Creating a Torture Culture

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CREATING A TORTURE CULTURE

Question:
Mr. President, I wanted to return to the question of torture … when you say that you want the U.S. to adhere to international and U.S. laws, that’s not very comforting. This is a moral question: Is torture ever justified?

President George W. Bush:
Maybe I can be more clear. The instructions went out to our people to adhere to law. That ought to comfort you. We’re a nation of law. We adhere to laws. We have laws on the books. You might look at those laws, and that might comfort you. And those were the instructions out of … from me to the government.¹

I. Introduction

Americans accept that the United States tortured people in its war against terror and sends others to places doing worse.² Moreover, the U.S. admits waterboarding suspects³ and a “majority of Americans consider waterboarding a form of torture.”⁴

² According to The Harris Poll #93, December 21, 2005, 83% believe that the United States uses torture (often 17%, sometimes 66%) and 82% believe that the United States uses rendition (often 25%, sometimes 58%). Moreover, a majority in the Harris Poll felt torture and rendition justified. <http://www.harrisinteractive.com/harris_poll/index.asp?PID=621> (visited February 2, 2008). On the other hand a May 27, 2004 ABCNews/Washington Post poll found a majority of 63% saying that torture is never justifiable even as half believe the government is doing it anyway and even more “think the government is employing physical abuse that falls short of torture.” <http://abcnews.go.com/sections/us/Polls/torture_poll_040527.html> (visited February 2, 2008).
The persistent skeptic will object that the majority may be wrong. The White House denies the use or sanction of any sort of torture and defends waterboarding saying, “the programs have been reviewed, and the Department of Justice has determined them to be legal.” President Bush continues to deny the use of torture saying: “And whatever we have done is legal. That’s what I’m saying. It’s in the law. We had lawyers look at it and say, ‘Mr. President, this is lawful.’ That’s all I can tell you.”

As late as 2008, the President continued to assert the authority to use the waterboarding technique, claiming it to be lawful. Moreover, President Bush continues to press for a worldwide ban on torture - strong evidence that he sees no hypocrisy in the U.S. position. Similarly, Secretary of State Condoleezza Rice has refused to characterize waterboarding as torture insisting that “the determination of whether interrogation techniques are consistent with our international obligations and American law are made

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5 Brett Murphy, White House defends CIA use of waterboarding, JURIST (Feb. 6, 2008) at: <http://jurist.law.pitt.edu/paperchase/2008/02/white-house-defends-cia-use-of.php>
7 Id.
8 In June 2003, for example, President George W. Bush said:
   The United States is committed to the world-wide elimination of torture and we are leading this fight by example. I call on all governments to join with the United States and the community of law-abiding nations in prohibiting, investigating, and prosecuting all acts of torture and in undertaking to prevent other cruel and unusual punishment. I call on all nations to speak out against torture in all its forms and to make ending torture an essential part of their diplomacy.
by the Justice Department. Former Secretary of defence Donald Rumsfeld also deferred to legal interpretations while contending that the U.S. has not tortured.

Attorney General Michael B. Mukasey has said that because the Justice Department approved the program, it will not open a criminal investigation into the practice. Vice President Dick Cheney states unequivocally “[t]he United States is a country that takes human rights seriously. We do not torture — it’s against our laws and against our values.” The Department of Justice Office of Legal Counsel (OLC), has conceded that waterboarding is no longer legal under current law (presumably because of the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006, both of which came after the last publicly known use of waterboarding). The OLC however, maintains that the President retains the power to authorize waterboarding and other discontinued harsh techniques in special circumstances “such as when there is a ‘belief that an attack is imminent.’” The administration maintains that the executive branch retains discretion to return to these practices. According to administration views, neither

10 Id.
15 Greg Miller, Waterboarding is still an option; The White House calls the technique legal; stunning critics, LOS ANGELES TIMES (February 7, 2008) A1.
16 The Acting head of the Department of Justice Office of Legal Counsel, Steven G. Bradbury says that in order for waterboarding or other such techniques to be used:
the courts nor the legislature can check or constrain the practice – or any other practices that the administration deems necessary in the war on terror\textsuperscript{17} and which it has the unilateral power to declare “not amounting to torture.”\textsuperscript{18}

The administration uses a sliding scale to decide if a practice amounts to torture – the more necessary it deems potential information, the less likely it is to see a practice as torture. The idea is that a practice will constitute torture only if it shocks the conscience (thus setting or moving the line between it and the lesser standard of cruel, inhuman and degrading treatment,\textsuperscript{19} (CIDs) based on whether a specific method shocks the

\begin{itemize}
  \item The CIA and the Director of National Intelligence would have to determine new method necessary in the war on terror;
  \item The Attorney General would have to conclude use of the method would be lawful (including DTA and MCA and Common Art. 3);
  \item President would have to personally authorize the technique;
  \item In the case of waterboarding, Congress and relevant committees would have to be notified.
\end{itemize}

“Let me be clear, though: There has been no determination by the Justice Department that the use of waterboarding, under any circumstances, would be lawful under current law.” Brett Murphy, \textit{Waterboarding not authorized under current law: DOJ to House panel}, \textit{JURIST} (February 14, 2008) at \url{http://jurist.law.pitt.edu/paperchase/2008/02/waterboarding-not-authorized-under.php}. \textsuperscript{17} See, for example, the President’s signing statement of the Detainee Treatment Act of 2005, where he claimed the right to construe that law (including its prohibition on torture) “in a manner consistent with the constitutional authority of the President” at President’s Statement on Signing of H.R. 2863, the “Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006,” at \url{http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html}. This statement has been widely construed as claiming the right to torture notwithstanding the statutory bar. \textsuperscript{18} The President was given the unreviewable power to interpret the Geneva Conventions by the Military Commissions Act of 2006, § 6(a)(3), 120 Stat. at 2632. Since violations of the War Crimes Act, 18 U.S.C. §2441 are tethered to violations of the Geneva Conventions, the MCA will, if upheld, give the President virtually unlimited legal authority to determine what constitutes torture. \textsuperscript{19} Both torture and cruel, inhuman and degrading treatment are prohibited by the Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or
conscience). The notion comes from *Rochin v. California*\(^{20}\) a case in which the Supreme Court professed its conscience had been shocked by the involuntary pumping of an arrested person’s stomach. In that case, the suspect had apparently tried to hide drugs by swallowing them. One way to read that case is that the need to secure the evidence of drug use was outweighed by the abuse involved in involuntary stomach pumping, thus shocking the judicial conscience.

According to the calculus suggested by this reading of the “shock the conscience” metaphor, the executive branch’s\(^{21}\) conscience (and presumably the judicial branch’s, to the extent it has any role to play under this theory) becomes less and less offended as the need for the information increases.\(^{22}\) The need for information thus affects (and may even determine) whether a practice legally constitutes torture or its lesser cousin CIDs. Torture, on this view, has become partially untethered from its effect on the individual and changes to fit the perceived need – the greater the need the greater the level of abuse that can be tolerated without calling it “torture.” This stridently instrumental view, when

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\(^{20}\) 342 U.S. 165 (1952).

\(^{21}\) Vice President Dick Cheney, who has been one of the most vocal exponents of this theory, put it this way: “Now, you can get into a debate about what shocks the conscience and what is cruel and inhuman. And to some extent, I suppose that's in the eye of the beholder. But I believe and we think it's important to remember that we are in a war against a group of individuals, a terrorist organization, that did, in fact, slaughter 3,000 innocent Americans on 9/11, that it's important for us to be able to have effective interrogation of these people when we capture them. And the debate is over the extent to which we're going to have legislation that restricts or limits that capability.” *Interview of the Vice President by ABC News, White House Press Releases*, December 18, 2005.

combined with unchecked Presidential power to say what torture is, leaves the concept, for all practical purposes, unbounded, providing ample space for the claim “we do not torture.”

Action tells more than words, and here the government remains consistent.

Military prosecutors have begun military commissions, seeking the death penalty, for six “high-value” detainees allegedly involved in the events of September 11, 2001. These include self-proclaimed “superterrorist” Kahlid Shaikh Mohammed who was waterboarded, and Mohammed al-Qahtani, so badly abused that he evidenced extreme psychological trauma by talking to non-existent people and hearing voices. Undoubtedly the admissibility of evidence procured because of harsh interrogations will

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23 See, notes 17 and 18 supra. and surrounding text.


27 Joseph Margulies, GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER (Simon & Schuster, 2006) at 86; Margulies, who represented detainees at Guantanamo Bay, writes “the Pentagon defended the professionalism of Al Qahtani’s interrogators.” Margulies at 88.
be an issue before the military commissions.\textsuperscript{28} Nonetheless, the government thinks it can defend its position and proceed with these controversial cases. Moreover, the decision to seek the death penalty sharpens the focus on torture and cruel, inhumane and degrading interrogation practices. Plainly, the administration rejects allegations that it tortures, or has done anything illegal, while vigorously defending the right to use “alternative interrogation” techniques,\textsuperscript{29} and seeking the death penalty\textsuperscript{30} for persons whose incriminating statements may have resulted from those harsh interrogations.

The issue is a hot one, prompting domestic\textsuperscript{31} and international\textsuperscript{32} astonishment at the claimed lawfulness of such practices. Manfred Nowak, who is both a law professor

\textsuperscript{28} Gitanjali Gutierrez, lawyer for al-Qahtani, upon hearing that his client may be tried before a military commission said, “But if he is [charged], I can assure you that his well-documented torture and the controversy over secret trials will be the focus.” William Glaberson, 6 Guantanamo Detainees Are Said to Face Trial Over 9/11, THE NEW YORK TIMES (Feb. 9, 2008).

\textsuperscript{29} One possible exception to the administration’s otherwise solid front in defending its interrogation practices is C.I.A. Director Michael V. Hayden who told a Congressional Committee that waterboarding, while legal when used in the past may no longer be lawful. In a later attempt to clarify his remarks, a C.I.A. spokesman said that Hayden’s remarks were in agreement with other administration officials that any decision to use waterboarding in the future would require approval from the attorney general and the president. Human rights advocate Jennifer Daskal, of Human Rights Watch called the concession “a long overdue recognition of what the law is.” Scott Shane, C.I.A. Chief Doubts Tactic to Interrogate Is Still Legal, THE NEW YORK TIMES (February 8, 2008) at http://www.nytimes.com/2008/02/08/washington/08intel.html.

\textsuperscript{30} Interestingly, Attorney General Mukasey, while defending the death penalty generally, says that he hopes that the accused in the 9/11 attacks do not receive the death penalty because such would make martyrs of them. He went on to say that he was expressing personal opinion and not government policy. Steve Czajkowski, Executing 9/11 suspects would make them martyrs: Mukasey, THE JURIST, (March 15, 2008) at http://jurist.law.pitt.edu/paperchase/2008/03/executing-911-suspects-would-make-them.php.

\textsuperscript{31} For example, Senator Dick Durban has called for an investigation into the CIA’s use of waterboarding and has criticized U.S. Attorney General Mukasey for not taking a stronger stance on waterboarding. Supra note 24. Similarly, David Stout and Scott Shane have written for THE NEW YORK TIMES on February 7, 2008 in Cheney Defends Use of Harsh Interrogations, that The flurry of public statements about an interrogation technique that has not been used since mid-2003 showed how the harsh tactics secretly adopted by the Bush administration after the Sept. 11 terrorist attacks have become a
and the UN Special Rapporteur on Torture, says “I’m not willing any more to discuss these questions with the US government, when they say this [waterboarding] is allowed. It’s not allowed.”

The Director of National Intelligence, Mike McConnell has said, “If I had water draining into my nose, oh God, I just can’t imagine how painful! Whether it’s torture by anybody else’s definition, for me, it would be torture.” The legality of waterboarding aside, it is undisputed that the United States uses harsh interrogation techniques that many consider torture, even as the government fiercely disputes that characterization.

Prior to the current Bush Administration, American courts and other tribunals consistently branded waterboarding “torture.” The United States prosecuted members of the Japanese armed forces after World War II, in part because they used waterboarding as

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33 Martin Hodgson and agencies, US censored for waterboarding, THE GUARDIAN (London) (Feb. 7, 2008). Furthermore, Manfred Nowak has sharply criticized the United States for defending the use of waterboarding saying “[t]his [waterboarding] is absolutely unacceptable under international human rights law. (The) time has come that the government will actually acknowledge that they did something wrong and not continue trying to justify what is unjustifiable.”. Id.

34 Eugene Robinson, Damage That Must Be Undone, THE WASHINGTON POST (Feb. 8, 2008) A19 citing THE NEW YORKER.

35 Documented in part by Swiss Senator Dick Marty’s report to the Council of Europe and Justice Dennis O’Connor’s Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, as well as the reporting of investigative journalists like Dana Priest of the WASHINGTON POST, and Jane Mayer of THE NEW YORKER.

36 U.S. does not Torture, Bush says, DEUTSCHE PRESSE AGENTUR (11/7/2005).

a form of torture. Moreover, its own courts have called waterboarding torture when used by domestic law enforcement. The United States even court-martialed at least one of its own military officers for employing waterboarding during the occupation of the Philippines at the beginning of the twentieth century. Thus, if waterboarding is not torture, it is because the Administration has succeeded in moving the definition.

More importantly, a too narrow focus on waterboarding may distract from other harsh interrogation techniques. Many of these other “alternative interrogation techniques” have equally profound effects on their victims and justly deserve the name “torture.” We will detail more of this later. It suffices, for the present, that some victims of U.S. interrogation practices at Guantanamo have become delusional, and another was seen - during interrogation – chained hand and foot, on in a fetal position on the floor beside a pile of their own hair, which he had had pulled out over the course the night. According to one of the leading authorities on the subject, “torture lite” victims can suffer “depression, excessive anxiety, post-traumatic stress disorder and sometimes full-blown psychosis.” Moreover, these symptoms can persist 20 or 30 years and are extremely

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38 Id. at 477-494.  
39 Id. at 502-504.  
40 Id. at 499.  
41 The Bush Administration disputes this claiming that its techniques have been refined and do not constitute torture. See, supra. note 187 and surrounding text.  
44 Ian Robbins is head of the Traumatic Stress Service at St. Georges Hospital, London. He is an expert on the treatment of persons traumatized by interrogation and imprisonment. Ian Robbins, We have ways ….; How do interrogators bend people to their will? There are tried and tested method, says Ian Robbins, but many leave subjects permanently scarred, NEW SCIENTIST (November 20, 2004) at 44.  
45 Id.
difficult to treat. According to a study of nearly 300 persons from the former Yugoslavia, the degree of stress reported by those who suffered “clean” torture did not differ from that of those subjected to physical torture. Both groups showed “equally high levels of post-traumatic stress disorder.” The *New Scientist* reports,

“Clean” methods of interrogation might appear more sanitized and therefore more acceptable than those that leave physical scars. But don’t be fooled. They are just as brutal, crude - and pointless - as ever.

One may reasonably ask why (regardless of formal legal definitions) techniques that cause such long-lasting anguish are not torture. Thus, while waterboarding may be

46 Id.

47 *Staff, Modern barbarity: The idea that torture can be ‘clean’ needs refuting, New Scientist* (Feb. 23, 2008) at 3.

48 Id.

49 Article 1 Section 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides “For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

The United States Reservations, declarations and understandings with regard to CAT includes the understanding as to Article 1, Section 1 of CAT that “in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.” U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990). The U.S. reservation is plainly intended to narrow CAT’s scope.
the most obvious example of a practice clearly constituting torture, it should not be the sole focus. Many of the authorized alternative interrogation techniques are ill disguised by the euphemisms currently in vogue.\footnote{Christopher Kutz points out the Bush Administration chooses coercive techniques “that would conventionally be thought of as straightforwardly torturous, including waterboarding, false burial, “Palestinian hanging” (where the prisoner is suspended by his arms, manacled behind his back), being left naked in a cold cell and doused with cold water, and being made to stand for forty hours while shackled to a cell floor.” Christopher Kutz, Torture, Necessity and Existential Politics, 95 CALIF. L. REV. 235 (2007).}

Finally, regardless of whether the United States government counts these techniques as torture, others do, with adverse consequences for the war on terror. For example, a Spanish judge recently dropped extradition requests of the United Kingdom for two alleged members of Al-Qaeda. Both became incompetent to stand trial because of severe mental and physical stress caused by detention at Guantanamo and in Afghanistan.\footnote{Katerina Ossenova, Spain judge drops extradition request for UK residents released from Guantanamo, THE JURIST, March 6, 2008 at http://jurist.law.pitt.edu/paperchase/2008/03/spain-judge-drops-extradition-request.php.}

Only one day after the U.S. announced that it would seek the death penalty for six of the Guantanamo detainees, human rights groups and legal experts criticized the decision pointing to torture as a major reason for doubting the fairness of any such trials.\footnote{Carol Eisenberg, Case’s legal peril; Bush administration will push for execution of 6 Guantanamo detainees tied to 9/11, but legal and public opinion make quick resolution unlikely, NEWSDAY (New York) (February 12, 2008) (arguing that legal experts warn that these cases are “fraught with legal peril.”). Out of order; Evidence obtained through waterboarding would taint the 9/11 trials and our nation, LOS ANGELES TIMES (Editorial Section, February 12, 2008) (arguing that the rest of the world will be against these trials which will “inflame critics.” William Tinning, Why torture claims matter more than facts in 9/11 trial; Suspects to face 2973 counts of murder, THE HERALD (Glasgow) (February 12, 2008) (great deal of the evidence comes from questionable methods, quoting Clive}
ally,53 British Foreign Secretary David Miliband expressed concern about the fairness of these military tribunals in light of the torture allegations saying that waterboarding is torture and, “And I think it’s very, very important that we always assert that our system of values is different from those who attacked the US and killed British citizens on 11 September, and that’s something we’d always want to stand up for.”54

Notwithstanding administration denials, a majority of the American people shares the world’s skepticism and strong majorities around the world condemn these practices.55 The gulf between the Administration’s position and that of the rest of the world (including the majority of Americans) could hardly be wider.

Stafford Smith as saying that their execution would make them “martyrs.” Amnesty condemns Guantanamo trials, THE IRISH TIMES, February 12, 2008 at <http://www.ireland.com/newspaper/breaking/2008/0212/breaking3.htm> (calling on the international community to challenge the US to drop the charges, to try the men before “independent and impartial court, without resort to the use of the death penalty.”

53 This is not to denigrate the importance over the long run of the views and advocacy of NGO’s whose work remains influential and important, but only to state the obvious, that the views of the British Foreign Secretary is likely to have more immediate impact on the Bush Administration. As Thomas Buergenthal puts it “[t]he activities of international and regional human rights institutions, as well as the work of human rights NGOs, have gradually changed governmental perceptions of the role human rights play in contemporary international relations,” The Evolving International Human Rights System, 100 AMERICAN JOURNAL OF INTERNATIONAL LAW 783, 806 (2006).


55 One poll shows that 59% of people around the world reject torture to elicit information even if it would save innocent lives. Opposition to torture is strongest in Europe generally, and 81% of Italians are opposed to the practice as are 72% of British and 58% of American. The poll had an N=27,407 with margins of error varying by country from 2.5 to 4 percent. BBC Press Office, Press Releases, World citizens reject torture, global poll suggests (July 20, 2007) at <http://www.bbc.co.uk/pressoffice/pressreleases/stories/2006/10_october/19/poll.shtml>. Seventy-four percent of Canadians agreed that “Clear rules against torture should be maintained,” while only 22% thought “Governments should now be allowed to use some degree of torture” The detailed country by country results from this worldwide poll can be found at: http://www.globescan.com/news_archives/bbctorture06/detail.html.
International human rights norms generally, and international law more specifically, informs the backlash against the U.S. use of torture and cruel, inhuman and degrading interrogation techniques, and this criticism by the international community works to curtail the practice. Notwithstanding the Bush Administration’s possibly successful attempts to insulate its officials from civil and criminal liability,\textsuperscript{56} it would be wrong to assert a too stridently realist conception of international affairs that views law as epiphenomenal always “failing in the big case.”\textsuperscript{57} The Administration may be able to protect its own officials, but the United States, in the end, may have to change its ways. It is one thing to provide short-term protection for individuals, quite another for a nation to permanently resist strong international condemnation. As Harold Hongju Koh puts it:

Even rogue states cannot insulate themselves forever from complying with international law if they wish to participate in the transnational economic or political process. Once nations begin to interact, a complex process occurs, whereby international legal norms seep into, are internalized, and become embedded in domestic legal and political processes.\textsuperscript{58}

Even a nation as powerful as the United States cannot forever evade world insistence on international rules. It is constrained by international human rights regime that increasingly abhors torture as an instrument of state policy.

This essay contains four substantive subsections (excluding the introduction and conclusion). Section II, \textit{Torture’s Reality}, will provide context for what we know about why torture occurs and how, once rooted spreads. It will show how governments can

\textsuperscript{56} Argued more fully in Part V below.
\textsuperscript{58} \textit{Id.}, at 205.
come to accept (as the U.S. apparently has) what David Luban calls a “torture culture.” 59

It attempts to understand the psychological, social, historical, cultural and political
imperatives that put the U.S. torture culture in place. Section III, American Torture
Before September 11, provides a short history of the use of torture and abusive
interrogation techniques prior to the war on terror. One cannot understand the present
torture regime without an understanding of what went on before. Section IV, Creating a
Torture Culture: After September 11, outlines some of the more important strains of
torture, and the misnamed “torture lite” that have come about since September 11.
Finally, Section V., How High Did the Torture Culture Reach, provides evidence
concerning how high up the chain of command the torture culture provably went with an
analysis of the probable consequences (or lack thereof) for the officials involved.

II. Torture’s Modern (and Democratic) Reality

_Torture is a true slippery slope._ 60 Behavioral sciences and history teach
skepticism about the “few bad apples” hypothesis; most people are capable of
torture; in the absence of enforced prevention rules, systemic abuses become
prevalent.

Americans are no different from others; modern psychology teaches that people
everywhere are capable of great cruelty just as they are also capable of great kindness.

Much turns on the situation, which can bring out the worst (or best) in us all.

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59 David Luban uses the term “torture culture” in David Luban, _Liberalism, Torture, and
the Ticking Bomb_, THE TORTURE DEBATE IN AMERICA, Karen J. Greenberg, ed.,
(Cambridge, 2006).

60 Anyone using the term “slippery slope” bears the burden of proof in demonstrating
empirically that if a given step is taken, the parade of horribles posited will likely follow.
Otherwise, the use of the term is simply an empty rhetorical gesture. See, e.g., L.A. Whitt,
_Acceptance and the Problem of Slippery-Slope Insensitivity in Rule-Utilitarianism_, 23
_DIALOGUE_ 649 (1984) for an explanation of this problem. The author recognizes and
accepts this burden.
Institutionalized torture comes about from otherwise ordinary people, who, when caught up in situations that seemingly demand it, abuse their fellow humans. As both Stanley Milgram\(^{61}\) and Phillip Zimbardo’s\(^{62}\) experiments have taught, otherwise normal people can do some surprisingly harsh things.

Milgram demonstrated that almost anyone can torture. His experiments at Yale (that some have suggested may have received secret CIA funding)\(^{63}\) succeeded in persuading ordinary residents of New Haven, Connecticut to deliver supposed electric shocks to strangers causing grunting to violent screaming, and even (on the face of it) fatalities. What the volunteers did not know was that these strangers were actors playing the part of victims and that the shocks were not real. Most people followed orders to the point of delivering to strangers, what appeared to be, severe pain and even to the point believing that they may have even killed someone (or at least rendered the person unconscious or otherwise unable to respond). While Milgram’s research is frequently cited for its ethical lapses (its participants were severely stressed and potentially harmed)\(^{64}\) the finding that ordinary people would so quickly follow such depraved orders


\(^{63}\) The evidence for this is admittedly speculative. Alfred W. McCoy summarizes the evidence as relying on “the timing, the topic, military ties, conflicted NSF funding, and NSF rejection of all his later projects, if taken together, provide indications, albeit circumstantial, that Milgram’s experiment was a by product of the larger CIA mind-control project. A QUESTION OF TORTURE: CIA INTERROGATION, FORM THE COLD WAR TO THE WAR ON TERROR (Henry Holt, 2006) at 49.

\(^{64}\) Dale Carpenter, Institutional Review Boards, Regulatory Incentives, and Some Modest Proposals for Reform, 101 NORTHWESTERN U.L. REV. 687, n.3 (2007) (Milgram’s “study was almost immediately criticized as ethically questionable.” citing: Diana Baumrind, Some Thoughts on the Ethics of Research: After Reading Milgram’s ‘Behavioral Study of Obedience,’ 19 AM. PSYCHOLOGIST 421 (1964)).
from an unknown authority figure surprised Milgram.⁶⁵ Shocking, as his results seemed, they are now commonly accepted.⁶⁶ As David Luban puts it,

Milgram demonstrates that each of us ought to believe three things about ourselves: that we disapprove of destructive obedience, that we think we would never engage in it, and, more likely than not, that we are wrong to think we would never engage in it.⁶⁷

We like to think that horrific human rights abuses are limited to narrow historical circumstances like those occurring in the Third Reich, that normal, everyday humans do not act that way. Milgram’s experiments suggest that most people will do things that they would never have guessed themselves capable.⁶⁸ As historian Alfred W. McCoy reports, “one subject, a military veteran . . . recalled feeling like ‘an emotional wreck’ . . . from the realization ‘that somebody could get me to do that stuff.’”⁶⁹ Milgram’s research does not show how a culture of torture comes about, but it does show how, once started, ordinary people can so easily participate.

Zimbardo’s prison experiments showed how groups of average people can, when given arbitrary power (and a perceived need) severely abuse others without remorse or thought about the consequences. Zimbardo set up an experimental prison at Stanford University. He advertised for ordinary college students who were paid to participate as either guards or prisoners. Local police cooperated in making the “arrests” giving the

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⁶⁶ Id. at 996.
⁶⁸ As Jean-Paul Sartre put it “Anybody, at any time, may equally find himself victim or executioner.” Preface to Henri Alleg, *The Question*, translated by John Calder (Bison Books Edition, University of Nebraska Press, 2006) at xxvii
⁶⁹ McCoy *supra* note 63, at 48.
experiment the appearance of being true or real. This verisimilitude provides confidence in the results. Insofar as participants saw their part in this experiment as real, they presumably acted as they would have had it been a real-world situation.

He tested each of these volunteer subjects at the beginning, rejecting those not found to be psychologically and emotionally normal, and then randomly divided the remainder such that there was no difference on average between those chosen as guards and those destined to be prisoners. In short, he selected ordinary people, with ordinary strengths and weaknesses, as guards and prisoners. There is no reason to think that they were different in any meaningful way from the rest of us.

After only six days, abuse by the guards became so great, and the psychological harm to the volunteer prisoners so severe, that Zimbardo shut the experiment down. He now concedes that given the levels of anguish created, he should have ended it sooner. As an experimenter, he found himself caught up in the situation. Even though a trained professional, a professor at Stanford, he failed to recognize quickly enough the human suffering caused by his experiment. That an eminent and ethical behavioral scientist like Phillip Zimbardo would get caught up in his own experiment such that he allowed one set of humans to so thoroughly abuse another group speaks volumes about the power of the situation to bring ordinary people to the point where they will hurt others. 

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70 Phillip Zimbardo is Professor Emeritus of Psychology at Stanford University, two-time past president of the Western Psychological Association, past president of the American Psychological Association. He is the author of numerous scholarly books, articles and monographs. For more information see, <http://www.zimbardo.com/zimbardo.html>.

71 It is almost impossible to describe the horrific abuse that occurred in this famous experiment. Fortunately, Phillip Zimbardo (who is surely one of the most important psychologist of the Twentieth Century) has widely disseminated his results and has widely collaborated with others on the issue of torture and abuse. The Stanford Prison experiment is thus documented by an online slide show and a DVD of the experiment can
Zimbardo’s experiment adds to Milgram’s results by demonstrating the group dynamic that can help to create the situation where abuse can occur. It adds a larger social dimension to our understanding of why abuses happen and helps to explain why insular organizations, such as the police, corrections and military, may be vulnerable to such. As important as this research is, it still does not explain how a society can come to tolerate and accept torture.

Sociologist Martha Huggins pushes the analysis one step further by demonstrating a large, real world application of Milgram and Zimbardo’s findings. Her study of police torture in Brazil identifies six conditions that are associated with systemic torture:

1. Unchecked and arbitrary executive rule;
2. Ideology of war – against evil (or communism, etc.);
3. Secrecy of interrogation locations and procedures;
4. Hidden identities of interrogators and those interrogated;
5. A social control division of labor giving plausible deniability and obscured perpetrator’s relationship to the violence;
6. A public rendered impotent by fear.⁷²

Each of these factors has been present to some degree in the present war on terror. However, Brazil was, for the period in which many abuses occurred, an authoritarian

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⁷² Martha K. Huggins, *Moral Universes of Brazilian Torturers*, 67 ALB. L. REV. 527 - 528 (2003). These factors were taken directly from her article. Professor Huggins is the Charles and Leo Favrot Professor of Human Relations, Department of Sociology, Tulane University and is considered an expert on the subject of torture.
junta. We know, however, that democracies like Great Britain, Israel, France and the United States also torture. Why?

Political scientist Darius Rejali, explains that, while democracies are not as bad as totalitarian regimes, they not only engage in torture but are the real innovators in 20\textsuperscript{th} century torture. Britain, France, and the United States were perfecting new forms of torture long before the CIA even existed. It might make Americans uncomfortable, but the modern repertoire of torture is mainly a democratic innovation.\textsuperscript{73}

The difference between democratic torture and that of the Gestapo has been the search for “clean” techniques that leave no mark. “[A]s societies have become more open, the art of torture has crept underground and evolved into the chilling new forms – often undetectable – that define torture today.”\textsuperscript{74} This is because the torturer is susceptible to public pressure, so that “[g]overnments that continue to use torture have moved to techniques that leave little trace…. Strange as it may seem, torturers and their apologists really do care.”\textsuperscript{75} Thus, torture can thrive in a democracy if it can be hidden and that depends on a closed system, with a lack of accountability and lack of access to courts.

Rejali notes three situations that can lead democracies to torture.

First torture may arise because security bureaucracies overwhelm those assigned to monitor them. This phenomenon typically begins in colonies or war zones of democratic states, but it may spread backward to the metropole … Second, torture may arise because judicial systems place too great an emphasis on confessions. Third, it may arise because neighborhoods want civic order on the streets whatever the cost. Each process generates powerful demands for torture.\textsuperscript{76}

\textsuperscript{73} Darius Rejali \textit{Torture, American style -The surprising force behind torture: democracies} THE BOSTON GLOBE (December 16, 2007) D1.
\textsuperscript{74} \textit{Id.}
\textsuperscript{75} \textit{Id.}
\textsuperscript{76} Darius Rejali, \textit{TORTURE AND DEMOCRACY} (Princeton University Press, 2007) at 46.
Only the first of these stemming from the security apparatus (in the case of the U.S. the CIA) directly concerns our focus here. It suggests that the U.S. experience in this regard is little different from that of the French in Algeria, the British in Northern Ireland or the Israeli’s experience with Gaza and the West Bank.

These researchers provide a framework for understanding how torture cultures arise and even flourish. We now know that we as humans are far more susceptible of following orders to abuse others; we have a sense of the group dynamics involved, and we even have some understanding of the societal conditions necessary for abusive culture’s to evolve. Because of Milgram, Zimbardo and Huggins’ research, we know that the holocaust did not result from anything innately evil about the German people as a whole; nor were the people who ran Stalin’s Gulags inherently evil or somehow different from us. Rejali adds that, when confronted by a threat, and where there is a lack of accountability, democracies will also torture – the main difference is the extent to which they will go to try to hide it. These tools then, aid our understanding of the uses of torture in the war against terror.

We are told that the “war on terror is a different kind of war” with “no geographic limitations and no end in sight.” The U.S. President says that our enemies are “evil-doers” outside and undeserving of law. We inhabit an “us” against “the evil doers”

77 Bill Lambrecht, New type of war brings new interpretations of the Constitution, St. Louis Dispatch, THE TRIBUNE (San Luis Obispo) September 14, 2007).
world as we slide into a torture culture. Al-Qaeda compare with pirates and slave traders
to be dealt with or extirpated at will. As one prominent legal defender of the
Administration puts it:

Why is it so hard for people to understand that there is a category of behavior not
covered by the legal system?” What were pirates? They weren’t fighting on behalf of any nation. What were slave traders? Historically, there were people so bad that they were not given protection of the laws. There were no specific provisions for their trial, or imprisonment. If you were an illegal combatant, you didn’t deserve the protection of the laws of war.  

In this context, with suspects demonized and placed outside of law, the Administration’s statements sound uncomfortably similar to General Wilhelm Keitel’s Nuremburg testimony:

The main theme [of Hitler’s instructions] was that this was the decisive battle between two ideologies, and that this fact made it impossible to use in this war methods as we soldiers knew them and which were considered to be the only correct ones under International law. The war could not be carried on by these means. In this case completely different standards had to be applied. This was an entirely new kind of war, based on completely different arguments and principles.  

Plainly, Huggins’s conditions of a “war against evil,” and a “public immobilized by fear,” are met in the war on terror. The point is not that the United States is close to becoming another Nazi Germany, whose excesses far outstrip the evils of almost any imagined

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79 Former Office of Legal Counsel lawyer and law professor John Yoo is the foremost proponent of the proposition that the enemy in the war against terror are outside of the law, undeserving of most legal protections, and that no laws can prevent a President from exercising his powers as commander-in-chief. See, generally, John Yoo, The Changing Laws of War: Do We Need a New Legal Regime After September 11?: Transferring Terrorists, 79 NOTRE DAME L. REV. 1183 (2004).
80 John Yoo, quoted by Jane Mayer, Outsourcing Torture, NEW YORKER (February 14, 2005) at 106.
comparison. The reasoning underpinning the current abusive practices is the same, and as
Professor Huggins’s research shows, must be considered a contributing factor. We\textsuperscript{82}
cannot demonize, and simultaneously raise fears, without paying a price.

Moreover, the French experience in the 1950’s war in Algeria shows that even a
people who have recently experienced torture can in turn torture others and justify (at
least to themselves)\textsuperscript{83} the practice. As historian Alfred W. McCoy points out:

Despite the Third Reich’s defeat in 1945, its legacy persisted in the former
occupied territories, particularly among French officers in colonial Algeria. As
partisans who fought the German occupation during World War II, some of these
officers had suffered Nazi torture and now, ironically, used the experience to
inflict this cruelty on others …

Forcing water down a victim’s throat to simulate drowning, a technique then
favored by the French army and later used by the CIA, was, the report insisted,
perfectly acceptable” (emphasis added).\textsuperscript{84}

Thus, torture is not, as some may wish, contrary to most people’s nature, it is not an
aberration limited to a few sadists. If that were so, one would have thought that those
French partisans who had suffered Nazi torture would have been among the most
reluctant to torture, rather than, as it happened, enthusiastically embrace it.\textsuperscript{85} Indeed, “to

\textsuperscript{82}“We have met the enemy and he is us,” Walt Kelly, \textit{Pogo}, available at
<http://www.igopogo.com/final_authority.htm>. Or as Jean-Paul Sartre put it, “when we
raise our heads and look into the mirror we see an unfamiliar and hideous reflection:
ourselves.” Preface to Henri Alleg, THE QUESTION (translated by John Calder (Bison

\textsuperscript{83} General Paul Aussaresses, the French army intelligence officer most prominently
associated with torture in the French-Algerian war provides what is undoubtedly one of
the most famous examples of a torturer justifying his craft. See, Paul Assaresses, \textit{Do You
Think I Enjoy This?}, from his memoir, THE BATTLE OF CASBAH, reprinted in THE
PHENOMENON OF TORTURE: READINGS AND COMMENTARY, William F. Schulz, Ed.

\textsuperscript{84} A QUESTION OF TORTURE: CIA INTERROGATION, FROM THE COLD WAR TO THE WAR ON

\textsuperscript{85} General Paul Aussaresses, “who developed many torture techniques” for the French
forces, “did not regret his use of torture because it was done in order to protect innocent
himself, [the torturer] is a hero, defending the motherland, ridding the world of subversives. And, of course, this image is rigorously reinforced by his training.”

Even when laws specifically prohibit torture, abuses can occur. Abner Louima’s sad case—beaten and sexually assaulted by police officers in New York City—only served to highlight police abuses that had been going on for years. It appears from the evidence that police there never expected discovery or punishment for what now appears to have been a routine practice.

The teachings of modern psychology, sociology and history suggest that when faced with systemic, widespread torture and cruel treatment, one should look, not to a “few bad apples” but rather to failures of command and control; failures that go to the top. While this does not prove that higher-level administration officials were responsible for creating a culture of torture in the United States after 9/11, it does suggest that one should be skeptical of the Administration’s “few bad apples” theory. It also suggests the need to look for evidence to support Senator Patrick Leahy’s claim that because of information made public,

it has become clear to all that these incidents at U.S. facilities around the world are not just the actions of a few low-ranking members of the military. Rather, in the upper reaches of the Executive Branch a process was set in motion that rolled forward to produce scandalous results.

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And, his further claim that,

senior officials in the Bush White House, Ashcroft Justice Department and
Rumsfeld Pentagon set in motion a systematic effort to minimize, distort and even
ignore our laws, policies and agreements on torture and the treatment of prisoners. Defense Secretary Rumsfeld and, later, Lt. Gen. Ricardo Sanchez, authorized the
use of techniques that were contrary to both U.S. military manuals and
international law. Former CIA Director Tenet requested and Secretary Rumsfeld
approved the secret detention of "ghost detainees" in Iraq so that they could be
hidden from the International Committee of the Red Cross. Still unexplained are
instances where the U.S. Government delivered prisoners to other countries
known to utilize torture.\footnote{Id.}

From this perspective Abu Ghraib, extraordinary rendition, secret prisons and the
abusive treatment of prisoners at Guantanamo Bay, was the foreseeable result of a secret
and unaccountable culture.\footnote{Matthew B. Stannard, Stanford experiment foretold Iraq scandal, SAN FRANCISCO
As David Luban has put it, “Abu Ghraib is the fully
predictable image of what a torture culture looks like. Abu Ghraib is not a few bad apples
– it is the apple tree.”\footnote{David Luban, Liberalism, Torture, and the Ticking Bomb, 91 VA. L. REV. 1425, 1452
(2005).} Moreover, also as Luban points out, torture is independent of
ideology. Embraced by liberals like Alan Dershowitz and Senator Charles Schumer, as
well as conservatives, “American abhorrence to torture now appears to have
extraordinarily shallow roots.”\footnote{Id. at 1426 (2005). Luban further undercuts any notion that ideology plays a dominant
role by pointing out that conservative William Saffire “expresses revulsion at ‘phony
tough’ pro-torture arguments, and forthrightly labels torture ‘barbarism.’” For another
liberal who is rethinking non-physical, psychological torture as a possibility in the war on
terror, see, Jonathan Alter, Time to Think About Torture, NEWSWEEK, (November 5,
2001) at 45.} Other scholars would leave torture formally illicit, but
provide a broadened necessity defense to those who engage in it, a strategy to allow
torture in those cases where a judge or jury determines that it was, after the fact, necessary. Plainly, the idea of using torture is no longer the sole province of the fanatic nationalist; it encompasses a wide intellectual and ideological spectrum.

Once started, torture and other abusive practices spread. Their logic cannot be easily contained. If it is right to torture in the extreme case, what about a slightly less extreme case? And a yet still less extreme case? In every case harsh practices can be justified on the ground that the person being questioned may harbor information that could save innocent lives.

Proponents always trot out the extreme case, such as the “ticking bomb” in defense of torture. The idea revolves around the notion that we could through torture, be able to learn of the existence of a massive bomb set to go off in a crowded place in time to avert the disaster and thus save thousands or even millions of lives. Imagine a nuclear bomb set to go off on Manhattan and you have the terrorist in your hands. What would you do? Thus arises the Dirty Harry question.

94 Clint Eastwood starred in the movie, Dirty Harry (Warner Brothers, 1971) that has come to signify the problem of when police should avoid the niceties of the law in order to see that innocents are saved and justice done. Eastwood’s character, Dirty Harry, abused a suspect in order to try (failing in the attempt) to save a young girl. Law professors seized on this movie, now featured in Criminal Procedure textbooks and law reviews, to illustrate the point – at what point is abuse or even torture justified notwithstanding prohibitory norms. A Lexis-Nexis search of “Dirty Harry” on March 29, 2008, revealed 137 citations to the movie in U.S. and Canadian law reviews. Many raised this supposed tension between following the law with respect to suspects who have vital, time-sensitive and potentially life-saving information and yielding to the impulse to get the information any way one can.

The fictional Dirty Harry scenario seems remarkably similar to a real-world case arising in Frankfurt, Germany where 11-year old Jakob von Metzler, was kidnapped for ransom, and hidden with mouth and nose covered with duct tape and wrapped in plastic. Threatened with torture, the kidnapper revealed the boy’s location, but it was too late and
The philosopher Henry Shue pointed out over 25 years ago that this example has no practical significance.\textsuperscript{95} Its carefully built in provisos do not operate in the real world. When have we ever had certain (or near certain) knowledge that a specific person knows about a bomb set imminently to explode in a crowded area, and who could, if tortured, timely tell you of its location, such that you might either find experts to defuse it or be able to evacuate the area? This hypothetical scenario is thus, “corrupt in the illicit conclusions it invites.”\textsuperscript{96} By allowing otherwise normal people to contemplate torture in the extraordinary case, it invites abuse in a real-world (and always less extraordinary) case. It invites ordinary people to imagine, justify and ultimately participate in a culture of torture. \textit{Dirty Harry} is fine Hollywood fiction. We follow its logic at our peril.

Two points follow from this. First, since the conditions carefully built into most philosophical defenses of torture are not met in the real world, logic suggests those who torture do so outside the bounds of its justification.\textsuperscript{97} Thus, torture is never limited to a few necessary instances where we know we have the right person and only the right

the boy was found dead. This case, like the fictional \textit{Dirty Harry}, is used to question whether torture, or at least the threat of torture is not sometimes justified. Mark Bowden, \textit{The dark art of interrogation: the most effective way to gather intelligence and thwart terrorism can also be a direct route into morally repugnant terrain. A survey of the landscape of persuasion}, 292 \textit{The Atlantic Monthly} 51 (Oct. 1, 2003). See, also, Bernhard Schlink, \textit{The Problem With “Torture Lite,”} 29 Cardozo L. Rev. 85 (2007)(arguing that case, in part, led “some constitutional scholars rethink the issue.” \textit{Id.} at 85).


\textsuperscript{97} This can be demonstrated by a syllogism.

\begin{tabular}{ l l }
Major premise: & Torture can only be justified where conditions A and B are met. \\
Minor premise: & The conditions for A and B are never met. \\
Conclusion: & Those who torture do so outside the justificatory boundaries. \\
\end{tabular}
person and we know he or she has critical, timely information. Second, regardless of
whether one accepts an argument based on logic alone, the empirical lessons earlier
summarized from behavioral science and history, suggest that torture inevitably slips its
philosophical moorings. The practice extends to all seen as the enemy and who could
possibly have information useful in defeating that enemy. Torture’s logic thus easily
expands outside of its original justification to encompass anyone thought worth
questioning – all who oppose “us” in an “us” against “them” war.

Elaine Scarry points out just how fallacious “ticking time bomb” reasoning has
proven in the present “war on terror.”

In the two and a half years since September 11, 2001, five thousand foreign
nationals suspected of being terrorists have been detained without access to
counsel, only three of whom have ever eventually been charged with terrorism-
related acts; two of those three have been acquitted. When we imagine the ticking
time bomb situation, does our imaginary omniscience enable us to get the
information by torturing one person? Or will the number more closely resemble
the situation of the detainees: we will be certain, and incorrect 4,999 times that we
stand in the presence of someone with the crucial data, and only get it right with
the five thousandth prisoner? Will the ticking bomb still be ticking. (citations
omitted).

The question is: “[d]o you really want to torture by the numbers? …Would you torture 49
innocent people to get at the one who has the information on the ticking bomb? Why stop

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98 Obviously if one does not accept either the major or minor premise then one need not
accept the conclusion.

99 Elizabeth Scarry, *Five Errors in the Reasoning of Alan Dershowitz*, in TORTURE A
COLLECTION, Sanford Levinson, Ed., (Oxford, 2004) at 284. The fact that since Elaine
Scarry wrote this piece the government has managed to procure a few more convictions
and has started military commissions in Guantanamo Bay does not undercut the power of
her point. Here, as elsewhere, we torture many more innocent people, and others who
have not truly useful information, for rare times we may get it “right.”

100 The French in the Algerian war had a similar experience, torturing thousands while
getting relatively little in the way of useful information. Darius Rejali, *Does Torture
Work?*, in *THE TORTURE PHENOMENON: READINGS AND COMMENTARY*, Ed. William F.
Two problems are subsumed within this question. One is the problem of torture of the innocent. The other revolves around torture’s propensity to devolve to less and less important adversaries until we reach the point of torturing all supposed enemies. Both problems raise moral concerns.

Experts estimate that 80% of people tortured by our forces and our South Vietnamese allies during the Vietnam War were wholly innocent people who were in the wrong place at the wrong time. Many were “simply opposed to the government of President Thieu. Many others were simply low-level Viet Cong with little useful information. During World War II, even the infamous Gestapo got poor results from torture, torturing many with few successes and limited results.

No one is immune. Moreover, false confessions can be elicited just as easily from non-physical, “clean” interrogation techniques. During the Korean War, the North Koreans succeeded in getting 36 captured U.S. airmen to confess to a bizarre and false scheme to use biological warfare against Korean civilians. All 36 were subjected to touchless torture using isolation, standing or sitting in awkward positions, made to defecate in public, and other humiliations. The American public was incredulous that these airmen could falsely accuse the U.S. of such barbarity without being “tortured.”

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102 Michael Otterman, American Torture: From the Cold War to Abu Ghraib and Beyond (Pluto Press, 2007) at 71.
103 Id., quoting from the New York Times.
104 Id. at 66.
106 Joseph Marguilles, Torture not appropriate then, or now, The Times Union, (October 4, 2006) at A9.
Torture, and torture “lite’s” propensity for leading to false confessions should not be underestimated.

The appalling incidence of innocent persons wrongfully convicted after otherwise fair trials\(^\text{107}\) should give pause to those who think that our intelligence services, acting on incomplete and often speculative information, always focus only on the guilty. One should also be skeptical of the claim that our intelligence services only single out the worst of the worst.

The anti-colonialist journalist Henri Alleg’s torture at the hands of French paratroopers provides a famous historical example of just how quickly torture slips its initial justification to expand to less and less important victims. Jean-Paul Sartre\(^\text{108}\) explains:

How are the torturers justified? It is sometimes said that it is right to torture a man if his confession can save a hundred lives. This is nice hypocrisy. Alleg was no more a terrorist than Audin [a friend of Alleg’s, tortured and “disappeared”]. The proof is that he was charged with ‘endangering the safety of the State and reconstructing banned organizations’.

Was it to save lives that they scorched his nipples and pubic hair? No, they wanted to extract from him the address of the person who had hidden him. If he had talked, one more Communist would have been locked up, no more than that.

Torture not only slips its initial logic spreading to less important cases; it also expands as to any given victim; there is no clear endpoint for the individual any more

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\(^{108}\) Preface to Henri Alleg, *THE QUESTION* (translated by John Calder (Bison Books Edition, University of Nebraska Press, 2006) at xxxvii. Both Sartre and his long-time lover, Simone de Beauvoir, were among many French intellectuals who opposed and attempted to publicize French torture in the war in Algeria. James D. Le Sueur, Introduction to *THE QUESTION*. 
than there is a boundary over the numbers to be tortured. The innocent person is most vulnerable. Torturers often suggest that the victim is at fault; all he or she need do is come forward with the truth. But that is a mirage. One can never know whether the person undergoing torture knows anything of value, or if he has told all he knows. How can an innocent person persuade his interrogator that he knows nothing? And how can the person who has told all persuade make clear that he has nothing more of value to say? Moreover, those who do have important information “can only protect themselves, as torture victims always have, by pretending to be collaborators or innocents, and thereby imperiling the members of these categories.”

Again, Sartre forces us to confront this nasty counterintuitive reality.

Torture is senseless violence, born in fear. The purpose of it is to force from one tongue, amid its screams and its vomiting up of blood, the secret of everything. Senseless violence: whether the victim talks or whether he dies under his agony, the secret that he cannot tell is always somewhere else and out of reach. It is the executioner who becomes Sisyphus. If he puts the question at all, he will have to continue for ever.”

Contrary to Camus’s Sisyphus, who rebels and is ultimately happy notwithstanding the absurdity of his situation, Sartre posits a grim Sisyphus, perverted by his task, but who, like the mythological Sisyphus, is condemned to continue. The logic is counterintuitive; we ordinarily suppose that torturers will stop once they possess the sought after information. Sartre reminds that this is naive. The torturer cannot stop.

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111 *THE MYTH OF SISYPHUS:* AND OTHER ESSAYS, (Alfred A. Knopf, 1955). Sartre and Camus, were friends, contemporaries and French intellectuals. They alluded to the myth, however, with a far different focus.
The historian Alfred W. McCoy points out, once a nation has committed to mass torture it cannot just free its victims; torture must inevitably continue to its logical endpoint.

As we slide down that slippery slope to torture in general, we should realize that there is a chasm at the bottom called extrajudicial execution. With the agency’s gulag full … CIA agents, active and retired, have been vocal in their complaints about the costs … Illegal rendition or legal deportation is a possibility for some…. The ideal solution … is extrajudicial execution. Indeed, the systematic French torture of thousands from the Casbah of Algiers in 1957 also entailed over three thousand ‘summary executions’ as ‘an inseparable part’ of this campaign.

Darius Rejali points out the French could not release their torture victims without their story becoming known and having “their relatives and friends ‘join the resistance.’”

The French were not alone among democracies that killed its torture victims. The United States and its allies disposed of some twenty thousand persons in its “pump and dump” interrogations between 1968 and 1971 during the Vietnam War. One possible reason for this is explained in “an ambiguous note” in the CIA’s 1983 Human Resource Exploitation Training Manual in which “interrogators are advised to ask themselves a cautionary question: If the subject is released, ‘will he be able to cause embarrassment by

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112 Alfred W. McCoy, A QUESTION OF TORTURE: CIA INTERROGATION, FROM THE COLD WAR TO THE WAR ON TERROR (HenryHolt, 2006) at 195-96.
113 Of course, as we point out in the sections on the Military Commissions Act of 2006, the Administration may well try to get convictions and prison sentences for each and every person that it cannot deport or render.
going to the newspapers or courts.’” The note is subject to interpretation - was it there as a caution to avoid torture, or to avoid being caught, or both? Regardless, it plainly demonstrates one motive for killing those whom one has tortured.

People released after rendition, or from secret CIA prisons and from Guantanamo, have done just that – talked to the press and pressed lawsuits. The United States faces hard choices with those it has tortured. If it releases them, it will suffer

116 James Hodge and Linda Cooper, Roots of Abu Ghraib in CIA techniques: 50 years of refining, teaching torture found in interrogation manuals; The U.S. and Torture; Cover Story, 3 NATIONAL CATHOLIC REPORTER, volume 41, pg. 11 (November 5, 2004).

117 For example, both Mahr Arar and Kalid El Masri attempted to bring lawsuits based upon their illegal rendition; both cases have thus far been stymied by interposition of the state secrets doctrine. El Masri v. Tenet, 479 F. 3d 296 (4th Cir. 2007), cert. denied, 2007 LEXIS 11351 (Oct. 9, 2007) (state secrets privilege precluded litigation of El Masri’s claims which included kidnapping, rendition and torture); see also, Arar v. Ashcroft, 414 F. Supp. 2d 250 (E.D.N.Y. 2006).

118 Nick Fiske, Former CIA ‘ghost detainee’ describes interrogation abuses in Amnesty report, THE JURIST, March 14, 2008 at <http://jurist.law.pitt.edu/paperchase/2008/03/former-cia-ghost-detainee-describes.php>. (Khaled Abdu Ahmed Saleh al-Maqtari, a Yemeni and Former CIA ghost detainee detailed torture and abuse at Abu Ghraib and secret CIA facility in Afghanistan. He was held total of 32 months after being arrested in Fallujah in Feb. 2004. He was flown from Afghanistan to a secret CIA prison believed to be in Eastern Europe before being returned to Yemen in May 2007. The torture included, beatings, sleep deprivation, freezing water. he was not told where he was, and not allowed to contact his family or lawyer.

119 According to THE JURIST, Mauritanian, Mohamed Ould Sillahi, a detainee at Guantanamo Bay, has threatened to sue U.S. officials and alleges he was tortured. He claims he was tortured in Jordan and Mauritania after arrest in 2001 and handed over to U.S. authorities in 2002. He has been held 6 years without charge, and denied access to counsel of choice. A 2007 Wall Street Journal report said Sillahi had been accused by other terror detainees of helping to recruit the terror cell behind the 9/11 attacks but a Sr. US military prosecutor refused to prosecute him, believing some of his statements obtained under torture. A Mauritanian foreign ministry official says that Mauritania seeks his return. Mike Rosen-Molina, Mauritanian Guantanamo detainee alleges torture in US, foreign custody, THE JURIST, March 10, 2008 at <http://jurist.law.pitt.edu/paperchase/2008/03/mauritanian-guantanamo-detainee-alleges.php>; See also, Devin Montgomery, Guantanamo detainee Khadr accuses US interrogators of threats, physical abuse, THE JURIST, March 18, 2008 at <http://jurist.law.pitt.edu/paperchase/2008/03/guantanamo-detainee-khadr-accuses-us.php>.
embarrassment. If it convicts, after unfair trials, or holds them as unlawful enemy combatants, it may keep them in custody, perhaps deferring the problem; or, it may dispose of its most embarrassing problem.

Finally, one may reasonably ask what torture does as an organized social practice. What does it do to us? Our society? The people who do it? Where do we draw the line? Where do torturers draw the line? Social psychology teaches that,

we judge right and wrong against the baseline of whatever we have come to consider "normal" behavior, and if the norm shifts in the direction of violence, we will come to tolerate and accept violence as a normal response. The psychological mechanisms for this re-normalization have been studied for more than half a century, and by now they are reasonably well understood.\textsuperscript{121}

Given this empirical reality, one might reasonably ask about the coarsening effect these practices bring. Will we come to accept this as the normal, even moral, state of affairs? Anyone can torture; once begun its peculiar logic expands in scope and intensity; it remains a slippery slope, a boundary that once breached gives way. Torture metastasizes;\textsuperscript{122} like Pandora’s box, once opened, we cannot corral it. Absent enforced

\begin{footnotesize}
\begin{enumerate}
\item According to former chief prosecutor, Colonel Morris Davis, at Guantanamo Bay, there is reason to believe that the Pentagon may be rigging the results of the trials. In one conversation that he had with Pentagon General Counsel, William Haynes, Haynes said “these trials will be the Nuremberg of our time,” recalled Davis. Davis replied “if we come up short and there are some acquittals in our cases, it will at least validate the process” Haynes responded “Wait a minute, we can’t have acquittals. If we’ve been holding these guys for so long, how can we explain letting them get off? We can’t have acquittals. We’ve got to have convictions.” Davis submitted resignation October 4, 2007, hours after informed that Haynes had been put above him in commissions’ chain of command. The military disputes Davis’s account. See, Ross Tuttle, Rigged Trials at Gitmo, THE NATION (Feb. 20, 2008) at <http://www.thenation.com/doc/20080303/tuttle>, for an account of this controversy.
\item According to Alfred W. McCoy, “CIA torture techniques that have metastasized over the last 50 years like an undetected cancer.” Interview with NCR, James Hodge and Linda Cooper, Roots of Abu Ghraib in CIA techniques: 50 years of refining, teaching
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proscriptions, its boundaries swell undetermined and unconstrained, always amorphous and hidden, yet somehow, despite our reluctance, recognized. A Henri Alleg predictably surfaces, forcing our hesitant gaze.

III. Pre-9/11 Torture by the United States

When Americans found themselves looking at photographs of U.S. soldiers abusing naked and hooded Iraqis at Abu Ghraib prison, it’s a safe bet that most didn’t realize that they were looking at torture techniques refined by the Central Intelligence Agency over the last half century.\textsuperscript{123}

American use of torture traces at least back to the occupation of the Philippines during the rebellion of 1899 to 1902.\textsuperscript{124} The immediate predecessors of the present culture of torture trace to the cold war and to a lesser extent the French war in Algeria in the late 1950’s.\textsuperscript{125}

After World War II, Cold War fears of communist domination combined with persistent reports of “brainwashing” seemingly required an aggressive response. Long before Vice President Dick Cheney argued for working “sort of on the dark side”\textsuperscript{126} a

\textsuperscript{123} Id. at 11.
\textsuperscript{125} General Paul Aussaresses of the French-Algerian war “was employed as a training officer by U.S. Special Forces at Fort Bragg in 1966. Editor’s note to Paul Assaresses, \textit{Do You Think I Enjoy This?}, from his memoir, \textit{The Battle of Casbah}, reprinted in \textit{The Phenomenon of Torture: Readings and Commentary}, William F. Schulz, Ed. (University of Pennsylvania Press, 2007) at 138-39.
\textsuperscript{126} Cheney is quoted in a Meet the Press interview as saying: “We also have to work, though, sort of the dark side, if you will. We’ve got to spend time in the shadows of the intelligence world. A lot of what needs to be done here will have to be done quietly, without any discussion.” Michael Bilton, \textit{Post-9/11 Renditions: An Extraordinary Violation of International Law} (May 22, 2007) International Consortium of Investigative Journalists at:
secret panel chaired by Lieutenant General Jimmy Doolittle advised President Eisenhower that: “acceptable norms of human conduct do not apply” to the cold war, that “American concepts of ‘fair play’ must be reconsidered” in an effort to “develop effective espionage and counter-espionage services” that “must learn to subvert, sabotage and destroy our enemies by more clever, more sophisticated means than those used against us.”

American officials did not know what to make of the brilliant Cardinal Mindzenty’s inexplicable “confession” delivered in flat tones to a Bulgarian Court. How this man of “intransigent moral stamina” could be so thoroughly broken, led to speculation that the communists must have developed ways to quickly and without obvious physical signs elicit confessions from even the strongest and most resistant opponents. The CIA sought the secret to quick and effective interrogation techniques, and scrambled to learn what it supposed that the communists already knew. Ostensibly, the goal was to prepare U.S. agents to resist. However, they also sought quick and effective methods to make someone talk. Torture was not only to be defended against; it was a useful tool to be refined for our own use.

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http://www.publicintegrity.org/militaryaid/report.aspx?aid=855. This quotation has been widely cited as evidence for the Vice President’s acceptance of torture.


128 McCoy supra note 62, at 22.

129 Torture’s effectiveness has been questioned since imperial Rome. The jurist Ulpian explained that torture is “a delicate, dangerous and deceptive thing,” … “For many persons have such strength of body and soul that they heed pain very little, so that there is no means of obtaining the truth from them. While others are so susceptible to pain that they will tell any lie rather than suffer it.” Quoted in, Sally Neighbour, Asking the painful questions, WEEKEND AUSTRALIAN, June 16, 2007) at 22.

130 McCoy supra note 62, at 35.
The United State’s use of torture follows two tracks – the outright physical torture used throughout history, and newer techniques designed to break a person without leaving telltale marks. This second, “no marks” version, said not to constitute “real” torture, divides into three related tracks - related because each can find use in combination with one or both of the others.

One spur focused on sensory deprivation as a way to induce madness and a willingness to talk. Another looked at the use of drugs to induce a person to talk. Finally, interrogation focused on intensive stress techniques that cause great anguish but not obvious signs of torture (unless the unlucky victim dies and is autopsied). All of these techniques can cause irreparable harm and some can cause extreme psychological or emotional damage. One may reasonably ask why interrogation techniques that can lead to psychotic delusions\textsuperscript{131} do not count as “real torture.”

Sensory deprivation as an interrogation technique traces directly to the pioneering work of Dr. Donald O. Hebb of McGill University. Between 1951 and 1954 Hebb using funding from the Canadian Defence Research Board conducted sensory deprivation studies on paid student volunteers.\textsuperscript{132} Hebb quickly found that he could induce hallucinations and it is now known that extreme sensory deprivation can rapidly induce psychotic states. The CIA continued to fund research in this area throughout the 1950’s but much of the results remain classified.\textsuperscript{133} Even subjects in Hebb’s efforts (which were

\textsuperscript{131} See note 27 supra and surrounding text.
\textsuperscript{132} For succinct accounts of this research see, Alfred W. McCoy, A QUESTION OF TORTURE: CIA INTERROGATION FROM THE COLD WAR TO THE WAR ON TERROR, (HenryHolt, 2006) at 21-59; Michael Otterman, AMERICAN TORTURE: FROM THE COLD WAR TO ABU GHRAIB AND BEYOND (Pluto Press, 2007) 41-58.
\textsuperscript{133} Otterman, Id., at 45.
rather tame by comparison to later CIA uses) reported fears lasting weeks later.\textsuperscript{134} Hebb’s strategy was followed by a 1954 study at the National Institute of Mental Health, by John Lilly in which volunteers lasted no more than three hours. One kicked his way out of the sensory deprivation box “after an hour of tearful pleas for release had been ignored.”\textsuperscript{135} The CIA funded many more tests of sensory deprivation on both voluntary and involuntary subjects, finding that the technique could “produce major mental and behavioral changes,”\textsuperscript{136} from which some people never recover.\textsuperscript{137} Ultimately, however, sensory deprivation did not work on everyone.\textsuperscript{138} Many intelligence experts, as well as academics, doubt whether sensory deprivation can yield useful intelligence.\textsuperscript{139}

Sensory deprivation continues to be used in combination with other more active techniques, including self-inflicted pain,\textsuperscript{140} to throw the person to be interrogated off-balance and to enhance the effectiveness of the other methods.\textsuperscript{141} Given the pressure now

\begin{thebibliography}{99}
\bibitem{134}Otterman, at 44.
\bibitem{135}Mark Bowden,\textit{ The dark art of interrogation: the most effective way to gather intelligence and thwart terrorism can also be a direct route into morally repugnant terrain. A survey of the landscape of persuasion}, 292\textit{ The Atlantic Monthly} 51 (Oct. 1, 2003).
\bibitem{136}McCoy,\textit{ supra} note 63, at 40.
\bibitem{139}Mark Benjamin,\textit{ supra} note 132.
\bibitem{140}McCoy,\textit{ supra} note 63, at 47.
\bibitem{141}Sensory deprivation was one of the allegations of torture made by Jose Padilla (who was convicted of terrorist activities in a Federal District Court in Miami). See, e.g., Peter Whoriskey,\textit{ Judge Orders Padilla Jail Personnel to Testify},\textit{ The Washington Post}, (February 17, 2007) at A17. While the government denied, and the Judge rejected claims that Padilla was tortured, we do know that he was placed in a blacked out room (see, Laura Parker,\textit{ Terror suspect’s claim: Too traumatized for trial},\textit{ USA Today}, (February 14, 2007) at 1A) and forced to wear ear-muffs and goggles. Although the Federal District judge found Padilla competent to stand trial and that he had not been tortured, she did find that he had been subjected to “harsh conditions” and “extreme stresses.”\textit{ Padilla given long jail sentence}, BBC\textit{ World News} (January 23, 2008) available at
\end{thebibliography}
placed on waterboarding and other harsh physical interrogation techniques, some predict a return to sensory deprivation as a means of interrogating terrorist suspects.  

Beginning in 1942, the CIA and other intelligence services sought, and experimented with, the use of drugs as “truth serums” with limited success. From 1953 to 1963, the CIA funded this research, sometimes on unwitting test subjects, at least one of whom died as a result. Because of its lack of success, (and with similar lack of success with hypnosis as well) the CIA has shifted to other more invasive measures, although it likely continues to use drugs in combination with other abusive techniques.

http://news.bbc.co.uk/2/hi/americas/7203276.stm. What is not clear from the publicly available information is just how extreme the sensory deprivation was for Padilla.

Mark Benjamin, The CIA’s favorite form of torture, SALON.COM (June 7, 2007)


There is no evidence that truth serum works. The information known publicly suggests that it does not work as it may loosen lips but not yield truthful answers. Linda M. Keller, Is Truth Serum Torture?, 20 AM. U. INT’L L. REV. 521, 531 (2005). In the famous case from the French war in Algeria involving Henri Alleg, the use of truth serum failed completely. Henri Alleg, THE QUESTION, translated by John Calder (Bison Edition, University of Nebraska Press, 2006) at 72-80. Of course, one cannot know whether the CIA has discoveries not encompassed by the publicly known literature.


McCoy supra note 63, at 31; “Not a single mind-control experiment succeeded. ‘The whole MKULTRA program was a giant dead-end’ says Alfred W. McCoy,” Mischa Gaus, Interrogations Behind Barbed Wire; Who’s to blame for America’s new torture techniques?, IN THESE TIMES (Feb. 2007) at 26.

McCoy supra note 63, at 31.

Journalist Mark Bowden writes “[a]ccording to my intelligence sources, drugs are sometimes used to assist in critical interrogations, and the preferred ones are methamphetamines tempered with barbiturates and cannabis. These tools can help, but they are only s effective as the interrogator.” The dark art of interrogation: the most effective way to gather intelligence and thwart terrorism can also be a direct route into morally repugnant terrain. A survey of the landscape of persuasion, 292 THE ATLANTIC MONTHLY 51 (Oct. 1, 2003), see also, Andrew A. Moher, The Lesser of Two Evils?: An Argument for Judicially Sanctioned Torture in a Post-9/11 World, 26 T. JEFFERSON L. REV. 469, 479 (2004).
Scholars disagree on whether the administration of an effective truth serum, should the CIA secretly have one, would constitute torture.  

During the cold war the CIA and other intelligence services became interested in more forceful interrogation tactics that would not leave telltale marks, so-called “torture lite” or as Darius Rejali puts it “clean” torture. Such, when combined with sensory deprivation, and drugs became the new torture. Typically, for U.S. interrogators, these include sleep deprivation, exposure to heat or cold, the use of drugs to cause confusion, rough treatment (slapping, shoving or shaking), forcing a prisoner to stand for days at a time or to sit in uncomfortable positions, and playing on his fears for himself and his family. Although excruciating for the victim, these tactics generally leave no permanent marks and do no lasting physical harm.

In 1994 Gary Cohn, Ginger Thompson and Mark Matthews, journalists for The Baltimore Sun newspaper used the Freedom of Information Act to seek the long suppressed truth about American use of torture. In 1997, after nearly three years of wrangling, the CIA declassified and released two key manuals, and the article that

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150 Darius Rejali’s list of clean tortures is nearly 3 pages long and includes such things as, electrotorture (including magnetos, cattle prods, and stun guns), beatings with telephone books, sandbags, hands; water torture of various kinds, dry chocking, Hot and cold temperatures, exhaustion exercises, positional tortures, restraints, spiced gases, sleep deprivation, noise, and sensory deprivation. This list demonstrates stunningly creative ways to cause stress, pain and discomfort. TORTURE AND DEMOCRACY (Princeton University Press, 2007) at 554-56. When one considers the way in which multiple techniques may be used on any single person, what may seem merely abusive when considered alone, can quickly become torture.

151 Mark Bowden, The dark art of interrogation: the most effective way to gather intelligence and thwart terrorism can also be a direct route into morally repugnant terrain. A survey of the landscape of persuasion, 292 THE ATLANTIC MONTHLY 51 (Oct. 1, 2003).
followed, *Torture was taught by CIA*,\(^{152}\) has become an influential source\(^{153}\) on U.S.
torture practices. Through their efforts, we learned that U.S. efforts to find effective
interrogation techniques that left no mark began in the early 1950’s\(^ {154}\) resulting in 1963
with a 128 page how-to manual, called *KUBARK*.\(^ {155}\) The newspaper also pried loose a
1983 Human Resource Exploitation Manual, which, while based on the earlier *KUBARK*
manual, updated CIA interrogation techniques.

Both manuals explicitly contemplate torture. For example, *KUBARK* states “the
electric current should be known in advance, so that transformers or other modifying
devices will be on hand if needed.”\(^ {156}\) And under the heading “pain” *KUBARK*
recommends that,

> [t]he threat to inflict pain, for example, can trigger fears more damaging than the
immediate sensation of pain. In fact, most people underestimate their capacity to
withstand pain.\(^ {157}\)

\(^{152}\) Gary Cohn, Ginger Thompson, Mark Matthews, *Torture was taught by CIA;*
Declassified manual details the methods used in Honduras; Agency denials refuted, *THE
BALTIMORE SUN* (January 27, 1997).

\(^{153}\) A Lexis/Nexis search of “Kubark and Baltimore Sun” under “News, all” yields 20
citations. The same search using U.S. and Canadian Law Reviews, Combined yields 4
citations. Books by Joseph Margulies, *supra* note 27, Alfred W. McCoy, *supra* note 61,
and Michael Otterman, *supra* note 98 credit the Baltimore Sun article with exposing
these two manuals.

\(^{154}\) James Hodge and Linda Cooper, *Roots of Abu Ghraib in CIA techniques: 50 years of
refining, teaching torture found in interrogation manuals; The U.S. and Torture; Cover
Story, 3 NATIONAL CATHOLIC REPORTER, volume 41, pg. 11 (November 5, 2004).

\(^{155}\) The *KUBARK* manual, as well as the later 1983 Human Resource Exploitation
Manual and various Department of Defense training manual’s detailing abusive
interrogation techniques are available at *The National Security Archive, Prisoner Abuse:
Patterns from the Past*, posted on the George Washington University website by Thomas
Blanton and Peter Kornbluh at:

http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/index.htm. The term “Kubark” is
“a cryptonym, KU a random diptych and BARK the agency’s code word for itself.” Tim
Weiner, *Word for Word/Interrogation CIA Style: The Spy Agency’s Many Mean Ways To
Loosen Cold-War Tongues*, *THE NEW YORK TIMES* (February 9, 1997) at 7.

\(^{156}\) *KUBARK* at 46.

\(^{157}\) *Id.* at 90.
Similarly, “threats delivered coldly are more effective” and “depends ... on whether [the person interrogated] believes that his questioner can and will carry the threat out.”\textsuperscript{158}

Finally, “resistance is likelier to be sapped by pain which he [the person interrogated] seems to inflict upon himself.”\textsuperscript{159} Thus, the manual recommends,

\begin{quote}
In the simple torture situation the contest is one between the individual and his tormentor (...and he can frequently endure.) When the individual is told to stand at attention for long periods, an intervening factor is introduced. The immediate source of pain is not the interrogator but the victim himself. The motivational strength of the individual is likely to exhaust itself in this internal encounter... As long as the subject remains standing, he is attributing to his captor the power to do something worse to him, but there is actually no showdown of the ability of the interrogator to do so.\textsuperscript{160}
\end{quote}

KUBARK’s commitment to permitting and regulating torture is spelled out in the section on Legal and Policy Considerations which, among other things, requires “prior Headquarters approval” before 1) “bodily harm is to be inflicted” or 2) “medical, chemical, or electrical methods or materials are to be used.” The third item on the list requiring headquarters approval is redacted, leaving one to wonder what more an interrogator might do.\textsuperscript{161} Plainly, the United States moved towards “clean” torture techniques that leave no mark, but pain, stress and extreme discomfort are to be the torturer’s tools, nonetheless.

The Human Resource Exploitation Manual followed KUBARK twenty years later in 1983. KUBARK as well as Army Field Manuals of the 1960’s heavily influenced the

\begin{footnotes}
\footnotetext{158}{Id. at 91.}
\footnotetext{159}{Id. at 94.}
\footnotetext{160}{Id. at 94.}
\footnotetext{161}{Id. at 8.}
\end{footnotes}
1983 manual. After Congressional investigations threatened to expose the latter manual, editors hand altered passages “that appeared to advocate coercion and stress techniques” adding that these methods were “prohibited by law” and were “neither authorized nor condoned.” These alterations make clear that the government understood the illegal and immoral nature of these practices – practices that continue in today’s war on terror. Both these manuals make clear that much of the torture and torture training that went on in Vietnam, Latin America, Iran, and the Philippines was the result of deliberate U.S. policy.

Experimentation and manuals, without more, could not, disseminate the culture of torture. That requires schools. Recall that, during the cold war, the government sought to understand communist interrogation techniques in part to see if ways to resist could be developed and taught. Begun in 1947 the resulting training programs or schools called SERE for Survival, Evasion, Resistance, and Escape, have, among other things, taught

163 Id.
164 Id.
165 Id.
166 For more details on the U.S. history of torture and use of client state’s in disseminating torture practices see, Alfred W. McCoy, A QUESTION OF TORTURE: CIA INTERROGATION, FORM THE COLD WAR TO THE WAR ON TERROR (HenryHolt, 2006), and Michael Otterman, AMERICAN TORTURE FROM THE COLD WAR TO ABU GHRAIB AND BEYOND, (Pluto Press, 2007). Also see, Mathew Rothschild, America’s Amnesia, 68 THE PROGRESSIVE 24, July 1, 2004 (“From Greece to Iran to Indonesia to Vietnam and throughout Latin America, the U.S. Government has been complicit in the torture or murder of hundreds of thousands of people.”).
167 According to the US Air Force SERE Specialist Website, the first SERE training program began in 1947 at Marks AFB, Alaska. http://www.gosere.com/medium.html. However, according to Michael Otterman, training to “inoculate soldiers against the stress of torture” began in 1953, and was exported to allies in South-East Asia by the late 1950’s. AMERICAN TORTURE: FROM THE COLD WAR TO ABU GHRAIB AND BEYOND (Pluto Press, 2007), at 11-12.
thousands of soldiers, airmen and sailors ways to resist enemy interrogators. Graduates simply by going through the training, also learned how to use these methods against others – how to stress and abuse without ordinarily causing permanent physical harm to the victim. SERE instructors, including psychologists devised programs that could be “reverse engineered” and then used at Guantanamo Bay.\footnote{Jane Mayer, The Experiment; The Military trains people to withstand interrogation. Are those methods being misused at Guantanamo?, The New Yorker (July 11, 2005) at 60.} Torture thus had two paths to leak out into the broader war – through graduates who could improvise interrogations on the spot in war zones, and through SERE instructors who could bring these methods to bear in secret and not-so-secret prisons in Afghanistan, Iraq and Eastern Europe, and at Guantanamo Bay.

One graduate of such survival training describes being waterboarded as “real drowning that simulates death.”\footnote{Richard E. Mezo, Why It Was Called ‘Water Torture’, The Washington Post (February 10, 2008) at <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/08/AR2008020803156.html>.} He continued,

\begin{quote}
The questions (What is your unit? Where are you from?) were asked by one man. But we were not supposed to talk. I remember that the blindfold was heavy and completely covered my face. As the two men held me down, one on each side, someone began pouring water onto the blindfold, and suddenly I was drowning. The water streamed into my nose and then into my mouth when I gasped for breath. I couldn't stop it. All I could breathe was water, and it was terrifying. I think I began to lose consciousness. I felt my lungs begin to fill with burning liquid.

Pulling out my fingernails or even cutting off a finger would have been preferable. At least if someone had attacked my hands, I would have had to simply tolerate pain. But drowning is another matter.\footnote{Id.} \end{quote}
The government, however, steadfastly denied that SERE program instructors or methods were, systematically and as a matter of policy, used on detainees. Similarities between SERE techniques and those used at Guantanamo, were attributed to graduates doing “some stupid things sometimes.”\textsuperscript{171} Notwithstanding continued denials, documents obtained by the American Civil Liberties Union through the Freedom of Information Act and first reported by \textit{Salon.com}, quotes the former chief interrogator saying

[w]hen I arrived at GTMO my predecessor arranged for SERE instructors to teach their techniques to the interrogators at GTMO … The instructors did give some briefings to the Joint Interrogation Group interrogators.\textsuperscript{173}

\textit{Salon} went on to report:

There are striking similarities between the reported detainee abuse at both Guantánamo and Abu Ghraib and the techniques used on soldiers going through SERE school, including forced nudity, stress positions, isolation, sleep deprivation, sexual humiliation and exhaustion from exercise. …detainees were exposed to loud music and yelling….interrogators would crank up the air conditioning to make detainees cold, and that one prisoner was also given a "lap dance" by a female interrogator "to use sexual tension in an attempt to break a detainee." The interrogator was later told not to do it again."

It seems clear, then, that SERE instructors were instrumental in transferring the knowledge of “clean” torture to Guantanamo Bay. Administration denials ring hollow.

KUBARK came out of the cold war and leads directly to the interrogation of detainees at Guantánamo and Abu Ghraib. The U.S. has openly embarked on a “culture

\textsuperscript{171} Id., Jane Mayer, at 60. The problem was sufficiently troublesome that the SERE program now requires graduates to sign an agreement promising not to use what they learned in the program on detainees. Id.

\textsuperscript{172} Even after the release of documents demonstrating the use of SERE techniques at Guantánamo, Army spokesman Carol Darby said “We do not teach interrogation techniques … Interrogation policy and techniques are taught by other military schools.” Mark Benjamin, \textit{Torture Teachers}, SALON.COM (June 29, 2006).

\textsuperscript{173} Id.
of torture.” Torture, however, rarely remains constrained even to “clean” or “lite” torture. Torture migrates toward the extremes. Prior to September 11, there have been many instances where abusive interrogation techniques migrated toward traditional physical torture. We have already mentioned the “pump and dump” programs created during the Vietnam War.

One more case serves to make the point – the matter of Dan Mitrione who brought wholesale cruelty to Latin America. Mitrione was an Indiana police chief who became a police advisor for CIA front organization, whose role “was to teach the most effective ways to obtain information” 174 first in the Dominican Republic, then Brazil and finally Uruguay, where he was murdered by Tupamaro guerrillas. Mitrione, who sought to “professionalize” 175 and make torture “scientific,” 176 apparently tortured to death innocent beggars during his classroom teaching sessions. 177 His philosophy of interrogation is a chilling reminder of just how far some people will go:

When you receive a subject, the first thing to do is to determine his physical state, his degree of resistance, thorough a medical examination. A premature death means a failure by the technician….

176 A.J. Langguth, HIDDEN TERRORS (Pantheon, 1978) at 286.
177 Michael Otterman quotes a Cuban intelligence agent, Manuel Hevia Cosculluela, saying: “[a]s subjects for the first testing they [Mitrione] took beggars … there was no interrogation, only a demonstration of the effects of different voltages on different parts of the human body, as well as demonstrating the use of a drug which induces vomiting – I don’t know why or what for – and another chemical substance. The four of them died. AMERICAN TORTURE: FROM THE COLD WAR TO ABU GHRAIB AND BEYOND (Pluto Press, 2007) at 76.
Another important thing to know is exactly how far you can go given the political situation and the personality of the prisoner. It is very important to know beforehand whether we have the luxury of letting the subject die …

Before all else, you must be efficient. You must cause only the damage that is strictly necessary, not a bit more. We must control our tempers in any case. You have to act with the efficiency and cleanliness of a surgeon and with the perfection of an artist. …

In any event, before he was murdered by guerillas in 1970, Mitrione, among other things, introduced electrified needles manufactured by the CIA and imported in diplomatic pouches. These needles varied in thicknesses and could be inserted in a victim’s fingernails and even between teeth. American agents trained allies in the methods of torture from the dreaded Iranian Savak to the Philippine military. As with KUBARK there is a direct line from American torture practices in the past to Abu Ghraib and Guantanamo.

IV. Creating a Torture Culture: After September 11

We – and I mean we as Americans – don’t believe it. We can read the accusations, even examine the evidence and find it irrefutable. But, in our hearts, we cannot believe that Americans have gone abroad to spread the use of torture.

David Luban argues persuasively that the U.S. Administration, through its lawyers, sought to “construct a judicially-endorsed practice of permissible torture.” This “torture culture is firmly in place, notwithstanding official condemnation of

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178 Manuel Hevia Conculluela, quoted by A.J. Langguth, Torture’s Teachers, THE NEW YORK TIMES (June 11, 1979) A19. Langguth says he believes “Mr. Hevia’s version . . . to be accurate.” This writer assumes that Conculluela is the same person noted in footnote 172 as Cosculluela.


180 Id.

Moreover, he argues “the only reasonable inference to draw is that the United States government is currently engaging in brutal and humiliating interrogations. At most torture has given way to CID.”

A few examples serve to make the point that what the Administration claims to be lawful interrogation many reasonable people would characterize as torture. An unnamed Federal Bureau of Investigation Agent observed activities at Guantanamo Bay and reported:

On a couple of occasions, I entered interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food, or water. Most times they had urinated or defecated on themselves, and had been left there for 18-24 hours or more. On one occasion, the air conditioning had been turned down so far and the temperature was so cold in the room, that the barefooted detainee was shaking with cold. When I asked the MP’s what was going on, I was told that interrogators from the day prior had ordered this treatment, and the detainee was not to be moved. On another occasion, the A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees. The detainee was almost unconscious on the floor, with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night. On another occasion, not only was the temperature unbearably hot, but extremely loud rap music was being played in the room, and had been since the day before, with the detainee chained hand and foot in the fetal position on the tile floor.

In another case an FBI agent reported that he asked a marine what had caused a detainee at Guanamanio Bay, who was being interrogated, to grimace:

The marine said Sgt. Lacey [the interrogator] had grabbed the detainee’s thumbs and bent them backwards and indicated that she also grabbed his genitals. The marine also implied that her treatment of that detainee was less harsh than her

182 Id. at 73.
183 Id., CID stands for cruel, inhuman and degrading treatment.
treatment of others by indicating that he had seen her treatment of other detainees result in detainees curling into a fetal position on the floor and crying in pain.\textsuperscript{185}

Acting chief of the Justice Department’s Office of Legal Council, Steven G. Bradbury, told a House subcommittee that CIA interrogators were allowed methods that were “quite distressing, uncomfortable, even frightening”\textsuperscript{186} as long as they did not meet the Administration’s definition of torture. According to Bradbury, “if it doesn’t involve severe physical pain, and it doesn’t last very long, it may not constitute severe physical suffering. That would be the analysis.”\textsuperscript{187} By this measure, waterboarding, as now practiced, subject to “strict time limits, safeguards, restrictions”\textsuperscript{188} is allowed and was in fact used on at least three detainees.\textsuperscript{189}

Defense of administration policy has come at the highest level. Supreme Court Justice, Antonin Scalia told BBC that “smacking someone in the face” is justifiable in the face of an imminent threat, “[y]ou can’t come in smugly and with great satisfaction and say ‘Oh it’s torture, and therefore no good.’”\textsuperscript{190}

Professor Marjorie Cohn argues that one reason why the administration refuses to admit that waterboarding (or, for that matter any of the harsh tactics formerly used by the

\textsuperscript{185} Quoted in, Joseph Margulies, \textit{Guantanamo and the Abuse of Presidential Power} (Simon and Schuster, 2006) at 6-7.
\textsuperscript{187} Id.
\textsuperscript{188} Id.
\textsuperscript{189} CIA chief confirms use of waterboarding on 3 terror detainees, JURIST (Feb. 5 2008) (CIA used waterboarding on 3 detainees and has not used it in 5 years. Used on Abu Zubayadah, Abd al-Rahim al-Nashiri and Khalid Sheikh).
\textsuperscript{190} US judge steps in to torture row, BBC NEWS (February 12, 2008) at: http://news.bbc.co.uk/1/hi/world/americas/7239748.stm
CIA) is because torture remains a crime under the War Crimes Act even after the amendments of the Military Commissions Act of 2006. Thus, it would be calling Dick Cheney a war criminal if [Attorney General Mukasey] admitted waterboarding is torture. Lawrence Wilkerson, Colin Powell’s former chief of staff, has said on National Public Radio that the policies that led to torture and abuse of prisoners emanated from the Vice President’s Office.\(^{191}\)

Thus, so-called “clean” teams are now re-interrogating detainees who have been tortured, so as to try to paint their confessions as having been obtained humanely.\(^{192}\)

Torture like pornography cannot be bounded precisely. However, like former Supreme Court Justice Potter Stewart, “I know it when I see it.”\(^{193}\) Most ordinary people know it as well. Most in the Administration know it, but cannot admit it. They have gotten themselves into the ultimate bind. If they admit publicly that what they did was wrong, that it was torture, they could be subject to prosecution. Thus, they continue to deny the obvious, even as they (as we see in the next section) admit from where the orders came. Moreover, it the Administration were to admit that its interrogation practices in fact constituted torture, the cases against many detainees would then fall apart.

One can easily see how the fear of another attack, like the one on September 11, combined with a kind of group think as to the correct (muscular) response came about. Without strongly dissenting voices, and with fear animating the decision-making, the

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\(^{192}\) Id.

Administration fell into tactics that many now perhaps regret. But they are stuck, and we are stuck. As Jean-Paul Sartre put it

[d]isavowed – sometimes very quietly – but systematically practised behind a facade of democratic legality, torture has now acquired the status of a semi-clandestine institution. Does it always have the same causes? Certainly not: but everywhere it betrays the same sickness. But this is not our business. It is up to us to clean out our own backyard, and try to understand what has happened to us…”

V. How High Did the Torture Culture Reach?

Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.195

Until Friday, April 11, 2008 we did not know that President Bush personally approved of cabinet minister’s micromanaging interrogations that include torture. This bit of long-suspected but not provable knowledge radically changes the debate.196 Given that approvals came from the highest possible level within the U.S. government, prosecution of anyone within the U.S. becomes virtually impossible. Exercise of universal jurisdiction by foreign governments becomes politically much harder. Speculation about the motive for these revelations remains hazardous. It seems reasonable, however, that the admissions detailed below were not inadvertent, but were, rather, a determined effort to staunch the calls for investigation into, and prosecution of, abusive interrogations at the hands of the C.I.A. We now have a full-fledged torture culture that has been granted de facto immunity.

For several years we have known that formed Secretary of Defense, Donald
Rumsfeld, was directly involved with torture; that he set down the techniques, including
chaining to the floor, stripping, hooding, dogs that were used at Guantanamo and Abu
Ghraib and that he was personally involved in Mohamed Al-Qahtani’s case.\(^{197}\)

Al Qahtani was selected for… the "First Special Interrogation Plan." …
interrogators subjected him to eighteen to twenty hours per day of aggressive
interrogation for forty-eight days over a fifty-four day period. During this time,
his body temperature fell to ninety-five degrees on two occasions, and his pulse
dropped to a life-threatening thirty-five beats per minute. (citations omitted)\(^{198}\)

Al-Qahtani’s treatment has been well documented using official an interrogation log
obtained by Time Magazine;\(^{199}\) unlike the treatment of some of the other detainees it is
not a matter of taking the word of the victim over official denials. The administration
cannot plausibly respond in al-Qahtani’s case (as it so often does) that members of al-
Qaeda are trained to claim that they have been tortured and thus, those claims are not
believable.\(^{200}\) Moreover, the Center for Constitutional Rights has filed lawsuits “in

\(^{197}\) Amy Goodman, \textit{On Visit to France, Donald Rumsfeld Hit with Lawsuit for Ordering,
Authorizing Torture}, DEMOCRACY NOW (Oct. 26, 2007) at
\(^{198}\) Jonathan H. Marks, \textit{Interrogational Neuroimaging in Counterterrorism: A “No-
Brainer” or a Human Rights Hazard?}, 33 Am. J. L. And Med. 483, 496 (2007).
\(^{199}\) Adam Zagorin and Michael Duffy, \textit{Inside the Interrogation of Detainee 063, TIME
MAGAZINE}, (June 12, 2005).
\(^{200}\) In one example, from among many that might be cited, Defense Deputy Assistant
Secretary Lawrence Di Rita said at a Defense Department Briefing: “With respect to
lawyers making allegations of detainees who have been released, we anticipate, and have
seen, in fact, all manner of statements made by detainees -- as you recall, many of whom
as members of al Qaeda were trained to report -- to claim alleged torture at virtually every turn, and mistreatment at virtually every turn.”
Germany and France against Donald Rumsfeld, George Tenet, and other high ranking Pentagon officials for their creation and approval of torture tactics.”

What we did not know until ABC News broke the story on April 9, 2008 was just how far into the White House the orders to torture went; we now know that the authorization to torture al-Qaeda suspects reached to the highest levels of the White House. According to ABC News’s groundbreaking report, senior administration officials held dozens of meetings in the White House Situation Room specifically to approve the precise techniques used against individual detainees. Chaired by then National Security Advisor, Condoleezza Rice, Vice President Cheney, Defense Secretary Rumsfeld, Secretary of State Powell, CIA Director Tenet, and Attorney General Ashcroft, decided the minutiae of torture down to the specific number of times that CIA agents could use a specific tactic such as being pushed, slapped, deprived of sleep or waterboarded.

Shockingly, President Bush knew that these officials were meeting to discuss and approve these interrogations and approved. According to an ABC News Report on April 11, President Bush said “[w]ell, we started to connect the dots in order to protect the American people” continuing to the ABC News team, “And yes, I’m aware our national

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security team met on this issue. And I approved.” Thus, we now know what was heretofore only suspected – the orders to torture went all the way to the top.

At the time, only John Ashcroft expressed reservations – not to the wisdom of the policy of aggressive interrogations, nor to their legality – rather he worried about whether “White House advisors should be involved in the grim details,” asking “[w]hy are we talking about this in the White House? History will not judge this kindly.” These meetings continued after the withdrawal of the infamous Bybee torture memo. Even as Secretary Powell expressed concerns that the program was hurting the United States image abroad, National Security Advisor Rice continued “telling the CIA: ‘this is your baby. Go do it.’”

The ABC News story suggests that the reason that these decisions on the minute details of interrogations of were made at such a high level stemmed from the CIA’s need for protection. Apparently, older CIA agents recall the agency’s public tarring after exposure of its Phoenix Program (involving torturing and killing thousands of Viet Cong and sympathizers). Field agents worried about potential prosecution and exposure to civil suits. (We now know that agents have been buying insurance to protect

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204 Id.
205 Id.
206 Id.
208 Jack L. Goldsmith, a law professor at Harvard who served in the Defense Department and the Justice Department under Mr. Bush, said the shifting legal atmosphere made fear
themselves from litigation costs and liability arising from the use of harsh interrogation techniques.\textsuperscript{209}

Director Tenet sought to protect his agents and the agency by procuring approval of the minutest details at the highest possible level. This cut directly against the usual tendency of bureaucracies to protect high-level officials with plausible deniability. While these officials maintain that Abu Ghraib was the work of a few bad apples, this new report by ABC News shreds even that possibility as to the enhanced interrogation techniques employed by the CIA.

Speculation has already started on whether these officials might be prosecuted for war crimes under the War Crimes Act.\textsuperscript{210} Law Professor, Jack Balkin, however, points out that sections 8 and 6(b) the Military Commissions Act of 2006 insulate these “officials from liability for many of the violations of the War Crimes Act”\textsuperscript{211} and, in any event, Professor Marty Lederman also points out that no Justice Department would likely of criminal or civil liability on the part of C.I.A. and military personnel “a completely genuine concern, even if it seems far-fetched.


\textsuperscript{209} Jeffrey Smith, \textit{Worried CIA Officers Buy Legal Insurance; Plans Fund Defense in Anti-Terror Cases}, \textit{The Washington Post} (September 11, 2006) A01. (“Justice Department political appointees have strongly backed the CIA interrogations. But ‘there are a lot of people who think that subpoenas could be coming’ from Congress after the November elections or from federal prosecutors if Democrats capture the White House in 2008, said a retired senior intelligence officer who remains in contact with former colleagues in the agency’s Directorate of Operations, which ran the secret prisons.”).

\textsuperscript{210} 18 U.S.C. 2441.

prosecute persons who reasonably relied on a prior Justice Department opinion.\footnote{Marty Lederman, \textit{A Dissenting View on Prosecuting the Waterboarders}, BALKINIZATION (February 8, 2008) at \url{http://balkin.blogspot.com/2008/02/dissenting-view-on-prosecuting.html}.} Finally, the political cost to any succeeding administration would likely be too high – such prosecutions would sour any attempt to pursue bipartisan legislation. Thus, as Balkin also points out, prosecution, if at all, would have to come from another country exercising universal jurisdiction over a former official who happened to travel to that country. Finally another law professor, Scott Horton, points out that preparatory investigations for proceedings against American policy makers has already begun in foreign courts and matters could proceed after a new president is sworn in, if “one of the targets makes the foolish decision to use his passport for travel beyond America’s borders.”\footnote{Scott Horton, Comments to Jack Balkins’s blog at \textit{War Crimes Prosecutions in the U.S.? Dream On}, BALKINIZATION, (April 9, 2008) at \url{http://balkin.blogspot.com/2008/04/war-crimes-prosecutions-in-us-dream-on.html}.} Professor Horton also points out that there might be a possibility of prosecuting some of these officials for lying to Congress, which he calls “Ersatz War Crimes.”\footnote{\textit{Id}.}

That may be, but in this writer’s opinion, none of this is likely. No nation is likely to want to prosecute, on its own, high U.S. officials using universal jurisdiction as the predicate. The risk of affronting what remains the world’s most powerful nation would be enormous. Later administrations – even Democratic Administrations – are not likely to want to see such a precedent set and are likely to resist any such attempt at exercising universal jurisdiction. It is in both the United States and the international community’s
interest to pursue closer and better relations after January 20, 2009. Prosecution of high
Bush Administration officials would not assist better relations.

Moreover, we now know that the approval for torture went all the way to the
President. Of course, he does not admit that the approved conduct amounted to approval
of torture. That would cross one bridge too many. It would render his (and his National
Security Council’s) approval manifestly unlawful; that neither he nor his top officials can
safely do. The President, and his closest advisors, was involved right down to the details
with authorizing the harsh interrogation techniques that much of the rest of the world
deems torture.\(^{215}\) Thus, any trial of any former administration official leads directly to
what would, by then be a former president of the United States. How likely is it that any
government in the world will want to open that debate? How likely would any future
president regardless of party allow such a prosecution to go forward without vigorous and
meaningful protest? And how likely is any foreign government to pursue such a
prosecution in the face of sustained U.S. opposition? Does anyone think Brussels, or
Paris, London or Madrid will charge forward solely on a matter of principle?

What about lower-level officials? Perhaps C.I.A. interrogators? Here the analysis
changes a bit, but the result remains the same. The instrumental defense “to protect the
American people” has not changed, but the effectiveness of that defense has changed. It
does not matter that Bush is a lame duck, crippled politically, with poll approval ratings

\(^{215}\) As Steven Gillers, who teaches Professional Ethics at New York University Law
School, points out, the torture lawyers were telling “the President what he wanted to
hear.” CIA agents saw the Office of Legal Counsel’s “torture memos” as a “golden
shield’ against criminal prosecution of agents who had used harsh interrogation
techniques.” The Torture Memo, THE NATION (April 28, 2008)
hovering around 30%. Any prosecution domestically will have to surmount the practical hurdle that the interrogations were authorized by the President of the United States. While it is true that Nuremburg put an end to the “just following orders” defense, it is difficult to imagine that a U.S. court would find orders approved by a sitting President, with the support of the entire National Security Council, including the Attorney General, to be so “manifestly unlawful” that a person following them would be criminally liable under the War Crimes Act, or any other law for that matter. It would take a bold prosecutor to even contemplate such a charge, and it is difficult to see how such a suit could succeed.

Similarly, any foreign nation attempting to exercise universal jurisdiction, will have to confront the inconvenient political fact that prosecution of any U.S. official, at whatever level, directly drags what will by that time be a former president of the United States. This is not impossible, but it becomes far more difficult. Moreover, while foreign courts may not be subject to precisely the same political constraints as domestic courts, they nonetheless would likely hesitate in such circumstance. One cannot be certain, but the safe bet is no one beyond the few scapegoats following Abu Ghraib will ever be prosecuted.

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216 According to PollingReport.com, Bush’s polls as reported on that service (and with the average calculated by the author) since the beginning of March 2008 and running through April 15, 2008 have ranged from a high of 35 to a low of 28 with an average of 30%. These polls can be accessed at <http://www.pollingreport.com/BushJob.htm>.

217 A person following orders is not responsible, even if the orders prove unlawful, so long as they are not “manifestly unlawful.” The Nuremburg principle is not a trap for the unwary, but is rather a rule that one cannot commit an obviously criminal act and then claim that one was merely following orders. See, e.g., David Luban, David Luban, *Liberalism, Torture, and the Ticking Bomb*, THE TORTURE DEBATE IN AMERICA, Karen J. Greenberg, ed., (Cambridge, 2006) note 12, At 55.
Thus, the Administration may have achieved what it set out from the beginning to do – insulate both itself and lower level officials from criminal prosecution for torture. While the price – disclosure all the way to the President – is high, it is not unimaginably high. The President’s polls will not sag further as a result of this; the President’s ability to skillfully wrangle with Congress will not likely suffer (and he has been very skillful in this endeavor); and the whole thing will likely blow over rather rapidly. Indeed, very few major news outlets have as of this writing even picked-up on the story. It appears to be a nonevent. As Dan Froomkin of The Washington Post reported:

The mainstream media by and large seem to agree with Bush that the ABC News Report wasn't so startling, and they have given Bush's remarks almost no coverage. There was no mention of Bush's admission in the New York Times, the Wall Street Journal or the Los Angeles Times. There was nothing on the major wire services. And nothing on CNN, CBS or NBC.

Froomkin points to a number of smaller papers around the country that editorialized about the revelation that Bush himself approved of the torture. The ACLU has called for independent Counsel to investigate, possible violations of the War Crimes Act, the Anti-Torture Act and federal assault laws. A group called “Activist Democrats” has called for impeachment. The attacks by activist groups was no doubt expected and if

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218 A Lexis-Nexis search on April 15, 2008 in the “All News, English” database using the search string “Bush / knew / (central intelligence agency or CIA)” and covering the preceding week only, picked up 13 results. None of these involved any major news outlet.


220 ACLU Calls for Independent Counsel to Investigate Administration’s Approval of Torture and Abuse (April 12, 2008) at <http://www.aclu.org/safefree/general/34879prs20080412.html>.

this is all the attention that this issue gets then the Bush Administration will not only have achieved its objective but will have done so spectacularly. One cannot avoid the conclusion, speculative though it may be, that these revelations, coming when and as they did, were calculated to end the torture debate by insulating all who participated. About the worst that can happen has happened. Anthony Lewis says that for him, George Bush will always be “the Torture President.” 222

We can heap on the opprobrium as that is what is left. All, except for one more thing. Given the international and domestic concerns one can hope that we have seen the high tide of American torture; that international human rights law will begin to bite.

VI. Conclusion

The Bush Administration has succeeded in creating and protecting a torture culture. While one may disagree with the policies and direction of this administration, it is evident that it has been quite skillful in this regard. We have shown how torture culture’s arise, and how in fact the United States has developed and refined a torture culture that continues into the twenty-first century.

It remains to be seen whether this culture of torture can be contained. It is beyond the scope of this essay to cover all of the ways in which the backlash internationally against torture has constrained U.S. practices. The fact that the United States has even temporarily abandoned its worst practices, and has scrambled to protect its officials and agents, suggests that while the Administration has scored some very real victories, the practices themselves are continuing to fall further and further into disrepute. There is

222 Dan Froomkin, supra note 219, quoting from Anthony Lewis in THE NEW YORK REVIEW OF BOOKS.
room for both hand-wringing despair and optimism. Torture will eventually abate; just not as quickly as some would like. Moreover, it seems certain that those who designed, approved and perpetrated the worst abuses will not sit in any criminal dock. Whether disgrace suffices remains an open question.