

# Some Unsettling Ethical Reflections on Interrogation

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In the wake of the 9/11 attacks, a view quickly developed within the U.S. government and much of the general public that at least some prior restraints on the conduct of intelligence and military personnel needed to be modified or even abandoned in order to obtain information that might be vital to preventing another devastating terrorist strike. Since then there have been many indications that U.S. government personnel—primarily Central Intelligence Agency (CIA) clandestine service officers but also military intelligence and special forces—were given permission to use more forceful and aggressive tactics than had previously been allowed, including interrogation methods intended to produce acute pain and fear, and renditions of detainees to countries notorious for using torture, all of which are problematic under international treaties, to say the least.<sup>1</sup>

Obviously, members of al-Qaeda and similar groups have treated American citizens and other innocent people in ruthless ways, and fully intend to do so in the future. What, then, is morally permissible for us to do in preventing them from carrying out their plans? Given (1) the global expressions of revulsion that accompanied the revelations of abuses at Abu Ghraib, (2) the overwhelming support in Congress for the Detainee Treatment Act of 2005, and (3) President Barack Obama's executive order of January 22, 2009, "Ensuring Lawful Interrogations," the question of torture might seem moot at this point. But there are some important lines of analysis that have yet to be sufficiently explored. And if the United States were to experience "another 9/11," the ethical questions would certainly arise again, and we'd need to be prepared to address them with solid facts, reflections, and arguments. A recent survey suggests that 49 percent of U.S. military personnel and 63 percent of the general public believe that it would at least occasionally be ethical to use torture against suspected terrorists.<sup>2</sup>

In what follows I will examine some empirical, nonconsequentialist (deontological), consequentialist (teleological), and character (aretaic) factors bearing on intelligence interrogation techniques, which often play a role in human intelligence (HUMINT). More specifically, this article will explore nonmoral questions about the effectiveness of torture in interrogations: (1) Does it ever “work” in the sense of producing accurate intelligence? (2) What does the law require? What have we pledged to do in relevant international treaties? (3) If the law were silent on torture, or if we were to reconsider our treaty obligations, how should we sort out the moral rights involved? Is a right not to be tortured absolute, or something less strict than that? (4) What would be the probable consequences of legalizing torture in intelligence interrogations? Would the likely harms from that outweigh its potential benefits?

I personally feel greatly ambivalent and torn about the contending moral considerations at stake here. But I concur with law professor Sanford Levinson’s sense of our urgent contemporary need to wrestle with the ethics of torture: “We are staring into an abyss, and no one can escape the necessity of a response.”<sup>3</sup>

## **Does Torture Ever Work?**

The empirical, nonmoral question of whether torture ever works as a method of intelligence interrogation is obviously important to the moral controversy, since if torture never worked then it would be silly to use it in HUMINT.<sup>4</sup> Unfortunately, experts seem to be divided on the empirical question of whether torture can be effective.

On the one hand, a legal historian concluded from a study of centuries of torture in Europe that it is a highly unreliable way of producing accurate confessions.<sup>5</sup> A CIA interrogation manual written in 1963 and declassified in 1997 also surmised, “Intense pain is quite likely to produce false confessions, concocted as a means of escaping from distress.”<sup>6</sup> The U.S. military and the Federal Bureau of Investigation (FBI) have taught their interrogators for decades that torture is not effective in eliciting truthful statements.<sup>7</sup> And recent experiments with volunteers on the effects of isolation and sensory deprivation (conditions forcibly inflicted on some of our country’s detainees since 9/11, but which don’t necessarily constitute torture per se) indicate that significant memory loss and suggestibility can occur after only forty-eight hours, meaning that statements made by



detainees subjected to such treatment are likely to be unreliable and misleading, even if they intend at that point to cooperate with their captors.<sup>8</sup>

A detailed memoir called *The Interrogators* (2004), written by a U.S. Army noncommissioned officer (NCO) who served in military intelligence in Afghanistan, suggests that the most reliable interrogation methods are those echoing classic police and detective work: building rapport with the subject to foster trust, offering incentives for cooperation, gathering independent evidence without the suspect's knowledge, identifying discrepancies between the suspect's story and the stories of his accomplices and other witnesses, deceiving the suspect into thinking you know more than you do, and catching the suspect in lies that he can't sustain.<sup>9</sup> Such methods can be effective even against committed terrorists, and have the added virtue of not crossing the line into torture.

On the other hand, the CIA interrogation manual suggests that physical coercion as well as sensory deprivation and verbal threats can sometimes be effective against a recalcitrant subject.<sup>10</sup> It also quotes a separate study indicating that "most people who are exposed to coercive procedures will talk and usually reveal some information that they might not have revealed otherwise."<sup>11</sup> In recent years the CIA sought legal authorization—quietly at first, but later openly—to use "enhanced interrogation techniques" (like "waterboarding" or simulated/controlled drowning) beyond those approved in military interrogation manuals, presumably because it believes such techniques to be effective in at least some cases.

The U.S. military also reportedly employs techniques that border on torture as well as cruel, degrading, and inhumane treatment in the Survival, Evasion, Resistance and Escape (SERE) training that it requires for some troops, indicating that the military believes them to be effective in "breaking" at least some detainees. Apparently those techniques were copied from ones used against American POWs during the wars in Korea and Vietnam. And at least some of the same techniques were adopted by U.S. interrogators at Guantanamo Bay in Cuba and in Afghanistan and Iraq, all with the authorization of senior civilian leaders and attorneys in the Department of Defense, the Department of Justice, the office of the vice president, and the CIA.<sup>12</sup>

Of course, "breaking" someone's will to resist doesn't necessarily mean that everything he says after that point will be trustworthy.

Indeed, the more acutely painful the torture is, the more likely the victim would be to say anything—including lies—to end the ordeal.

But there is some anecdotal evidence that torture can at least occasionally be effective in eliciting useful intelligence. A Sri Lankan army officer told Bruce Hoffman that torture induced some Tamil Tiger detainees to reveal details about planned terrorist acts.<sup>13</sup> Mark Bowden claims that torture enabled Lebanese and CIA officers to identify who blew up the U.S. Embassy in Beirut in 1983.<sup>14</sup> And Alan Dershowitz has argued,

The tragic reality is that torture sometimes works, much though many people wish it did not. There are numerous instances in which torture has produced . . . truthful information that was necessary to prevent harm to civilians. The *Washington Post* recounted a case from 1995 in which Philippine authorities tortured a terrorist into disclosing information that may have foiled plots to assassinate the pope and to crash eleven commercial airliners carrying approximately four thousand passengers into the Pacific Ocean. . . . It is precisely because torture sometimes does work and can sometimes prevent major disasters that . . . the U.S. government sometimes “renders” terrorist suspects to nations like Egypt and Jordan.<sup>15</sup>

Even if those reports are true, that obviously doesn’t prove that torture is reliable always or even most of the time. Like doctors who continue to use treatments they’re comfortable with well after they’ve been proven scientifically to be less effective than other treatments, some intelligence officers might persist in practicing torture due to laziness, lack of creativity, or willful ignorance of the relative advantages of more humane methods.<sup>16</sup>

But then *no* method of interrogation is guaranteed to work with every subject. And if intelligence personnel have already tried less questionable methods on a suspected terrorist without success, they might see torture as a last resort, a technique that might just work when other means have failed.

To me, it’s still an open question whether torture would ever be necessary, let alone more effective than humane interrogation methods, in producing timely and reliable intelligence. But apart from moral and legal concerns, it’s hard to see why any interrogator would want to deny herself a potentially useful HUMINT tool, especially if the stakes were very high and time were of the essence, as in a “ticking-bomb” situation or its analogues.

So, assuming that torture might at least occasionally work, what does the law require?



## Legal Restrictions on Coercive Interrogation

Since the law can sometimes permit or require unethical actions (e.g., racial discrimination under “Jim Crow” or South African apartheid), it can sometimes be ethical to break the law. But a *prima facie* obligation clearly exists to respect and obey laws that have been established by legitimate political bodies, as well as treaties ratified by representative governments.

Contemporary international treaties prohibit torture as well as inhumane and degrading treatment of detainees or prisoners. The prohibition stated in the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) is clear, comprehensive, and absolute. Torture is defined in the convention as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession.<sup>17</sup>

Moreover, the treaty permits no exceptions to its prohibition of torture, even for situations where government officials suspect that a detainee has information that could prevent the loss of many innocent lives. Hence, since the United States is a signatory to the CAT and during its ratification expressed no reservations about its absolute prohibition of torture, there is no basis for the opinion voiced by some Bush administration lawyers that waterboarding is legal for the CIA to use “under certain circumstances.”<sup>18</sup>

However, after 9/11 some of the president’s legal advisers claimed that Common Article 3 of the Geneva Conventions (which also forbids torture and inhumane treatment) did not apply to al-Qaeda suspects, a position President George W. Bush formally announced in February 2002. And some of those same legal advisers subsequently defined “torture” under the CAT in a ridiculously narrow way, and the president’s authority as commander in chief in a ludicrously expansive way, suggesting that in that role he has constitutional authority to override federal statutes. Apparently as a result, some interrogation techniques that were previously considered illegal were approved by senior U.S. officials, including stress positions, sleep deprivation, face slapping, removal of clothing, exposure to cold, waterboarding, and threats of death.<sup>19</sup>

Andrew McCarthy has argued that U.S. statutory law since 1994 categorically prohibits all forms of torture, with no exception for

intelligence interrogation.<sup>20</sup> And a highly detailed study of relevant laws and treaties noted that, in the U.S. government's own words to the UN Committee on Torture in 1999,

[e]very act constituting torture under the [Torture] Convention constitutes a criminal offense under the law of the United States. No official of the Government, federal, state or local, civilian or military, is authorized to commit or to instruct anyone else to commit torture . . . or other cruel, inhuman or degrading treatment . . . ([even] during a "state of public emergency. . .").<sup>21</sup>

However, that same study surmised that federal statutes didn't necessarily apply to U.S. detention centers outside of U.S. territory.<sup>22</sup> That may be the main reason why many terrorist suspects have been questioned at Guantanamo Bay in Cuba, Bagram Airfield in Afghanistan, and secret CIA detention centers, even though using such sites to evade U.S. law clearly contradicts the intent of the Torture Convention.<sup>23</sup>

In order to remove any ambiguities about U.S. obligations under the Geneva and Torture conventions, Congress enacted the Detainee Treatment Act of 2005. The point of that legislation was further reinforced in June 2006 by the Supreme Court in its ruling in *Hamdan v. Rumsfeld*. The White House was thus forced to accept (at least publicly)<sup>24</sup> that the Torture Convention and Common Article 3 of the Geneva Conventions do apply to the conflict with al-Qaeda, and that anyone detained by the United States anywhere in the world should not be subjected to cruel, inhuman, or degrading treatment.<sup>25</sup>

As a result, the U.S. Army's revised Field Manual (FM) 2-22.3, *Human Intelligence Collector Operations*, issued in September 2006, affirms the importance of respecting the Geneva Conventions and the Detainee Treatment Act, not only when questioning enemy prisoners of war but even when interrogating suspected insurgents and terrorists (categorized as "unlawful enemy combatants"). The manual also reminds army personnel that they can be prosecuted under the Uniform Code of Military Justice (UCMJ) for cruelty, assault, etc.<sup>26</sup>

Although FM 2-22.3 does not explicitly refer to the Torture Convention, its regulations appear to be consistent with it for the most part. (A separate military manual on counterinsurgency issued in December 2006 does cite that treaty specifically.)<sup>27</sup> In light of the notorious uses of beatings, sexual humiliations, and intimidating guard dogs that occurred at Abu Ghraib and elsewhere,<sup>28</sup> FM 2-22.3 specifically prohibits the following:



Forcing the detainee to be naked, perform sexual acts, or pose in a sexual manner. Placing hoods or sacks over the head of a detainee; using duct tape over the eyes. Applying beatings, electric shock, burns, or other forms of physical pain. "Waterboarding." Using military working dogs. Inducing hypothermia or heat injury. Conducting mock executions. Depriving the detainee of necessary food, water, or medical care.<sup>29</sup>

However, some of the interrogation techniques that are authorized elsewhere in FM 2-22.3 seem to be in tension with at least the spirit of the Geneva and Torture conventions. For example, sleep deprivation—which can disorient a resistant subject<sup>30</sup> and impair his ability to stick to a consistent story—is apparently permitted by the manual, within limits; detainees must be allowed at least "four hours of continuous sleep every 24 hours."<sup>31</sup> But there's no stipulation as to how many days such a regimen could legitimately be sustained; some reports indicate detainees to have undergone twenty-hour interrogations every day for many weeks in a row.<sup>32</sup> Prolonged sleep deprivation can actually be life threatening.

An additional army-approved approach, referred to as "Fear Up," involves identifying a preexisting fear or creating one in the source's mind, in order to link the reduction of that fear to his cooperation. The manual cautions, "The HUMINT collector must be extremely careful that he does not threaten or coerce a source" lest he violate the UCMJ.<sup>33</sup> But the line separating "Fear Up" from illegal threats is perilously thin (especially in regard to a "Fear Up Harsh" variant).<sup>34</sup>

Another method, termed "Pride and Ego Down," is "based on attacking the source's sense of personal worth. . . . In his attempt to redeem his pride, the source will usually involuntarily provide pertinent information in attempting to vindicate himself."<sup>35</sup> Although this technique is hard to distinguish clearly from treatment that would classify as degrading, FM 2-22.3 states candidly: "The HUMINT collector must remember that his goal is collecting information, not concern with the psychological well being of the source. He will be concerned with the latter only insofar as it helps him obtain the former."<sup>36</sup>

While neither "Fear Up" nor "Pride and Ego Down" would qualify as torture under the law, since they don't rise to the level of inflicting severe pain or suffering, they might well qualify as inhuman or degrading under both the Geneva and Torture conventions.

On the other hand, whatever U.S. law and military regulations currently permit or require, that obviously does not exhaust the moral issues at stake. Although the claim of some of the president's advisers that he may unilaterally override a treaty without the consent of the Senate<sup>37</sup> is highly dubious, in theory the president acting *with* the Senate could formally abrogate (annul) the CAT and other relevant treaties, if they concluded that strict adherence to them would endanger our nation's security. We might also imagine, hypothetically: What if the law were silent on torture? How should we construe the relevant moral concerns and sort out any conflicts among them? Those questions will be addressed in the remaining sections of this article.

### **Is a Moral Right Not to Be Tortured Absolute?**

Torture and other cruel, inhuman, or degrading treatment share the following essential characteristics: (1) an intentional infliction of suffering on another person (2) without that person's informed consent and (3) not intended to promote that person's welfare. The second condition is essential to distinguish cruelty from, say, painful medical experiments for which people might freely volunteer to undergo solely to help others. Condition 3 is needed to exclude painful medical treatments given to children or people with intellectual disabilities for their own good but without their informed consent, since they lack that capacity. But any actions characterized by all three conditions are *prima facie* immoral, because they are clearly in tension with moral principles basic to virtually every serious normative theory today: compassion or concern for the well-being of others (entailing nonmaleficence or "nonharm"), and respect for human autonomy, dignity, and equality. By implication, a right not to be tortured would seem to be among the most fundamental of human rights, possibly even stronger (as some have argued) than the right not to be killed.<sup>38</sup>

If a moral right not to be tortured were *absolute*, then there could be no legitimate exceptions to a rule against torture. This ethical stance is implied in the Geneva and Torture conventions, and explicitly affirmed by organizations like Amnesty International, Human Rights Watch, and many legal scholars and moral philosophers.<sup>39</sup> The U.S. military's 2006 *Counterinsurgency Manual* echoes that view: "Torture and cruel, inhuman and degrading treatment is never a morally permissible option, even if lives depend on gaining



information.”<sup>40</sup> Alberto Mora, a former general counsel to the U.S. Navy, was one of the earliest and most insistent voices inside the Bush administration opposing the adoption of harsh interrogation methods. In Senate testimony in June 2008, he attacked that decision publicly, in part on the basis of fundamental rights implied in the U.S. Constitution:

The United States was founded on the principle that every person—not just each citizen—possesses certain inalienable rights that no government, including our own, may violate. Among these rights is unquestionably the right to be free from cruel punishment or treatment, as is evidenced in part by the clear language of the Eighth Amendment and the constitutional jurisprudence of the Fifth and Fourteenth Amendments. If we can apply the policy of cruelty to detainees, it is only because our Founders were wrong about the scope of inalienable rights.<sup>41</sup>

An absolute right not to be tortured is especially compelling in light of the horrifying testimony of torture victims during the past century at the hands of ruthless dictatorships. We need to retain the sense of revulsion and terror that torture evokes, even while examining it philosophically.

Consider also the scope and significance of the *jus in bello* rule of noncombatant immunity: The underlying principle here is that people who pose no physical threat to others should not be harmed in war; this evinces the Latin root of the word “innocent,” i.e., nonthreatening. The principle of noncombatant immunity not only prohibits direct and intentional attacks on civilians; it also forbids harming soldiers who have either surrendered or been incapacitated by their wounds. Respect for this fragile principle might be seen as the most important way to prevent international conflicts from becoming total wars of annihilation, nothing more than a grim series of atrocities. So any step taken to qualify the complete prohibition on torturing detainees is very alarming in the context of military ethics and law. This is one reason why many military lawyers objected strenuously to the recommendations of Bush administration civilian legal advisers David Addington, John Yoo, Jay Bybee, William Haynes, Alberto Gonzales, and others to authorize harsh interrogation techniques.<sup>42</sup>

However, although it disturbs me to say this, I’m not convinced that torture in interrogation is necessarily or always immoral. This is because an absolute right not to be tortured would entail that nothing anyone might intentionally do to others—including actively

plotting mass murder—could justify torture, which strikes me as an absurd ethical stance.

Imagine that a senior member of al-Qaeda were arrested and refused to cooperate with his captors.<sup>43</sup> (Readers might imagine being the CIA officers in charge of interrogating notorious al-Qaeda operatives Abu Zubaydah, Ramzi bin al-Shibb, or Khalid Shaykh Muhammad soon after their capture.) In spite of his having instigated the murder of scores of innocent people—and more importantly, his probable involvement in planning many more killings—let's also imagine that he then were to claim an absolute right not to be tortured and demand to be treated accordingly. Ignoring for a moment the *legal* rights accorded to detainees under the Geneva and Torture conventions, I have great difficulty accepting the plausibility of absolute *moral* claims or demands made by people who have shown complete contempt for the basic rights and well-being of others, especially if they have knowledge of ongoing plans to commit mass murder.<sup>44</sup> I'm thus led to hypothesize that a moral right not to be tortured may be something less than absolute, that it might be more sensible to consider it a *prima facie* right instead, i.e., a right that is clearly established and usually ought to be upheld, but which can be trumped by other moral considerations under certain circumstances. Let me explain.

### **The Right Not to Be Tortured as *Prima Facie***

A *prima facie* right not to be tortured might be qualified in a couple of ways:

- a. Perhaps the right could be *overridden* by the rights of innocent persons not to be murdered, if torture were thought to be the only way to obtain information needed to prevent their murders. That sounds intuitively plausible, but it might also rationalize the torture of *innocent* people in order to save other innocents, which would be fundamentally unjust. Indeed, we would become no better than terrorists if we intentionally tortured the innocent, so I would strongly urge drawing a bright ethical line there.
- b. Alternatively, perhaps a moral right not to be tortured could be *forfeited*,<sup>45</sup> as in the case of captured al-Qaeda leaders. This would be similar to a deontological rationale for capital punishment: We rightly assume that every person has a *prima facie*



right not to be killed, but we might nonetheless also claim that even that basic right can be forfeited by individuals who commit murder or conspire to do so.<sup>46</sup>

Although torture in both (a) and (b) would be morally troubling to say the least, only in (b) would it not clearly be unjust. In other words, while torture would certainly *harm* an al-Qaeda leader, it wouldn't necessarily *wrong* him. (The same could be said of executing a murderer.) By contrast, torturing the innocent would *both* harm and wrong them.<sup>47</sup>

Thus, I contend, only those who could plausibly be said to have forfeited their right not to be tortured could legitimately be subject to that appalling treatment, and, I further stipulate, only if necessary to prevent serious harms to innocent persons, when more humane interrogation methods are highly unlikely to produce that result or have already failed.<sup>48</sup>

But concluding that someone has forfeited his right not to be tortured might seem to imply that there would be no moral limits on what their interrogators might be allowed to do. This is so disturbing, even regarding would-be mass murderers, that we must look more closely at the right in question and other ethical concerns beyond that.

Perhaps some rights can be forfeited in part but not wholly, to some extent but not completely. For example, when we send convicted criminals to prison, we intentionally deprive them of some of their rights, but not all of them. Even criminals sentenced to death are protected from "cruel and unusual punishment" under the Constitution, without any obvious logical, moral, or legal contradiction. Similarly, even if terrorists could not credibly claim moral immunity from torture entirely, they would presumably retain a *prima facie* right not to be subjected to all possible forms of torture, or to be tortured merely out of vengeance or spite, or to amuse their captors, or long after they could plausibly know any "actionable" intelligence.<sup>49</sup> (There is a parallel here to the *jus in bello* principle of proportionality.) Hence, even if torture were warranted in certain cases, it could not justifiably be conducted in utterly ruthless fashion.

There is another argument in favor of torturing suspected insurgents or terrorists that, in spite of being full of holes, needs to be addressed if only because many U.S. leaders accept it uncritically.<sup>50</sup> The argument goes something like this: (1) We force our own troops during SERE training to undergo severe physical and mental abuse

to enable them to resist such methods if captured in hostile territory like North Korea.<sup>51</sup> Since (2) we don't consider that unfair to our own troops, then (3) it's not unfair to treat enemy detainees any differently.

This argument is unsound. First, it assumes that the abuse that we force on our own soldiers is useful to them, that we need to torture them to enable them to resist torture in the future by their enemies, which is highly doubtful to me. Second, even if that empirical assumption were credible, at least our own troops "consent" in a general way to whatever training is deemed necessary by their superiors to prepare them for dangerous roles they've more or less freely chosen. No one outside of our military, least of all a captured foreign combatant, has even remotely consented to SERE-like abuse at our hands.

Techniques apparently authorized and used in SERE training include stress positions, waterboarding (at least in navy training), slapping of the face and abdomen, shoving heads against walls and onto floors, solitary confinement, cramped confinement, inducing exhaustion, sensory deprivation, sensory overload, sleep disruption, manipulation of diet, and "degradation." I'm personally very troubled that any of our troops are subjected to such treatment, even ostensibly for their own good. I worry as well about the potential moral corruption of the officers and NCOs expected (and trained!) to inflict such suffering and indignity on their comrades. Somewhat ironically, part of the stated rationale for those extremely harsh SERE methods is to reinforce the military code of conduct: more specifically, to help troops avoid giving up information that would betray other personnel, military plans, etc., and to help them "maintain dignity and honor."<sup>52</sup> But I find it hard to see how experiencing torture and degrading treatment at the hands of a fellow soldier could thereby teach the trainee any lessons about loyalty to country or devotion to comrades. On the contrary, it seems much more likely to induce alienation, mistrust, callousness, and cynicism about upholding high ethical standards.

Then again, I'm not an expert in the psychology of SERE training, and at least one PhD in clinical psychology who oversaw air force SERE training, Jerald Ogrisseg, told Congress that it can be very useful to trainees who subsequently experience interrogation by enemy captors. He also claimed that SERE trainees are given a phrase they can use to end the training whenever they might find it unbearable.<sup>53</sup> In theory that could minimize the degree of brutality experienced



(and inflicted), though trainees must surely feel compelled to endure as much as they possibly can, and most likely feel guilt and shame if they “break” or quit.

## Intelligence Officer Virtues and Vices

More than thirty years ago in Senate testimony, a CIA officer stated paradoxically, “This is such a dishonest business that only honest people can be in it.” He went on to say, “An intelligence officer . . . must be scrupulous and he must be moral . . . he must have personal integrity. . . . [He] must be particularly conscious of the moral element in intelligence operations.”<sup>54</sup> Another career CIA officer told me,

I have never seen the professional life of an intelligence officer as providing its own [separate] moral justification apart from fundamental ethical principles. Even [intelligence] tradecraft . . . can and should be made to conform to moral principles of decency, respect for individual rights, and consideration of the consequences of the action contemplated.<sup>55</sup>

Still another CIA officer assured me that high ethical standards play an important role in the evaluation and certification of clandestine service officers, who receive specialized tutorial training in ethical issues related to espionage, counterintelligence, and covert action.<sup>56</sup> I’m confident that when it comes to patriotism, courage, and selfless service, CIA officers exhibit those virtues as reliably as do our military personnel, physicians, nurses, police, and firefighters.

However, one of the professional skills uniquely required of intelligence officers (both civilian and military) who employ HUMINT is an ability to *manipulate* persons. The degree of manipulation can vary from the subtle blackmail threat latent in a financial relationship with an espionage agent to more obviously coercive measures. The element of control in intelligence operations is directly related to suspicion of the loyalty of the agent. Suspicion is a professional virtue for intelligence officers, especially those who work in security and counterintelligence, since in theory anyone thought to be trustworthy may in fact be secretly serving the enemy.

A CIA analyst wrote that the agency’s clandestine service officers (who recruit spies overseas) are “painstakingly trained in techniques that will convert an acquaintance into a submissive tool, to shred away his resistance and deflate his sense of self-worth.”<sup>57</sup> The practice of interrogation is a significant component of intelligence work,

but also illustrates manipulation in its rawest form. William Johnson, a former CIA counterintelligence officer, has offered a glimpse of the ethical risks involved:

Interrogation is such a dirty business that it should be done only by people of the cleanest character. Anyone with sadistic tendencies should not be in the business.<sup>58</sup>

We are reminded, though, of the ease with which people can come to rationalize callousness and cruelty in dealing with perceived enemies. Given the natural human capacity for aggression, combined with the wrong set of biases, incentives, and peer pressures, many ordinarily decent people can succumb to sadism or callous cruelty.

But torture is not necessarily something conducted solely by sadists. In the interrogation of terrorist suspects, for example, an intelligence officer might well be driven by the motive of preventing harm to innocent people. That officer might take no great pleasure in inflicting pain or fear, but nonetheless consider it a regrettable but necessary means of seeking enough details about a terrorist plot to nip it in the bud.

Johnson further stated, "The interrogator, like a priest or doctor, must have a talent for empathy, a personal need to communicate with other people, a concern for what makes other people tick even when he is putting maximum emotional pressure on them."<sup>59</sup> In everyday moral parlance, empathy is related to compassion. But in intelligence work, the other is considered to be a potential threat to persons and interests that the intelligence officer is sworn to protect. "Knowing one's enemy" in this role means understanding the other, but not in the interest of enhancing his or her freedom or well-being; on the contrary, empathy becomes a manipulative tool.

Would authorizing the torture of suspected terrorists, even with strict limits, inevitably corrupt the consciences and character of the personnel we asked to conduct it? There is something so obviously and intrinsically appalling about torture that anyone who hoped to remain a person of integrity—an admirable person—would not use more than the minimum degree of force necessary to obtain vital information. In other words, even if we could show that the person being interrogated had forfeited his right not to be tortured, an ethical interrogator would not consider that a "blank check." Then again, having the sort of compassion I would consider part of the "standard equipment" of a person of conscience might make a professional interrogator less effective than someone who was less



benevolent or who could train himself to suppress his compassion when questioning a detainee.

Consider what it would take to create a training program for personnel who would be authorized to conduct torture. Presumably we would be logically and practically compelled to authorize a broad range of “scientific” experiments on the relative effectiveness of various forms of torture in interrogation,<sup>60</sup> as well as psychological assessments to determine who among the group of prospective interrogators would be most effective at certain techniques. These projects might require the participation of medical doctors at various stages, which would represent an extreme departure from their core professional ethic of nonmaleficence.<sup>61</sup> The American Psychiatric Association has ruled that “psychiatrists should not participate in, or otherwise assist or facilitate, the commission of torture of any person.”<sup>62</sup> Similarly, while the American Medical Association permits its physician members to “perform physical and mental assessments of detainees,” it further specifies that “[t]reatment must never be conditional on a patient’s participation in an interrogation.” Moreover, “[p]hysicians must neither conduct nor directly participate in an interrogation, because a role as physician-interrogator undermines the physician’s role as healer.”<sup>63</sup>

Like medical doctors, some CIA and military interrogators themselves might object to being expected to employ torture,<sup>64</sup> seeing it to be a violation of their professional or personal ethic. No doubt this issue would generate heated debate among intelligence officers, and perhaps necessitate establishing a “conscience clause” to permit objectors to opt out. Although the claim that “Americans don’t torture, period,” was never comprehensively true, it clearly represents an important ideal or core value that many conscientious professionals would be unable to abandon.

However, Michael Skerker has suggested that the moral character of an interrogator trained and authorized to use coercive methods is under no greater risk than that of military personnel in special operations who learn to kill at close quarters with their bare hands.<sup>65</sup> In other words, Skerker implied, since special operators do not typically become murderers as a result of their training or missions, neither should we expect interrogators inevitably to lose their moral integrity. Then again, we might also expect interrogators who use torture to suffer post-traumatic stress disorder (PTSD) at least as frequently as soldiers who’ve killed in close combat, and we’ve learned from our ongoing conflicts in Afghanistan and Iraq that PTSD is

much more common (20 to 25 percent) among troops returning from combat than we previously imagined.<sup>66</sup> So this would also need to be counted among the probable costs of authorizing torture.

### **Other Potential Consequences of Legalizing Torture in HUMINT**

I must now acknowledge that my earlier example of the captured al-Qaeda leader, like the standard “ticking-bomb” scenario, assumes greater knowledge of the identities and intent of the subjects of interrogation than their captors typically have. In other words, allowing any torture in interrogation runs the risk in practice of subjecting entirely innocent people to horrific and wholly unjust suffering. Individuals are sometimes erroneously detained by counter-insurgency forces, for instance, as a result of false accusations made against them by fearful or resentful neighbors, or based on flimsy circumstantial evidence, or when rounded up for questioning with other locals to satisfy some arbitrary quota or misguided metric of productivity.<sup>67</sup> Anyone like me who questions whether a right not to be tortured is absolute must take into account the incredibly unjust harms to the innocent that could easily occur if the practice of torture were officially permitted at all.

In the end, I don’t believe it’s possible to eliminate the chance of accidentally torturing the innocent if interrogational torture were permitted legally, even if conducted by the most conscientious and skilled interrogators we have. Even one instance of that would be a horrific tragedy. But would it be possible to limit that risk significantly, short of a blanket prohibition? And if so, would that be morally acceptable, along the lines of the *jus in bello* rule of proportionality that permits indirect harms to noncombatants as long as they are not directly and intentionally targeted?

Alan Dershowitz has famously proposed requiring intelligence and law enforcement personnel to obtain a “torture warrant” (like a search warrant) from a judge before being allowed to use torture on a terrorist suspect. He argues that this would make the practice of torture—which he believes is inevitable—both more accountable and less frequent.<sup>68</sup> Andrew McCarthy has further suggested that judicial authorizations for torture would be more effectively regulated by means of a centralized “national security court,” a single tribunal made up of federal judges.<sup>69</sup>



Although the proposals of Dershowitz and McCarthy are clearly inconsistent with the Geneva and Torture conventions, I think that they're worth careful consideration. But they've provoked vociferous condemnation from many circles. Ethicist Jean Bethke Elshtain called Dershowitz's torture warrants "a stunningly bad idea,"<sup>70</sup> but like law professor Oren Gross, she nonetheless asserted that some forms of coercive interrogation might be morally justified in certain cases. Elshtain and Gross prefer to keep the legal ban on torture intact, while allowing government officials to plead "necessity" if prosecuted for torturing terrorist suspects.<sup>71</sup> Their approach echoes one advocated in 1978 by philosopher Henry Shue.<sup>72</sup> Similarly, former Justice Department lawyer John Yoo argued that U.S. interrogators could legitimately appeal to "necessity" in defending their use of harsh techniques against terror suspects, in spite of our treaty obligations to the contrary.<sup>73</sup>

But Sanford Levinson has pointed out a contradiction inherent in the legal position suggested by Shue, Elshtain, Gross, and Yoo:

[T]his scarcely avoids legitimizing at least some acts of torture. What else, after all, is conveyed by accepting the possibility of acquittal, suspension of sentence, or gubernatorial and presidential pardons of what would be perceived as "morally permissible" torture? State officials would then be giving their formal imprimatur to actions that the various conventions condemn without exception.<sup>74</sup>

If we *openly* permitted torture, even under highly restricted legal criteria à la Dershowitz and McCarthy, would we lose all of what little remains of our credibility in the international community on human rights? I would assume so. Alberto Mora, the previously cited former general counsel to the U.S. Navy, noted that our country's adoption of harsh interrogation methods beginning in 2002 had significant negative effects on our relationships with allies:

International cooperation, including in the military, intelligence, and law enforcements arenas, diminished as foreign officials became concerned that assisting the U.S. in detainee matters could constitute aiding and abetting criminal conduct in their own countries.<sup>75</sup>

Would we want other countries to follow our example if we legalized torture? Presumably they would be logically permitted to do so in relevantly similar circumstances, so we'd be hard pressed to persuade them not to imitate us. But their systems of legal checks on abuses of power would not necessarily be as robust as ours. So the number of

innocent people tortured around the world would probably grow.<sup>76</sup> As Tom Malinowski of Human Rights Watch has argued:

The United States has been a powerful voice for victims of torture and human rights abuses around the world. When it violates the principles it preaches to others, its moral authority diminishes, and repressive governments find it much easier to resist American calls for change.<sup>77</sup>

In addition, legalizing torture by U.S. intelligence officers would almost certainly undermine our efforts to “win hearts and minds” in countries where we’re battling insurgents.<sup>78</sup> Would our own personnel be placed at greater risk of torture if captured or kidnapped overseas? This is quite likely, because the fact that our soldiers in Afghanistan and Iraq have usually upheld the Geneva Conventions has not deterred insurgents from violating them with impunity. Detainee abuses at Abu Ghraib almost certainly served to motivate hundreds, if not thousands, of Iraqis to kill American troops. An Iraqi interviewed by Mark Danner in November 2003 (i.e., months before those abuses were publicized) vividly and passionately anticipated that result:

For Fallujans it is a *shame* . . . for the foreigners to put a bag over their heads, to make a man lie down with your shoe on his neck. This is a great *shame*, you understand? This is a great *shame* for the whole tribe. It is the *duty* of that man, and of that tribe, to get revenge on this soldier—to kill that man. Their duty is to attack them, to *wash the shame*. The shame is a *stain*, a dirty thing; they have to *wash* it. No sleep—we cannot sleep until we have revenge. They have to kill soldiers.<sup>79</sup>

If we permitted *only* CIA officers to use torture within the limits advocated by Dershowitz and McCarthy, we might theoretically be able to limit risks to our *military* personnel by continuing to forbid them from ever using it, as columnist Charles Krauthammer has suggested.<sup>80</sup> But it’s difficult to imagine how that bright line could be maintained in counterinsurgency, since CIA officers would inevitably want to interrogate some individuals detained by soldiers. And obviously, if harsh CIA methods were publicized, retribution would likely occur against American military personnel as well as civilians.

The serious concerns discussed in this section weigh heavily against changing our laws to permit torture under any circumstances. Even if terrorists have in effect forfeited their moral right not to be tortured, and even if torture might prevent some terrorist attacks, there may still be overriding consequentialist reasons *not* to legalize torture in HUMINT. By analogy, even if we regard some



crimes to be so heinous as to deprive their perpetrators of the right not to be killed, we might nonetheless refrain from instituting capital punishment, or establish a moratorium on further executions, out of concern, say, for the risk of inadvertently executing innocent people falsely convicted from sloppy police work or the testimony of false witnesses. I don't feel qualified to assess in sufficient detail the likely consequences of prohibiting or permitting torture. But such matters are eminently worthy of continuing reflection and public debate.

## A Machiavellian Temptation

We treat detainees humanely.

—Donald Rumsfeld, former Secretary of Defense,  
February 2002

We do not torture.

—President George W. Bush, November 2005

We don't torture people.

—George Tenet, former Director of  
Central Intelligence, May 2007

Machiavelli wrote in *The Prince*, “It is good to *appear* merciful, truthful, humane, sincere, and religious; it is good to *be* so in reality. But you [the head of state] must keep your mind so disposed that, in case of need, you can turn to the exact contrary.”<sup>81</sup> In theory we might adopt a quasi-Machiavellian policy of pretending to prohibit torture while secretly practicing it.<sup>82</sup> Indeed, the (temporary?) existence of a number of secret CIA detention facilities where al-Qaeda leaders were subjected to harsh interrogation techniques, combined with analogous military practices at Guantanamo, etc., in contrast to the Bush administration's repeated public condemnations and denials of torture, indicates that our government actually adopted a version of the Machiavellian ethic.

We can no longer credibly claim that Americans never torture. The evidence now shows overwhelmingly that some military and civilian interrogators after 9/11 used methods that clearly constituted torture as well as cruel, inhuman, and degrading treatment, and moreover, that they were authorized to do so (in terms of “aggressive” and “enhanced” interrogation techniques or “counterresistance strategies”)

by top civilian officials in the departments of Defense and Justice and the CIA, and by their respective military chains of command. But since those decisions and events represented a clear violation of U.S. laws in relation to the Geneva and Torture conventions, they may also have violated the U.S. Constitution, since they occurred without the consent of the Senate, which was required to ratify those treaties in the first place.

In March 2008, Congress passed a bill intending to limit CIA interrogation techniques to those approved in the military's 2006 HUMINT manual, which, among other things, would have prevented CIA officers from using waterboarding. But Bush vetoed that bill, reasoning that it would have denied the agency some effective tools in dealing with suspected terrorists: "We have no higher responsibility than stopping terrorist attacks," he said. (But isn't upholding the rule of law just as important?) He added, "And this is no time for Congress to abandon practices that have a proven track record of keeping America safe."<sup>83</sup> Thus Bush seemed to think that he could authorize very harsh techniques like waterboarding even while continuing to claim that the United States doesn't use torture. (Curiously, if Congress truly opposed that idea, why was it unable to override his veto?) As a result, prior to the inauguration of Barack Obama as president in January 2009, we had a bizarre and quasi-Machiavellian policy, at least with regard to nonmilitary interrogations, one that was inconsistent with our stated values and our legal obligations under the Geneva and Torture conventions.

In my view, if any American president would seek to authorize CIA or military personnel to use harsh interrogation methods against suspected terrorists and insurgents, he or she must first open a public dialogue with the Senate about abrogating the relevant treaties or otherwise modifying our existing pledges to uphold them comprehensively, as well as reflect very carefully on what that would entail for our country's core legal and ethical principles. Given the Senate's overwhelming endorsement of the Detainee Treatment Act of 2005 and its condemnation in 2007–2008 of the CIA's use of waterboarding, it is unlikely in the near future to take seriously any proposal to modify our existing treaty obligations. And Obama is highly unlikely to propose any such change: One of his first executive orders ("Ensuring Lawful Interrogations") prohibited the CIA and other federal personnel from using any techniques on detainees that are not allowed by the army's interrogation manual, Common Article 3 of the Geneva Conventions, or the Torture Convention. Obama's



order also repudiated all of the legal interpretations of interrogation issued by the Justice Department under Bush from 2001 to 2009.<sup>84</sup>

However, if U.S. citizens were to become victims of a terrorist attack on par with or exceeding the carnage of 9/11, that could well renew the national debate about the ethics of coercive HUMINT interrogation. If our leaders were to consider adopting (again) what amounts to torture in our efforts against terrorists, though, they must be forthright in doing so. Even Alan Dershowitz qualified his advocacy of torture warrants thusly:

Even the defense of necessity must be justified lawfully. The road to tyranny has always been paved with claims of necessity made by those responsible for the security of the nation. Our system of checks and balances requires that all presidential actions, like all legislative or military actions, be consistent with governing law. If it is necessary to torture in the ticking bomb case, then our governing laws must accommodate this practice. If we refuse to change our law to accommodate any particular action, then our government should not take that action.<sup>85</sup>

At the very least, unless and until our president and Senate are willing to formally renounce our treaty obligations that prohibit torture and other cruel, inhuman, and degrading treatment, our interrogators should stay clear of any methods that even contradict the spirit of those treaties. Fortunately, as I indicated early in this essay, there are many *humane* interrogation techniques that skilled military and civilian intelligence personnel know how to use effectively, methods that they can rely on in the overwhelming majority of cases to elicit the intelligence that may be desperately needed to save scores of innocent lives.

## Notes

1. John Barry et al., "The Roots of Torture," *Newsweek*, May 24, 2004, 26–34; Human Rights Watch, *The Road to Abu Ghraib*, June 2004; Mark Danner, *Torture and Truth: America, Abu Ghraib, and the War on Terror* (New York: New York Review of Books, 2004); Philippe Sands, *Torture Team: Rumsfeld's Memo and the Betrayal of American Values* (New York: Palgrave Macmillan, 2008); Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (New York: Doubleday, 2008).

2. Pew Research Center for the Public and the Press, "Opinion Leaders Turn Cautious, Public Looks Homeward: III. Iraq and the War on Terrorism," November 2005, 24, <http://people-press.org/reports/display.php3?PageID=1019> (accessed November 23, 2008).

3. Sanford Levinson, "Contemplating Torture: An Introduction," in *Torture: A Collection*, ed. Sanford Levinson (New York: Oxford University Press, 2004), 39.

4. I have not seen any controlled scientific studies examining this directly—any such study would obviously violate the ethical guidelines standard in human subjects research. But American military personnel who had endured torture and degrading treatment as POWs in Korea and Vietnam were extensively debriefed after their return to the United States as to their reactions to interrogation tactics. Albert Biderman, "Communist Attempts to Elicit False Confessions from Air Force Prisoners of War," *Bulletin of the New York Academy of Medicine* 33, no. 9 (September 1957): 616–25.

5. John Langbein, "The Legal History of Torture," in *Torture: A Collection*, ed. Sanford Levinson (New York: Oxford University Press, 2004), 93–103.

6. N.A., "KUBARK [CIA] Counterintelligence Interrogation," July 1963, 94.

7. U.S. Army, Field Manual (FM) 34–52: *Intelligence Interrogation* (1992), 1-8, and FM 2–22.3: *Human Intelligence Collector Operations* (2006), 5-21. Pagination in such manuals typically uses the format "chapter-page," i.e., 1-8 means page 8 in chapter 1, 5-21 means page 21 in chapter 5, and so on. On FBI interrogation policies, see Sands, *Torture Team*, and Mayer, *Dark Side*.

8. *Total Isolation*, a documentary that aired on BBC TV, January 22, 2008, <http://www.bbc.co.uk/sn/tvradio/programmes/horizon/broadband/tx/isolation/> (accessed November 23, 2008). See also "Alone in the Dark," BBC News, January 21, 2008, [http://news.bbc.co.uk/2/hi/uk\\_news/magazine/7199769.stm](http://news.bbc.co.uk/2/hi/uk_news/magazine/7199769.stm) (accessed November 23, 2008).

9. Chris Mackey [pseud.] and Greg Miller, *The Interrogators* (New York: Little, Brown, 2004). See also Tony Lagouranis and Allen Mikaelian, *Fear Up Harsh: An Army Interrogator's Dark Journey through Iraq* (New York: New American Library, 2007), 34, 38.

10. "KUBARK Counterintelligence Interrogation," 82–94.

11. Paul Hinkle, "The Physiological State of the Interrogation Suspect As It Affects Brain Function," in *The Manipulation of Human Behavior*, ed. Albert Biderman and Herbert Zimmer (New York: Wiley, 1961), cited in *ibid.*, 83.

12. M. Gregg Bloche and Jonathan Marks, "Doing unto Others As They Did unto Us," *New York Times*, November 14, 2005, claimed that SERE techniques are "based on studies of North Korean and Vietnamese efforts to break American prisoners," and are "intended to train American soldiers to resist the abuse they might face in enemy custody" (A21). William Safire, "Waterboarding," *New York Times Magazine*, March 9, 2008, 16, noted that navy trainees were reported in 1976 to have been subjected in training to "water board" torture, which resembled a technique used



against U.S. POWs by North Korean captors in the early 1950s. See also Sands, *Torture Team*, especially on the paper trail implicating high officials in the Bush administration; Scott Shane, "China Inspired Interrogations at Guantanamo," *New York Times*, July 2, 2008, A1; and Mayer, *Dark Side*, chaps. 7, 8, and 10.

13. Bruce Hoffman, "A Nasty Business," *Atlantic Monthly*, January 2002, 49–52.

14. Mark Bowden, "The Dark Art of Interrogation," *Atlantic Monthly*, October 2003, 51–76.

15. Alan Dershowitz, *Why Terrorism Works* (New Haven, CT: Yale University Press, 2002), 137. He mentions other ostensibly successful uses of torture on 139–40 and 249–50. See also Jerome Slater, "Tragic Choices in the War on Terrorism: Should We Try to Regulate and Control Torture?" *Political Science Quarterly* 121, no. 2 (2006): 202.

16. Lagouranis claims in *Fear Up Harsh* to have observed many army interrogators in Iraq who routinely resorted to harsh methods out of laziness.

17. United Nations, Office of the High Commissioner for Human Rights, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), [http://www.unhchr.ch/html/menu3/b/h\\_cat39.htm](http://www.unhchr.ch/html/menu3/b/h_cat39.htm) (accessed November 23, 2008), adopted by the General Assembly on December 10, 1984, and ratified by the United States on October 21, 1994.

18. Dan Eggen, "White House Defends CIA's Use of Waterboarding in Interrogations," *Washington Post*, February 7, 2008, A3, and "White House Pushes Waterboarding Rationale," *Washington Post*, February 13, 2008, A3; Mark Mazzetti, "Letters Give CIA Tactics a Legal Rationale," *New York Times*, April 27, 2008, A1.

19. U.S. Office of Legal Counsel, "Re: Standards of Conduct for Interrogation," a memorandum for Alberto Gonzales, August 1, 2002, was apparently written largely by John Yoo but signed by Jay Bybee. Subsequently, Jerald Phifer, "Request for Approval of Counter-Resistance Strategies," October 11, 2002, advocated the use of certain stress positions, exposure to heat and cold, and a technique that appears to be waterboarding; Donald Rumsfeld approved most of them on December 2, 2002, then rescinded that decision on January 15, 2003. Those documents are reprinted in Danner, *Torture and Truth*, 115–68 and 181–83. Another "torture memo," U.S. Office of Legal Counsel, "Re: Military Interrogation of Alien Unlawful Combatants Held outside the United States," March 14, 2003, was also written by John Yoo but for William (Jim) Haynes II, the general counsel for Rumsfeld at the Defense Department. Mayer, *Dark Side*, provides a comprehensive account of these developments.

20. Andrew McCarthy, "Torture: Thinking about the Unthinkable," *Commentary*, July–August 2004, 22.

21. U.S. report to the UN Committee on Torture, quoted in Association of the Bar of the City of New York, *Human Rights Standards Applicable to the United States' Interrogation of Detainees* (2003), 70.

22. Ibid., 11. By contrast, Abraham Sofaer, "No Exceptions," *Wall Street Journal*, November 26, 2005, 11, argued that the CAT applies to any territory under U.S. jurisdiction.

23. Rosemary Foot, "Torture: The Struggle over a Peremptory Norm in a Counter-Terrorist Era," *International Relations* 20, no. 2 (June 2006): 138, 141; Mayer, *Dark Side*, 230.

24. But see Charlie Savage, "Bush Could Bypass New Torture Ban," *Boston Globe*, January 4, 2006, A1. Michael Skerker reminded me in August 2007 that the president's signing statement left doubts as to whether he intended to uphold the Detainee Treatment Act. Skerker's concern was reinforced in October 2007, when Attorney General Alberto Gonzalez was revealed to have secretly ruled as lawful in 2005 a number of harsh interrogation techniques that were clearly intended by Congress to be illegal. Scott Shane, David Johnston, and James Risen, "Secret U.S. Endorsement of Severe Interrogations," *New York Times*, October 4, 2007, A1.

25. Joel Brinkley, "Rice Is Challenged in Europe over Secret Prisons," *New York Times*, December 7, 2005, A1; Scott Shane, "Terror and Presidential Power: Bush Takes a Step Back," *New York Times*, July 12, 2006, A20. See also President Bush's Executive Order of July 20, 2007, "Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency."

26. FM 2-22.3: *Human Intelligence Collector Operations*, vi-viii, 5-13 to 5-27, and appendix A.

27. U.S. Army, Field Manual 34-52: *Marine Corps Counterinsurgency Manual* (Washington, DC: Government Printing Office, 1992), 251.

28. Danner, *Torture and Truth*, 26-49; Human Rights Watch, *Road to Abu Ghraib*; Josh White, "Soldiers' 'Wish Lists' of Detainee Tactics Cited," *Washington Post*, April 19, 2005, A16; Tim Golden, "In U.S. Report, Brutal Details of Two Afghan Inmates' Deaths," *New York Times*, May 20, 2005, A1; Adam Zagorin and Michael Duffy, "Inside the Interrogation of Detainee 063," *Time*, June 20, 2005, 26-32; Josh White, "Documents Tell of Brutal Improvisation by GIs," *Washington Post*, August 3, 2005, A1.

29. FM 2-22.3: *Human Intelligence Collector Operations*, 5-21.

30. Randy Borum, "Approaching Truth: Behavioral Science Lessons on Educating Information from Human Sources," in *Educating Information: Interrogation Science and Art*, ed. Robert Destro et al. (Washington, DC: National Defense Intelligence College, 2006), 33-34.

31. FM 2-22.3: *Human Intelligence Collector Operations*, M-10. Lagouranis says in *Fear Up Harsh*, 85, that during part of his tour in Iraq the Interrogation Rules of Engagement did not specify four *continuous* hours



of sleep each day, so his supervisor told him to “break those four hours into five pieces” when interrogating a certain pair of suspected insurgents. Lagouranis further states (86–90) that he and his peers took turns executing that exhausting regimen every day for four straight weeks with those detainees, combining sleep deprivation with stress positions and exposure to cold, rendering them extremely weak and disoriented. Apparently those detainees never provided any useful intelligence, though, even after being menaced by growling and lunging guard dogs (107–11). An earlier but similarly relentless, lengthy, and brutal interrogation at Guantanamo of Mohammed al-Qahtani, an al-Qaeda suspect captured in Afghanistan in November 2001, was first publicized in Zagorin and Duffy, “Inside the Interrogation of Detainee 063.” Sands, *Torture Team*, convincingly documented the direct and immediate influence of decisions by Secretary of Defense Donald Rumsfeld on techniques used in interrogating al-Qahtani.

32. David Luban, “Torture, American-Style,” *Washington Post*, November 29, 2005, B1; Sands, *Torture Team*.

33. FM 2–22.3: *Human Intelligence Collector Operations*, 8–10.

34. See, e.g., an incident in Afghanistan involving an army intelligence officer, narrated in Mackey and Miller, *The Interrogators*, 276–77.

35. This wording is from FM 34–52: *Intelligence Interrogation* (1992), 3–15 and 3–16; the comparable text in FM 2–22.3: *Human Intelligence Collector Operations* is on 8–13. “Pride and Ego Down” strikes me as a highly dubious way of eliciting cooperation from a subject. Lagouranis says in *Fear Up Harsh*, “I’m not sure why interrogators think insults and humiliation produce results.” But he immediately goes on to describe an encounter with a large and imposing Iraqi detainee who surprisingly breaks down after Lagouranis berates him as “illiterate and stupid, besides being fat and lazy” (82). So perhaps Pride and Ego Down does sometimes “work.”

36. FM 2–22.3: *Human Intelligence Collector Operations*, 8–12.

37. Bybee, “Re: Standards of Conduct for Interrogation,” 146–49; Yoo, “Re: Military Interrogation,” 4–6, 18–19.

38. Henry Shue, “Torture,” *Philosophy & Public Affairs* 7, no. 2 (1978), reprinted in *Torture: A Collection*, ed. Sanford Levinson (New York: Oxford University Press, 2004), 47–60.

39. Ibid.; Association of the Bar of the City of New York, “Human Rights Standards,” 9–10. See also Ariel Dorfman, “The Tyranny of Terror: Is Torture Inevitable in Our Century and Beyond?” and Jean Bethke Elshtain, “Reflection on the Problem of ‘Dirty Hands,’” in *Torture: A Collection*, ed. Sanford Levinson (New York: Oxford University Press, 2004), 3–18 and 77–89, respectively.

40. U.S. Army/Marine Corps Counterinsurgency Manual, 251.

41. Alberto Mora, statement before the U.S. Senate Armed Services Committee, June 17, 2008.

42. Barry et al., "The Roots of Torture"; Josh White, "Military Lawyers Fought Policy on Interrogations," *Washington Post*, July 15, 2005, A1; Barton Gellman and Jo Becker, "The Unseen Path to Cruelty" *Washington Post*, June 25, 2007, A1; Eric Lichtblau and Scott Shane, "Gonzales, Loyal to Bush, Held Firm on War Policies," *New York Times*, August 28, 2007, A1; Sands, *Torture Team*.

43. Charles Krauthammer suggested a similar scenario in "The Truth about Torture," *Weekly Standard*, December 5, 2005. But although he approved of using torture in such cases, he didn't say whether he thinks anyone has a *prima facie* right not to be tortured, or whether that right could be forfeited or overridden.

44. Analogously, I have argued elsewhere that people convicted of violent felonies can be said to have forfeited their otherwise equal claim to a major organ transplant: "Should Violent Felons Receive Organ Transplants?" *San Jose Mercury News*, January 31, 2002, and "Tough Choices on Heart Transplants," *Santa Clara Magazine*, Fall 2002, 32.

45. This claim was persuasively defended by Stephen Kerhmar in "For Interrogational Torture," *International Journal of Applied Philosophy* 19, no. 2 (Fall 2005): 230–34.

46. Joel Feinberg, *Rights, Justice, and the Bounds of Liberty* (Princeton, NJ: Princeton University Press, 1980), 239.

47. Fritz Allhoff, "An Ethical Defense of Torture in Interrogation," in *Ethics of Spying: A Reader for the Intelligence Professional*, ed. Jan Goldman (Lanham, MD: Scarecrow Press, 2006), 129–32, briefly considers the possibility that a terrorist might forfeit a right not to be tortured. But he quickly abandons that train of thought in favor of the idea that the terrorist (like everybody else) has an "inalienable" right not to be tortured, which would nonetheless be overridden by the rights of his intended victims. Allhoff thus ignores the problem that his argument would also justify torturing *innocent* people, if their rights were overridden by the rights of a larger number of innocent people. Slater, "Tragic Choices," 203–4, takes "the innocence problem" very seriously. But elsewhere (212) he claims that in a "supreme emergency" such as an impending WMD attack, "there can be no limits at all," which could imply that even the intentional torture of the innocent might be justified (a position I reject).

48. Here I concur with Slater, "Tragic Choices," 211, on the importance of restricting torture exclusively to "last-resort" scenarios.

49. Compare the limits proposed by Allhoff, "Ethical Defense of Torture in Interrogation," 132–35, and by Skerker, "Interrogation Ethics in the Context of Intelligence Collection," in *Ethics of Spying: A Reader for the Intelligence Professional* (Lanham, MD: Scarecrow Press, 2006), 161.

50. I have personally heard many U.S. military officers of various ranks and in different settings voice this argument.

51. Bloche and Marks, "Doing unto Others As They Did unto Us."



52. See the excerpts from Joint Personnel Recovery Agency, "Physical Pressures Used in Resistance Training and Against American Prisoners and Detainees," July 25, 2002, made public in a hearing of the U.S. Senate Armed Services Committee on June 17, 2008.

53. Jerald Ogrisseg, statement before the U.S. Senate Armed Services Committee, June 17, 2008. Ogrisseg also testified that the air force would never use waterboarding in its SERE training, because in his view no one could be trained to endure it.

54. Testimony of "Michael Mulroney," in Congress, Senate, Select Committee to Study Governmental Operations with Respect to Intelligence Activities, *Alleged Assassination Plots Involving Foreign Leaders*, Interim Report #94-465, 94th Congress, 1st session, 1975, 436n27.

55. B. Hugh Tovar, letter to the author, February 25, 1992.

56. James Barry, letter to the author, January 24, 1992.

57. E. Drexel Godfrey Jr., "Ethics and Intelligence," *Foreign Affairs* 56, no. 4 (April 1978): 631.

58. William Johnson, "Tricks of the Trade: Counterintelligence Interrogation," *International Journal of Intelligence and Counterintelligence (IJIC)* 1, no. 2 (1986): 104.

59. William Johnson, *Thwarting Enemies at Home and Abroad: How to Be a Counterintelligence Officer* (Bethesda, MD: Stone Trail Press, 1987), 33, 32, italics in the original. See also Ralph White, "Empathy as an Intelligence Tool," *IJIC* 1, no. 1 (1986): 57-75.

60. As noted above and extensively documented in Mayer, *Dark Side*, some U.S. military and civilian interrogators applied at Guantanamo and in Afghanistan and Iraq what had been learned from years of internal SERE training about how to break the will of detainees. So perhaps we already have "scientific" torture-training programs in place!

61. Jonathan Marks, "Doctors of Interrogation," *Hastings Center Report*, July-August 2005, 17-22; Michael Gross, *Bioethics and Armed Conflict: Moral Dilemmas of Medicine and War* (Cambridge, MA: MIT Press, 2006), chap. 7.

62. American Psychiatric Association, *Psychiatric Participation in Interrogation of Detainees: Position Statement*, May 2006, <http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/200601.aspx> (accessed November 23, 2008).

63. American Medical Association, "Physician Participation in Interrogation," *Opinions of the Council on Ethical and Judicial Affairs*, June 2006, <http://www.ama-assn.org/ama1/pub/upload/mm/38/i-06ceja.pdf> (accessed November 23, 2008).

64. I'm indebted to John Hawkins for suggesting that point.

65. Michael Skerker, "Interrogation Ethics," 162. A similar claim was made three decades ago by former CIA officer Arthur Jacobs in a letter to *Foreign Affairs* 56, no. 5 (July 1978): 867-75.

66. Dana Priest and Anne Hull, "The War Inside: Troops Are Returning from the Battlefield with Psychological Wounds, but the Mental-Health System That Serves Them Makes Healing Difficult," *Washington Post*, June 17, 2007, A1.

67. U.S. military intelligence officers estimated in 2003 that "between 70% and 90% of the persons deprived of their liberty in Iraq had been arrested by mistake": "Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment and Interrogation," February 2004, in Danner, *Torture and Truth*, 257. Lagouranis, *Fear Up Harsh*: "We had a lot of prisoners who were fingered by informants, [e.g.,] turned in by neighbors. Usually, this was their way of settling a grudge" (74). On indiscriminate detention of Iraqis to fulfill arbitrary quotas or on the basis of flimsy testimony or evidence, see 149, 187, 192–97, 219–20, e.g.

68. Dershowitz, *Why Terrorism Works*, 158–61.

69. McCarthy, "Torture," 24.

70. Elstain, "Reflection," 83.

71. Ibid., 85–87, and Oren Gross, "The Prohibition on Torture and the Limits of the Law," in *Torture: A Collection*, ed. Sanford Levinson (New York: Oxford University Press, 2004), 229–32.

72. Shue, "Torture," 58–59.

73. Yoo, "Re: Military Interrogation," 74–80.

74. Levinson, "Contemplating Torture," 36. See also Dershowitz, "Tortured Reasoning," in *Torture: A Collection*, ed. Sanford Levinson (New York: Oxford University Press, 2004), 272–77.

75. Mora, statement before the Senate Armed Services Committee.

76. Ironically, our own legalization of interrogational torture would probably reduce our need to "outsource" it to other countries via "extraordinary renditions"! But the global incidence of torture would likely increase anyway, as our ability to persuade other countries not to employ it declined.

77. Tom Malinowski, "Banned State Department Practices," in Kenneth Roth and Minky Worden, eds., *Torture: Does It Make Us Safer? Is It Ever OK?* (New York: Human Rights Watch, 2005), 141.

78. Ibid. See also my article "Why Hearts and Minds Matter," and U.S. *Army/Marine Corps Counterinsurgency Manual*, chap. 7.

79. Danner, *Torture and Truth*, 1, emphasis in the original.

80. Krauthammer, "Truth about Torture."

81. Niccolo Machiavelli, *The Prince*, trans. and ed. Robert Adams (New York: Norton, 1977), 50, emphasis added.

82. Bowden argued in "Dark Art of Interrogation": "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” (76). His intended distinction between torture and coercion is unclear, though, especially as he equated “coercion” with “torture lite.”

83. Steven Lee Myers, “Bush’s Veto of Bill on CIA Tactics Affirms His Legacy,” *New York Times*, March 9, 2008, A1. Senator John McCain supported the president’s veto, which is surprising in light of his earlier firm stance against the use of harsh interrogation methods by the military, and his own previous experience of being tortured by the North Vietnamese.

84. Barack Obama, “Executive Order no. 13491: Ensuring Lawful Interrogations,” January 22, 2009, [http://www.whitehouse.gov/the\\_press\\_office/Ensuring\\_Lawful\\_Interrogations/](http://www.whitehouse.gov/the_press_office/Ensuring_Lawful_Interrogations/) (accessed February 13, 2009).

85. Dershowitz, *Why Terrorism Works*, 153.

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