

## DISABUSING OURSELVES OF TORTURE

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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> The claim is one that the current U.S. administration apparently shares.

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. The most successful interrogators, he would have us believe, 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 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 and their supporters. 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.

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

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The Geneva Convention, governing treatment of prisoners of war, makes no 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 legal and moral judgment against torture, consensus is clearly lacking regarding the moral justification for many 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> Surely anyone subjected to such treatment finds it to be torture. Bush administration officials have been loathe to acknowledge the existence of such practices at places like 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>

Neither the public discourse surrounding the disclosures of abusive practices at Abu Ghraib, Guantanamo, and Bagram, Afghanistan, nor the debate over the appointment of Alberto R. Gonzales as U.S. Attorney General, nor the recent Senate action to prohibit “cruel, inhuman or

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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.

degrading treatment” of U.S. prisoners has done much to clarify or bring consensus to the question of the moral status of torture. For a long time President George W. Bush and his administration managed fairly successfully to finesse the issue by claiming, on the one hand, that the U.S. was opposed to torture and did not engage in it, while insisting, on the other hand, that the emergency war powers of the President authorize him to make unilateral decisions in the name of national security, e.g., that the detainees apprehended in the “war on terror” are not prisoners of war and therefore fall outside the protections of the Geneva Conventions. As appalling as the Abu Ghraib and subsequent abuse disclosures were, they did not lead to an immediate political response. The U.S. administration and the U.S. military treated the incidents reported at these facilities as aberrations, resulting largely from the misconduct of a few soldiers without adequate supervision.

Gradually, however, word has gotten out that the abuse of detainees in U.S. military prisons has been widespread and systemic. Some of the stories of former detainees have been told. The International Red Cross, Human Rights Watch, Amnesty International, and other organizations have reported findings implicating branches of the U.S. government and the military in widespread abuses. The American Civil Liberties Union has published documentation of autopsy and death reports of individuals apprehended in Iraq and Afghanistan, many of whom died during or after interrogations at the hands of their U.S. captors.<sup>8</sup> Brig. Gen. Janis Karpinski, the only high-level military leader held accountable for the abuses at Abu Ghraib, has gone public with her own account of the involvement of her senior military commanders and Secretary of Defense, Donald Rumsfeld, in authorizing the harsh treatment of prisoners thought to possess valuable intelligence information. As reported by Human Rights Watch, U.S. Army Captain Ian Fishback, who has served two combat missions in Iraq and Afghanistan, has testified that U.S. military commanders directed and condoned the abuses of Abu Ghraib. Fishback’s superiors repeatedly turned a deaf ear to his complaints regarding prisoner abuses, but he finally gained a hearing—from U.S. Senator John McCain. With the U.S. Senate’s recent endorsement of Sen. John McCain’s amendment that would prohibit “cruel, inhuman or degrading treatment” of detainees in U.S. custody, there now appears to be an increasing public support for the U.S. to back away from policies that have authorized or permitted U.S. interrogators to employ techniques that clearly fall outside the bounds of what is permitted by the Geneva Conventions and the Convention Against Torture.

It is not clear to me, however, that there has been a fundamental shift in public attitudes about torture. It is clear that recent disclosures have sullied the reputation of the United States in the eyes of the world. It is also clear that many military leaders worry that the abandonment of international standards against torture and prisoner abuse have ominous implications with respect to how captured U.S. military personnel might expect to be treated at the hands of their enemies. And it is clear that most Americans disapprove of the treatment to which many U.S. detainees have been subjected. It is not clear what most Americans would say, however, about torture as a method of interrogation of bona fide terrorists known to possess information judged to be vital to

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<sup>8</sup>The report is accessible at <http://action.aclu.org/torturefoia/released/102405/>

U.S. security interests.

Only a few months ago, the situation seemed to be one in which hardly anyone was prepared to defend torture, yet the general public seemed prepared to tolerate it, either in “moderation” or in the most exceptional of circumstances.<sup>9</sup> Until recently Bowden probably could have still claimed 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>10</sup>

Why was there not a greater public outcry against U.S. interrogation practices *before* it became so patently obvious that American interests and prestige were being seriously undermined by growing awareness of the egregious disparities between our anti-torture rhetoric and actual torture practices? Why was the American public not outraged by 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,” were not—and still are not—being held accountable? Could it be that Bowden’s view represents majority opinion: torture, at least torture lite, is a necessary evil? Is some level of torture essential as a practice to which nation-states must sometimes resort, in the interests of national security and human welfare, to “fight” the war on terrorism?

## TORTURE IN CURRENT MORAL DISCOURSE

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>11</sup> For the most part, however, and despite that fact that torture is believed to be practiced in over 100 countries, torture is almost universally

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<sup>9</sup>See, e.g., Eyal Press, “In Torture We Trust?”, *Nation* 276:12 (March 31, 2003), 11-14.

<sup>10</sup>Op. cit., 76

<sup>11</sup>Why Terrorism Works: Understanding the Threat, Responding to the Challenge (New Haven: Yale University Press, 2002).

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 1978 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 would warrant exception to legal prohibitions.<sup>12</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>13</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>14</sup> As Bowden rhetorically puts it, “Decent people everywhere agree on this: torture is evil and indefensible. But is it always?”<sup>15</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 dispose us on the one hand to believe 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 available means 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 essay I assume the validity, for the most part, of the deontological case against torture. I find torture in all its forms to be morally wrong. Torture as a means of terrorism, and interrogational torture, both instrumentalize human beings in a morally disturbing way. It is easy to see that torture, so construed, violates the Kantian categorical imperative that requires human beings to be treated primarily as ends, not as means. It is less clear, however, whether torture as a form of punishment can be similarly proscribed. Kant advocated a retributivist view of

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<sup>12</sup>“Torture,” *Philosophy and Public Affairs* 7:2 (Winter 1978), 143

<sup>13</sup>*Philosophy and Public Affairs* 33:1, Winter 2005, 1-33; citation from p. 33

<sup>14</sup>“Political Action: The Problem of Dirty Hands,” *Philosophy and Public Affairs* 2:2 (Winter 1973), 171; see especially pp. 166ff. Reprinted in Sanford Levinson, editor, *Torture: A Collection* (Oxford University Press: New York, 2004, 61-75). 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>15</sup>70.

punishment, in keeping with the principle of *jus talionis*.<sup>16</sup> It is not immediately obvious why a retributivist construal of torture could not be invoked to justify the torture of those guilty of the most heinous crimes. Indeed, many Americans seem emotionally disposed to support the torturing of presumed terrorists precisely because terrorists are seen to be deserving of harsh, punishing treatment. I disagree vigorously with Kant's view of punishment, partly because I think it leads to the unwarranted justification of torture. However, I will not explore this line of thought here, inasmuch as the predominant moral justifications for torture in current public discourse are all framed in consequentialist terms.<sup>17</sup>

My primary intention here, then, is to examine the consequentialist case for torture in what are viewed as exceptional circumstances. Consequentialist arguments that seek to justify torture begin with the presumption that torture is ordinarily, if not absolutely, wrong. They assume a burden of argument right from the start. Torture itself is never a good thing. The question is whether there are circumstances when it can be said that, all things considered, torture is justified.

Can the case sometimes be made for torture? Although answering that question is my main objective, before concluding this essay I also want to reflect on the morality of hypocrisy. Can it really be "wise," as Bowden asserts, 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, or an egregious breach of public trust and human decency?

#### TORTURE: TO WHAT END?

The major argument against an absolute moral prohibition of torture is utilitarian in form. The central claim is that the wrong committed by torture, including the harm inflicted by torture, may

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<sup>16</sup>See the excerpt from Kant's *The Philosophy of Law*, Part II, in James Rachels, editor, *The Right Thing to Do: Basic Readings in Moral Philosophy*, (New York: McGraw-Hill, 1989), 233-236. Kant even says that the penal law is a categorical imperative (234).

<sup>17</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. These essays are suggestive and contain ideas that might be appropriated to construct a theory of non-retributive justice. However, I find the continued use of the term *punishment* itself problematic.

There is an incoherence in our current thinking about punishment that the constitutional prohibition against "cruel and unusual punishment" intimates but does not make transparent. We want punishment that fits the crime, but only 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 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.

be morally outweighed by the far greater harm to be avoided. I will argue that this claim is unsupported.

Are there any important moral distinctions to be made regarding methods of torture? Some methods are evidently more cruel and damaging than others. Therefore, it would seem intuitively obvious that some methods are morally worse than others. This may be true within certain contexts, but I will argue that the moral distinction Bowden makes between torture and torture lite does not hold up for interrogational torture.

A more salient distinction can be made regarding types of torture. It does matter, I believe, to what purpose torture is undertaken. In terms of their purposes or rationales, we may distinguish among at least five types of torture. These may be designated as punitive torture, inquisitional torture, sadism, terroristic torture, and interrogational torture. Any actual instance of torture is likely to consist of more than one of these types. Nonetheless, as indicated above, I am setting aside the question of punitive torture in this essay. I also want to set aside inquisitional torture, that is, torture used to obtain confession of guilt, to force repudiation of heresy, or to coerce confession of loyalty or belief. I will ignore sadistic torture as well. In my view, neither inquisitional torture nor sadism deserves serious moral consideration. In any event, current public discussion about torture focuses mainly on terroristic and interrogational torture, and predominantly on the latter.<sup>18</sup>

As noted above, 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>19</sup> Arguments have been made on behalf of both interrogational and terroristic torture within a consequentialist perspective, however. Let us first consider terroristic torture. Despite its widespread existence, I hope some brief observations will be sufficient here to indicate why there is little reason to think this type of torture is ever morally justifiable.

Historically, terroristic torture has often been employed as an instrument of political repression and practiced as part of a policy of state terrorism. Terroristic torture continues to be practiced by all kinds of political regimes and nation-states even today. But to what possible morally acceptable end might any legitimate authority or government engage in terrorizing some portion of its citizens? Where is the convincing evidence that terroristic torture is a reliable way to produce great social benefits or reduce great social harms?<sup>20</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 thinks here of Iraq under Saddam Hussein, the

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<sup>18</sup>Terroristic and interrogational torture also happen to be the two main types treated by Henry Shue in his "Torture" essay.

<sup>19</sup>Cf. Sussman, *op. cit.*, 13.

<sup>20</sup>Cf. Eyal Press (*op. cit.*): "[N]o regime has ever quelled the hatred of its enemies by engaging in torture."

Soviet Union under Stalin, China under Mao, or any of several Latin American dictatorships of the last half-century. However, the resulting society is hardly one whose virtues we 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 sometimes 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. Even if terrorism might sometimes be justifiable, that would not make terroristic torture either necessary or justifiable. Without a convincing case for the morality of terrorism there can certainly be no moral justification for terroristic torture.<sup>21</sup> In any event, in light of the great preponderance of contemporary and horrific examples of terroristic torture, both by established regimes and subversive movements, the practice stands condemned.<sup>22</sup>

If any form of torture is to be justified on consequentialist grounds, it would appear to be interrogational torture, the type of torture that Bowden defends and others seek to justify. The most notorious of current arguments for possible justification of interrogational torture is presented in the form of the ticking bomb scenario. 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 hypothetical cases is that they often rest on improbable or unrealistic assumptions, and give rise to arguments that rely heavily on unfounded speculations about human behavior. I find it implausible that U.S. authorities will ever be confronted with such an extreme situation. For starters, how could anyone be sure there was a bomb, or that it was disarmable? How could anyone be sure of the identity of the terrorist who planted the bomb? What terrorist would disclose the correct location in time for it to be removed or disarmed? Any determined terrorist could surely engage in a ruse long enough for the bomb to detonate. Faced with the prospect of torture if caught, it seems more likely a terrorist would detonate the bomb on the spot. Recent experience with so-called suicide bombers suggests that threats of death and the use of

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<sup>21</sup>I am not suggesting that the idea of justifying terrorism itself 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, although I find these arguments unpersuasive. 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 proffered justifications, for various kinds of terrorist activity. See "The Roots of Terrorism," *The Christian Century* (April 9, 1986), 355-357.

<sup>22</sup>William Schultz, Executive Director of Amnesty International, writes, "Torture is of course extraordinarily common. Almost three-fourths of the world's countries practice it. But not to find ticking bombs. To punish political opponents. To intimidate their allies. To cow a citizenry"; "The Torturer's Apprentice," in *The Nation* 274:18 (May 13, 2002), 26.



potentially lethal methods of torture would fail, as the terrorist would rather die than jeopardize completion of the mission. Moreover, if Bowden and others are right, effective implementation of most forms of interrogational torture takes time. One of the chief justifications given for the resort to torture in such a dire situation, the shortness of the time available before the bomb's detonation, is also one of the chief reasons why torture would not likely be successful. It is also a commonplace that there is no single universally effective method of interrogational torture. Moral claims that the vaporization of a major U.S. city by a suitcase bomb would be worse than inflicting torture on terrorist bombers may be true! But posing the matter so starkly begs the question of whether torture could prove to be a viable means for preventing such an event. What terrorist organization sophisticated enough to produce a suitcase nuclear bomb would not take sophisticated measures to prevent its plans from being thwarted by the capture and torture of its members? The theoretical possibility that information derived from torture might someday make the difference in whether or not a nuclear bomb goes off seems so slim that the ticking bomb scenario simply does not merit the attention it continues to receive in moral reflections about torture.<sup>23</sup>

That scenario aside, it is widely assumed, especially since the events of September 11, 2001, that torture is 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 being 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. It is the primary reason given in justification of the interrogational practices of U.S. government officials. At the emotional level, terrorists are felt to be deserving of torture, while at the morally reflective level, torture seems justified as a means of interrogation of prisoners allied with Saddam Hussein, the Taliban, and those suspected of al Qaeda or other terrorist connections.

## DECONSTRUCTING THE UTILITARIAN CASE

Before taking a closer look at what appears to have resulted from U.S. policies regarding coercive interrogational procedures, most of which would probably fit Bowden's category of torture lite, let us consider the utilitarian argument for torture abstracted from the messiness of actual historical events. The first thing to observe 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 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

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<sup>23</sup>William Schultz comments, "The ticking bomb scenario in its purest form is a fantasy of 'moral' torture all too easily appropriated by tyrants as an excuse to justify the more mundane variety"; *ibid*.

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 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>24</sup> The first difficulty is one that besets utilitarian 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>25</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. 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>26</sup> Therefore, it is hardly necessary to torture anyone to death in order to obtain the desired result. Indeed, if a torture subject dies, then he is no longer a potential source of information. The only value that may result 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 must be seen as a negative outcome. Indeed, the continued survival of the torture subject, and his continued subjection to torture, might conceivably be a greater form of intimidation or deterrence to others than his death.

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<sup>24</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>25</sup>I accept 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. A rather different view is implied by Bruce Hoffman’s report of his conversations with an experienced torturer in “A Nasty Business,” *The Atlantic Monthly*, Vol. 289, Issue 1 (January 2002), 52, but I find what is reported to be somewhat inconsistent and not entirely credible.

<sup>26</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.

However, from the perspective of the torture victim, torture may be a fate worse than death.<sup>27</sup> It is one thing for an individual to die, it is quite another for that individual to be robbed 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>28</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 will never be the same again. It is quite plausible, therefore, that a successful interrogational torture inflicts 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.

Interrogational torture, by its very nature, cannot be justified even on consequentialist grounds if it cannot be reasonably expected to achieve its intended result. 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, 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

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<sup>27</sup>In fact, it is common for torture victims to hope and pray for death, and it is not uncommon for torture survivors to commit suicide later in life.

<sup>28</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. In his memoir, *At the Mind's Limits*, (New York: Schocken Books, 1990), p. 40, Jean Amery writes, "Whoever has succumbed to torture can no longer feel at home in the world. The shame of destruction cannot be erased. Trust in the world . . . will not be regained."

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 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 judged morally justifiable within a utilitarian perspective.

There are at least four reasons why we must finally reject this conclusion, however. The first is that, apart from the most exceptional of imagined circumstances, deontology should trump utilitarianism in the case of torture. This is simply to repeat the claim already made on Kantian grounds. It is intrinsically wrong to torture another human being.

The second reason why the attempt to formulate a general utilitarian justification of torture fails lies in the fact that it depends on an outcome that cannot be known, or even reliably anticipated, before the fact. Only a “successful” interrogational torture can possibly be justified, but only in retrospect, never in prospect, can one 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.

A third reason derives from the covert circumstances surrounding interrogational torture. The reported successes of torture must be viewed in critical perspective. In the first place, there is seldom any indication whether or not the information purportedly derived from interrogational torture could have been obtained by other means. Just because an act of torture has proven useful in providing helpful intelligence does not mean the torture was either necessary or less objectionable than some other means that might have been employed to obtain that information. Moreover, torture generally occurs out 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>29</sup> Bowden observes, “if official and unofficial government

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<sup>29</sup>A Newsday news story published April 25, 2005, in the *Edmonton Journal*, A8, reported the ouster of the top human rights investigator in Afghanistan. The report stated that Cherif Bassiouni, 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.” Bassiouni’s position was eliminated by the United Nations under pressure from the United States. It is also telling that this story appears to

reports are to be believed, the methods work.”<sup>30</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>31</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. One is the inherent uncertainty regarding the likely outcome of any particular torture procedure. The other 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>32</sup> Consequentialist arguments to justify torture that rely on selected and undocumented accounts of particular and possibly isolated instances of 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>33</sup>

This brings us to the fourth reason for rejecting the utilitarian 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 convinced that the use of torture has yielded important 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?* No scientifically valid statistical studies 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.

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have been published by very few U.S. newspapers.

<sup>30</sup>Op. cit., 55

<sup>31</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>32</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

<sup>33</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.

## 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 inherently impossible 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. Additionally, 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>34</sup>

In a footnote Sussman adds that torture “tends to erode any legal strictures imposed upon it.”<sup>35</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 refuses to acknowledge as forms of torture.<sup>36</sup> A March 2003 memorandum prepared by a Defense Department legal task force declared, among other things, that President Bush was not bound either by international treaty prohibiting torture or by federal anti-torture law because he had the authority as commander in chief to approve any technique

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<sup>34</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.

<sup>35</sup>Ibid.

<sup>36</sup>The British have their own term, “interrogation in depth,” for what others are now referring to as Highly Coercive Interrogation (HCI) techniques that they wish to characterize as less than torture.

needed to protect the nation's security.<sup>37</sup> In all these ways existing legal strictures against torture have been subverted and circumvented in the name of national security.<sup>38</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>39</sup> The most poignant and relevant examples are those individuals rounded up by U.S. authorities after 9/11, in Afghanistan, Iraq, the United States and elsewhere, who have since been released and begun to tell their stories of unfounded arrest and subsequent torture.<sup>40</sup>

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<sup>37</sup>"A Guide to the Memos on Torture," *The New York Times*, @ <http://www.nytimes.com/ref/international/24MEMO-GUIDE.html>. The ruling is in direct contradiction to the Geneva Convention (1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of 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>38</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. Theirs is the logic of criminal regimes, of dictatorships around the world that sanction torture on grounds of "national security."

<sup>39</sup>Cf. Sussman, op. cit., p. 12, n. 18

<sup>40</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

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 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>41</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>42</sup>

There are really two separate points to be made here against the view that interrogational torture 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 avoid 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>43</sup>

As the photographic evidence from Abu Ghraib first made clear, and as Sullivan observes, the

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American and international law.

<sup>41</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>42</sup>Op. cit., 134

<sup>43</sup>“Atrocities in Plain Sight.” More recent disclosures of deliberate desecration of the Qur’an corroborate this assessment.



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, punish, 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>44</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. 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>45</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>46</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 labeled “unlawful combatants” is reflected not only in

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<sup>44</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.

<sup>45</sup>Cited by Herbert in “We Can’t Remain Silent,” *The New York Times*, April 1, 2005.

<sup>46</sup><http://www.cbsnews.com/stories/2005/03/16/terror/main680658.shtml>. This report is corroborated by the October 24, 2005, report released by the ACLU documenting the autopsy and death reports of 44 individuals apprehended in Iraq and Afghanistan; cf. n. 5 above.

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>47</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 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>48</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.

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

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<sup>47</sup>David Stout, “U.S. Denies Guantanamo Inmates’ Rights, Judge Says,” *The New York Times*, January 31, 2005.

<sup>48</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)

torture, and are therefore allowable.<sup>49</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>50</sup> Most recently, the vigorous efforts of Vice President Cheney to dissuade Sen. McCain from offering his amendment to prohibit "cruel, inhuman or degrading" treatment of U.S. prisoners wherever they are held, in accordance with the U.S. Army Field Manual and the Geneva Conventions, Cheney's subsequent efforts to persuade McCain to insert language exempting the C.I.A. from this prohibition, and President Bush's threat to veto any bill containing the amendment, make perfectly clear this administration's belief in the efficacy of interrogational torture.<sup>51</sup> Meanwhile, the *Washington Post* reported on November 2, 2005, that the C.I.A. has been hiding and interrogating some of its more important terrorism suspects in "a covert prison system set up by the CIA nearly four years ago that at various times has included sites in eight different countries," including a Soviet-era compound in Eastern Europe and facilities in Thailand and Afghanistan. These "black sites" are known only to a handful of U.S. officials and, usually, only the president and a few top intelligence officers in each host country. "Virtually nothing is known about who is kept in the facilities, what interrogation methods are employed with them, or how decisions are made about whether they should be detained or for how long."<sup>52</sup>

Yet so far as the administration is concerned, it has never sanctioned torture, and the methods of interrogation that it continues to employ for purposes of interrogation do not amount to torture. If there has been any substantive change at all in interrogation practices, 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

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<sup>49</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>50</sup>Douglas Jehl and David Johnston, "White House Fought New Curbs on Interrogations, Officials Say," *The New York Times*, January 13, 2005

<sup>51</sup>The proposed exemption requested by Cheney would have stated that the measure "shall not apply with respect to clandestine counterterrorism operations conducted abroad, with respect to terrorists who are not citizens of the United States, that are carried out by an element of the United States government other than the Department of Defense and are consistent with the Constitution and laws of the United States and treaties to which the United States is a party, if the president determines that such operations are vital to the protection of the United States or its citizens from terrorist attack"; reported by Eric Schmitt, "White House Seeks Exception in Abuse Ban," *New York Times*, October 25, 2005.

<sup>52</sup>Dana Priest, "CIA Holds Terror Suspects in Secret Prisons," *Washington Post*, November 2, 2005, A1.

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>53</sup> The bottom line is that while the Pentagon must now report to Congress on the methods it uses to conduct interrogations, Congress is able to exercise at most only nominal oversight of C.I.A. interrogations. Abuses of the sort 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>54</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 seldom been noted 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. Admittedly, 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 and human rights.<sup>55</sup>

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<sup>53</sup>“White House Has Tightly Restricted Oversight of C.I.A. Detentions,” *The New York Times*, April 5, 2005

<sup>54</sup>Prohibited under Article 3 of the United Nations Convention Against Torture

<sup>55</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

## 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>56</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 averted?<sup>57</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?

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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 confirmed that Powell knew what he was talking about.

<sup>56</sup>Op. cit., 72

<sup>57</sup>It is inconceivable that 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* 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.

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 the fool. Human beings are capable of enormous evil. 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. 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 the worst designs of the most determined terrorists. But we run the risk of destroying all that really matters most in civilization by sanctioning inhumane measures to save it from destruction at the hands of others. Can we really believe that a free, open, democratic society can 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.”<sup>58</sup>

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 is not a morally inconsequential act. It is hard to resist the influence of one’s own words, even when spoken without 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, although it is hypocrisy to condemn torture while equivocating over its meaning, as the Bush administration has done in its attempt to make some methods of torture permissible, 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. 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 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

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<sup>58</sup>University of Minnesota Law Professor, Oren Gross, drawing on the British experience with Northern Ireland and the French experience in Algeria, observes: “One lesson that the experience of other countries can (and should) teach the United States and those who debate the issue of torture in interrogations of suspected terrorists is that such practices, once engaged in overseas, may well become part of the modus operandi at home”; “Is Torture Ever Justified?”, supplemental to PBS’s *Frontline* television program, “The Torture Question,” online @ <http://www.pbs.org/wgbh/pages/frontline/torture/justify/3.html>

consume and destroy his or her own humanity.<sup>59</sup> 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>60</sup> The low-ranking enlisted service personnel at Abu Ghraib who were singled out for prosecution are hardly the only ones responsible for what happened there. 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.

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. Iraqi authorities are now reported to be engaging in the same sorts of torture practices against their fellow citizens, the elimination of which has been advanced by U.S. authorities as a major justification for our invasion and occupation of Iraq. 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

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<sup>59</sup>One instance of this sad truth is told by Marian Blasberg and Anita Blasberg in “The Prisoner and the Guard: A Tale of Two Lives Destroyed by Abu Ghraib,” in *Der Spiegel*, September 26, 2005; online @ <http://service.spiegel.de/cache/international/spiegel/0,1518,377361,00.html>

<sup>60</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/>

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.