

## THE TORTURED LOGIC OF TORTURE

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May 31, 2005

In the October 2003 issue of *The Atlantic Monthly*, shortly before the public revelations of torture and abuse at Abu Ghraib, Mark Bowden contributed an extended and illuminating essay on torture, "The Dark Art of Interrogation."<sup>1</sup> Bowden claims that this dark art may well be the most vital weapon in America's current fight against terrorism.<sup>2</sup>

Early in the essay Bowden distinguishes between what he calls "the more severe traditional outrages" of torture, which involve extreme physical and mental abuse and are typically accompanied by lasting physical and mental injury or death, and what he calls "torture lite." The severe forms of abuse are torture, plain and simple. For the most part, Bowden accepts the view that such torture is morally forbidden. Torture lite, on the other hand, refers to forms of coercion involving moderate physical pressure that, Bowden claims, are designed to produce "life-saving information without doing lasting harm to anyone."<sup>3</sup> He views the moral status of various purportedly less extreme forms of coercion somewhat differently.

As Bowden explains, it is generally unnecessary for successful interrogators to resort to extremely brutal physical or psychological methods that are permanently debilitating. In fact, the most successful interrogators are practitioners of "torture lite." They are skilled manipulators who are able to exploit the peculiar interpersonal and intrapsychic dynamics of the torture situation to maximum advantage. It becomes clear from Bowden's descriptions, however, that torture lite, or coercion, is also a very serious and unpleasant business. It is likely to involve deception as well as the infliction of excruciating mental and physical distress. The alleged aim, after all, is to extract from human beings information that they are loathe to divulge. In the current context, most of the individuals from whom such information is sought by U.S. military and intelligence officials are viewed as known or suspected terrorists. From the perspective of the interrogator the information sought may be vital to save human lives, or to disrupt and terminate activities that pose real dangers to human security and welfare. From the perspective of the individual undergoing interrogation, however, the situation must look very different. If he or she is not in possession of any vital information, then there is no way to satisfy the interrogators, and the torture is likely to continue. If he or she is in possession of such vital information, then the divulging of it would represent a form of betrayal that will put other lives and the cause to which he or she is devoted at great risk. Indeed, such betrayal may also represent a fundamental loss of integrity. Coercion, or torture lite, is hardly morally benign.

It must be noted that the Geneva Convention, governing treatment of prisoners of war, makes no

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<sup>1</sup>Vol. 290, Issue 10, pp. 51-76

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distinction between torture and coercion. All mistreatment of prisoners is banned. Organizations like Amnesty International and Human Rights Watch likewise oppose all coercive treatment of other human beings. The United Nations Convention Against Torture explicitly prohibits torture, which it defines as follows:

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.

Moreover, the Convention calls upon its signatories to prevent “acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture.”<sup>4</sup>

While there appears to be a broad consensus of moral judgment against torture, consensus is clearly lacking regarding the moral justification for many of the purportedly less extreme forms of human coercion and manipulation, or what Bowden calls torture lite. The lack of such consensus is reflected in debates regarding what constitutes torture. Did anything that happened at Abu Ghraib rise—or sink—to the level of torture? Surely there was cruel mistreatment. In at least one instance it evidently resulted in death. Some of the perpetrators report that the abuses they inflicted on the prisoners were in keeping with instructions to “soften them up” for future interrogation. Are “stress positions” a form of torture? Is sleep deprivation torture?<sup>5</sup> What about water-boarding, the practice of strapping a prisoner to a board and submerging him under water till he is almost unconscious and thinks he is drowning?<sup>6</sup> I suspect that anyone undergoing such treatment finds it to be torture. Bush administration officials have of course been loathe to acknowledge the existence of such practices at places like Guantanamo Bay and Abu Ghraib. They have also been loathe to call such practices torture. Even the International Red Cross was less than definitive when it termed such practices “tantamount to torture.”<sup>7</sup>

The public discourse surrounding the disclosures of abusive practices at Guantanamo Bay, Abu Ghraib, and elsewhere, as well as the debate over the appointment of Alberto R. Gonzales as U.S. Attorney General, have done little to bring clarity or consensus to the question of the moral status of torture. It is one of those things that almost everyone professes to be against, yet it is also one

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<sup>4</sup>The definition of torture is found in Article 1; Article 16 calls for the prevention of cruel acts.

<sup>5</sup>Sleep deprivation is commonly thought to be a mild form of coercion compared to other more physically abusive techniques. In fact, however, it can be among the most unendurable of coercion techniques. See, e.g., John Conroy, *Unspeakable Acts, Ordinary People: the Dynamics of Torture* (University of California Press: Berkeley, 2000), 34.

<sup>6</sup>The practice is also sometimes called “the submarine.”

<sup>7</sup>The International Red Cross’ confidential report on prisoner treatment at Guantanamo Bay was first reported by *The New York Times* on November 30, 2004.

of those things we seem prepared to tolerate, either in “moderation” or in the most exceptional of circumstances.<sup>8</sup> It appears as if Bowden could still claim what he said in the concluding section of his 2003 essay, before the public debate about torture had become front page news:

The Bush administration has adopted exactly the right posture on the matter. Candor and consistency are not always public virtues. Torture is a crime against humanity, but coercion is an issue that is rightly handled with a wink, or even a touch of hypocrisy: it should be banned but also quietly practiced. Those who protest coercive methods will exaggerate their horrors, which is good: it generates a useful climate of fear. It is wise of the President to reiterate U.S. support for international agreements banning torture, and it is wise for American interrogators to employ whatever coercive methods work. It is also smart not to discuss the matter with anyone.<sup>9</sup>

Why has there not been a greater public outcry against U.S. interrogation practices? Why does the American public seem content with efforts to dispose of the matter by prosecuting a handful of lower level military personnel stationed at Abu Ghraib, while the architects of the policy that permitted and promoted aggressive and coercive interrogation measures, “tantamount to torture,” to be used against “detainees” and others suspected of anti-American and terrorist activity in Afghanistan, Iraq, and around the world, are not held accountable? Could it be that Bowden’s view represents majority opinion: torture, at least “torture lite,” is a necessary evil. It is one of the essential means to which nation-states must sometimes resort, in the interests of national security and human welfare, to “fight” the war on terrorism.

A peculiar ambivalence marks the thinking of a number of moral philosophers who have given sustained attention to the matter of torture. Almost everyone continues to argue against the legalization of torture. One notable exception is that of Harvard legal scholar Alan Dershowitz, who has argued for “torture warrants” as a highly restricted way of sanctioning torture in particular cases. Dershowitz claims that such warrants, functioning as legal preconditions to the infliction of torture, would increase political accountability and reduce the current hypocrisy and plausible deniability that mark U.S. torture practices.<sup>10</sup> For the most part, however, and despite that fact that torture is believed to be practiced by 150-some countries, torture is almost universally regarded as inhumane and morally wrong. On the other hand, there is great reluctance to conclude that torture is always and everywhere morally unjustifiable.

In his classic essay, “Torture”, philosopher Henry Shue explicitly called for strengthening international prohibitions against torture. Yet he conceded that torture might be justifiable in some rarefied but imaginable situations, and that an argument might conceivably be made that

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<sup>8</sup>Such is the burden of the argument in Eyal Press, “In Torture We Trust?”, *Nation* 276:12 (March 31, 2003), 11-14.

<sup>9</sup>Op. cit., 76

<sup>10</sup>Why Terrorism Works: Understanding the Threat, Responding to the Challenge (New Haven: Yale University Press, 2002).

would warrant exception to legal prohibitions.<sup>11</sup> David Sussman concludes his essay, “What’s Wrong with Torture?”, by posing the question whether moral objections to torture “could ever be overcome by legitimate military or punitive interests.” The answer, he claims, “waits upon more comprehensive understandings of the morality of punishment, warfare, and self-defense.”<sup>12</sup> Michael Walzer frames the issue rather differently, so far as law and morality are concerned, but to much the same effect. He refuses to regard torture as anything but wrong or immoral, but also allows that it may be “the best thing to do on the whole in the circumstances.”<sup>13</sup> Or, as Bowden rhetorically puts it, “Decent people everywhere agree on this: torture is evil and indefensible. But is it always?”<sup>14</sup>

The lack of moral clarity regarding torture is due in large part to the way in which it brings two competing moral theories into stark contrast and possible contradiction. This contrast and seeming contradiction is plainly evident in our competing moral sensibilities, which inform us on the one hand that it is morally wrong to torture any human being, while insinuating on the other hand that there are surely times when the forceful extraction of information from an enemy may be justified as the only means available to avoid a great harm. It would be difficult to imagine a more intractable moral confrontation between Kantian deontology and utilitarian consequentialism than is posed by the practice of torture.

In this article I have three objectives. The first is to revisit the question of the morality of torture. Is torture to be condemned, or not? And if so, is this condemnation to be restricted only to the most severe forms of physical and mental abuse, or does it also apply to many, most, or all forms of coercion that involve the intentional infliction of pain and distress for such purposes as extracting information or confessions that the person being tortured would not ordinarily be willing to provide? My second objective is to explore the justifiability of torture in its larger context. Here I want to examine the utilitarian arguments that are typically invoked to warrant actual practice. Just how compelling are these arguments? And what does the actual evidence regarding the practice of torture suggest? In particular, what are we to make of the evidence that many if not most of the prisoners in Guantanamo and Abu Ghraib have no known connections to al Qaeda or other terrorist groups. These and many others in undisclosed locations have been subject to terrible abuses without any legal recourse, and in the absence of any compelling reason for U.S. officials to believe that they possess secret information crucial to our national interests. It is one thing to advocate that aggressive interrogation methods be used against a known

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<sup>11</sup>“Torture,” *Philosophy and Public Affairs* 7:2 (Winter 1978), 143

<sup>12</sup>*Philosophy and Public Affairs* 33:1, Winter 2005, 1-33; citation from p. 33

<sup>13</sup>“Political Action: The Problem of Dirty Hands,” *Philosophy and Public Affairs* 2:2 (Winter 1973), 171; see especially pp. 166ff. Eyal Press (op. cit.) reports that moral philosopher Martha Nussbaum has taken a position that appears to me to fall in with these others. She wrote in an e-mail to *The Nation*, “I don’t think any sensible moral position would deny that there might be some imaginable situations in which torture [of a particular individual] is justified.”

<sup>14</sup>70.

terrorist. It is quite another to use such methods against persons for whom there may be some shred of suspicion, but no hard evidence, of terrorist connections. My third objective is to reflect on the morality of hypocrisy. Can it really be “wise,” as Bowden argues, for government officials to say one thing while practicing quite another when it comes to the use of coercive measures against persons suspected of harboring ill will and malignant intentions against the United States? Is such hypocrisy a virtue of statecraft, a cover for the pernicious exercise of imperial power, or an egregious breach of public trust and human decency?

## THE DEONTOLOGICAL CASE AGAINST TORTURE

Is torture always wrong? Or does our answer depend on how torture is defined? Let me first deal with the question of definition. Sussman begins his essay with the observation that torture seems to be universally morally condemned. What is it about torture, he asks, that accounts for this? Sussman undertakes a kind of phenomenological account of torture, which he wants to distinguish from what he calls coercion, on the one hand, and brainwashing, on the other.<sup>15</sup> Coercion, as he defines it, is a kind of hard bargaining that appeals to its victim’s rationality. It is not necessarily less severe in its effects than torture, however, for it may involve the infliction of excruciating pain and permanent injury. Brainwashing, which does not appeal to its victim’s rational judgment, tends to be distinguished by its psychological manipulations, and aims to induce the victim to “ultimately take up and identify with the will of another person.”<sup>16</sup> Placing torture somewhere between coercion and brainwashing, and seeing it as involving elements of both, Sussman proposes a view of torture that focuses on its interpersonal dynamics as well as its intrapsychic effects in compromising the individual’s experience and exercise of his or her own rational autonomy: “What is distinctive about torture is that it aims to manipulate its victims through their own responses, as agents, to the felt experience of their affects and emotions in a context of dependence, vulnerability, and disorientation”; “torture forces its victim into the position of colluding against himself through his own affects and emotions, so that he experiences himself as simultaneously powerless and yet actively complicit in his own violation. So construed, torture turns out to be not just an extreme form of cruelty, but the pre-eminent instance of a kind of forced self-betrayal.”<sup>17</sup>

In trying to locate what is uniquely objectionable about torture, in contradistinction to coercion or brainwashing, Sussman leaves the question of the moral status of these latter unexplored. He is clearly motivated, at least in part, by Kantian considerations. He wants to show, most particularly, how rational autonomy is fundamentally compromised by torture techniques that

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<sup>15</sup>Sussman’s nuanced account of torture is indebted to others who have described torture in a similar vein, e.g., Elaine Scarry, “The Structure of Torture,” *The Body in Pain* (New York: Oxford University Press, 1985), 27-59, and Jean Amery, “Torture,” in *Art from the Ashes*, ed. Lawrence L. Langer (New York: Oxford University Press, 1995); also John Conroy, op. cit. In his *Atlantic* essay, Bowden also describes many of the features that Sussman views as peculiar to torture.

<sup>16</sup>Op. cit., 9

<sup>17</sup>Op. cit., pp. 8, 4.

turn the torture victim against herself.<sup>18</sup>

Though I agree that there are interesting distinctions to be noted in method and effects among what Sussman calls torture, coercion, and brainwashing, I am inclined to see these three phenomena as three species of the same moral genus. Consequently, it lies beyond my purposes here to attend to the distinctions. What belongs to all three of these practices is the effort to overcome the will of the subject. In effect, each threatens to compromise the moral integrity of its victim. These practices may be distinguishable with respect to the degree of psychological manipulation employed, or the amount of intrapsychic conflict subjectively experienced by the victim, or the amount of physical force inflicted, but they are all ways of trying to twist and turn an individual into someone who will say and/or do what he or she would never freely will to say or do. If there are moral distinctions to be made among the members of this genus, and I am not sure there are, those distinctions must be based primarily on differences of degree or severity of physical and psychological harm to the individual rather than differences of kind.

For economy, then, I will not attempt to maintain any phenomenological or moral distinctions among torture, coercion, and brainwashing in the argument that follows. These will all be regarded as forms of torture. So, to return to the main question, is torture morally wrong? I will proceed as if this is a different question from that of whether torture is ever morally justifiable. In truth, it seems to me that—Shue and Walzer notwithstanding—if torture can ever be justified, then we cannot say without equivocation that it is always wrong. However, I will first attempt to provide a definitive answer to the question of the morality of torture from a deontological perspective.<sup>19</sup>

According to Kant, human beings are rational beings and, as such, are ends in themselves. Moreover, it is intrinsic to the nature of a rational being to possess an autonomous will, which is properly subject only to the exercise of reason. Consequently, in his second formulation of the categorical imperative, Kant declares that human beings are always to be treated as ends, never simply as means. One cannot reasonably conclude otherwise. Torture, under most definitions, clearly subverts the human will and treats human beings as means rather than ends. In Kantian perspective, we may tentatively conclude, most if not all torture is wrong.

But are there any important moral distinctions to be made here? And could there possibly be any exceptions to the judgment, on deontological grounds, that torture is wrong? Does it matter, for

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<sup>18</sup>However, Sussman seems inconsistent later in his essay when he takes up the matter of punitive torture, or what was known in medieval times as the ordeal. He wants to claim that the ordeal subjects the subject to the same kind of psychic stresses as he has been describing regarding torture proper. But, as Sussman describes punitive torture, or the ordeal, it is hardly distinguishable in structure from what he has denoted as coercion. Perhaps the only difference is that as punishment it does not have any other purpose such as the extraction of information. Why that makes the ordeal a form of torture rather than of coercion, or why coercion (e.g., as a method of interrogation) may not also be considered a form of torture, remains unclear.

<sup>19</sup>The Christian maxim known as the Golden Rule, “Do to others as you would have them do to you,” might serve equally well for this purpose.

example, to what purpose torture is undertaken? Shue distinguishes between two major types of torture, interrogational and terroristic.<sup>20</sup> Bowden is preoccupied primarily with interrogational torture, that is, torture as a means to obtain valued information. Historically, torture has also been employed as a means of intimidation. It has been practiced as a policy of state terrorism. It has been used to obtain confessions of guilt. It has also been an expression of cruelty, sadistically inflicted by torturers for their own amusement. In all these instances, torture involves treating human beings merely as means to some other end, and must be judged immoral in Kantian perspective.

However, torture has also historically been employed by ecclesiastical authorities to coerce heretics to recant. It might be argued that in this case the person being tortured is not being treated simply as a means but also as an end. Torture as an antidote to heresy has been regarded as a severe form of mercy, directed toward the salvation of the errant misbeliever. Nonetheless, this kind of torture should not be regarded as a valid exception to the Kantian prohibition. Such use of torture to combat heresy and compel religious confession has deservedly been discredited and rejected within the modern world. It holds no claim for serious consideration in our contemporary situation. Any authentic confession of faith would now be widely held to require voluntary assent. Just as much “information” extracted under the duress of torture is false, provided only in hopes of ending the torture and alleviating the pain, so any recantation of heresy or any prescribed confession of faith coerced by torture can hardly be judged to be voluntary or genuine.

#### TORTURE AS PUNISHMENT

There remains one other form of torture that is not so easily dismissed on moral grounds. This is torture used as a form of punishment. To be sure, the United Nations Convention Against Torture includes in its definition of torture the infliction of severe pain and suffering for purposes of punishment. Nonetheless, one might argue that punitive torture could be countenanced within a Kantian perspective. Such torture might be regarded as a demand of justice. Certain legal notions of justice prescribe the exercise of varying degrees of coercion, or the infliction of varying degrees of pain and loss, to effect the just rule of law. It is often said that someone has been “brought to justice,” meaning that the person has had to pay, or been made to suffer appropriately, for his or her crimes. There is a widespread sensibility that wrongdoers must be punished if justice is to be done. Morally speaking, the main point here seems to be that punishment, in the words of Michael Walzer, “confirms and reinforces our sense that certain acts are wrong.”<sup>21</sup> Given the heinousness of their crimes, the tortured may be thought to be receiving their just deserts. Their punishment may be regarded as intrinsic to the maintenance of a just

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<sup>20</sup>Ibid.

<sup>21</sup>Op. cit., 177.

social order.<sup>22</sup>

Moreover, one might claim that punitive torture is not just for the sake of justice. Within certain theological or juridical perspectives, punitive torture has been commended for the sake of guilty sinners, or for the sake of their own souls.<sup>23</sup> A deontological argument could be made that torture as punishment is morally acceptable when it has in view the deliverance and redemption of the miscreant from his or her abominations. In more religious vernacular, torture may be justified as a form of purgation or chastisement. The religious idea of purgatory reflects this sensibility. At first blush, then, there is this one possible exception of punitive torture to the basic Kantian claim that all forms of torture of whatever degree of severity are proscribed by the moral imperative to treat all human beings as ends, not as means.<sup>24</sup>

From a deontological perspective in general, any argument regarding the rightness or justice of torture as a way of treating another human being would seem to be contingent upon at least two claims. First, the torture must be punitive in the sense that it is deserved and it must be necessary as an exercise in justice, essential to the maintenance of a just society. However, the moral grounds for torture will be much greater if one can also claim that the torture is for the good of the particular “victim.”<sup>25</sup> It will be immediately apparent, in framing the matter this way, that the subject of such torture cannot properly be regarded as a victim at all. Rather, the subject of justified torture must be someone who is the recipient of just punishment and, more importantly, one who is being chastised for his or her own good. Moreover, the torture must not involve the degradation of the individual human being, which is the principle reason Kant was opposed to torture. Additionally, there should be good reason to assume that the punishment will be efficacious in bringing the wrong-doer to repentance and reform. In this case, it is the act of

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<sup>22</sup>There is also a utilitarian argument for punishment, based on the view that punishment serves an important social function, and provides an important social benefit, as a deterrent to crime and immorality. I will not make any attempt here to assess the moral validity of this argument, but simply note that I believe the deterrent value of most punishment is highly over-rated.

<sup>23</sup>This is true even in recent times, as indicated by Mark Osiel’s account of the practice of torture in Argentina circa 1976-83: “Several priests in the military chaplaincy were present during torture sessions, encouraging victims to confess and collaborate, for the good of their souls.”; “The Mental State of Torturers: Argentina’s Dirty War,” in Sanford Levinson, editor, Torture: A Collection (Oxford University Press: New York, 2004), 133.

<sup>24</sup>I am not claiming that Kant himself would ever have approved of punitive torture! Kant’s views on punishment are not entirely clear, nor are they transparently consistent; it does seem clear both that he opposed torture as degrading treatment and that he endorsed punishment as an intrinsic requirement of justice. See Thomas E. Hill, Jr., “Wrongdoing, Desert, and Punishment,” in Human Welfare and Moral Worth: Kantian Perspectives (Oxford: Clarendon Press, 2002), 310-339.

<sup>25</sup>Kant rejected the view that punishment can be inflicted merely for the good of the individual (criminal), or for the good of civil society, insisting that it must always be inflicted “only because he has committed a crime,” but he did not rule out the prospect that it might have such beneficial effects. The existence of such beneficial effects, at least insofar as they redound to the individual, seem to me to strengthen the Kantian case for punishment, whether Kant thought so or not. See Hill’s citation from Kant’s The Metaphysics of Morals, op. cit., 230-31, n. 48.



torture itself that is judged to serve as a means for the sake of the good of the wrong-doer, as the instrument by which to accomplish his or her redemption. Only on these terms might one claim that the torture subject is not being instrumentalized, but is being treated as an end in him- or herself.<sup>26</sup>

I want to pause here simply to note how closely related are the ideas of punishment and torture. While torture is widely questioned and condemned, punishment is generally accepted as a necessary practice for the maintenance of a just society. There is constitutional proscription of “cruel and unusual punishment” in the United States,<sup>27</sup> but no proscription of punishment as such. Yet it is hard to identify any intrinsic difference between punishment and torture. To be sure, the word torture is largely reserved to refer to the intentional infliction of *intense* physical and/or mental pain. Moreover, as I will elaborate below, torture is most often justified instrumentally, in terms of its intended consequences. But the fundamental semantic difference between punishment and torture appears to lie in the implicit assumption that punishment, so long as it is not “cruel and unusual,” is an intrinsically just form of behavior, whereas torture is not. Punishment is the unfavorable and possibly harsh treatment of a human being that is typically seen as justified because it is justly deserved.<sup>28</sup> And because such punishment is justly deserved, it presumably requires no further justification. Torture, on the other hand, may or may not be justifiable, and—except to the extent that it is a form of punishment or chastisement—its possible justification must rest largely on other grounds.

This way of thinking about punishment, and about torture as punishment, is far more problematic than may first appear to be the case, and not just because it leaves us wondering how severe a punishment must be before it qualifies as torture. Consider the case of the serial rapist and killer, or the mass murderer. Assuming such an individual is not insane, would anyone contest the claim that such a person *deserves* punishment by death? Indeed, in many cases, death seems too light a punishment. Prolonged torture might seem to be more equal to the crime. At times, of course, it was the custom that those guilty of the most heinous crimes be publicly tortured to death.<sup>29</sup> Major religious traditions have long invoked the torments of hell to compensate for the deficiencies of temporal justice in regard to the punishment of the most heinous of crimes (and, sadly, many not so heinous as well). In any case, in my view there are persons whose heinous acts are such that they deserve to die, and who suffer no injustice by being put to death. In fact, the punishment of death is really insufficient as just retribution for their crime. However, that

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<sup>26</sup>Again, I am not claiming that Kant himself would find this line of thought congenial. He would doubtless object that the coercion of the human will is tantamount, *ipso facto*, to treating the human being as something other than, and therefore less than, a rational, autonomous, free being.

<sup>27</sup>The Eighth Amendment to the U.S. Constitution

<sup>28</sup>Again, I am disregarding the utilitarian case for punishment as a form of deterrence. Utilitarian arguments for punishment clearly fail the Kantian test that human beings are to be treated chiefly as ends rather than means.

<sup>29</sup>Cf. Michel Foucault, “Torture,” Discipline and Punish: The Birth of the Prison, trans. by Alan Sheridan (New York: Vintage Books Edition, Random House, 1979), 1-69

does not mean that it is just to put such persons to death!

Very briefly, there are two basic arguments for contesting the justice of capital punishment. Neither of these has much to do with the widely accepted argument that flaws in the human administration of justice are sufficient to justify proscribing capital punishment in order to avoid the killing of the innocent. The fact that capital punishment may some times be administered unjustly surely counts against the practice, but it does not of itself constitute a definitive argument against the justice of capital punishment as such. The first argument against capital punishment as such rests on the claim that ultimate justice, the justice that bears on life and death, belongs solely to God. The central claim here is that all life belongs to God, and that it is God's prerogative alone to give life, or to take it away. No government, nor even any religious community, yet alone any individual, may rightly exercise this prerogative on behalf of God. While I am strongly attracted to this argument, it does not constitute the primary basis for my own opposition to capital punishment.

The second argument against capital punishment rests upon the claim that justice, fully and adequately understood, cannot be reduced to a moral calculus of just deserts. There is a dynamic, transformative, creative justice that is greater than any justice on which we hold purchase. Rather than being a justice to which we may lay claim, it is a justice that lays claim to us and exercises claims upon us. This higher justice is infused with mercy and love. It is justice that envisions the future, and thus is not constrained by the past. It is not the justice that we are owed, but the justice that we owe one another. It is the justice that asks us to regard even the most miserable of human beings, not simply in terms of what they have done or failed to do, and thus in terms of what they deserve, but in terms of what and who they are and perhaps may yet become. It is a justice that obliges us to act, without retribution, and so far as possible, for the sake of the good of the other.

Now, there is no reason this argument against capital punishment cannot be broadened to encompass all forms of punishment. If the justice of one's treatment of another human being is not determined by the just deserts of that human being, but rather by the obligations that justice places upon oneself with respect to the treatment of others, then the whole notion of punishment, at least insofar as it has been justified on deontological grounds, must be challenged.<sup>30</sup> In whatever ways we are led to treat other human beings, whatever constraints we may judge to be fitting and necessary to place upon them, and even whatever pain we may countenance them to suffer, require some other justification than the claim that they are only receiving what they deserve.

What I mean to argue here is that the attempt to formulate a deontological justification of torture,

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<sup>30</sup>See the essays by Warren Quinn, C. S. Nino, and Jean Hampton in A. John Simmons, Marshall Cohen, Joshua Cohen, and Charles R. Beitz, editors, *Punishment: A Philosophy and Public Affairs Reader* (Princeton, NJ: Princeton University Press, 1995), for attempts to develop non-retributive bases for punishment. Although these essays are suggestive and contain ideas that might be appropriated to construct a theory of non-retributive justice, I find the continued use of the term *punishment* itself problematic.

even on the narrow grounds that equate it with justly deserved punishment, must be challenged. It must be challenged because the justice of punishment itself must be called into question. When one takes into consideration that punitive torture represents a particularly harsh form of punishment, the justification for such treatment of another human being is rendered even more questionable.

The argument I am making here is, admittedly, highly contestable.<sup>31</sup> It goes against the grain of most people's sensibilities to suggest that punishment merits no place in human relations. It may be only from a religious perspective that one can fathom and appreciate the wholesale rejection of the idea that justice demands punishment equal to, or fitting to, the crime. Yet it is a commonplace within some religions, at least, and certainly within Christianity, that God does not deal with human beings according to their offenses or sins. If everyone received what they deserved, in the traditional Christian view, they would be punished with eternal torments. However, God, who is righteous and just, forgives rather than punishes all who are granted salvation. One does not have to assent to the whole scheme of divine salvation, as elaborated in traditional Christianity, to recognize in this teaching a fundamental reconceptualization of the meaning of justice in human affairs. Conventional notions of punishment as "just deserts" do not do justice to the higher conception of justice that is expressed in Christian salvation teaching.

This is not the place to elaborate on the case against punishment, but two more points may be made on its behalf. The first point is to make clear that rejection of punishment does not mean rejection of accountability. Nor does it entail the rejection of constraints on human behavior. There are people whose dispositions and actions are such that they must be coercively constrained from doing harm to others. Wrong-doers must be held accountable for their actions and, where possible, required to make amends. But the simplistic notion that by being punished one may pay a debt to society, and its reciprocal claim, that the mere punishment of a wrong-doer accomplishes justice, must be challenged.

The second point is that the attempt to scale the magnitude of punishment to the magnitude of crime or wrong-doing, which seems to be a basic moral principle undergirding the practice of punishment, leads inexorably to the sanctioning of the worst forms of torture. There are some crimes so heinous that nothing short of the most heinous punishment, namely torture, can measure up to them. Without resort to torture, on this account, justice will not be done. Either torture must be *sanctioned and practiced* as a just form of punishment, or basic notions about

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<sup>31</sup>Although no consensus exists regarding *how* punishment is to be justified, there appear to be few who would join me in questioning *whether* it can be morally justified. See Simmons, et. al, Punishment. Christian theologian Jurgen Moltmann appears to be a notable exception. Using the term "penal atonement" to refer to the retributive notion of punishment, he writes, "Whoever opposes torture and its abolishment (sic) must also give up penal atonement and punishment as deterrence." It is clear in context that Moltmann's meaning requires the insertion of the word "supports" between "and" and "its" in this statement, which comes from his article, "The Tortured Christ," in Victoria Lee Erickson and Michelle Lim Jones, editors, Surviving Terror: Hope and Justice in a World of Violence (Brazos Press: Grand Rapids, Michigan, 2002), 260.

punishment must themselves be contested.<sup>32</sup> The constitutional prohibition against “cruel and unusual punishment” intimates but does not make transparent the incoherence in our current thinking about punishment. We want punishment that fits the crime, but only up to a point. That point is not fixed by any internal logic in the argument about the justice of punishment. Rather, that point is defined by widely shared, culturally variant, and historically changeable moral sensibilities regarding how far society should go in punishing offenders, no matter how serious the offense. The fact that we have such moral sensibilities, however inchoately understood, lends credence to my claim is that it is a mistake simply to equate the imposition of a justly deserved punishment with justice, fully and adequately understood. We would have no qualms about any forms of punishment, including severe forms of torture, if our only moral consideration in seeking justice were to fit the punishment to the crime.

In sum, I see no way, shape, or form in which torture of any degree of severity can be justified on deontological grounds. I agree with what I take to be the moral consensus regarding torture, namely that we must begin with the moral presumption against torture. In my view, this consensus is not as solid as might first appear, however. It is a consensus that exists in the face of widespread acceptance of retributive notions of human justice. Most people need no persuasion to assent to the justice of punishment. They balk only when what they perceive to be the punitive treatment of human beings shades over from punishment to torture. But there is no clear line to distinguish the one from the other. In fact, there is a current debate in the United States over whether the prolonged solitary confinement of a condemned, death-row prisoner is not tantamount to torture. Moreover, historically torture has been deliberately practiced as a form of punishment, usually reserved for the worst of criminals or sinners. It is not clear why punishment should be justified, while punitive torture should be proscribed, given the heinousness of some crimes of which human beings are capable and the fact that both punishment and punitive torture, when meted out in accordance with the magnitude of the offense committed, may be regarded as “just deserts.”

In any event, I regard my own view of the immorality of torture to be more stringent than that of others cited in this essay. I am not yet prepared to say that torture is always and everywhere *absolutely* wrong. However, clearly, and in accord with the almost universal consensus of thinking about torture, there is a strong moral presumption against the use of torture. For me, that presumption is just shy of constituting an absolute proscription of torture. An enormous burden of proof exists for those who would attempt to justify torture in the face of this presumption.

## CONSEQUENTIALIST CONCERNS

As already noted, the major challenge to an absolute moral prohibition of torture comes cloaked in utilitarian consequentialism. The central argument is that the wrong committed by torture, including the harm inflicted by torture, may be morally outweighed by the far greater harm to be

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<sup>32</sup>As per notes 21, 27, 25 & 30 above, deficiencies in the retributive view of punishment have led some moral philosophers to develop other rationales for punishment. Typically, these rationales regard the threat of punishment as a form of deterrence, and thereby needed as a means of protection from harmful behavior.

avoided. The most notorious form of this argument is the case of the ticking bomb. Suppose a terrorist has planted a nuclear bomb in a major urban center or strategic location, and that it is set to go off within a fixed and short period of time. The terrorist has been apprehended, and he is the only person who knows the location of the bomb. Surely it would be morally permissible to torture this terrorist in order to learn the location of the bomb and remove or disarm it before it wreaks horrendous death and destruction!

The problem with the scenario described is that it is highly artificial and improbable. How could anyone be sure there was a bomb? How could anyone be sure the person in custody is the terrorist who planted the bomb? How could anyone be confident that the terrorist would disclose the correct location in time for it to be removed or disarmed? If the terrorist really had planted a bomb, could he not engage in a ruse in order to delay his captors long enough for the bomb to detonate? Recent experience with so-called suicide bombers suggests, further, that threats of death and the use of potentially lethal methods of torture would fail, as he might be perfectly willing to sacrifice his own life rather than disclose the location of the bomb. Moreover, as Bowden and others note, most of the more effective forms of interrogational torture take time to be implemented effectively. One of the chief justifications that might be given for the resort to torture, the shortness of the time available before the bomb will detonate, is also one of the chief reasons why torture is not likely to be successful.

The problem with hypothetical cases is that they may rest on improbable or unrealistic assumptions, and give rise to arguments that rely heavily on speculations about human behavior that are far from the mark. So let us consider a real-life account of an interrogation that took place in a kind of ticking bomb situation. For many years the island nation of Sri Lanka has been wreaked by violence as the Tamil Tigers have fought against the Sri Lankan government. The Tigers have frequently employed terrorist tactics in a struggle that is said to have claimed the lives of over 60,000 people. A Sri Lankan army officer charged with fighting against the Tigers tells the story of the time when his unit apprehended three terrorists who were suspected of having planted a bomb somewhere in the capital city of Colombo. The bomb was set to go off later in the day. The three men were brought before the officer. He demanded that they tell him the location of the bomb. They refused. He ordered them again to tell him the bomb's location, warning that he would kill them if they withheld this information. They remained silent. The officer took his gun from his belt, pointed it at the head of one of the men, and shot him dead. The other two talked immediately, disclosing the location of the bomb, which was quickly found and defused before it could go off during the evening rush hour in a crowded railway station where it would have taken many lives.<sup>33</sup> What are we to make of this incident, morally speaking?

It could be argued that this is not a case of torture. The army officer shot one of the terrorists dead, he did not torture him. On the other hand, the threat of death, made all the more real by the shooting death of their compatriot, surely was experienced as a form of torture by the two

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<sup>33</sup>Recounted by Bruce Hoffman, to whom the officer told the story, in "A Nasty Business," *The Atlantic Monthly*, Vol. 289, Issue 1 (January 2002), 52.

surviving terrorists. The technique employed by the officer was evidently effective. Does that make the killing, along with the repeated death threats, morally justifiable?

We might first want to ask whether the same result could have been obtained by other means. It is not insignificant that the same army officer is reported to have said that there were other incidents when similarly recalcitrant terrorists were brought before him. They were trained to resist harsh and coercive measures. However, when a few drops of gasoline were flicked into a plastic bag that was placed over the terrorist's head and cinched tight, it did not take long to obtain from the terrorist the full details of any planned attack.<sup>34</sup> But if this was consistently the case, then why did the officer resort to killing one of the terrorists in the instance reported? Shooting a man dead hardly seems morally acceptable if the same result could be obtained with the gasoline in a bag technique. Of course, most other torture techniques would also appear to be unnecessary and therefore unjustifiable if the gasoline in a bag technique consistently yields desired results. On the other hand, if use of the gasoline in a bag technique is consistently effective in coercing from suspected terrorists information vital to saving other lives, then it is rather hard to argue against it in cases like that of the bomb planted in the Colombo railway station. The ticking bomb scenario may not be so hypothetical after all. For the moment I will not try to make any definitive judgment about the moral status of torture, e.g. by means of gasoline in a bag—in contradistinction to outright killing, e.g., by shooting one of three suspected terrorists dead—in the case of something like a ticking bomb.

It has become a commonplace in today's world, especially since the events of September 11, 2001, that torture may be a useful means of obtaining information from terrorists or enemy combatants for purposes of tracking down other terrorists or prosecuting a war against enemy forces. Purportedly, lives have been saved and are continuing to be saved by the resort to torture by U.S. military and intelligence forces in the Middle East. That is the burden of Mark Bowden's essay, and I suspect it is the reason why there has been no outright renunciation of interrogational practices by U.S. government officials and no massive public outcry against the obvious use of harsh interrogational procedures against prisoners allied with Saddam Hussein, the Taliban, and those suspected of al Qaeda or other terrorist connections.

Before taking a more thorough look at what appears to have been the result of U.S. policies regarding coercive interrogational procedures, most of which would probably fit Bowden's category of "torture lite," let us consider for a moment the utilitarian argument for torture abstracted from the messiness of actual historical events. The first thing to be said is that there is no clear qualitative distinction between the severest forms of torture and torture lite in a utilitarian perspective. If the aim of torture is to avoid some terrible harm, surely there are avoidable harms so great as to justify infliction of even the severest forms of torture, *assuming that in fact such forms of torture are necessary to obtain whatever result is essential to avoid the harms in question*. The primary moral limitations on torture, within a utilitarian perspective, are two: 1) the harm to be inflicted must not be so great as the harm to be avoided; 2) no greater harm

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<sup>34</sup>Ibid.

may be inflicted than is necessary. The second limitation may be viewed from two perspectives: a) torture may be used only to the extent that it is necessary and less harmful than any alternative; and b) torture may not be used beyond the point where it is sufficient. In other words, if there are other less harmful means of obtaining critical, harm-avoiding information, or some other demonstrably important result, or if such information or result may be obtained by lesser rather than more severe forms of torture, these other or lesser means must be employed. In addition, once the information or other result being sought has been obtained, no further torture may be employed.

Although the moral calculus may be fairly straightforward here, the application is hardly so.<sup>35</sup> The first difficulty is one that besets utilitarianism and consequentialist ethics in general, and that is the difficulty of actually assessing and somehow quantifying alternative consequences. For example, in any particular case of torture, it would be next to impossible to know *in advance* the value or importance of information that one might extract from a subject. Moreover, it would also be extraordinarily difficult to know just how much coercion, and of what type, would be sufficient to apply in order to obtain the desired result.<sup>36</sup> It would also be next to impossible to know in advance the extent of harm that would be permanently inflicted upon the tortured subject, even within known and prescribed limits in the application of the chosen methods of torture. Human beings vary widely in their capacities to endure pain and suffering, and in their capacities to recover from the physical and psychological injuries that torture inflicts.

It is often assumed that being tortured is less harmful than being killed. However, it is also generally presumed and empirically evident that hardly any individual is indefinitely able to endure the most skillful torture. Sooner or later virtually everyone will “break.”<sup>37</sup> Therefore, it should not be necessary to torture anyone to death in order to obtain the desired result. Moreover, if a torture subject dies, then he is no longer a potential source of information. The only value that may derive from his being tortured, in that case, may be the effect of his torture and death on others. The torture victim’s death may weaken the resolve of others, intimidate them, deter them, or have some other desired effect that is judged to be justifiable because it reduces possible future harms. Nonetheless, the death of the torture victim may be seen as a negative outcome, insofar as it is seldom if ever necessary. Indeed, the continued survival of the torture subject, and his continued subjection to torture, might conceivably be a greater form of

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<sup>35</sup>Henry Shue writes, “any complete argument for permitting instances of interrogational torture would have to include a full specification of all necessary conditions of a permissible instance, such as its serving a supremely important purpose (with criteria of importance), its being the least harmful means to that goal, its having a clearly defined and reachable endpoint, and so on. This would not be a simple matter”; *op. cit.*, 141.

<sup>36</sup>The Sri Lankan army officer’s report regarding the effectiveness of the gasoline in a bag technique, if true, would appear to refute this point. For the time being, however, I am taking the word of most writers on the subject of torture to the effect that there is no “magic bullet” when it comes to effective torture techniques.

<sup>37</sup>Bowden notes that “religious extremists are the hardest cases,” and that there are those rare individuals who cannot be broken; *op. cit.*, 64-65. It is not clear, however, whether no effective method exists for breaking such individuals, or whether the interrogators simply did not employ or have at their disposal an effective method.

intimidation or deterrence to others than his death.

This raises the possibility that, from the perspective of the torture victim, torture may be a fate worse than death. It is one thing for an individual to die, it is quite another for that individual to suffer the stripping away of his humanity. Moreover, it is one thing to kill a person, it is quite another to destroy that person. Prolonged and severe torture can destroy human beings without killing them. Indeed, it is difficult to imagine interrogational torture being successful, from the perspective of the torturer, without resulting in the permanent if not complete impairment of the torture victim. From the perspective of those who survive torture, the physical injuries of torture are seldom the worst of it. The emotional and psychological damages are much more difficult to live with. The torture victim is often incapable of regaining any semblance of a normal life.<sup>38</sup>

Torture assaults the individual at the core of his being. In addition to the permanent emotional and psychological damage that typically results, there is also the damage to the moral integrity and humanity of the individual. Consider what is demanded of the torture subject. It is not just information that his torturers demand, but information, the divulging of which most likely constitutes a fundamental betrayal. This betrayal is at one level a self-betrayal, as Sussman has noted. But the torture subject may also be coerced into betraying his country, his cause, his comrades, or his friends. The fact that his torturers may view his country as an enemy, his cause as unjust, his comrades as foes, and his friends as morally despicable, hardly mitigates the egregiousness of the betrayal that they demand of their subject. The more committed the torture subject is to his cause, the more loyal to his friends, the more devoted to his family, the more his betrayal will strike at the core of his identity. Unless he is a mercenary or an opportunist, his integrity may be shattered. He may never recover, and he will never be the same again. It must at least be argued, therefore, that a successful interrogational torture may inflict upon the torture subject a harm far greater than death. In any moral calculus of the consequences of torture, the magnitude of this harm must not be forgotten.

We have already seen that neither interrogational nor terroristic torture can be justified on Kantian grounds. Both exhibit a profound disrespect for the humanity or autonomy of the torture subject, treating him or her as a means rather than an end.<sup>39</sup> Arguments can be made on behalf of both interrogational and terroristic torture within a consequentialist perspective, however, although Bowden and most others who want to leave room for the possible justification of some forms of torture typically reject terroristic torture in any event. The problem with terroristic torture, besides violating basic Kantian moral sensibilities, is that it is virtually impossible to make a convincing case regarding any benefits or reductions in harm that it may produce. To what possible morally acceptable end might any legitimate authority or government engage in

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<sup>38</sup>Shue, for example, cites one Amnesty International group report that stated, “Undoubtedly the worst sequelae of torture were psychological and neurological”; *op. cit.*, 142, n. 17. Press (*op. cit.*) quotes from torture victim Jean Amery’s memoir, *At the Mind’s Limits*, “Whoever has succumbed to torture can no longer feel at home in the world.”

<sup>39</sup>Cf. Sussman, *op. cit.*, 13.



terrorizing some portion of its citizens? What evidence is there that torture may actually serve as a deterrent to behaviors that threaten great harm?<sup>40</sup> Torture as an instrument of state terror may temporarily quell dissent and opposition, and thus contribute a measure of order, stability, and security to a particular society. One may think here of Iraq under Saddam Hussein, the Soviet Union under Stalin, or China under Mao. However, the resulting society is hardly one whose virtues we would extol. State terrorism ultimately corrupts and undermines the very social order that it seeks to maintain. Terroristic torture may also be practiced by groups seeking to subvert and undermine state power or social order. It may even be effective in achieving its aim. But it is hard to see where the long-term consequences of such an achievement represent an improvement in the human condition. Unless terrorism itself can be morally justified on consequentialist grounds (for it certainly cannot be justified on Kantian grounds), one cannot even begin to make an argument justifying terroristic torture.<sup>41</sup> Even if terrorism can sometimes be justified, that hardly means that terroristic torture is either necessary or justifiable. In my view, in the absence of a convincing case for the morality of terrorism there can certainly be no moral justification for terroristic torture.

Thus, if any form of torture is to be justified on consequentialist grounds, it would appear to be interrogational torture. However, interrogational torture, by its very nature, cannot be justified even on consequentialist grounds if it cannot be reasonably expected to achieve its intended result. And, in order for it to achieve that result, it must coerce the torture subject to the point that he or she can no longer resist the betrayal of self and others. Discussions about the severity of coercion or harm necessary to qualify as torture become especially ambiguous and possibly moot in this light. Does the measure of severity reside in the amount of coercion to which an individual is subjected, or in the degree of physical and psychological abuse, or in some quantifiable measure of distress or pain? Or is that severity rather to be measured by the fact that it has been sufficient to provoke a fundamental betrayal and its accompanying loss of integrity? I doubt that the question can be definitively answered. The point I wish to underline and reiterate is that there is no way to draw a clear moral distinction between torture, pure and simple, and some version of “torture lite.” To be sure, there are degrees of pain, degrees of coercion, degrees of stress, degrees of suffering, degrees of abuse, degrees of emotional and psychological damage, degrees physical injury—in short, there are degrees of torture. But it would seem that if any torture is to be justified, it must be on consequentialist grounds. That means the torture must be successful in achieving its purpose. The one purpose that seems most valid is the obtaining of information that would prevent or mitigate grave future harms. There is this common price—the price of being “broken”—that every torture subject of a successful interrogational torture must

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<sup>40</sup>Cf. Eyal Press (op. cit.): “[N]o regime has ever quelled the hatred of its enemies by engaging in torture.”

<sup>41</sup>I am not suggesting that the idea of justifying terrorism is *prima facie* absurd. The sad fact is that certain forms of terrorism, for example the bombings of Hiroshima and Nagasaki, have been morally defended precisely on consequentialist grounds. Robert L. Phillips has argued that, ironically, the intellectual roots of modern terrorism lie in three peculiarly Western philosophical ideas, popular sovereignty, self-determination, and ethical consequentialism. Needless to say, these ideas function as rationales, or justifications, for various kinds of terrorist activity. See “The Roots of Terrorism,” *The Christian Century* (April 9, 1986), 355-357.

pay. Rare though they may be, it would seem that there are times when the value of information sought is so high that this does not seem to be an unreasonable price to demand someone to pay. In such times the infliction of interrogational torture, but only to whatever minimal extent necessary to obtain the valued information, could be said to be morally justifiable within a utilitarian perspective.

There are three reasons why we must finally reject this conclusion, however. The first is that, apart from the most exceptional of imagined circumstances, deontology should trump utilitarian consequentialism in the case of torture. This is simply to repeat the argument already made on Kantian grounds. It is intrinsically wrong to torture another human being. All of us can imagine to some extent what it might be like to be tortured. We have no difficulty recognizing the heinousness of such an act if we imagine it being perpetrated against ourselves. Can any of us imagine that such a moral outrage could be justified in terms of the value or benefit of the information it could yield? Can any one of us imagine that someone else could have such a claim to information he or she holds that it would be morally permissible for that someone to torture him or her for that information? I do not think so. On what grounds can we rightfully claim an exemption from torture that we are not willing to grant to others? The acceptability of torture requires a failure of moral imagination, a failure to identify with the torture subject, a failure to grant to the torture subject the same humanity one accords oneself. Indeed, “torture is—and has always been—a function not of brute sadism but of the willingness to view one’s enemies as something less than human.”<sup>42</sup> There would be little equivocation about what constitutes torture, and whether it would be permitted, if everyone who is uncertain about such matters would place himself or herself in the circumstances of the torture subject and ask, Would I experience what is being done to this other person as torture if done to me? Would I consider it possible to justify what is being done to this other person if done to me? I submit that the answer to the first question would generally be yes, and the answer to the second would be no.

The second reason why the attempt to formulate a general consequentialist justification of torture fails lies in the fact that it depends on an outcome that cannot be known before the fact. Only a “successful” interrogational torture can possibly be justified, but it is only in retrospect, never in prospect, that one can come to any judgment whether any torture was successful. One must not reason that because a particular act of torture proved to be successful in obtaining a desired and important result, therefore it was morally justifiable to undertake that act of torture before its outcome could be known. The Sri Lankan army officer had the good fortune, if one may use that term, to be right about the three terrorists suspected of planting a ticking bomb in the city of Colombo. But what if he had been wrong? Even if he could be certain that they were terrorists, he could not be certain there was a bomb. What if there was a bomb, but these men were, like many of today’s suicide bombers, willing to die for their cause? After shooting one man, would the officer have shot another? He dare not kill the third if he hoped to gain any vital information. How could he know whether all three men knew the location of the bomb? He might inadvertently spare the life of the only one of the terrorists who did not know the bomb’s

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<sup>42</sup>Press, op. cit.

location!

One can only imagine the exasperation of the army officer at this line of questioning. One can picture him responding, “You would just have to be there. You would just have no know, as I know, what these terrorists are like. You would just have to be familiar with what works and what doesn’t, so far as interrogation goes.” The officer may be right in this, but how are we to know? All we know is what he tells us, and what he tells us suggests that he could have obtained the same result without killing anyone, if only he had resorted to the gasoline in the bag technique. Fortunately, the real-life circumstances in which torture takes place, and arguments that are made for its justification, are highly alien to most of us. But just so, much of our thinking about torture remains unavoidably abstract and hypothetical.

Moreover, torture generally occurs ought of public sight, away from public scrutiny, under circumstances where it is next to impossible to obtain sufficient information of doubtless reliability regarding the facts of the situation to have any confidence in the claims of those who would argue for its justification.<sup>43</sup> Bowden observes, “if official and unofficial government reports are to be believed, the methods work.”<sup>44</sup> But are the reports to be believed? According to the Army Field Manual on Intelligence Interrogation, “The use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind is prohibited by law and is neither authorized nor condoned by the US Government. Experience indicates that the use of force is not necessary to gain the cooperation of sources for interrogation. Therefore, the use of force is a poor technique, as it yields unreliable results, may damage subsequent collection efforts, and can induce the source to say whatever he thinks the interrogator wants to hear.”<sup>45</sup> Where does this leave us? Given a general moral presumption against torture--which almost everyone seems to share--there are at least two circumstances that make it virtually impossible to provide convincing evidence to justify the resort to torture in prospect. The first is the inherent lack of knowledge regarding the likely outcome of any particular torture procedure. The second is the dearth of adequate information about torture practices and outcomes, subject to outside scrutiny and examination, that might substantiate that torture is a viable, effective, and reliable method of obtaining crucially vital information.<sup>46</sup> Consequentialist arguments to justify torture that rely on selected and undocumented accounts of particular and possibly isolated instances of

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<sup>43</sup>An Associated Press news story published April 25, 2005, reported the ouster of the top human rights investigator in Afghanistan. The report stated that Cherif Bassouni, a Chicago-based law professor and independent expert on human rights “has repeatedly criticized the U.S. military for detaining prisoners without trial and for barring almost all human-rights monitors from its prisons in the country.” Bassouni’s position was eliminated by the United Nations under pressure from the United States. *Bloomington Herald Times*, Bloomington, Indiana, A4

<sup>44</sup>Op. cit., 55

<sup>45</sup>FM34-52, Chapter 1, “Interrogation and the Interrogator: Prohibition Against Use of Force,” available @ <http://www.globalsecurity.org/intell/library/policy/army/fm/fm34-52/chapter1.htm>

<sup>46</sup>As noted by Sanford Levinson, “we really have no idea how reliable torture is as a way of obtaining information”; in “Contemplating Torture: An Introduction,” op. cit., 33

apparent success, rather than a complete accounting of the circumstances and outcomes of the practice, fail to pass the utilitarian test of the greater good, or the lesser harm.<sup>47</sup>

This brings us to the third reason for rejecting the utilitarian consequentialist case for torture, which rests on an important distinction between what may be true in a particular case and what may be true in general, or as a rule. As noted above, there may be the particular case in which it appears that the value of information obtained justifies the practice of interrogational torture. No doubt U.S. intelligence officials can point to particular instances in which they are persuaded that the use of torture has yielded important and favorable results in terms of information needed to avoid future harms. But the larger moral question persists, namely, what is the full extent of the torture that took place under the policies and practices that were instrumentally necessary to obtain this information? And what is the full extent of the harms that have resulted? There are no scientifically valid statistical studies that can be invoked to answer such questions. The secretive, illicit, non-public nature of torture makes it impossible to exercise critical scrutiny of the practice. However, it is patently obvious that torture is seldom if ever practiced on the sort of limited scale that would reflect a proximate adherence to the moral scruples advocated here.

#### TORTURE'S TANGLED WEB

The validity of these reasons for rejecting utilitarian justifications of torture will be illumined as we move from the theoretical to the empirical. Examination of some of the consequences of the actual practice of torture should be sufficient to dissolve the utilitarian case for interrogational torture. I have already noted the empirical and epistemological difficulties of all consequentialist ethics. It is generally difficult to know what is minimally required to obtain a desired result with respect to the content and value of the information sought, and at what cost to the tortured individual. Those problems aside, the resort to torture seems to bring with it a host of unintended consequences. As Sussman observes:

Politically, torture tends to become entrenched, ever-widening practice, progressively divorced from whatever legitimate aims it might have originally served. Torture that is resorted to as an emergency measure frequently becomes a permanent feature of a regime of terrorization for its actual and potential victims, an education in brutality for its perpetrators, and a corrosive that progressively dissolves the rule of law. The sophisticated utilitarian will also point to the typical inefficiencies and self-defeating effects of torture. Torture is a notoriously unreliable way of gathering intelligence . . . Torture is usually a counterproductive strategy of political control, undermining respect for legal authority and in the long run leaving a subject population more alienated and radicalized than cowed.<sup>48</sup>

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<sup>47</sup>Conroy's investigative research suggests that torture is in fact seldom an effective means of obtaining reliable and useful information of any importance; cf. *op. cit.*, 112ff.

<sup>48</sup>*Op. cit.*, 12. Andrew Sullivan, in the *New York Times Sunday Book Reviews*, corroborates this judgment, noting that torture, at least in the Abu Ghraib situation, yielded little if any useful information; "Atrocities in Plain Sight," January 23, 2005.

In a footnote, Sussman adds that torture “tends to erode any legal strictures imposed upon it.”<sup>49</sup>

U.S. citizens have seen how President George W. Bush and his Legal Counsel, Alberto Gonzales, have acted to exclude hundreds of “detainees” suspected of al Qaeda or Taliban connections from the protections of the Geneva Convention by labeling them “unlawful combatants” rather than “prisoners of war.” We have seen how Gonzales, in his 2002 memo to the President, described certain provisions of the Geneva Convention as “quaint” and “obsolete.” We have seen how U.S. officials have repudiated due process provisions regarding the treatment of prisoners by preventing their access to legal counsel. We have seen how the meaning of torture itself has been tortuously redefined in order to legitimate certain kinds of “enhanced interrogation techniques” that the U.S. administration refused to acknowledge as forms of torture. A March 2003 memorandum prepared by a Defense Department legal task force declared, among other things, that President Bush was not bound by either international treaty prohibiting torture or by federal anti-torture law because he had the authority as commander in chief to approve any technique needed to protect the nation’s security.<sup>50</sup> In all these ways existing legal strictures against torture have been subverted and circumvented in the name of national security.<sup>51</sup> Furthermore, once accepted as a limited and emergency measure, restrictions on torture tend to be relaxed, to the point that almost anyone becomes a potential victim.<sup>52</sup> The most poignant and relevant examples are those individuals rounded up by U.S. authorities after 9/11, in Afghanistan, in Iraq, in the United States and elsewhere, who have since been released and begun to tell their stories of

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<sup>49</sup>Ibid. The ruling is in direct contradiction to the Geneva Convention (1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 2.2), which states: “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.”

<sup>50</sup>“A Guide to the Memos on Torture,” *The New York Times*, @ <http://www.nytimes.com/ref/international/24MEMO-GUIDE.html>

<sup>51</sup>One of the most scathing attacks on the Bush administration’s torture policies appeared on the editorial page of the *Washington Post* on June 9, 2004. Responding to the latest revelations regarding legal opinions issuing from the Pentagon and the Justice Department, the Post editorialized: “According to copies leaked to several newspapers, they lay out a shocking and immoral set of justifications for torture. In a paper prepared last year under the direction of the Defense Department’s chief counsel, and first disclosed by the *Wall Street Journal*, the president of the United States was declared empowered to disregard U.S. and international law and order the torture of foreign prisoners. Moreover, interrogators following the president’s orders were declared immune from punishment. Torture itself was narrowly redefined, so that techniques that inflict pain and mental suffering could be deemed legal. All this was done as a prelude to the designation of 24 interrogation methods for foreign prisoners—the same techniques, now in use, that President Bush says are humane but refuses to disclose. There is no justification, legal or moral, for the judgments made by Mr. Bush’s political appointees at the Justice and Defense departments. There is the logic of criminal regimes, of dictatorships around the world that sanction torture on grounds of “national security.”

<sup>52</sup>Cf. Sussman, op. cit., p. 12, n. 18

unfounded arrest and subsequent torture.<sup>53</sup>

Sussman writes after the revelations of Abu Ghraib and the release of information documenting the erosion of U.S. policies against torture that opened the door to such abuses. His observations about the difficulties of implementing torture on a strictly limited basis may reflect actual U.S. experience. In any event, U.S. experience with torture since 9/11/2001 provides *prima facie* evidence that the acceptance of actual torture practices tends to erode the legal boundaries that might otherwise define the limits within which torture is arguably justifiable.<sup>54</sup> Moreover, the tendency is not only to become less discriminate regarding those who may be interrogationally tortured and the methods by which they may be tortured. The tendency is also to engage in torture that has little or nothing to do with obtaining highly valued information. As Shue observed long before the current debacle, “very few actual instances of torture are likely to fall entirely within the category of interrogational torture.”<sup>55</sup> What we have seen at Abu Grahib is a case in point. Whatever rationale there may have been for intelligence gathering, the abuses perpetrated there clearly had strong elements of sadism and, probably, extralegal punishment. The treatment of prisoners was counterproductive, divorced from any clear legal standards, and enormously damaging in terms of political impact. And it has become increasingly clear that those abuses are only the tip of the iceberg.

There are really two separate points to be made here against the view that interrogational torture

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<sup>53</sup>One of the most publicized of these is the case of Maher Arar, a Canadian citizen, who was detained by U.S. authorities at John F. Kennedy Airport in New York while flying home to Montreal. After 12 days of detention and interrogation he was escorted through Jordan to Syria, where he was tortured and kept in a rat-infested, grave-like cell for 10 months. Finally cleared by a Syrian court, he was sent back to Canada, never charged with any crime. Arar fell victim to a widespread U.S. practice called “extraordinary rendition,” a means by which U.S. authorities relocate suspected terrorists or criminals to other countries where they can be interrogationally tortured without the legal constraints and potential public scrutiny to which such treatment would be subject within the U.S. In his testimony to the 9-11 Commission, then-CIA director, George Tenet, acknowledged that even before September 11, 2001, the CIA had accomplished the rendition of many dozens of terrorists. Reported by Kareem Fahim, “The Invisible Men: Canadian inquiry may reveal CIA secrets on outsourcing torture,” *The Village Voice*, March 30, 2004; cf. Bob Herbert, “Torture, American Style,” *The New York Times*, February 11, 2005, and “It’s Called Torture,” *The New York Times*, February 28, 2005. Egypt, Morocco, Uzbekistan, and Jordan are other locations where the United States has reportedly been outsourcing torture. Fahim and Herbert are both indebted to Jane Mayer’s February 14, 2005, article in *The New Yorker*, “Outsourcing Torture; the secret history of America’s ‘extraordinary rendition’ program.” *The New York Times* gave extensive coverage to another case, that of Mamdouh Habib, an Australian citizen who was held as a terror suspect for 40 months, including a period of imprisonment and torture in Egypt, in an article by Raymond Bonner on February 13, 2005, titled, “Detainee Says He Was Tortured While in U.S. Custody.” See also Douglas Jehl and David Johnston, “Rule Change Lets C.I.A. Freely Send Suspects Abroad to Jails,” *The New York Times*, March 6, 2005. Needless to say, extraordinary rendition violates both American and international law.

<sup>54</sup>Even Bowden notes that the relaxation of strictures against torture had similar consequences in Israel after 1987, such that “the use of coercive methods [became] widespread in the Occupied Territories. It was estimated that more than two thirds of the Palestinians taken into custody were subjected to them”; 76.

<sup>55</sup>Op. cit., 134

can be justified. The first has to do with the failure to limit torture to those specific cases in which it might be credible to claim that information vital to avoidance of great harm is at stake. The second has to do with the plethora of negative unintended consequences that have resulted.

Writing in *The New York Times Sunday Book Review* in January 2005, Andrew Sullivan has commented:

What's notable about the incidents of torture and abuse is first, their common features, and second, their geographical reach. No one has any reason to believe any longer that these incidents were restricted to one prison near Baghdad. They were everywhere: from Guantanamo Bay to Afghanistan, Baghdad, Basra, Ramadi and Tikrit and, for all we know, in any number of hidden jails affecting "ghost detainees" kept from the purview of the Red Cross. They were committed by the Marines, the Army, the Military Police, Navy Seals, reservists, Special Forces and on and on. The use of hooding was ubiquitous; the same goes for forced nudity, sexual humiliation and brutal beatings; there are examples of rape and electric shocks. Many of the abuses seem specifically tailored to humiliate Arabs and Muslims, where horror at being exposed in public is a deep cultural artifact. . . . Almost all took place within prisons designed to collect intelligence, including, of course, Saddam Hussein's previous torture palace at Abu Ghraib and even the former Baathist secret police office in Basra.<sup>56</sup>

As the photographic evidence from Abu Ghraib first made clear, and as Sullivan observes, the extent and nature of the abuse and torture of prisoners held by U.S. military and intelligence officials and their surrogates has hardly been restricted to intelligence gathering. Much of the abuse is clearly sadistic. Much of it seems designed specifically to shock, humiliate, intimidate, and degrade. It is estimated by U.S. military personnel that 70-90% of those imprisoned at Guantanamo and Abu Ghraib had little or no connection to al Qaeda, the Taliban, the Saddam regime, or any terrorist organization. They just happened to be in the wrong place at the wrong time when U.S. forces were sweeping up suspected enemy combatants in Afghanistan and Iraq.<sup>57</sup> It is hard to fathom any moral justification for keeping them imprisoned all this time.

Criticism of U.S. interrogation policies and practices has come from within the ranks of the military as well outside. In September 2004 a group of eight retired admirals and generals wrote a letter to President Bush urging him to create an independent commission to investigate the problem of prisoner abuse from the top to the bottom of the command structure. In March 2005 Rear Adm. John Hutson and Brig. Gen. James Cullen talked with Bob Herbert of *The New York Times* about the content of that letter and their reasons for writing it. Emphasizing the wide scope of the problem, the letter noted the existence of "dozens of well-documented allegations of torture, abuse and otherwise questionable detention practices" involving prisoners in U.S.

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<sup>56</sup>"Atrocities in Plain Sight," January 23, 2005

<sup>57</sup>Cf., e.g., Mark Danner, *Torture and Truth: America, Abu Ghraib, and the War on Terror* (New York: The New York Review of Books, 2004); William Cavanaugh, "Taking exception: When torture becomes thinkable," *The Christian Century* (January 25, 2005), 9

custody. “These reports have implicated both U.S. military and intelligence agencies, ranging from junior enlisted members to senior command officials, as well as civilian contractors. . . . No fewer than a hundred criminal, military and administrative inquiries have been launched into apparently improper or unlawful U.S. practices related to detention and interrogation. Given the range of individuals and locations involved in these reports, it is simply no longer possible to view these allegations as a few instances of an isolated problem.”<sup>58</sup>

Moreover, it is clear that the severity of the torture and abuse has been greatly underplayed, and is hardly limited to a handful of exceptional circumstances. On March 16, 2005, the Associated Press reported that, according to government data, at least 108 people have died in American custody in Iraq and Afghanistan, most of them violently. While the 108 figure includes deaths attributed to natural causes, it is clear that the problem is not simply one of a few rogue soldiers indulging in sadistic abuse.<sup>59</sup> There are systemic issues here, issues regarding the consequences of a policy in which violent and morally repugnant means have been enlisted in the service of dubious ends.

The magnitude of the injustice that the U.S. administration is apparently willing to contemplate against Afghan, Iraqi, and other detainees whom it has labeled “unlawful combatants” is reflected not only in the abusive treatment and torture to which many of them have been subjected. As federal judge Joyce Hens Green of Washington, D.C., ruled on January 31, 2005, the Bush administration has been wrongly blocking Guantanamo detainees from legally contesting their detention. Judge Green ruled that the procedures provided in the Combatant Status Review Tribunal, created under orders by Deputy Defense Secretary Paul Wolfowitz, “fail to satisfy constitutional due process requirements in several respects.” Noting that the administration has asserted a right to detain Afghan, Iraqi, and other prisoners indefinitely, until it is determined they are no longer a threat to the United States, or that the “war on terrorism” is over, Judge Green wrote, “Indeed, the government cannot even articulate at this moment how it will determine when the war on terrorism has ended. The government has conceded that the war could last several generations, thereby making it possible, if not likely, that ‘enemy combatants’ will be subject to terms of life imprisonment at Guantanamo Bay.”<sup>60</sup>

Sadly, Judge Green does not exaggerate. As the Reuters news agency reported on January 3, 2005, “The Bush administration is planning for possible lifetime detention of suspected terrorists, including hundreds whom the government does not have enough evidence to charge in courts.” Administration plans come at the urging of the Pentagon and the C.I.A., as a permanent approach is needed for those detainees for whom there are no plans for release or transfer to other jurisdictions. According to Defense Department officials, the department has plans to ask

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<sup>58</sup>Cited by Herbert in “We Can’t Remain Silent,” *The New York Times*, April 1, 2005.

<sup>59</sup><http://www.cbsnews.com/stories/2005/03/16/terror/main680658.shtml>

<sup>60</sup>David Stout, “U.S. Denies Guantanamo Inmates’ Rights, Judge Says,” *The New York Times*, January 31, 2005.



Congress for \$32.1 million to build a 200-bed jail to hold detainees who are unlikely to be prosecuted by military tribunal due to lack of evidence. “The new prison, dubbed Camp 6, would allow inmates more comfort and freedom than they have now, and would be designed for prisoners the Government believes have no more intelligence to share.” Another proposal under consideration would involve transfer of large numbers of Afghan, Saudi, and Yemeni detainees from Guantanamo to U.S.-built jails in their home countries.<sup>61</sup>

Obviously, what is being contemplated for these detainees stands American jurisprudence on its head. The policy is clearly one of guilty until proven innocent, without due process, and with little or not opportunity to defend oneself. The default position is not to remain at liberty, but to be imprisoned for life, which is surely a cruel and unusual punishment for anyone never convicted of a crime. It is “tantamount to torture,” no matter how well the detainees are fed or how comfortably they are housed. But one must ask, what conceivable reason could there be for such lifetime detention? What would there be to fear from the release of these detainees and their return to their home countries? Of course, then many more reports could be made public regarding what has transpired within the walls at Guantanamo. Perhaps some of the detainees, even if innocent in the beginning, have become radicalized against the United States. Perhaps many are in such debilitated condition that the full horror of their treatment at the hands of U.S. authorities would be too great an ignominy for the U.S. to countenance at the hands of world opinion. The truth is, we do not know why U.S. authorities are prepared to perpetuate the egregious violations of human rights that have marked the Guantanamo Bay detentions.

Meanwhile, the Bush administration has continued to oppose greater limits on the use of torture by American intelligence officers. In August 2002 the Justice Department issued a legal opinion declaring that interrogation methods that stop short of pain “of an intensity akin to that which accompanies serious physical injury such as death or organ failure” are not to be considered torture, and are therefore allowable.<sup>62</sup> In 2004 proposed new restrictions were included in intelligence reform legislation that would have explicitly extended a prohibition of torture and inhumane treatment to intelligence officers. The legislation passed in the U.S. Senate, but the restrictions were scrapped by Congressional leaders in December 2004 at the urging of the White House. Consequently, despite an opinion issued in 2004 by deputy attorney general James B. Comey explicitly rejecting torture and adopting more restrictive standards to define it, there appears to be little or no substantive change in the administration’s policy and practice with respect to coercive and extreme interrogation methods.<sup>63</sup> So far as the administration is concerned, it has never sanctioned torture, and the methods of interrogation that it continues to

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<sup>61</sup>[http://www.heraldsun.news.com.au/common/story\\_page/0,5478,11835522%255E663,00.html](http://www.heraldsun.news.com.au/common/story_page/0,5478,11835522%255E663,00.html)

<sup>62</sup>Contained in the famous Bybee memo of August 1, 2002, authored by Jay S. Bybee, former assistant to Alberto Gonzales when he was head of the Office of Legal Counsel in the Justice Department. As of this writing, the entire memo is available on-line at <http://news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf>.

<sup>63</sup>Douglas Jehl and David Johnston, “White House Fought New Curbs on Interrogations, Officials Say,” *The New York Times*, January 13, 2005

employ for purposes of interrogation do not amount to torture. If there is any substantive change at all, it appears to be only with respect to who can engage in the more extreme measures of interrogation with impunity. As Douglas Jehl has reported, “By law, the White House is required to notify the House and Senate Intelligence Committees of all intelligence-gathering activities. But the White House has taken the stance that the secret detention program [run by the C.I.A.] is too sensitive to be described to any members other than the top Republican and Democrat on each panel.”<sup>64</sup> The bottom line is that while the Pentagon must now report to Congress on the methods it is using to conduct interrogations, Congress is currently able to exercise at most only nominal oversight of C.I.A. interrogations. Abuses of the sort that were exposed at Abu Ghraib may no longer be so widespread or tolerated, but there is every reason to think that official U.S. policy and practice continue to permit and promote interrogation methods that qualify as torture. This torture is surely being intentionally carried out by U.S. intelligence officials in the C.I.A.’s secret detention program and by unknown U.S. surrogates in the jails of a number of countries to which U.S. authorities continue to send terrorist suspects under the practice of extraordinary rendition.<sup>65</sup>

It is impossible at this juncture to assess the full political and moral significance of the resort to torture by U.S. authorities, under the Bush administration’s directives, in the wake of 9/11. We will be living with the repercussions of this betrayal of American ideals and violation of national and international law for a long time to come. Many would argue, nonetheless, that the resort to torture was the necessary and right thing to do under the circumstances. Many others, including many military officials, would argue that the end result has been to dishonor our country, including the great majority of those who serve in its armed forces. Military and civilian leaders alike worry that there will be a further price to pay due to our violations of the Geneva Convention and United Nations sanctions against torture. The standard the U.S. has set for the treatment of “unlawful combatants” may well come back to haunt us, if it becomes the standard by which U.S. military and civilian personnel are treated when they fall into the hands of our enemies. In all the public debate about the moral justifications for torture, it has too often been forgotten that international laws and treaties, and in particular international proscriptions against torture and inhumane treatment, exist not simply for the protection of our enemies, but for the protection of our own citizens from mistreatment at the hands of others. To be sure, such protections are hardly ironclad. But it would be foolhardy and presumptuous to suppose that they are of no consequence. A Manichean view of the world, in which all evil resides with our enemies and all virtue with ourselves, can hardly be maintained in the face of U.S. abuses, mistreatment, and systematic provision for interrogational torture. We must hope that not all of our current and future enemies are prepared to lower their standards regarding humane treatment

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<sup>64</sup>“White House Has Tightly Restricted Oversight of C.I.A. Detentions,” *The New York Times*, April 5, 2005

<sup>65</sup>Prohibited under Article 3 of the United Nations Convention Against Torture

and human rights.<sup>66</sup>

## WISDOM AND THE MORAL

In a world where torture remains a common if covert practice, a world increasingly susceptible to terrorist violence and potential catastrophe, does it really make sense to maintain a blanket condemnation of torture? In one respect, this question must clearly be answered in the affirmative. As the U.S. experience demonstrates, when restrictions and prohibitions against torture are relaxed, abuses for which there is no conceivable justification invariably follow. It does not seem possible to maintain a policy of strictly defined but legally sanctioned (or permitted) torture without opening the door to wanton forms of human abuse, mistreatment, and torture. But then, must we resign ourselves to moral and political hypocrisy? There is little that is all that new about Abu Ghraib and Guantanamo Bay in the history of U.S. intelligence gathering. As Bowden observes, “The history of interrogation by U.S. armed forces and spy agencies is one of giving lip service to international agreements while vigorously using coercion whenever circumstances seem to warrant it.”<sup>67</sup> Were it not for the invention of the digital camera, the current moral and political debate about torture might never have occurred. It took those awful pictures to sear our consciences, to move us as a people to consider our responsibility for some of the worst consequences of the policies and practices of our government. We invaded Iraq, so our leaders have since claimed, in order to topple a sadistic torturer. In the process we became torturers ourselves.

Precisely because torture is generally practiced in secret, shuttered from public scrutiny in all kinds of ways, we must ask whether it is beyond the reach of legal and moral constraint. Does it do any good to be morally opposed to torture? Can we hope someday to prevent the practice in fact as well as in law? Or must we, to the contrary, contemplate a future in which rogue terrorists or other enemies of the state are bound to present us someday with a real, live, ticking bomb scenario, the likes of which will require that our military and intelligence forces have honed their skills at interrogatory torture to the nth degree if some unimaginable catastrophe is to be

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<sup>66</sup>On January 26, 2002, then U.S. Secretary of State Colin Powell submitted a memorandum to the Counsel to the President and the Assistant to the President for National Security Affairs in which he outlined the following reasons why the United States might not want to take the position that the Geneva Convention did not apply to the Afghanistan conflict: “It will reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the law of war for our troops, both in this specific conflict and in general. It has a high cost in terms of negative international reaction, with immediate adverse consequences for our conduct of foreign policy. It will undermine public support among critical allies, making military cooperation more difficult to sustain. Europeans and others will likely have legal problems with extradition or other forms of cooperation in law enforcement, including bringing terrorists to justice. It may provoke some individual prosecutors to investigate and prosecute our officials and troops. It will make us more vulnerable to domestic and international legal challenge and deprives us of important legal options.” Cited by Katherine S. Mangan from The Torture Papers: The Road to Abu Ghraib (Cambridge University Press) in “Torture’s Paper Trail,” *The Chronicle of Higher Education*, January 21, 2005, A13. Subsequent events have surely confirmed that Powell knew what he was talking about.

<sup>67</sup>Op. cit., 72

avoided?<sup>68</sup> Must a very calculated discretion become the unspoken part of official U.S. policy regarding torture? That is to say, is Bowden right that we must publicly condemn torture as immoral, but wisely and discreetly continue to practice it when circumstances demand?

It should be transparent by now that I want to answer this question in the negative, but also that I do not want to appear to be the sentimental fool. Human beings are capable of such enormous evil that one dare not be sanguine about the efficacy of moral prohibitions against violence, terrorism, or torture. But one must also wonder whether the fearful effort to save ourselves from the rogue terrorist and his ticking bomb, poison gas, or deadly virus, does not threaten an even greater terror. Surely it is wishful thinking to believe that, in a free and open democratic society, it will ever be possible completely to insure our safety against worst designs of the most determined terrorist. Might we not risk destroying all that really matters most in civilization by our efforts to save it from destruction at the hands of others? Can we really believe that a free, open, democratic society can continue to flourish in tandem with a sustained, intentional, covert intelligence-gathering apparatus that is prepared to torture human beings in secret, without legal sanction, without legal recourse, indefinitely, out of fear and on the chance that they may provide some information that will diminish the risks to our physical security? In a society that knowingly tolerates, despite legal sanctions, the covert, unchecked, unofficially endorsed practice of torture, every citizen bears some responsibility. Every citizen is also a potential “detainee.”

How we think about torture, and what we are prepared to do about it, finally comes down to the question of the kind of world in which we want to live. It is hardly in our power to secure such a world for ourselves, but it is not beyond our power to orient ourselves one way rather than another, and to make some not insignificant gestures toward the world we want to inhabit. Even lip service, I would argue, is not a morally inconsequential act. It is hard to resist the influence of one’s own words, even when spoken without real conviction. To continue to speak against torture, and to continue to maintain in public and political life that torture is wrong, immoral, and never to be legally sanctioned or permitted, will have its effect on moral sensibilities. To say that torture is always wrong, and if possible to believe it, will serve as a restraint against any contrary impulses we may have to give it sanction or justification.

In short, it may be hypocrisy to condemn torture while equivocating over its meaning, as the Bush administration has done in its attempt to make some forms of torture permissible, but hypocrisy in this case seems preferable to an outright defense or allowance of torture. A more morally serious consideration of torture will lead us beyond such hypocrisy, however. In light of the foregoing argument, to condemn torture with genuine conviction, despite not knowing whether there might be some circumstance in which that conviction could be overruled, must be regarded as a moral obligation. It is a crucial gesture toward the creation of the sort of world that

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<sup>68</sup>I find it next to impossible to imagine a world in which there could simultaneously exist a universal and effective ban on the actual practice of torture for all but the most heinous of prospects, such as the ticking nuclear bomb scenario, along with the maintenance of a highly skilled but untested military or intelligence capability for the effective employment of interrogational torture in the rare instance when it might be the only means to extract information needed to prevent massive catastrophe.

must exist if human beings are not to be destroyed by turning against themselves. Torture entails self-destruction, for both the tortured and the torturer. It is not only the tortured, but also the torturer, who is driven by the dynamics of the torture situation to turn against self, to act in ways that consume and destroy his or her own humanity. We must remain unequivocal in our moral objection to torture.

If we do not wish to live in a fear-driven, security-obsessed, control-dominated world, there is the further obligation to take responsibility as citizens for the actions of our government. This means we must act in opposition to every effort to give sanctuary to the defenders and practitioners of torture in our military and intelligence-gathering communities. Psychological studies, like that of Philip Zimbardo, suggest that the great majority of us, if placed in the “right” circumstances, could be provoked to abuse, mistreat, and even torture our fellow human beings.<sup>69</sup> The low-ranking enlisted service personnel who have been singled out for prosecution in the Abu Ghraib scandal are hardly the only ones responsible for what happened there.<sup>70</sup> For one thing, we know that what happened there has also been happening in various other places. For another, the primary responsibility rests on the shoulders of those who created the policies that led to the indiscriminate imprisonment of the thousands who have been branded as unlawful combatants, most of whom have been held incommunicado and falsely treated as suspect terrorists and collaborators. Who knows how many of them have been horribly physically and psychologically abused by U.S. military and intelligence personnel and their surrogate interrogators.

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<sup>69</sup>For a slide-show of Prof. Zimbardo’s famous prison experiment in which college students role-playing as guards became abusive toward fellow students who were role-playing as prisoners see <http://www.prisonexp.org/>

<sup>70</sup>In a *New York Times* article on April 23, 2005 (“Four Top Officers Cleared by Army in Prison Abuses”), Eric Schmitt reported that an independent panel led by former Defense Secretary James R. Schlesinger concluded in August 2004 that Lt. General Ricardo S. Sanchez, the top U.S. commander in Iraq from June 2003 to July 2004, “had failed to make sure that his staff was dealing with Abu Ghraib’s problems.” The inquiry also found that General Sanchez’s deputy, Maj. Gen. Walter Wojdakowski, “failed to act quickly enough to make urgent requests to higher levels for more troops at the understaffed prison.” Schmitt also reported that an earlier Army investigation called the Kern-Fay-Jones report, “found that at one point General Sanchez approved the use of severe interrogation practices that led indirectly to some of the abuses.” However, the high-level Army investigation conducted by Army Inspector General, Lt. Gen. Stanley E. Green, at the request of the Senate Armed Services Committee cleared four of the Army’s top five officers overseeing prison policies and operations in Iraq of responsibility for the abuse of detainees there, including Maj. Gen. Barbara G. Fast and Col. Marc Warren, both of whom were more directly involved in overseeing detention policy and operations than Sanchez and Wojdakowski. Six other unnamed, top-ranking officials were also cleared of criminal allegations by General Green. Only Brig. Gen. Janis Karpinski, an Army Reserve officer who commanded the military police unit at the Abu Ghraib prison, was relieved of her command and given a written reprimand. Karpinski claims that she has been made a scapegoat for the failures of her superiors.

Both Karpinski and Ted Koppel state that her demotion by the Army was purportedly based on a three-year old shoplifting charge and an unexplained charge of “dereliction.” As reported by Ted Koppel, the Army’s Inspector General found that “no action or inaction on her part contributed to the abuse of detainees at Abu Ghraib” According to Karpinski, Gen. Geoffrey Miller, who came to Iraq from overseeing interrogation at Guantanamo Bay and who claimed to have the approval of Gen. Sanchez, planned to make Abu Ghraib “the center of interrogation in Iraq” when he introduced changes in military intelligence operations in those cell blocks at Abu Ghraib where the abuse and torture subsequently occurred (“Nightline,” aired on ABC Thursday, May 12, 2005).

To a considerable degree, perhaps a far greater degree than we imagine, we create the world in which we live. Acting on the presumption that we live in a dangerous world, inhabited by evil powers that are poised to harm us if we do not strike them down first, the Bush administration has helped to multiply and proliferate those very fearful elements of our world that it purportedly intended to destroy. The threat of terrorism has hardly diminished since the United States invaded Afghanistan to rout the Taliban. Hatred of America has spread, and Iraq has become a breeding ground for new strains of terrorism. Bin Laden remains at large and his stature has grown.

Our world is invariably in some measure a reflection of our own vision and self-understanding, our own fears and expectations. There is no doubt that, placed in the right conditions, provided the right conceptual framework, and given the right incentives, most human beings can be driven to abuse one another. Placed in other conditions, with different perspectives, and with other incentives, however, these same human beings can be motivated to treat one another with respect and dignity. We must be self-critical regarding the world we would envision, so as not to be Pollyannaish. But we must be no less self-critical regarding the world we conjure up in our fears. The challenge we face is not merely to act to counter the worries, fears, and claims of the would-be apologists for torture, but to propose a credible, constructive, alternative response to terrorism and other forms of violence by which we have come to feel threatened. Knowing that we have not seen the last of tragedy, violence, destruction, and war, and that the worst is probably still to come, we must nonetheless hearken to the angels of our better natures if we do not wish to become prisoners and victims of the demons that haunt our anxious souls.

In this essay I have not attempted to lay out a response to the perceived threats of terrorism and violence that trouble us today. Since 9/11, our nation has poured enormous energies and resources into its so-called war on terrorism. What if we, as a nation, had poured comparable energies and resources into reimagining our relations with peoples in other parts of the world, and reconstituting those relations on a more equitable, just, and cooperative basis? What if we had chosen primarily cultural, diplomatic, political, and economic rather than military means to address the apparent hatred and resentment that exists toward America in some parts of the world? What if we had sought true comity with other nations? What if we had conceived our security and freedom to reside in friendly relations and mutual interests, rather than the hegemonic exercise of power? My point is simply this, that we must have an alternative vision of what we hope and desire for the world to be if we are to take up the tasks of bringing such a world into being.

The practical challenges to be surmounted in changing the way people perceive, experience and respond to their world and one another are enormous. But before we can meet the challenges of creating a world in which torture could never be countenanced, we must be able to envision the possibility of such a world. If torture is unequivocally morally wrong, then it is part of our moral responsibility to envision a world in which torture could never be countenanced, and to gesture constantly toward that world in discourse and action.

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