavine, Emmanuel, 150, 155
- lawfare, 17–18, 294–319; in Colombia, 297; debates over, 294–303, 305–6; effect on public, 317; and international law, 299–300, 314; *longue duree* perspective on, 315, 317–19; military-centric understanding of, 296–97, 307; skepticism about, 308–13; success of, 295, 314–19; Vietnam and, 295; vs. US forces, 297. *See also* counterlawfare
- Lawfare* (blog), 299
- “lawfear.” *See* counterlawfare
- law of war, 16, 37, 235–45, 249–53, 294, 297; changes in, 126–27; command responsibility, 320–21, 333, 338; counterinsurgency and, 121, 135–36, 142–45; and morality, 136–37, 144; need for changes to, 143–45; need to punish violators of, 122, 142–44; principle of distinction, 124–25, 143–44; self-defense as justification, 5; violation by the enemy, 12, 136, 142–44; war-crimes act, 310. *See also* combatant's privilege; customary law; Geneva Conventions; just war theory
- Lawriors, 295, 298, 306, 312–13, 317–18
- legal positivism, 269
- Leo, Richard A., 13, 51, 231
- lesser-evil justification, 14, 210–12, 216–18, 245
- Levinson, Sanford, 232
- liability to harm, 201–2, 210–18; vs. desert, 211
- Liberia, 332
- Lieber, Francis, 130
- Lieber Code, 124, 130–32, 143–44; and torture, 130
- Limbaugh, Rush, 88–89, 91–92
- Littleton, Christine, 96–97
- London, J. P., 322
- Los Angeles Police Department, 90, 98–99
- Luban, David, 177, 179–80, 190, 192, 237–38, 295, 297
- Lusaka, 29



- Mackey, Chris, 93, 172  
 Mahomed, Ismail, 35  
 Mandela, Nelson, 23  
 Manning, Chelsey, 305, 311  
 Maputo, Mozambique, 32  
*Maqaleh v. Gates*, 304  
 Margulies, Joseph, 312–13, 315  
 Mark Antony, 108  
 Martinez, Antonio, 43  
 Mattis, James, 4  
 Mayer, Jane, 165, 167  
 McCoy, Alfred, 147–48  
 McMahan, Jeff, 15  
 McSally, Martha, 100–101  
 Metcalf, Hope, 312–13, 315  
 Mexican-American War, 123, 125, 126, 129, 134–35, 137  
 Milgram, Stanley, 55–56  
 Military Commissions Act of 2006 (MCA), 303–4, 310–11, 332  
 military contractors, 18, 294, 301, 321–44; criminal vs. civil liability, 323; non-US nationals as, 340; rogue contractors, 343; statutory cause of action over, 341–42; in US law, 322–44; in war on terror, 322  
 Military Extraterritorial Jurisdiction Act of 2000 (MEJA), 326–30, 342  
 military interrogation, professionalization of, 171  
 Miller, Greg, 172  
 Miranda warning, 158  
 Mitchell, James, 69  
 Modestinus, 113  
 Mohamed, Khalfan Khamis, 35–36  
*Mohamed v. Jeppesen Dataplan*, 302  
 Mora, Alberto, 167, 169  
 morality. *See* ethics  
 Mousa, Baha, 91  
 Mozambique, 26  
 Mukasey, Michael, 329–30  
 Murad, Abdul Hakim, 191  
 murder: absolute prohibitions on, 208, 233, 240, 253; prohibited by Geneva Conventions, 262; prohibited by War Crimes Act, 332  
 Muslims: gender attitudes of and toward, 87–90, 95–96, 99–101; US attitudes toward, 311  
 Nagel, Thomas, 16, 219–22, 228  
 napalm, 221  
 National Consortium of Torture Treatment Programs, 43  
 National Security Roundtable, 297  
 NATO, 296  
 necessity: as defense, 209–10, 235; as justification, 210–12  
 Nero, 110, 112  
 Nesbitt, Nathaniel, 59  
 Nisour Square incident, 327–29, 335–36  
 non-brutality principle, 278–79, 285  
 North Korea. *See* “axis of evil”; Korean War  
 Northern Ireland, 258  
 Nozick, Robert, 271  
 Nuremburg Trials, 57  
 Obama, Barack, 17, 173, 236, 303–4, 312; executive orders of, 304  
 Obama administration, 3, 304–6, 323, 326  
 Office of Legal Council (OLC), US, 163–64, 300–301  
*OK [Omar Khadr] v. Bush*, 302  
 Omar Khadr, 304  
 Ordower, Garrett, 18  
 Padilla, José, 306, 311  
 Palestine. *See* Israel/Palestine conflict  
 Passaro, David, 331  
 Patriot Act, 298  
 Pence, Mike, 4  
 Peters, Edward, 271–72  
 Philippine-American war (1899–1902), 12, 120, 123–24, 126, 131–35, 137–39, 245; torture in, 131–33, 137–39  
 Philo of Alexandria, 74–75  
 Physicians for Human Rights, 66–68  
 Pinochet, Augusto, 39, 295  
 police, 98–99; brutality, 156; motives for third degree, 154; professionalization of, 167–68, 170; public attitudes toward, 155; scientific methods of, 156–57; use of torture, 148–56  
 police interrogation 13; interrogation manuals, 158; manipulation in, 158; psychological techniques of, 158; via polygraph, 157–58  
 polygraph, 157  
 Popeo, Daniel, 298

- Posner, Richard, 336  
 POWs. *See* prisoners of war  
 precedents, 273–74  
 preemotions (*propatheia*), 73, 77  
 President's Commission on Criminal Justice and the Administration of Justice, 158  
 Prince, Erik, 343  
 principle of discrimination. *See* distinction, principle of  
 principle of distinction. *See* distinction, principle of  
 prisoners of war 10, 240–42, 263, 289. *See also* combatant's privilege  
 procedural due process, 278–79. *See also* US Constitution: Fifth Amendment  
 prohibitions. *See* absolutism  
 PTSD (post-traumatic stress disorder), 46–48; and cultural differences, 48–49  
 punishment: in ancient Rome, 105–6, 112–13; capital, 105–6, 116, 200–201; corporal, 105–6, 231, 247, 263, 277–78, 282; cruel and unusual, 260, 276–77 (*see also* US Constitution: Eighth Amendment); torture used as, 105–6; torture not legal as, 268  
 Quinn, Warren, 215  
 rape, 233; in prisons, 277, 285  
 Rasul, Shafiq, 81  
*Rasul v. Bush*, 301–2, 313  
 Rawls, John, 254  
 reconciliation, 228–30, 241  
 Rejali, Darius, 7, 11, 92–93, 134–35, 146, 168–69, 173–74, 191, 251  
*respondeat superior*, 341  
 Restatement (Third) of Foreign Relations, 341  
 Rice, Condoleeza, 328  
 Risen, James, 67  
 Rivkin, David, 299, 305  
 Robben Island, 34  
 Rochin, Richard Antonio, 279  
 Roman Catholic Church, 208  
 Rome (ancient), 12, 105–19, 245; evidential difficulties for historians of, 106–10, 117; slavery in, 105–6, 109–15, 118–19; status distinctions in, 105–15; 117–19; treason in, 112, 118; tyrants in 108, 118; law of, 109, 111–13, 118–19  
 rule of law, 24, 318; and archetypes, 293; difficulty of establishing as rebel movement, 30; enemies of, 38, 305; and “engines of state,” 288–89; incomplete acceptance of, 239; and lawfare, 307, 310–11; and the legal profession, 259; restoration of by Obama, 312; soft vengeance of, 26; vs. cruelty, 51; vs. sex discrimination, 88; vs. torture, 173  
 Rumsfeld, Donald, 90, 139–40, 338  
*R v. Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte*, 39  
 Sachs, Albie, 6–7, 18, 195–97, 200–202, 204–7  
*Saleh v. Titan*, 323  
 Sanders, Bernie, 340  
 Sartre, John Paul, 25  
 Saudi Arabia, 100  
 Scalia, Antonin, 90  
 Schakowsky, Jan, 340  
 Scheingold, Stuart A., 309–10, 313  
 Schlesinger, James, 90  
 Schmitt, Carl, 305  
 School of the Americas, 124  
 Sedgwick, A. C., 154  
 self-defense, 200, 202–3, 221, 223–26, 228–30; as justification, 14; and the principle of reciprocity, 223–25, 228–30  
 Seneca the Elder (Marcus Annaeus Seneca), 108  
 Seneca the Younger (Lucius Annaeus Seneca), 73–74, 76–77  
 Serbia, 296  
 SERE (survival, evasion, resistance, and escape) training, 10, 89, 97, 161  
 Sherman, Nancy, 10–11  
 Shklar, Judith, 288  
 Shue, Henry, 177, 179, 181, 190, 224  
 Sikkink, Kathryn, 319  
 Singer, P. W., 327  
 slippery-slope arguments, 282  
 soft vengeance, 26, 34  
 Solzhenitsyn, Aleksandr, 79  
 Sontag, Susan, 95  
*Sosa v. Alvarez Machain*, 335–36  
 Soufan, Ali, 186–87

- South Africa: apartheid in, 23, 25–28, 32; constitution of, 34; Constitutional Court of, 22, 34–39; judges in, 26; no death penalty in, 36; security forces, 196; terrorism in, 23, 32; Truth and Reconciliation Commission, 32–35
- South West African People's Organization (SWAPO), 37
- Spanish-American war, 123, 126, 131
- Spanish Inquisition, 85
- Special Maritime and Territorial Jurisdiction (SMTJ), 330–32, 326
- states' secrets privilege, 303–4, 317
- status of forces agreement, 338
- Staub, Edwin, 54–55, 57
- Sternberg, Robert, 55
- Stevens, John Paul, 272
- Stockdale, James, 10, 71–72, 79, 82
- stoicism 10–11; ancient, 71–80; and the body, 80–86; and complicity, 81–83; and dread, 79; and the emotions, 73–80; happiness in, 72–73, 78; popularized, 70–71; of POWs, 79; for resilience to torture, 70–76, 78–79, 82–86, 118; and shame, 79, 81–82
- Stop Outsourcing Security Act, 340
- Story, Joseph, 324
- Strauss, Marcy, 264
- substantive due process. *See* US Constitution: Fifth Amendment
- Sussman, David, 16
- Swofford, Anthony, 93–94
- Tacitus, 110
- Taguba, Antonio M., 173, 321
- Taguba Report, 91–92, 172–73, 321–22, 326
- Taliban, 258, 315
- Tambo, Oliver, 27, 29–30
- Taylor, Chuckie, 332
- terrorism: effect on terrorists, 27–28; state terrorism, 32
- third degree, 13, 148–74, 281; complicity of prosecutors and judges, 153–54; decline of, 154–58, 170; definition of, 149; deniability of, 151; in nineteenth century, 149; origins of term, 149; in popular culture, 155; prevalence of, 150, 166; psychological techniques of, 152–53; as punishment, 153–54, 166; secrecy of, 153, 155; severity of, 150; techniques of, 150–53; “water cure,” 151–52
- Thomson, Judith Jarvis, 182–83
- thought experiments. *See* hypothetical examples; ticking bomb case
- ticking bomb case, 14–15, 25, 31–32, 53, 177–94, 195–203, 205–7, 209, 212–19, 225, 246–48, 250. *See also* hypothetical examples
- Timerman, Jacobo, 70–71, 83
- torture: accountability for, 312; under Alien Tort Statute, 337; alternatives to, 170; anathema to law, 272; in ancient Rome, 105–19; banned in Lieber code, 130; as betrayal of social bond, 45–46; bodily integrity and, 280, 282; boot camp as inspiration for, 91; casuistry in, 266; complexity of, 44; corrupting influence of, 167–68; cost-benefit analysis of, 21, 32; as crime of universal jurisdiction, 338; cultural differences and, 48–50; definition of, 17, 122–23, 259, 261–68; dehumanization and, 25, 31, 53–57; as dirty fighting, 221–22, 228–30; distinguished from pain, 264, 268; domination and, 25; effect on third parties, 50–52; effect on torturers 22, 31, 53–59, 168; effect on the will, 25, 82–86, 268, 275–76; efficacy of, 6, 12, 111, 114–18, 165–66, 169, 185–91, 311; endurance of, 10–11; ethics of, 137–39, 177–254; European opposition to, 318; guilt and innocence and, 197, 200, 215–18, 227; history of, 1; human rights and, 50; to induce repentance, 116–17; institutions and, 7–8; international law and, 125; interrogational, 11, 106–19, 178, 188–89, 192; justifications for, 222–30; Latin-American opposition to, 318–19; lawsuits over, 303–4; lawyers and, 258–59; masculinity and, 49; as means of war, 5–6, 231, 234–54; by military contractors, 331; necessity of institutionalizing in practice, 188–89; overwhelms resistance, 77; police use of, 231, 245; pornography and, 95, 99; prevalence of, 59, 123; propensity to,

- 55–56; psychology of, 8–11; public attitudes toward, 313; as punishment, 211, 231, 247, 277; as self-defense, 202–3, 214–16, 223–26, 228–30; sexism and, 11; social domination and, 50; soldiers' perceptions of, 121, 134–36, 141, 144; state institutions and, 287–89; tendency to proliferate, 166–69, 186n24, 187–89; terrorism and, 45, 227–28, 230; toll on caregivers, 51–52; in 2016 US election campaign, 4; US attitudes toward, 2, 21–22; US history of, 148–56; US law on, 122, 205–6, 208–9, 231–54; US reputation for, 248–50; use by France in Algeria, 1, 25; use by Israel, 167, 258; use by South Vietnam army, 134; use by US, 236, 245, 257; usefulness in counterinsurgency conflicts, 120–21, 128–29, 135–38, 142; vicarious traumatization, 52; waterboarding distinguished from, 3, 164, 301. *See also* third degree; torture techniques; torture victims
- torture memos, 164, 301
- torture techniques, 133–34, 140, 146–47, 159–60, 251; “clean” torture, 168–69, 251; defecation, 83–84; feminization, 87–97, 102; forced-feeding, 84; “frequent flyer” program, 160–61, 316; invisible techniques, 160; sleep deprivation, 24–25; “water cure,” 133, 137–38; waterboarding, 4, 85, 140, 147, 207–8, 310
- Torture Victim Protection Act, 342
- torture victims, 9–10, 229, 317: effects of torture on, 45–50, 229, 246–47; individuality of, 44; prospects for recovery, 61–65; PTSD and, 46–48; as refugees, 60–61; resistance to torture, 23–25; treatment strategies for, 62–65
- torture warrants, 235, 285
- treason, 126
- Triple Canopy, 327
- Trump, Donald J., 4, 184n21
- Tushnet, Mark, 310, 313
- Ulpian, 113, 115, 117–18
- Umkhonto We Sizwe (Spear of the Nation), 23, 31
- unitary executive theory, 300
- United Kingdom, 318
- United States: conflicts with Native Americans, 123–24; embassy bombing in Dar es Salaam, 35–36; national security strategy, 298; sex equality in, 88, 101–2; Supreme Court, 39, 302, 304, 310, 334–35, 337; 2008 presidential campaign, 303. *See also* US Constitution; US justice system; US legal system; US military; war on terror
- Universal Code of Military Justice (UCMJ), 333–35, 340, 342; constitutional challenges to, 333–34
- Universal Declaration of Human Rights, UN, 59, 291
- universal jurisdiction, 295, 318–19
- University of Chicago, 21–22
- unlawful combatants. *See* combatants: lawful and unlawful
- UN Tribunals for Yugoslavia and Rwanda, 295
- Urbina, Ricardo, 328–29
- US Army Field Manual, 123, 169–71
- US Constitution, 260, 265, 269, 272, 274–80; constitutional law, 314; Eighth Amendment, 276–77, 285–86, Fifth Amendment, 278–81, 285–86, 328; political constitution, 310; presidential powers, 269
- US justice system: loss of confidence in, 155; social reformers and, 156–57
- US legal system: extraterritorial jurisdiction, 301; place of torture in, 259
- US military: as cultural practice, 136, 144–45; justice system, 333; treatment of POWs by, 127–28, 130–31, 133, 138–39; unlawful conduct of, 127, 131–32, 137–40
- US Revolutionary War. *See* US War for Independence
- US War for Independence, 123, 125–26, 128
- Vandeveld, Darrel, 316
- Verres, 107, 117–18
- Vietnam war, 10, 12, 72, 120, 123–24, 133–35, 137, 139, 245; torture in, 133–34, 137, 139. *See also* lawfare, Vietnam and

- Virginia Military Institute, 88, 96  
 Voltaire, 1  
 von Metzler, Jakob, 226–27
- Waiting for the Barbarians* (Coetzee), 197  
 Waldron, Jeremy, 16–17, 237–38  
 Wali, Abdul, 331  
 Walzer, Michael, 198–99  
 war, 213; permissible means of, 221;  
     preventive, 208. *See also* just war theory;  
     killing in war; torture: as means of war  
 War Crimes Act, 310, 326, 332, 342  
 Ward, Wynona, 80  
 War of 1812 (US), 123, 125  
 war on terror, 2–3, 11–13, 16–18, 56–58,  
     66–68, 87–100, 120–21, 123–24,  
     138–42, 146–48, 159–69, 171–74,  
     243, 257–60, 263, 286–87, 295–96,  
     301–35, 338–40, 343–44; differences  
     from criminal justice, 162–63; parallels  
     to third degree, 159–65; secrecy and,  
     163; use of torture in, 138–42, 146–48,  
     159–60, 164–65  
 Weber, Max, 275  
 Wickersham Report, 13, 155–56, 158, 172  
 WikiLeaks, 304–5  
 Willemse, Cornelius, 162  
 Williams, Kayla, 87, 97  
 Wittes, Benjamin, 299  
 World War I, 123, 126  
 World War II, 123, 126–28, 137; Japan in,  
     127; torture in, 127
- Yengeni, Tony, 33  
 Yoo, John, 2, 161, 258–59, 300, 305–7, 313
- Zakowski, Sandra G., 9  
 Zimbabwe, 37–38  
 Zimbardo, Philip, 54–56  
 Zubaydah, Abu, 169, 191